

## **“CHANGE DIRECTION” 2006: ISRAELI OPERATIONS IN LEBANON AND THE INTERNATIONAL LAW OF SELF-DEFENSE**

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On July 12, 2006, Hezbollah launched Operation True Promise, the ambush of Israel Defense Force (IDF) soldiers patrolling the border with Lebanon.<sup>1</sup> Three Israelis were killed and two captured. Four more died in an IDF tank responding to the attack, while an eighth perished as Israeli forces attempted to recover the bodies of the tank crew. Meanwhile, Hezbollah rocket attacks against northern Israeli towns and IDF facilities killed two civilians.

Israel reacted quickly and forcefully with Operation Change Direction. The military action included a naval and air blockade of Lebanon, air strikes throughout the country, and, eventually, a major ground incursion into southern Lebanon. As the IDF acted, Israel’s Ambassador to the United Nations transmitted identical letters to the Secretary-General and the Security Council setting forth the legal basis for the operation.

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-defense when an armed attack is launched against a Member of the United Nations. The State of Israel will take appropriate actions to secure the release of the kidnapped soldiers and bring an end to the shelling that terrorizes our citizens.<sup>2</sup>

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1. The title “Operation True Promise” derived from the “promise” by Hezbollah Secretary-General Hasan Nasrallah to capture Israeli soldiers, who would in turn be exchanged for prisoners held by the Israelis. Amnesty Int’l, *Under Fire: Hizbullah’s Attacks on Northern Israel* 1, AI Index MDE 02/025/2006, Sept. 2006. For a factual summary of the conflict, see GlobalSecurity.org, *Operation Change Direction*, <http://www.globalsecurity.org/military/world/war/lebanon-change-of-direction-chron1.htm>.

2. Permanent Representative of Israel to the United Nations, *Identical Letters Dated 12 July 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council*, U.N. Doc. A/60/937, S/2006/515 (July 12, 2006) [hereinafter *July 12, 2006 Letters*].

This Article explores and assesses the Israeli justification for Operation Change Direction. Did the law of self-defense provide a basis for the operation? If so, defense against whom—Hezbollah, the State of Lebanon, or both? Were the Israeli actions consistent with the criteria for a lawful defensive action: necessity, proportionality, and immediacy? Did Operation Change Direction unlawfully breach Lebanese territorial integrity?

In order to frame the discussion, it is necessary to distinguish two distinct components of the international law governing the use of force. The *jus ad bellum* sets normative boundaries as to when a State may resort to force as an instrument of its national policy.<sup>3</sup> Its prescriptive architecture is modest, at least in terms of *lex scripta*.

Article 2(4) of the U.N. Charter prohibits the threat or use of force in international relations.<sup>4</sup> Only two exceptions to the proscription enjoy universal acceptance. The first is enforcement action sanctioned by the Security Council pursuant to Chapter VII of the Charter. By this linear scheme, the Security Council may declare that a particular action or situation represents a “threat to the peace, breach of the peace, or act of aggression.”<sup>5</sup> Once the declarative condition precedent has been met, it may implement non-forceful remedial measures.<sup>6</sup> Should such measures prove “inadequate,” or if the Security Council believes they would not suffice, “it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”<sup>7</sup> The Security Council does so by authorizing and employing U.N. commanded and controlled forces or by giving a mandate for enforcement action to either a regional organization or individual Member States organized as an “ad hoc” coalition (or a combination of the two).

Although the Security Council did employ its Chapter VII authority to enhance the size and mandate of the United Nations Interim Force in Lebanon (UNIFIL) as part of the August 2006 ceasefire,<sup>8</sup> it did not man-

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3. For a contemporary treatment of the subject, see generally IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* (1963); YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* (Cambridge University Press 4th ed. 2005) (1988).

4. U.N. Charter art. 2, ¶ 4 (“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.”).

5. U.N. Charter art. 39.

6. *Id.* art. 41.

7. *Id.* art. 42.

8. The Council authorized an increase to 15,000 troops and expanded the mandate to include monitoring the ceasefire, accompanying and supporting the Lebanese armed forces as they deployed south following the Israeli withdrawal, assisting the humanitarian relief effort and the return of displaced persons, assisting the Lebanese government in the demilitarization of the area (except for Lebanese armed forces and UNIFIL), and helping to secure the Lebanese borders. S.C. Res. 1701, ¶ 11, U.N. Doc. S/RES/1701 (Aug. 11, 2006); see generally

date Operation Change Direction, either in July 2006 or at any previous time. Instead, the legal basis for Operation Change Direction submitted by Israel lay in the second express exception to the Article 2(4) prohibition—self-defense.

Article 51 codifies the right of States to use force defensively: “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.”<sup>9</sup> A State acting in self-defense must immediately so notify the Security Council, a requirement epitomized during Operation Change Direction by Israeli notification on the very day defensive military operations began.<sup>10</sup>

The *jus in bello*, by contrast, governs how force may be employed on the battlefield. It addresses such matters as the persons and objects that may lawfully be targeted, how targeting has to be accomplished, and the protections to which civilians, civilian objects, and those who are *hors de combat* are entitled.<sup>11</sup> All sides to an armed conflict must comply with the *jus in bello*; status as an aggressor or a victim in the *jus ad bellum* context has no bearing on the requirement.<sup>12</sup> This Article does not address the *jus in bello*.<sup>13</sup>

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United Nations Department of Peacekeeping Operations, UNIFIL, <http://www.un.org/Depts/dpko/missions/unifil/index.html>.

9. U.N. Charter art. 51.

10. *Id.* art. 51. The Israeli government complied with the requirement the day it launched Operation Change Direction. See *July 12, 2006 Letters*, *supra* note 2.

11. The *jus in bello* is also known as the law of war, the law of armed conflict and international humanitarian law. For excellent contemporary surveys of the subject, see YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* (2004); A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* (2d ed. 2004).

12. Common Article 2 to the four 1949 Geneva Conventions provides that the conventions apply in “all cases of declared war or of any other armed conflict.” Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter *Geneva Convention (I)*]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members at Sea, art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter *Geneva Convention (II)*]; Geneva Convention Relative to the Treatment of Prisoners of War, art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter *Geneva Convention (III)*]; Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter *Geneva Convention (IV)*]. The Preamble to the 1977 Additional Protocol I similarly provides that “the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.” Protocol Additional (I) to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, pmbl., June 8, 1977, 1125 U.N.T.S. 3 [hereinafter *Additional Protocol I*].

13. On *jus in bello* issues in the conflict, see generally U.N. Gen. Assembly, Hum. Rts. Council, Comm’n of Inquiry on Leb., *Implementation of General Assembly Resolution 60/251 of*

## I. THE PRELUDE

A basic grasp of the complex historical predicates to the 2006 conflict in Lebanon is essential to understanding Operation Change Direction and its normative context. Southern Lebanon is a predominantly Shiite area that has been largely ignored by the Lebanese government.<sup>14</sup> The absence of a strong governmental presence rendered the area susceptible to exploitation by anti-Israeli groups.

Until its expulsion from Lebanon in 1982, the Palestinian Liberation Organization (PLO) used southern Lebanon as a base of operations against Israel.<sup>15</sup> In 1978, a PLO attack on two Israeli buses left thirty-seven dead and scores wounded. The IDF reacted with Operation Litani, an operation designed to force the PLO and other Palestinian armed groups from Lebanese territory south of the Litani River.<sup>16</sup> In response, the Security Council, in Resolutions 425 and 426, called on Israel to withdraw from Lebanon. It also created the United Nations Interim Force in Lebanon (UNIFIL) to monitor the withdrawal, help restore international peace and security, and assist Lebanon in establishing effective authority in the area.<sup>17</sup>

UNIFIL and the Lebanese government proved impotent in deterring further Palestinian attacks.<sup>18</sup> In 1982, the Abu Nidal Organization's attempted assassination of the Israeli Ambassador to the United Kingdom precipitated Operation Peace for Galilee.<sup>19</sup> During the controversial invasion of Lebanon, the IDF ousted Syrian forces from Beirut and expelled

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15 March 2006 Entitled "Human Rights Council": Report of the Commission of Inquiry on Lebanon Pursuant to Human Rights Council Resolution S-2/1, U.N. Doc. A/HRC/3/2 (Nov. 23, 2006) [hereinafter *Human Rights Council Report on Lebanon*]; Human Rights Watch, *Why They Died: Civilian Casualties During the 2006 War*, Vol. 19, No. 5(E) (Sept. 2007); Amnesty Int'l, *Israel/Lebanon: Deliberate Destruction or "Collateral Damage"? Israeli Attacks on Civilian Infrastructure* (Aug. 23, 2006), available at <http://www.amnesty.org/en/library/info/MDE18/007/2006> (last visited Mar. 11, 2008); Isr. Ministry of Foreign Aff., *Israel's War with Hizbullah: Preserving Humanitarian Principles While Combating Terrorism*, Diplomatic Note No. 1 (Apr. 2007), <http://www.mfa.gov.il/NR/rdonlyres/74D04C9D-FA73-4A54-8CBA-DBCB1152C82E/0/DiplomaticNotes01.pdf> [hereinafter *Israel's War*].

14. JEREMY M. SHARP ET AL., CONG. RES. SERV. REPORT FOR CONGRESS, *LEBANON: THE ISRAEL-HAMAS-HEZBOLLAH CONFLICT*, REPORT NO. RL33566, at 2 (Sept. 15, 2006).

15. Which in turn contributed to the 15-year internal conflict (1975–1990) between various Lebanese political and religious factions.

16. See AHRON BREGMAN, *ISRAEL'S WARS* 150–52 (2d ed. 2002).

17. S.C. Res. 426, ¶ 2, U.N. Doc. S/RES/426 (Mar. 19, 1978); S.C. Res. 425, ¶ 3, U.N. Doc. S/RES/425 (Mar. 19, 1978).

18. In 1981, Israel launched attacks into Beirut against targets allegedly tied to terrorist attacks. The Security Council condemned the Israeli response and demanded cessation of operations. S.C. Res. 490, U.N. Doc. S/RES/490 (July 21, 1981).

19. There had been prior attacks by Palestinian groups; the attempted assassination of Ambassador Shlomo Argov was merely the final straw for the Israelis.

the PLO, including its leader Yasser Arafat.<sup>20</sup> Israel established a buffer zone in the southern part of the country, where the IDF remained for the next 18 years.

The 1982 invasion radicalized many of southern Lebanon’s Shiites. Inspired in part by the 1979 Iranian Revolution, they created Hezbollah (Party of God). Trained, armed, financed, and logistically supported by Syria and Iran, Hezbollah’s manifesto includes the liberation of Jerusalem, the destruction of Israel, and the establishment of an Islamic State in Lebanon.<sup>21</sup>

Since its formation, Hezbollah has repeatedly engaged in international terrorism. The catalogue of such acts is long and bloody. They include the seizure of eighteen U.S. hostages in the 1980s and 90s, the 1983 bombings of the U.S. Embassy and Marine Barracks in Beirut, a 1984 attack in Spain that killed eighteen U.S. service members, the 1985 hijacking of TWA flight 847 (during which a U.S. Navy sailor was murdered), the 1992 bombing of the Israeli Embassy in Buenos Aires, and regular attacks against targets in Israel with bombs, rockets, and surface-to-air missiles.<sup>22</sup> Israel twice launched major military operations—Operations Accountability (1993) and Grapes of Wrath (1996)—in response.<sup>23</sup>

In May 2000, Israel ended its occupation of southern Lebanon, a move the Security Council recognized as compliant with Resolution 425.<sup>24</sup> Syria and Lebanon protested, maintaining that the ongoing Israeli presence at Shab’a Farms, seized in 1967, violated the resolution and

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20. For a discussion of the legal aspects of the operation, see Barry Feinstein, *The Legality of the Use of Force by Israel in Lebanon—June 1982*, 20 ISR. L.R. 362 (1985). The Security Council immediately called for withdrawal of the Israeli forces and respect for the sovereignty of Lebanon. S.C. Res. 508, ¶ 1, U.N. Doc. S/RES/508 (June 5, 1982); S.C. Res. 509, U.N. Doc. S/RES/509 (June 6, 1982). In 1983, negotiations led to a peace treaty between Israel and Lebanon, but the Lebanese National Assembly, under Syrian pressure, did not ratify it; the following year Lebanese President Amin Gemayel cancelled the agreement. SHARP ET AL., *supra* note 14, at 35.

21. AUDREY KURTH CRONIN ET AL., CONG. RES. SERV. REPORT FOR CONGRESS, FOREIGN TERRORIST ORGANIZATIONS, REPORT NO. RL32223, at 34–35 (Feb. 6, 2004). On Israeli assertions regarding Syrian and Iranian support, see ISR. MINISTRY OF FOREIGN AFF., *Statement by Foreign Ministry Deputy Director-General Gideon Meir* (July 13, 2006), <http://mfa.gov.il/MFA/About+the+Ministry/MFA+Spokesman/2006/Statement+by+Foreign+Ministry+Deputy+DG+Gideon+Meir+13-Jul-2006.htm>.

22. CRONIN ET AL., *supra* note 21, at 34–35.

23. SHARP ET AL., *supra* note 14, at 35.

24. S.C. Res. 1310, U.N. Doc. S/RES/1310 (July 27, 2000); *see also* The Secretary General, *Letter dated 24 July 2000 from the Secretary-General addressed to the President of the Security Council*, U.N. Doc S/2000/731 (July 24, 2000); The Secretary-General, *Report of the Secretary General on the United Nations Interim Force in Lebanon (for the period from 17 January to 17 July 2000)*, ¶¶ 6–11, U.N. Doc. S/2000/718 (July 20, 2000).

amounted to continued occupation of Lebanese territory.<sup>25</sup> In any event, Hezbollah quickly filled the security vacuum created in the wake of the withdrawal and continued to mount attacks against Israeli targets.<sup>26</sup> A declaration by Hezbollah's leader, Sheik Hassan Nasrallah, that "if they all gather in Israel, it will save us the trouble of going after them worldwide" confirmed the organization's aims.<sup>27</sup>

During this period, Israel repeatedly called on Lebanon to establish control over the south. Likewise, the Security Council regularly stressed the importance of Lebanese action.<sup>28</sup> The demands fell on deaf ears, in part due to the presence of Syrian forces in the country.<sup>29</sup> Lebanese President Emile Lahoud, a Maronite Christian who assumed power in 1998, had seemingly decided to tolerate Hezbollah's presence and activities. In 2004, the National Assembly, acting under Syrian pressure, amended the Constitution to allow extension of Lahoud's term in office for an additional three years.<sup>30</sup> The Security Council reacted in September with Resolution 1559.<sup>31</sup> Jointly sponsored by the United States and France, the resolution called for a Syrian withdrawal and the disarming of Hezbollah, a requirement previously set forth in the 1989 Ta'if Agreement ending the Lebanese civil war.<sup>32</sup>

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25. SHARP ET AL., *supra* note 14, at 11 n.21. Israel extended its laws to Shab'a Farms in 1981 in an act the Security Council condemned. S.C. Res. 497, U.N. Doc. S/RES/497 (Dec. 17, 1981).

26. For instance, in 2002, it murdered five civilians in a roadside shooting. See Isr. Ministry of Foreign Aff., *Behind the Headlines: The Second Lebanon War—One Year Later (July 12, 2007)*, <http://www.mfa.gov.il/MFA/About+the+Ministry/Behind+the+Headlines/The+Second+Lebanon+War+-+One+year+later+-+July+2007.htm>.

27. Paul Adams, *Fears Mounting of Another Israeli War with Hezbollah*, *GLOBE & MAIL* (Canada), Dec. 13, 2002, at A8.

28. S.C. Res. 1680, ¶¶ 4–6, U.N. Doc. S/RES/1680 (May 17, 2006); S.C. Res. 1655, ¶¶ 6–8, U.N. Doc. S/RES/1655 (Jan. 31, 2006); S.C. Res. 1614, ¶ 6, U.N. Doc. S/RES/1614 (July 29, 2005); S.C. Res. 1583, ¶ 4, U.N. Doc. S/RES/1583 (Jan. 28, 2005); S.C. Res. 1559, ¶¶ 4–5, U.N. Doc. S/RES/1559 (Sept. 2, 2004); S.C. Res. 1553, ¶ 4, U.N. Doc. S/RES/1553 (July 29, 2004); S.C. Res. 1525, ¶ 4, U.N. Doc. S/RES/1525 (Jan. 30, 2004); S.C. Res. 1496, ¶ 4, U.N. Doc. S/RES/1496 (July 31, 2003); S.C. Res. 1461, ¶ 5, U.N. Doc. S/RES/1461 (Jan. 30, 2003); S.C. Res. 1428, ¶¶ 5, 7, U.N. Doc. S/RES/1428 (July 30, 2002); S.C. Res. 1391, ¶¶ 5, 7, U.N. Doc. S/RES/1391 (Jan. 28, 2002); S.C. Res. 1365, ¶¶ 5, 7, U.N. Doc. S/RES/1365 (July 31, 2001); S.C. Res. 1337, ¶¶ 5–6, U.N. Doc. S/RES/1337 (Jan. 30, 2001); S.C. Res. 1310, ¶¶ 6–7, U.N. Doc. S/RES/1310 (July 27, 2000).

29. Not only did Lebanon fail to exert physical control over Hezbollah controlled territory, it refused to freeze the organization's financial assets. CRONIN ET AL., *supra* note 21, at 36.

30. The National Assembly amended the Constitution to make this possible; previously, the President's term had been limited to six years. CENTRAL INTELLIGENCE AGENCY, *Lebanon*, in *THE WORLD FACTBOOK*, Lebanon 330 (2007).

31. S.C. Res. 1559, *supra* note 28.

32. The agreement called for "spreading the sovereignty of the State of Lebanon over all Lebanese territory" through the "disbanding of all Lebanese and non-Lebanese militias" and the delivery of their weapons "to the State of Lebanon within a period of six months." The

The assassination of Rafiq al-Hariri in February 2005 caused the situation to deteriorate dramatically. Al-Hariri, a Sunni, had served as Lebanon's Prime Minister twice, having only resigned the previous October. His assassination, in which many suspected Syrian involvement, sparked massive demonstrations. The ensuing political crisis, labeled the "Cedar Revolution," led to the withdrawal of Syrian military forces from Lebanon. At the same time, the United Nations called on the Lebanese government "to double its efforts in order to ensure an immediate halt to serious violations" of the "Blue Line," the "border" between Lebanon and Israel.<sup>33</sup>

In May, an anti-Syrian coalition won elections, but fell short of the National Assembly seats necessary to unseat Lahoud.<sup>34</sup> Hezbollah, together with the Amal Movement and other partners, took over a quarter of the parliamentary seats; two of its members were appointed to cabinet posts in Prime Minister Fouad Siniora's government.<sup>35</sup> But the post-election political arrangements proved fragile. In December 2005, the Hezbollah-Amal coalition walked out of the government when the National Assembly agreed to a joint Lebanese and international tribunal to try those accused in al-Hariri's death.<sup>36</sup> Siniora was forced to make concessions to secure Hezbollah's return. In particular, he agreed never to refer to the organization as a "militia," and adopted an official position that "[t]he government regards the Lebanese resistance a true and natural expression of the natural right of the Lebanese people in defending its territory and dignity by confronting the Israeli threat and aggression . . . ."<sup>37</sup> By characterizing Hezbollah as a resistance group, Siniora effectively conceded the "legal fiction" that the Resolution 1559 requirement for militia disarmament did not apply to the organization.

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Secretary-General, *Report of the Secretary General Pursuant to Security Council Resolution 1559 (2004)*, ¶ 8, U.N. Doc. S/2004/777 (Oct. 1, 2004).

33. The Secretary-General, *First Semi-Annual Report of the Secretary-General to the Security Council on the Implementation of Resolution 1559 (2004)*, ¶ 45, U.N. Doc. S/2005/272 (Apr. 26, 2005). Blue Line is the territory to which Israel withdrew in 2000.

34. Two-thirds of the National Assembly seats are required in order to unseat Lahoud. See AUGUSTUS RICHARD NORTON, *HEZBOLLAH: A SHORT HISTORY* 30 (2007).

35. Mohammed Fneish was appointed to an Energy and Water post, and Trad Hamadeh a Labor post. Central Intelligence Agency, Lebanon, Chiefs of State and Cabinet Members, available at <https://www.cia.gov/library/publications/world-leaders-1/world-leaders-1/lebanon.html> (last visited Mar. 11, 2008); see also *So Who's Running the Show?; Lebanon's Government*, *ECONOMIST*, July 29, 2006, at 57.

36. As of March 2008, the Special Tribunal (hybrid United Nations-Lebanese) for Lebanon was still in the process of being established to address the assassination. See, e.g., U.N. Doc. SG/A/1124 (Mar. 10, 2008) (regarding the appointment of Robert Vincent of the United Kingdom to the Registrar for the Tribunal); S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007) (endorsing annexed agreement into force); S.C. Res. 1664, U.N. Doc. S/RES/1664 (Mar. 29, 2006).

37. *Human Rights Council Report on Lebanon*, *supra* note 13, at 130 n. 32.

Despite this victory, Hezbollah had been weakened by the “Cedar Revolution,” the departure of the Syrians, and Lebanese political infighting. It needed to somehow recapture momentum. In retrospect, it appears that Hezbollah concluded that terrorist operations offered promise in this regard. In November 2005, Hezbollah fired mortars and rockets across the Blue Line against IDF positions and facilities. Its forces also assaulted government offices and IDF positions in Ghajar, purportedly in an attempt to kidnap Israeli soldiers. Other actions against Israel followed.

Hezbollah moved quickly to strengthen its forces and stockpile arms. By mid-summer of 2006, the organization fielded two to three thousand fighters and thousands of rockets, some of which could reach far into Israel. Moreover, Nasrallah had proclaimed that he intended to kidnap Israeli soldiers and use them as bargaining chips in a prisoner exchange; 2006 was to be “the year of retrieving prisoners.”<sup>38</sup> The threat was highly credible, for in October 2000, Hezbollah fighters had crossed into Israel and kidnapped three soldiers. It killed them, using their bodies as bargaining chips in a 2004 prisoner exchange.<sup>39</sup>

Sensitive to the ominous situation, then-Secretary General Kofi Annan and other U.N. representatives repeatedly called on the Lebanese Government to move south and exert control over the border areas.<sup>40</sup> Their concerns proved well-founded. When Hezbollah mounted Operation True Promise on July 12, 2006, Israel responded with Operation Change Direction. The subsequent exchanges proved heavy. Hezbollah launched 125 rockets on July 13, 2006, 103 on the following day, and 100 on July 15.<sup>41</sup> On July 14, a Hezbollah rocket struck an Israeli warship, killing two sailors. The incident was especially noteworthy, for at the time some experts believed the attack had been mounted using radar data provided to Hezbollah from a Lebanese military radar site.<sup>42</sup>

For its part, Israel offered a seventy-two hour ultimatum for release of the captives and cessation of the rocket attacks.<sup>43</sup> In the meantime, it

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38. Lara Deeb, *Hizbullah: A Primer*, MIDDLE EAST REPORT ONLINE, July 31, 2006, <http://www.merip.org/mero/mero073106.html> (last visited Mar. 11, 2008); Int'l Crisis Group, *Israel/Palestine/Lebanon: Climbing Out of the Abyss*, MIDDLE EAST REPORT, July 25, 2006, at 10, available at <http://www.crisisgroup.org/home/index.cfm?id=4282>.

39. *Israel's War*, *supra* note 13, at 2; *see supra* note 1 and accompanying text.

40. The Secretary-General, *Report of the Secretary-General on the United Nations Interim Force in Lebanon (For the Period from 22 July 2005 to 20 January 2006)*, ¶ 12, U.N. Doc. S/2006/26 (Jan. 18, 2006).

41. *Israel's War*, *supra* note 13, at 23 app. A.

42. ANTHONY H. CORDESMAN, PRELIMINARY “LESSONS” OF THE ISRAEL-HEZBOLLAH WAR 17–18 (Ctr. for Strategic & Int'l Stud., Working Draft for Outside Comment, 2d rev. ed. 2006), available at [http://www.csis.org/media/csis/pubs/060817\\_isr\\_hez\\_lessons.pdf](http://www.csis.org/media/csis/pubs/060817_isr_hez_lessons.pdf).

43. *Israel's War*, *supra* note 13, at 8.

declared an air and naval blockade of Lebanon, conducted air strikes, and engaged in limited cross border operations designed to foil rocket launches. Many of the initial targets, such as the Rafik al-Hariri International Airport in Beirut and bridges throughout the country, were lines of communication.<sup>44</sup> Israel hoped to prevent the removal of its kidnapped soldiers by cutting them. By late July, the IDF was moving into southern Lebanon; on August 9, it launched ground operations extending well beyond the border.<sup>45</sup> Two days later, the Security Council passed Resolution 1701, in which it called for “the immediate cessation by Hizbollah of all attacks and the immediate cessation by Israel of all offensive military operations.”<sup>46</sup> A ceasefire agreement soon followed, and hostilities ended on August 14. Israeli troops had completely withdrawn from Lebanon by October.

## II. THE ISRAELI LEGAL JUSTIFICATION

As noted previously, Israel, in announcing its readiness to take “appropriate” steps to secure the release of its soldiers and force a halt to the rocket attacks, justified its military actions on the basis of self-defense pursuant to Article 51 of the U.N. Charter.<sup>47</sup> Somewhat precipitously, it pointed the finger of blame not only at Hezbollah, but also Syria, Iran and Lebanon.

Responsibility for this belligerent act of war lies with the Government of Lebanon, from whose territory these acts have been launched into Israel. Responsibility also lies with the Governments of the Islamic Republic of Iran and the Syrian Arab Republic, which support and embrace those who carried out this attack.

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44. A “line of communications” is a “route, either land, water, and/or air, that connects an operating military force with a base of operations and along which supplies and military forces move.” U.S. JOINT CHIEFS OF STAFF, DEP’T OF DEFENSE, DICTIONARY OF MILITARY TERMS AND ASSOCIATED TERMS, Joint Publication 1–02, as amended through 17 October 2007, available at <http://www.dtic.mil/doctrine/jel/doddict>.

45. The decision to do so was taken by the Israeli Cabinet. Isr. Ministry of Foreign Aff., *Political-Military Cabinet Resolution* (Aug. 9, 2006), available at <http://www.mfa.gov.il/MFA/Government/Communiques/2006/Political-Security+Cabinet+resolution+9-Aug-2006.htm>. For the Israeli justification of the step, see Isr. Ministry of Foreign Aff., *Behind the Headlines: Israel’s Counter Terrorist Campaign* (Aug. 15, 2006), available at <http://www.mfa.gov.il/MFA/About+the+Ministry/Behind+the+Headlines/Israels+counter+terrorist+campaign+-+FAQ+18-Jul-2006.htm>.

46. S.C. Res. 1701, *supra* note 8.

47. See *supra* notes 2, 8–10 and accompanying text.

These acts pose a grave threat not just to Israel's northern border, but also to the region and the entire world. The ineptitude and inaction of the Government of Lebanon has led to a situation in which it has not exercised jurisdiction over its own territory for many years. The Security Council has addressed this situation time and time again in its debates and resolutions. Let me remind you also that Israel has repeatedly warned the international community about this dangerous and potentially volatile situation. In this vacuum festers the Axis of Terror: Hezbollah and the terrorist States of Iran and Syria, which have today opened another chapter in their war of terror.

Today's act is a clear declaration of war, and is in blatant violation of the Blue Line, Security Council resolutions 425 (1978), 1559 (2004) and 1680 (2006) and all other relevant resolutions of the United Nations since Israel withdrew from southern Lebanon in May 2000.<sup>48</sup>

In great part, the Israelis attributed Hezbollah's actions to Lebanon on the basis of its failure to control the south. A special Cabinet communiqué issued the day of the Hezbollah attacks noted that "Israel views the sovereign Lebanese Government as responsible for the action that originated on its soil and for the return of the abducted soldiers to Israel. Israel demands that the Lebanese Government implement U.N. Security Resolution 1559."<sup>49</sup> Prime Minister Ehud Olmert added a second ground, Hezbollah's participation in the Lebanese government:

This morning's events were not a terrorist attack, but the action of a sovereign state that attacked Israel . . . The Lebanese government, of which Hizbullah is a member, is trying to undermine regional stability. Lebanon is responsible and Lebanon will bear the consequences of its actions.<sup>50</sup>

The extent to which Israel initially focused responsibility on Lebanon was perhaps best illustrated by IDF Chief of Staff Lieutenant

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48. July 12, 2006 Letters, *supra* note 2.

49. Cabinet Secretariat, Isr. Ministry of Foreign Aff., *Special Cabinet Communiqué—Hizbullah Attack* (July 12, 2006), available at <http://www.mfa.gov.il/MFA/Government/Communiques/2006/Special+Cabinet+Communique+-+Hizbullah+attack+12-Jul-2006.htm>.

50. Ehud Olmert, Israeli Prime Minister, Press Conference, PM Olmert: Lebanon is Responsible and Will Bear the Consequences (July 12, 2006), available at <http://www.mfa.gov.il/MFA/Government/Communiques/2006/PM+Olmert+-Lebanon+is+responsible+and+will+bear+the+consequences+12-Jul-2006.htm>.

General Dan Halutz's threat to "turn back the clock in Lebanon by 20 years."<sup>51</sup>

A November 2006 U.N. Human Rights Council report also drew a close connection between Hezbollah and Lebanon. In an analysis of the separate issue of whether an "armed conflict" between Israel and Lebanon existed,<sup>52</sup> the report noted that

[I]n Lebanon, Hezbollah is a legally recognized political party, whose members are both nationals and a constituent part of its population. It has duly elected representatives in the Parliament and is part of the Government. Therefore, it integrates and participates in the constitutional organs of the State. . . .

[F]or the public in Lebanon, resistance means Israeli occupation of Lebanese territory. The effective behavior of Hezbollah in South Lebanon suggests an inferred link between the Government of Lebanon and Hezbollah in the latter's assumed role over the years as a resistance movement against Israel's occupation of Lebanese territory. . . .

Seen from inside Lebanon and in the absence of the regular Lebanese Armed Forces in South Lebanon, Hezbollah constituted and is the expression of the resistance (*'mukawamah'*) for the defense of the territory partly occupied. . . .

Hezbollah had also assumed de facto State authority and control in South Lebanon in non-full implementation of Security Council resolutions 1559 (2004) and 1680 (2006) . . . .<sup>53</sup>

A Lebanese Cabinet policy statement of May 2005 had similarly characterized Hezbollah as a resistance force.<sup>54</sup> Enhancing the purported relationship was Nasrallah's leadership not only of Hezbollah's military wing, but also the political wing that was participating in government; neither faction advocated a peaceful solution to the dispute with Israel.

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51. Chris McGreal, *Capture of Soldiers was "Act of War" says Israel*, GUARDIAN (London), July, 13, 2006, at 1.

52. The existence of an armed conflict bears on the issue of whether international humanitarian law applies during the conflict. According to the U.N. Human Rights Council's Commission of Inquiry on Lebanon, the conflict qualified as an "international armed conflict" to which Israel, Hezbollah and Lebanon were parties. *Human Rights Council Report on Lebanon*, *supra* note 13, ¶ 55.

53. *Id.* ¶¶ 56–57 (explaining that although done so in the context of the *ius in bello*, the Commission of Inquiry found that Hezbollah constituted a "militia" belonging to a Party to the conflict within the meaning of Article 4A(2) of the Third Geneva Convention); *see also Geneva Convention (III)*, *supra* note 12, art. 4(2).

54. *Human Rights Council Report on Lebanon*, *supra* note 13, ¶ 32.

As Israel saber-rattled, Lebanon quickly denied culpability. In letters of July 13 to the U.N. Secretary-General and Security Council President, it claimed that “the Lebanese Government was not aware of the events that occurred and are occurring on the international Lebanese border” and that “the Lebanese Government is not responsible for these events and does not endorse them.”<sup>55</sup> Two days later, in an “Address to the People,” Prime Minister Siniora again distanced himself from the attacks, denying any prior knowledge thereof.<sup>56</sup> Secretary-General Kofi Annan accepted the Lebanese disclaimer.<sup>57</sup>

Israel quickly backed away from assertions that the July 12 attacks were attributable to Lebanon, at least in the normative context of self-defense. On the sixteenth, the Cabinet issued a communiqué that declared, “Israel is not fighting Lebanon but the terrorist element there, led by Nasrallah and his cohorts, who have made Lebanon a hostage and created Syrian- and Iranian-sponsored terrorists enclaves of murder.”<sup>58</sup> Similarly, a Ministry of Foreign Affairs briefing paper prepared shortly before the conflict ended stated that although Lebanon bore responsibility “for the present situation, and consequently, . . . could not expect to escape the consequences. . . . Israel views Hamas, Hizbullah, Syria and Iran as primary elements in the Jihad/Terror Axis threatening not only Israel but the entire Western world.”<sup>59</sup> As to Lebanon’s responsibility, the paper deviated from the attitude adopted at the outset of hostilities:

Israel did not attack the government of Lebanon, but rather Hizbullah military assets within Lebanon. Israel avoided striking at Lebanese military installations, unless these were used to assist the Hizbullah, as were a number of radar facilities which Israel destroyed after they helped the terrorists fire a shore-to-ship missile at an Israeli ship.<sup>60</sup>

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55. Chargé d’affaires of the Permanent Mission of Lebanon to the United Nations, Identical Letters dated 13 July 2006 from the Chargé d’affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. A/60/938, S/2006/518 (July 13, 2006).

56. Prime Minister Fouad Siniora, Address to the Lebanese People (July 15, 2006), <http://www.lebanonunderseige.gov.lb/english/F/eNews/NewsArticle.asp?CNewsID=17>.

57. The Secretary-General, *Statement to the Security Council*, U.N. SCOR, 61st Sess., 5492 mtg. at 3, U.N. Doc. S/PV.5492 (July 20, 2006) [hereinafter *Secretary General Statement July 20, 2006*]. At the time, Lebanon was not on the United States State Department list of State sponsors of terrorism. U.S. Department of State, Office of Coordinator for Counterterrorism, Country Reports on Terrorism (Apr. 28, 2006), available at <http://www.state.gov/s/ct/rls/crt/2005/64337.htm>.

58. Isr. Cabinet Secretariat, Cabinet Communiqué (July 16, 2006), <http://www.mfa.gov.il/MFA/Government/Communiques/2006/Cabinet+Communique+16-Jul-2006.htm>.

59. *Israel’s Counter Terrorist Campaign*, *supra* note 45.

60. *Id.*; see also U.N. SCOR, 61st. Sess., 5503d mtg., at 4, U.N. Doc S/PV.5503 (July 31, 2006) (speaking before the Security Council on 31 July, the Israeli Ambassador noted that

In fact, Israel assiduously avoided striking Lebanese government facilities and equipment, at least absent an express link to Hezbollah. While the earlier referenced Human Rights Council report cites a number of instances in which the IDF struck Lebanese military targets, the discussion is marked by the paucity of examples: a military airfield, radar installations (recall that Lebanese radar facilitated the anti-ship missile attack of July 14), and an army barracks.<sup>61</sup> Given the wherewithal of the Israeli Air Force, the catalogue would undoubtedly have been far lengthier had Israel wished to engage Lebanon militarily.<sup>62</sup>

Thus, by war's end, Israel was steering clear of arguments that Hezbollah actions amounted to a Lebanese “armed attack” by the terms of Article 51. Whether correct as a matter of law, tempering comments on the linkage represented sage policy. First, Israel needed the Lebanese army to move south to fill the security void its withdrawal would leave if it hoped to avoid another long occupation of southern Lebanon. Second, little was to be gained in styling Operation Change Direction as a response to a Lebanese “armed attack” because Israeli military operations could more convincingly be legally justified as a direct response to Hezbollah. Third, conflict between States in the volatile Middle East is always potentially contagious; therefore, for practical reasons, it is usually best to avoid portrayal of hostilities as inter-State. Finally, as will be discussed, the international community gingerly accepted Israel's need to defend itself against the increasingly frequent Hezbollah attacks. Limiting the finger pointing to Hezbollah would fit better within the prevailing international frame of reference, an important consideration in light of the fact that the international community's assistance would likely prove helpful in securing the border areas. It would also avoid a direct conflict with U.N. Secretary-General Annan, who early on adopted the position that the Lebanese government had no advance notice of the July 12 attacks and that the Hezbollah actions ran counter to the interests of the Lebanese government and people.<sup>63</sup>

Widespread, albeit cautious, acceptance of the legitimacy of the Israeli defensive response to Hezbollah emerged. It was certainly apparent in the Security Council discussions of July 14.<sup>64</sup> Similarly,

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Israel had “repeatedly been compelled to act not against Lebanon, but against the forces and the monstrosity which Lebanon had allowed itself to be taken hostage by”).

61. *Human Rights Council Report on Lebanon*, *supra* note 13, ¶ 53.

62. *See generally* INT'L INST. FOR STRATEGIC STUD., *THE MILITARY BALANCE 2007* 207, 227–29 (2007); JANE'S INFO. GROUP, *JANE'S SENTINEL: COUNTRY RISK ASSESSMENTS, EASTERN MEDITERRANEAN* 297–308 (2008).

63. *Secretary-General Statement July 20, 2006*, *supra* note 57.

64. *See* U.N. SCOR, 61st Sess., 5489th mtg., U.N. Doc. S/PV.5489 (July 14, 2006). China labeled the Israeli actions “armed aggression,” while Qatar called it a “barbaric military

Secretary-General Annan acknowledged “Israel’s right to defend itself under Article 51 of the United Nations Charter.”<sup>65</sup> So too did individual States and their leaders.<sup>66</sup> In the Arab world, Saudi Arabia criticized Hezbollah’s “uncalculated adventures,” a reproach echoed by Jordan, Egypt, and the United Arab Emirates.<sup>67</sup> Indeed, Nasrallah complained that such censure made possible the harsh Israeli reaction.<sup>68</sup> Arab support only dissipated in the aftermath of Israel’s July 30 bombing of Qana, during which twenty-eight civilians died.<sup>69</sup> The Group of Eight (G8), which was coincidentally meeting in July, condemned Hezbollah actions, and called on Lebanon to assert its “sovereign authority” over the south, while the European Union made clear that it considered the right to self-defense applicable.<sup>70</sup> In the United States, both the Senate and House of Representatives passed resolutions condemning the attacks against Israel.<sup>71</sup> Finally, the Security Council clearly indicated in Resolution 1702 that Hezbollah’s attacks of July 12 had precipitated events.<sup>72</sup>

Such acceptance is an important indicator of the operational code, the unofficial, but actual normative system governing international

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campaign.” *Id.* at 10–11; *see also* U.N. SCOR, 61st Sess., 5493rd mtg., U.N. Doc. S/PV.5493 (Resumption 1) (July 21, 2006).

65. *Secretary-General Statement July 20, 2006, supra* note 57 (condemning Hezbollah, but also the scope of the Israeli operation).

66. The United States, Australia, and Canada are examples. *Israel Acting in Self-defense, Says Howard*, AUSTL. BROAD. CORP. NEWS ONLINE, July 16, 2006, <http://www.abc.net.au/news/newsitems/200607/s1687707.htm>; Hassan M. Fattah & Steven Erlanger, *Israel Blockades Lebanon; Wide Strikes by Hezbollah*, N.Y. TIMES, July 14, 2006, at A1; Jane Taber, *Harper Defends Israel’s Right “to Defend Itself,”* GLOBE & MAIL (Canada), July 14, 2006, at A12.

67. NORTON, *supra* note 34, at 136–37.

68. *Id.* at 137 (referring to an Arabic newscast on AL-JAZEERA television with Hezbollah leader Nasrallah on July 21, 2006).

69. *Id.* at 140.

70. Delegation of the Eur. Comm’n to the United Nations, EU Council Conclusions on the Middle East (July 17, 2006), [http://www.europa-eu-un.org/articles/en/article\\_6125\\_en.htm](http://www.europa-eu-un.org/articles/en/article_6125_en.htm); U.S. DEP’T OF STATE’S BUREAU OF INT’L INFO. PROGRAMS, *G8 Statement on Situation in Middle East* (July 16, 2006), <http://www.america.gov/st/texttrans-english/2006/July/20060716150444uhyggep0.5012432.html>.

71. S. Res. 534, 109th Cong. (2006) (enacted); H.R. Res. 921, 109th Cong. (2006) (enacted).

72. S.C. Res. 1701, *supra* note 8. The Council “[e]xpress[ed] its utmost concern at the continuing escalation of hostilities in Lebanon and in Israel since *Hizbollah’s attack on Israel* on 12 July 2006.” *Id.* (emphasis added). A Secretary-General Report on the United Nations Interim Force in Lebanon (UNIFIL) similarly recounted that “[t]he crisis started when, around 9 a.m. local time, Hizbollah launched several rockets from Lebanese territory across the withdrawal line (the so-called Blue Line) towards Israel Defense Forces (IDF) positions near the coast and in the area of the Israeli town of Zarit. In parallel, Hizbollah fighters crossed the Blue [sic] Line into Israel and attacked an IDF patrol. Hizbollah captured two IDF soldiers, killed three others and wounded two more. The captured soldiers were taken into Lebanon.” The Secretary-General, *Report on the United Nations Interim Force in Lebanon to the Security Council*, ¶ 3, *delivered to the Security Council*, U.N. Doc. S/2006/560 (July 21, 2006).

actions.<sup>73</sup> In other words, when seeking to identify the applicable law, it is essential to ascertain how the relevant international actors, especially States, interpret and apply the *lex scripta*. Only then can norms be understood with sufficient granularity to assess an action’s legality. It is to those norms that analysis turns.

### III. LEGAL ANALYSIS

Self-defense under Article 51 of the U.N. Charter was the claimed legal basis for Operation Change Direction. In addition to Hezbollah, Israel initially pointed the finger of blame at Lebanon. This raises the natural question of whether the attacks and kidnappings of July 12, 2006, can be attributed to Lebanon such that Israel was justified in characterizing them as an attack by Lebanon itself.

In that Israel’s self-defense justification eventually centered on Hezbollah, and given the international community’s seeming acceptance of that position, the issue of an “armed attack” attributable to Lebanon is not determinative. Nevertheless, a colorable argument can be fashioned to the effect that Hezbollah’s actions were equally Lebanon’s, at least as a matter of law. In particular, Hezbollah’s participation in the Lebanese government and the government’s apparent recognition of the organization as a legitimate resistance group support such a depiction.

Article 8 of the International Law Commission’s Articles of State Responsibility provides that an action carried out “on the instructions of, or under the direction or control of, the State” amounts to an “act of a State.”<sup>74</sup> Hezbollah’s inclusion in the Lebanese government, considered

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73. It is discerned in part by observing the actual behavior of international elites. An operational code contrasts with a “myth system,” that is, the law that purportedly applies by simple reference to the *lex scripta*. On the distinction, see generally W. MICHAEL REISMAN & JAMES E. BAKER, *REGULATING COVERT ACTION: PRACTICES, CONTEXTS AND POLICIES OF COVERT COERCION ABROAD IN INTERNATIONAL AND AMERICAN LAW* 23–24 (1992); W. MICHAEL REISMAN & AARON M. SCHREIBER, *JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW* 23–25 (1987); Major Michael N. Schmitt, *The Resort to Force in International Law: Reflections on Positivist and Contextual Approaches* 37 A.F.L. REV. 105, 112–19 (1994).

74. *Draft Articles on Responsibility of States for Intentionally Wrongful Acts*, in REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTY-THIRD SESSION, art. 8, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001), available at <http://untreaty.un.org/ilc/reports/2001/2001report.htm> [hereinafter *Draft Articles on State Responsibility*]. Another approach would focus on Article 4, which provides that the “conduct of any State organ shall be considered an act of that State under international law . . .” Organs include “any person or entity which has that status in accordance with the internal law of the State.” *Id.* art. 4. By Article 7, this is so “even if [the organ] exceeds its authority or contravenes instructions.” *Id.* art. 7. Although Hezbollah had seats in the National Assembly and occupied two Cabinet posts, it is untenable to suggest that virtually all Hezbollah members thereby became agents of the State. Note that the Articles on State Responsibility are “soft law,” in that they merely attempt to restate customary law.

in light of Nasrallah's control over both the organization's political and military wings, is relevant in this regard. Yet, there is no evidence that the Hezbollah parliamentarians or cabinet members directed or were otherwise involved in the attacks, or that the Lebanese government controlled the organization, either directly or indirectly. Neither could Hezbollah be fairly characterized as "an organ placed at the disposal of a State by another State" or an entity that "exercised elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority" pursuant to Articles 6 and 9, respectively. The organization did not qualify as an "organ" in the meaning of the former, nor was the situation in southern Lebanon of the nature envisioned by the latter.<sup>75</sup>

Even when actions qualify as acts of State for responsibility purposes, Article 50 bars the use of forceful countermeasures in response to a breach short of an "armed attack" under Article 51 (absent a Security Council mandate).<sup>76</sup> Therefore, when assessing the Israeli response, the question is when a non-State armed group's actions can be attributed to a State for *self-defense* purposes.

It has long been recognized that support for non-State armed groups can amount to an armed attack by the State supporter.<sup>77</sup> The International Court of Justice has addressed the subject on multiple occasions. In the 1986 *Nicaragua* judgment, it found that a non-State actor's actions could amount to an armed attack if the group in question was "sen[t] by or on behalf" of a State and the operation, in light of its "scale and effects," "would have been classified as an armed attack . . . had it been carried

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75. Commentary to Article 6 states that "the organ in question must possess the status of an organ of the sending State," whereas that to Article 9 proves that "[s]uch cases occur only rarely, such as during revolution, armed conflict or foreign occupation, where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative." JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 105, 114 (2002). On the issue of responsibility, it should be noted that the International Court of Justice has deemed *ex post facto* endorsement of an action sufficient to attribute the act in question to the State. *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3, at 79–80 (May 24) [hereinafter *Consular Staff in Tehran*]. However, in the instant case, the Lebanese government immediately distanced itself from Hezbollah's July 12 attacks.

76. See *Draft Articles on State Responsibility*, *supra* note 74, art 50.1(a) ("Countermeasures shall not affect . . . the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations . . ."). Restated, force may only be used in response to another State's wrong if said force would otherwise be permissible under the Charter, i.e., defensive force in response to an armed attack or actions pursuant to a U.N. Charter, Chapter VII, Article 42, mandate.

77. See, e.g., HANS Kelsen, *COLLECTIVE SECURITY UNDER INTERNATIONAL LAW* 88 n.2 (Naval War College Int'l Law Studies Series No. 49, 1957); Hans Kelsen, *Collective Security and Collective Self-Defense Under the Charter of the United Nations*, 42 AM. J. INT'L L. 783, 791–92 (1948).

out by regular armed forces."<sup>78</sup> In support of its position, the Court cited Article 3(g) of the General Assembly's 1974 Definition of Aggression [3314 (XXIX)], which was characterized as reflective of customary international law.<sup>79</sup> The ICJ confirmed this "effective control" standard in its 2005 *Congo* and 2007 *Genocide* decisions.<sup>80</sup>

The *Nicaragua* standard has proven controversial. In 1999, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia rejected it in *Tadic*. At issue was the existence of an international armed conflict in Bosnia-Herzegovina by virtue of the Federal Republic of Yugoslavia's relationship with Bosnian Serb forces. In finding such a conflict, the Chamber adopted a more relaxed standard than that articulated by the ICJ. For the Chamber, the key was "overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations."<sup>81</sup> Both the effective control and overall control standards would exclude providing sanctuary or otherwise acquiescing to the presence of terrorists from the ambit of "armed attack." Since no evidence exists of a substantive Lebanese government link to the July 12 Hezbollah attacks, the relationship between Lebanon and Hezbollah met neither the *Nicaragua* "effective" nor the *Tadic* "overall" control tests.

In 2005, Judge Kooijmans, in his separate opinion in the *Congo* case, noted that the Court had failed to take "a position with regard to the question whether the threshold set out in the *Nicaragua* judgment is still in conformity with contemporary international law in spite of the fact that that threshold has been subject to increasingly severe criticism ever since it was established in 1986."<sup>82</sup> He was perceptive. The ICJ ignored the operational code evident in the international community's reaction to

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78. Or "substantial [State] involvement therein." Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, at 103 (June 27) [hereinafter *Nicaragua*]. In the case, the United States argued that its support for the Contra rebels was justified as collective defense against Nicaragua's provision of arms and logistical supplies to rebels conducting operations against El Salvador. The Court rejected the notion that providing supplies and logistic support amounted to an "armed attack" (although it might be unlawful intervention into another State's internal affairs in violation of Article 2(4) of the U.N. Charter). *Id.*

79. *Id.*; see also Definition of Aggression, G.A. Res. 3314 (XXIX), U.N. GAOR 6th Comm., 29th Sess., 2319th plen. mtg., Annex, U.N. Doc. A/RES/3314 (XXIX) (1975).

80. See Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, at 53 (Dec. 19) [hereinafter *Congo*]; see also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), at ¶¶ 391–392 (Judgment of Feb. 26, 2007), available at <http://www.icj-cij.org/docket/files/91/13685.pdf>; *Congo*, 2005 I.C.J. 116, at 6 (separate opinion of Judge Kooijmans).

81. Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 145 (July 15, 1999), available at <http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf>.

82. *Congo*, 2005 I.C.J. 116, at 6 (separate opinion of Judge Kooijmans) (citation omitted).

2001 Coalition attacks against the Taliban (the de facto government of Afghanistan). Taliban support for al Qaeda fell far below the bar set in either *Nicaragua* or *Tadic*. Nevertheless, most States approved of Operation Enduring Freedom, with many offering material support.<sup>83</sup> No international organization or major State condemned the operations. On the contrary, a month after the launch of operations, the Security Council condemned the Taliban “for allowing Afghanistan to be used as a base for the export of terrorism by the Al-Qaida network and other terrorist groups and for providing safe haven to Usama Bin Laden, Al-Qaida and others associated with them.” Additionally, it expressed support for “the efforts of the Afghan people to replace the Taliban regime.”<sup>84</sup>

Had the operational code for attributing attacks by non-State actors to States been relaxed? The precise parameters of any emergent standard remained unclear because the community reaction to attacks on the Taliban may merely have reflected a sense of relief over ouster of international pariahs, rather than a relaxation of the norms governing the use of force against States tied to terrorism. But if the bar had been lowered, the new standard could arguably apply to Lebanon. Like the Taliban, the Lebanese government allowed Hezbollah sanctuary when it failed to move south, as it had agreed to do in the 1989 Ta’if Accords,<sup>85</sup> and as the United Nations and Israel had demanded.<sup>86</sup> With organized armed forces under its control, Lebanon presumably had more capacity to deny sanctuary to Hezbollah than did the Taliban vis-à-vis al Qaeda.

Ultimately, attributing the July 12, 2006, attacks to Lebanon is problematic. True, the Lebanese President had expressed support for Hezbollah, the Cabinet had recognized it as performing legitimate resistance functions, Hezbollah exercised government functions in the south, and the failure of Lebanese forces to take control of the area could be characterized as providing sanctuary. On the other hand, the organization was not an organ of government empowered by Lebanese law, there is no evidence that the Hezbollah cabinet ministers participated in the decision to strike Israel and kidnap its soldiers, the government did not direct or control the operations, many Lebanese officials opposed Hezbollah, and the Lebanese government publicly, officially, and quickly distanced itself from the attacks.

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83. See Michael N. Schmitt, *Counter-Terrorism and the Use of Force in International Law*, in *INTERNATIONAL LAW AND THE WAR ON TERROR* 7, 16–18 (Fred Borch & Paul Wilson eds., 2003).

84. S.C. Res. 1378, at 1, U.N. Doc. S/RES/1378 (Nov. 14, 2001).

85. Ta’if Accords, Oct. 22, 1989, available at <http://www.al-bab.com/arab/docs/lebanon/taif.htm>.

86. *July 12, 2006 Letters*, supra note 2.

Israel correctly grasped that there was a much firmer normative foundation on which to base Operation Change Direction—self-defense against Hezbollah itself. Prior to the terrorist strikes of September 11, 2001 (9/11), it might have been plausible to suggest that Article 51 applied only to attacks by State actors.<sup>87</sup> Those conducted by non-State actors lay, so the argument went, in the realm of domestic and international criminal law enforcement.<sup>88</sup>

Article 51, however, contains no reference to whom the offending armed attack must be mounted by, before qualifying for a defensive reaction as a matter of law. Similarly, Articles 39 and 42 (which together comprise the other exception to the Article 2(4) prohibition on the use of force) do not limit the source of a threat to the peace, breach of peace, or act of aggression to States.<sup>89</sup> Beyond pure textual analysis, the Security Council has never restricted enforcement actions to those directed against States; for instance, it has created international tribunals to prosecute individuals charged with crimes against humanity, war crimes, and genocide.<sup>90</sup>

By contrast, Article 2(4) specifically pertains to the use of force by “Member states” in their “international relations” (i.e., relations with other States). This suggests that the drafters were sensitive to the textual scope of the articles. From an interpretive standpoint, it would resultantly be incongruous to add a State “attacker” criterion to the law of self-defense.

A construal of Article 51 that included non-State actor attacks had already been advanced by some members of the academy prior to the attacks of September 11. For instance, Professor Oscar Schachter argued a decade earlier that “[i]t is clear that terrorist attacks against State officials, police or military units are attacks on a State wherever they occur. Attacks on private persons and private property may also be regarded as attacks upon a state when they are intended to intimidate and strike fear

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87. In a 1949 report commenting on the meaning of the term “armed attack” in the North Atlantic Treaty, the U.S. Senate Foreign Relations Committee suggested that the “words ‘armed attack’ clearly do not mean an incident created by irresponsible groups or individuals, but rather an attack by one state upon another.” U.S. Senate, Report of the Committee on Foreign Relations on the North Atlantic Treaty, S. Exec. Report. No. 8, at 13, 81st Cong., 1st Sess. (1949).

88. BROWNLIE, *supra* note 3, at 279 (arguing that even if a non-State actor could mount an armed attack, “[i]ndirect aggression and the incursions of armed bands can be countered by measures of defence which do not involve military operations across frontiers”).

89. Use of force pursuant to a mandate of the Security Council. *See supra* text accompanying notes 5–7.

90. S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (creating International Criminal Tribunal for Rwanda); S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) (creating International Criminal Tribunal for the Former Yugoslavia).

in order to compel that State to take, or refrain from, political action.”<sup>91</sup> Similarly, Professor Yoram Dinstein has long maintained the right of a State to engage in “extraterritorial law enforcement” against attacks by non-State actors.<sup>92</sup>

Moreover, it must be remembered that the *locus classicus* of the international law of self-defense, the nineteenth century *Caroline* incident, involved non-State actors.<sup>93</sup> During the 1837 Mackenzie Rebellion in Canada, rebel forces sought refuge in New York State, where they also recruited from among a sympathetic population. On December 20, 1837, British forces boarded the *Caroline*, a steamer used for travel between the United States and rebel bases, while it was docked in Schlosser, New York. Of the thirty-three crewmembers and others on board, only twelve survived the onslaught. The attackers set the *Caroline* ablaze and sent it adrift over Niagara Falls.

An exchange of diplomatic notes ensued, with the British claiming that self-defense necessitated the action, particularly in light of the American failure to police its own territory. In 1841, the incident took a strange turn when New York authorities arrested one of the alleged British attackers, a Mr. McLeod, who, while intoxicated, had boasted of participating in the incident. The British demanded McLeod’s release, arguing that he was acting on behalf of the Crown in legitimate self-defense. The arrest resulted in a further exchange of diplomatic notes between U.S. Secretary of State Daniel Webster and his British counterparts, in particular Lord Ashburton.<sup>94</sup> The contents of those notes, discussed *infra*, became immortalized as the origin of the modern law of self-defense.<sup>95</sup> Thus, self-defense traces its normative lineage to an attack by a non-State actor.

In any event, it appeared as if the international community’s reaction to the September 11 attacks had settled the issue. The very day after the terrorists struck, when no one was pointing the finger of blame at any

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91. OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 164 (1991).

92. DINSTEIN, *supra* note 3, at 244–47 (and previous editions).

Extra-territorial law enforcement is a form of self-defence, and it can be undertaken by Utopia against terrorists and armed bands inside Arcadian territory only in response to an armed attack unleashed by them from that territory. Utopia is entitled to enforce international law extra-territorially if and when Arcadia is unable or unwilling to prevent repetition of that armed attack.

*Id.* at 247.

93. See generally D.W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 58–60 (1958); R.Y. JENNINGS, *The Caroline and McLeod Cases*, 32 AM. J. INT’L L. 82 (1938).

94. See Avalon Project at Yale Law School, Webster-Ashburton Treaty—The Caroline Case (1997), available at <http://www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm>.

95. McLeod was ultimately acquitted at trial. See Jennings, *supra* note 93, at 95.

State, the Security Council adopted Resolution 1368, which acknowledged the inherent right of self-defense in the situation.<sup>96</sup> On September 28, the Council reaffirmed 1368 in Resolution 1373.<sup>97</sup> NATO and the Organization of American States activated the collective defense provisions of their respective treaties (which are expressly based on Article 51),<sup>98</sup> and Australia initiated planning to join the United States in military operations pursuant to the ANZUS Pact.<sup>99</sup> Forty-six nations issued declarations of support, while twenty-seven granted overflight and landing rights.<sup>100</sup> State practice seemed to be demonstrating comfort with an operational code extending Article 51 to armed attacks by non-State actors.

Further evidence of this understanding of the scope of self-defense appeared as the U.S.-led coalition responded on October 7, 2001, with strikes against al Qaeda (and Taliban) targets. In its notification to the Security Council that it was acting pursuant to Article 51, the United States confirmed that it considered the article applicable to the terrorist group.<sup>101</sup> Subsequent State practice proved supportive. The Australia, Canada, the Czech Republic, Germany, Italy, Japan, the Netherlands, New Zealand, Turkey, and the United Kingdom provided ground troops.<sup>102</sup> Georgia, Oman, Pakistan, the Philippines, Qatar, Saudi Arabia, Tajikistan, Turkey, and Uzbekistan allowed U.S. military aircraft to transit through their airspace and provided facilities to support operations.<sup>103</sup> China, Russia, and Arab states such as Egypt expressed acceptance of Operation Enduring Freedom.<sup>104</sup> The European Union depicted the military operations as “legitimate under the terms of the United Nations Charter

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96. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

97. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

98. North Atlantic Treaty, Apr. 4 1949, art. 5, 63 Stat. 2241, 34 U.N.T.S. 243; Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, art. 3.1, 62 Stat. 1681, 21 U.N.T.S. 77; Terrorist Threat to the Americas, Res. 1, Twenty-fourth Meeting of Consultation of Ministers of Foreign Affairs, Terrorist Threat to the Americas, OAS Doc. RC.24/RES.1/01 (Sept. 21, 2001), available at <http://www.oas.org/oaspage/crisis/rc.24e.htm>; N. Atl. Treaty Org. [NATO], Press Release (2001) 124, Statement by the North Atlantic Council (Sept. 12, 2001), available at <http://www.nato.int/docu/pr/2001/p01-124e.htm> (declaring an attack against the United States would be treated as an attack against all members).

99. Security Treaty, U.S.-Austl.-N.Z., art. IV, Sept. 1, 1951, 3 U.S.T. 3420, 131 U.N.T.S. 83; Brendan Pearson, *PM Commits to Mutual Defence*, AUSTL. FIN. REV., Sept. 15, 2001, at 9.

100. White House, Fact Sheet: Operation Enduring Freedom Overview (Oct. 1, 2001), <http://www.state.gov/s/ct/rls/fs/2001/5194.htm>.

101. Letter Dated 7 October 2001 from The Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc S/2001/946 (Oct. 7, 2007).

102. Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: Legal Regulation of Use of Force*, 96 AM. J. INT'L L. 237, 248 (2002).

103. *Id.*

104. *Id.*

and of Resolution 1368 of the United Nations Security Council.”<sup>105</sup> The Security Council adopted repeated resolutions reaffirming the right to self-defense in the context of the conflict in Afghanistan.<sup>106</sup> It is undeniable that post-9/11 practice demonstrated the applicability of Article 51 to attacks by non-State actors.

Or so it seemed. In 2004, the International Court of Justice appeared to ignore this demonstrable history in its polemical Advisory Opinion, *Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory*.<sup>107</sup> Faced with claims that self-defense justified construction of the Israeli security fence, the Court found Article 51 irrelevant because Israel had not averred that the terrorist attacks the wall was intended to thwart were imputable to a State.<sup>108</sup> Judges Higgins, Kooijmans, and Buergenthal rejected the majority position, correctly pointing out the absence in Article 51 of any reference to a State as the originator of an “armed attack,” as well as the Security Council’s self-evident characterization of terrorist attacks as armed attacks in, *inter alia*, Resolutions 1368 and 1373.<sup>109</sup>

Despite this telling criticism, in *Armed Activities on the Territory of the Congo*, the Court again failed to address the issue head on, inquiring only into whether a State, the Democratic Republic of Congo, was responsible for the actions of a non-State actor, the Allied Democratic Forces, such that Uganda could act in self-defense against Congo.<sup>110</sup> In his separate opinion, Judge Kooijmans cogently maintained the position that a non-State actor could mount an armed attack.

If the activities of armed bands present on a State’s territory cannot be attributed to that State, the victim State is not the ob-

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105. Declaration by the Heads of State or Government of the European Union and the President of the Commission: Follow-up to the September 11 Attacks and the Fight Against Terrorism, Oct. 19, 2002, at 1, SN 4296/2/01 Rev. 2.

106. See, e.g., S.C. Res. 1390, U.N. Doc. S/RES/1390 (Jan. 28, 2002); S.C. Res. 1386, U.N. Doc. S/RES/1386 (Dec. 20, 2001); S.C. Res. 1378, U.N. Doc. S/RES/1378 (Nov. 14, 2001). Even the Organization of the Islamic Conference appeared to acquiesce. It merely requested that the operations not extend beyond Afghanistan. Daniel Williams, *Islamic Group Offers U.S. Mild Rebuke; Nations at Conference Avoid Criticizing Strikes on Taliban*, WASH. POST, Oct. 11, 2001, at A21.

107. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9) [hereinafter *Wall Case*].

108. *Id.* ¶ 139.

109. *Id.* ¶ 33 (separate opinion of Judge Higgins); *id.* ¶ 35 (separate opinion of Judge Kooijmans); *id.* ¶ 6 (declaration of Judge Buergenthal). Moreover, the question in the two International Court of Justice cases differed materially. In *Nicaragua*, the issue was when did a State’s support of guerrillas justify imputing their acts to the State such that the victim could respond in self-defense (individually or collectively) directly against the supporter. The Court did not address the issue at hand in the *Wall Case*, i.e., whether the actions of a non-State actor justified the use of force directly against that actor in self-defense.

110. *Congo*, 2005 I.C.J. 116, at 53.

ject of an armed attack by it. But if the attacks by the irregulars would, because of their scale and effects, have had to be classified as an armed attack had they been carried out by regular armed forces, there is nothing in the language of Article 51 of the Charter that prevents the victim State from exercising its *inherent* right of self-defence.<sup>111</sup>

Judge Simma criticized the Court on the same basis, chastising it for avoiding its responsibility for clarifying the law in a case directly on point.

Such a restrictive reading of Article 51 might well have reflected the state, or rather the prevailing interpretation, of the international law on self-defence for a long time. However, in the light of more recent developments not only in State practice but also with regard to accompanying *opinio juris*, it ought urgently to be reconsidered, also by the Court. As is well known, these developments were triggered by the terrorist attacks of September 11, in the wake of which claims that Article 51 also covers defensive measures against terrorist groups have been received far more favourably by the international community than other extensive re-readings of the relevant Charter provisions, particularly the “Bush doctrine” justifying the pre-emptive use of force. Security Council resolutions 1368 (2001) and 1373 (2001) cannot but be read as affirmations of the view that large-scale attacks by non-State actors can qualify as “armed attacks” within the meaning of Article 51.<sup>112</sup>

International reaction to Operation Change Direction demonstrated that the Court was swimming against the tide of the extant operational code. Although it might have been arguable that the supportive reaction to defensive strikes against al Qaeda (as distinct from law enforcement endeavors) was an anomaly deriving from the horror attendant to the 9/11 attacks, it would be incongruous to analogously dismiss the international community’s seeming acceptance of Israel’s right to act defensively against Hezbollah. What the Court failed to acknowledge is that international law is dynamic, that if it is to survive, it has to reflect the context in which it is applied, as well as community expectations as to its prescriptive content.

While the negotiating records of the United Nations Charter contain no explanation of the term “armed attack,” it would seem logical that hostile actions by non-State actors must, like those conducted by States,

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111. *Id.* at 7 (separate opinion of Judge Koijmans).

112. *Id.* at 3 (separate opinion of Judge Simma).

reach a certain level before qualifying as an “armed attack.”<sup>113</sup> For instance, in *Nicaragua*, the International Court of Justice excluded “mere frontier incidents” from the ambit of “armed attacks.”<sup>114</sup> Although the exclusion proved controversial,<sup>115</sup> plainly the mere fact that an incident occurs along a border does not disqualify it as an armed attack. As noted by Sir Gerald Fitzmaurice in 1952 in response to a Soviet request to include “frontier incidents” in a proposed Definition of Aggression, “What exactly does this mean? There are frontier incidents and frontier incidents. Some are trivial, some may be extremely grave.”<sup>116</sup> Although a frontier incident of sorts, Hezbollah’s actions on July 12 certainly rise to the level of armed attack.<sup>117</sup> They were planned in advance, complex in the sense of including multiple components (abduction and rocket attacks), and severe (kidnapping, death, destruction of property).<sup>118</sup>

Actions in self-defense against armed attacks, whether from a non-State group such as Hezbollah or a State, are subject to the same core criteria, which trace their roots to the *Caroline* case, discussed above. In one of the incident’s diplomatic exchanges, Secretary of State Webster argued:

Under these circumstances, and under those immediately connected with the transaction itself, it will be for Her Majesty’s Government to show upon what state of facts, and what rules of national law, the destruction of the *Caroline* is to be defended. It will be for that Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States

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113. The ICJ has distinguished the “most grave” uses of force (armed attacks under Article 51) from “less grave ones,” *i.e.*, those merely in violation of Article 2(4) of the U.N. Charter. *Nicaragua*, 1986 I.C.J. 14, at 101 (June 27). The Court relied heavily on the General Assembly’s Definition of Aggression Resolution, *supra* note 79, arts. 2, 3; *see also* *Oil Platforms* (Iran v. U.S.), 2003 I.C.J. 161, at 186 (Nov. 6).

114. *Nicaragua*, 2005 I.C.J. 116, at 103; *see also* *Oil Platforms*, 2003 I.C.J. 161, at 195 (finding that the mining of a single ship could rise to the level of an “armed attack”). The Court obliquely suggested that a pattern of incidents might exacerbate the severity of a single incident. *Oil Platforms*, 2003 I.C.J. 161, at 195.

115. *See, e.g.*, DINSTEIN, *supra* note 3, at 195; William H. Taft, IV, *Self-Defense and the Oil Platforms Decision*, 29 YALE J. INT’L L. 295, 300 (2004).

116. G.G. Fitzmaurice, Rep. of the U.K., *The Definition of Aggression (Extracts from speech to the United Nations General Assembly)*, 1 INT’L & COMP. L.Q. 137, 139 (1952).

117. Hezbollah’s actions amounted to an “armed attack,” even by restrictive standards such as Antonio Cassese’s “very serious attack.” *The International Legal Community’s “Legal” Response to Terrorism*, 38 INT’L & COMP. L.Q. 589, 596 (1989).

118. Recall that Hezbollah provided a label for the planned actions, “Operation True Promise.”

at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.<sup>119</sup>

The three universally accepted criteria of self-defense appear in the extract: 1) necessity (“necessity of self-defence” and “no choice of means”); 2) proportionality (“nothing unreasonable or excessive”); and 3) immediacy (“instant, overwhelming” and “leaving no moment for deliberation”). These requirements matured into, and remain, the normative catechism of self-defense.<sup>120</sup> The International Court of Justice recognized the first two as customary international law in *Nicaragua*;<sup>121</sup> a decade later it applied them to Article 51 self-defense in the advisory opinion, *Legality of the Threat or Use of Nuclear Weapons*.<sup>122</sup> The Court has recently confirmed the criteria in *Oil Platforms* (2003)<sup>123</sup> and *Congo* (2005).<sup>124</sup> Immediacy, the third criterion, is irrelevant when assessing Operation Change Direction because the Hezbollah attacks pre-date the Israeli response and continued throughout the IDF operations.

Conceptually, necessity is a qualitative criterion, whereas proportionality is quantitative. Reduced to basics, necessity requires the absence of adequate non-forceful options to deter or defeat the armed attack in question. This does not mean that non-forceful measures would not contribute to defense of the State. Rather, necessity requires that “but for” the use of force, they would not suffice.

Necessity analysis is always contextual, for the utility of non-forceful measures is situation specific. In the case of Operation Change Direction, a key variable was that Hezbollah—an entity historically resistant to diplomatic, economic, and other non-forceful actions and dedicated to the destruction of Israel—had carried out the attacks and kidnappings. Additionally, precedent existed that is directly on point, as to the futility of non-forceful measures in circumstances resembling those precipitating Operation Change Direction. Recall the 2000

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119. Letter from Daniel Webster, U.S. Sec’y of State, to Lord Ashburton (July 27, 1842), reprinted in 30 BRITISH AND FOREIGN STATE PAPERS 1840–1841 193 (1858), available at <http://www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm>; for an earlier recitation of the requirements, see Letter From Daniel Webster, U.S. Sec’y of State, to Henry Fox, British Minister in Wash. (Apr. 24, 1841), reprinted in 29 BRITISH AND FOREIGN STATE PAPERS 1840–1841 1137 (1857).

120. The International Military Tribunal at Nuremberg cited the standard when rejecting the argument that Germany invaded Norway in self-defense in 1940. See generally *Judgment, I TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL* 171, 207 (1946); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 905 (1987).

121. *Nicaragua*, 1986 I.C.J. 14, at 103.

122. *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, at 245 (July 8).

123. *Oil Platforms*, 2003 I.C.J. 161, at 183, 196–98.

124. *Congo*, 2005 I.C.J. 116, at 53.

kidnapping of IDF soldiers and the use of their bodies in a prisoner exchange. History seemed to be repeating itself.

The most likely alternative to Israeli action was, of course, immediate Lebanese action to: 1) control those lines of communication Hezbollah might use to whisk the captives out of the country, 2) recover the soldiers, and 3) extend military control over the south such that the area could no longer be used as a base of operations, especially for rocket attacks. However, the necessity criterion does not require naivety. As noted previously, extension of Lebanese government authority into the south had been a cornerstone of the Ta'if Accords ending the civil war in 1989.<sup>125</sup> Further, in Resolutions 1559 (2004) and 1680 (2006), the Security Council had emphasized the urgency of exerting government control throughout the country by disarming and disbanding Lebanese and non-Lebanese militia.<sup>126</sup> Yet, the Lebanese government had done nothing; on the contrary, it appeared that Hezbollah was growing militarily stronger. By the summer of 2006, Hezbollah had between two and three thousand regular fighters, with up to ten thousand reserves.<sup>127</sup> Hezbollah's arsenal included not less than twelve thousand rockets. Most were short range Katyushas, but the organization also possessed Iranian supplied Zelzal-2s, with a range of two hundred ten kilometers, sufficient to strike deep into Israel.<sup>128</sup> It was evident that action by the Lebanese government, particularly given its political disarray over the past year, did not represent a viable alternative to Israeli use of force.

Another possible alternative was deferral to action by the international community, much as Israel had done in 1991 when Saddam Hussein launched Scud missile attacks against Israeli population centers during the "First Gulf War." However, the situation in 2006 was dramatically different. No friendly forces were engaged against Hezbollah, as the Coalition had been with Iraqi forces, and UNIFIL was patently impotent. The two States enjoying influence over Hezbollah, Iran and Syria, offered little promise; the leader of the first had called for Israel's destruction,<sup>129</sup> while the latter was technically at war with Israel.<sup>130</sup> Finally, over the years the United Nations had demonstrated a marked inability to

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125. See Ta'if Accords, *supra* note 85.

126. S.C. Res. 1680, *supra* note 28; S.C. Res. 1559, *supra* note 28.

127. ANTHONY H. CORDESMAN, LESSONS OF THE ISRAEL-HEZBOLLAH WAR 17 (Ctr. for Strategic & Int'l Stud. 2007).

128. NORTON, *supra* note 67, at 135.

129. See, e.g., Jim Rutenberg, *Bush and Israeli Prime Minister Maintain Tough Front on Iran*, N.Y. TIMES INT'L, Nov. 14, 2006, at A6 (noting that Iranian leader Mahmoud Ahmadinejad was quoted in the Iranian media as saying "[w]e will soon witness [Israel's] disappearance and destruction").

130. DINSTEN, *supra* note 3, at 56 (noting that the war is not over because a bilateral peace agreement has not been concluded).

resolve matters in the area, Security Council politics generally precluded strong Chapter VII action, and previous U.N. entreaties to Lebanon and Hezbollah had failed to achieve meaningful results. In any event, the attacks were underway and nothing in Article 51 (or the customary law of self-defense) required Israel to yield to any other entity in defending itself. On the contrary, Article 51 expressly allows a State to act defensively in the face of an armed attack “until the Security Council has taken measures necessary to maintain international peace and security.”<sup>131</sup> The Security Council had taken no such step, nor did it purport to have done so. Operation Change Direction clearly met the necessity criterion of self-defense.

The other relevant self-defense criterion is proportionality. Proportionality deals with the degree of force permissible in self-defense; it allows the application of no more force than required, in the attendant circumstances, to deter an anticipated attack or defeat one that is underway. In other words, while necessity mandates a consideration of alternatives to the use of force, proportionality requires its calibration.

Proportionality is frequently misapplied in one of two ways. First, the degree of force employed by the defender is sometimes assessed through comparison to that used by the aggressor on the basis of a false premise that the former may not exceed the latter. Yet, proportionality requires no such symmetry between the attacker’s actions and defender’s response.<sup>132</sup> Operation Change Direction is paradigmatic. Although the IDF response exceeded the scope and scale of the Hezbollah kidnappings and rocket attacks many fold, the only way effectively to have prevented movement of the hostages was to either destroy or control lines of communication. Further, the best tactic for preventing Hezbollah rocket attacks, especially from mobile launchers, was through control of the territory from which they were being launched.

The second common misapplication of the proportionality principle confuses the *jus ad bellum* criterion of proportionality, under consideration here, with the *jus in bello* principle by the same name. The latter prohibits “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military

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131. See U.N. Charter art. 51.

132. As noted in a report to the International Law Commission, “[i]t would be mistaken . . . to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by the ‘defensive’ action, and not the forms, substance and strength of the action itself.” Robert Ago, *Addendum to Eighth Report on State Responsibility*, [1980] 2 Y.B. INT’L L. COMM’N 13, 69, U.N. Doc. A/CN.4/318/ADD.5–7.

advantage anticipated.”<sup>133</sup> It considers the consequences of individual or related operations, not the scope of a response to an armed attack.<sup>134</sup> Proportionality in the *jus in bello* context is fully divorced from that resident in the *jus ad bellum*—the autonomy of the two bodies of law is international law holy gospel.

Most critics of Operation Change Direction in the *jus ad bellum* context focus on the proportionality criterion. The U.N. Secretary-General, for example, condemned Israeli operations on the ground that they had, borrowing the words of the Prime Minister Siniora, “torn the country to shreds,” thereby producing results that ran counter to the Israeli need for the Lebanese military to exert its authority over southern Lebanon.<sup>135</sup> Similarly, the European Union criticized Israel for acting in violation of the principle of proportionality.<sup>136</sup>

But recall that to breach the proportionality norm, the defender must do more than reasonably required in the circumstances to deter a threatened attack or defeat an ongoing one. On July 13, Hezbollah fired one hundred twenty-five rockets into Israel. The next day, one hundred three were launched, with one hundred impacting Israeli territory. The IDF entered Lebanon by force on July 22, a day after ninety-seven rockets had been fired. Nevertheless, the number of rocket attacks actually grew following the Israeli movement north. In all, Hezbollah rockets killed forty-four civilians and one hundred nineteen IDF soldiers, while wounding nearly one thousand five hundred.<sup>137</sup> It is self-evident, therefore, that, at least vis-à-vis operations designed to stop rocket attacks, Israeli actions were proportionate (indeed, arguably *insufficient*).

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133. Additional Protocol I, *supra* note 12, arts. 51.5(b), 57.2(a)(iii), 57.2(b).

134. Rephrased in the Operation Change Direction context, was the harm to civilians and civilian property that was likely to have been caused during Israeli strikes on lawful military objectives excessive relative to the operational benefits Israeli commanders reasonably hoped to receive therefrom, such that they were disproportionate? Numerous reports on the conflict allege that certain of the Israeli operations did breach this norm. *See, e.g., Human Rights Council Report on Lebanon*, *supra* note 13, ¶¶ 317–331 (alleging breach of norm occurred); *Human Rights Watch*, *supra* note 13, at 5. *But see Israel’s War*, *supra* note 13, at 11–19; Isr. Ministry of Foreign Aff., *Responding to Hizbullah Attacks from Lebanon: Issues of Proportionality* (July 25, 2006), <http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Responding+to+Hizbullah+attacks+from+Lebanon+Issues+of+proportionality+July+2006.htm>.

135. *Secretary-General Statement July 20, 2006*, *supra* note 57, at 3 (noting that “[b]oth the deliberate targeting by Hizbullah, with hundreds of indiscriminate weapons, of Israeli population centres and Israel’s disproportionate use of force and collective punishment of the Lebanese people must stop”).

136. Fattah & Erlanger, *supra* note 66 (noting that the European Union styled the Israeli operations a “disproportionate use of force” on July 13).

137. Isr. Ministry of Foreign Aff., *Israel-Hizbullah Conflict: Victims of Rocket Attacks and IDF Casualties* (July 12, 2006), <http://www.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>.

More problematic from a proportionality perspective were Israeli operations targeting lines of communication. In particular, the IDF bombed Beirut International Airport, 109 Lebanese bridges, and 137 roads, and established air and naval blockades.<sup>138</sup> According to the Israelis, these steps were designed to frustrate any spiriting of the hostages out of the country and to keep Hezbollah from being re-supplied.<sup>139</sup> As a general matter of operational art,<sup>140</sup> attacking lines of communication also allows an attacker to isolate the battlefield, an especially useful strategy in Lebanon, given the concentration of Hezbollah in the south.

That a nexus existed between the stated objectives and the targets selected is apparent. The Israelis had intelligence that indicated there might be an attempt to remove the hostages from Lebanon and Hezbollah arms had been smuggled into Lebanon from abroad, especially from Syria and Iran. Interestingly, though, the lines of communication strikes provoked little discussion as to whether the IDF had gone too far in the *jus ad bellum* sense. Instead, debate focused on two *jus in bello* questions: 1) did the targets qualify as military objectives;<sup>141</sup> and 2) even if they did, was the expected harm to civilians and civilian property excessive relative to the anticipated military advantage.<sup>142</sup> The international community also condemned the effect the approach had on humanitarian assistance for the Lebanese civilian population and the movement of displaced persons.<sup>143</sup>

It does not seem possible objectively to portray Operation Change Direction as disproportionate from the *jus ad bellum* point of view. Characterizing an action as disproportionate can be justified on two grounds. First, the action may be so excessive relative to defensive needs that the situation speaks for itself—*res ipsa loquitur*. That was clearly not the case with Operation Change Direction, for Hezbollah continued to conduct anti-Israeli attacks. By definition, therefore, the operation cannot be styled as overly broad, at least absent an argument that the Israeli actions were inept.

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138. *Human Rights Council Report on Lebanon*, *supra* note 13, ¶¶ 136–137.

139. *Id.* ¶ 146.

140. DICTIONARY OF MILITARY TERMS, *supra* note 44 (defining operational art as consisting of the “application of creative imagination by commanders and staffs—supported by their skill, knowledge and experience—to design strategies, campaigns, and major operations and organize and employ military forces”).

141. Military Objectives are “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.” Additional Protocol I, *supra* note 12, art. 52.2.

142. *See July 12 2006 Letters*, *supra* note 2, at 133–34, and accompanying text.

143. *See generally Secretary-General Statement July 20, 2006*, *supra* note 57, at 2; Human Rights Council Report on Lebanon, *supra* note 13, ¶ 138.

Moreover, the Hezbollah actions of July 12 must be assessed contextually. The organization had been attacking Israel for a period measured in decades; no indication existed that it would desist from doing so in the future.<sup>144</sup> As noted by Judge Rosalyn Higgins, the present President of the International Court of Justice, “[p]roportionality cannot be in relation to any specific prior injury—it has to be in relation to the overall legitimate objective, of ending the aggression or reversing the invasion.”<sup>145</sup> Viewed in this way, the only truly effective objective from the defensive perspective was, as noted by the Israeli Ambassador to the United States, “Hezbollah neutralization.”<sup>146</sup> The law of self-defense does not require half-measures.

Second, an action is disproportionate when a reasonably available alternative military course of action employing significantly lesser force would have successfully met the defensive aims. Allegations of disproportionality are impossible to evaluate in the absence of an asserted viable alternative.

The Report of the Human Rights Council’s Commission of Inquiry exemplifies misapplication of the principle of proportionality. Although not tasked with conducting a *jus ad bellum* investigation, the group nevertheless opined that:

[W]hile Hezbollah’s illegal action under international law of 12 July 2006 provoked an immediate violent reaction by Israel, it is clear that, albeit the legal justification for the use of armed force (self-defence), Israel’s military actions very quickly escalated from a riposte to a border incident into a general attack against the entire Lebanese territory. Israel’s response was considered by the Security Council in its resolution 1701(2006) as “offensive military operation”. These actions have the characteristics of an armed aggression, as defined by General Assembly resolution 3314 (XXIX).<sup>147</sup>

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144. That a series of attacks has occurred bears on the proportionality of the response. As Robert Ago noted in a report to the International Law Commission, “[i]f . . . a State suffers a series of successive and different acts of armed attack . . . , the requirement of proportionality will certainly not mean that the victim State is not free to undertake a single armed action on a much larger scale in order to put an end to this escalating succession of attacks.” Ago, *supra* note 132, at 69–70.

145. ROSLYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 232 (1994).

146. Israeli Ambassador Daniel Ayalon noted, “[w]e will not go part way and be held hostage again. We’ll have to go for the kill—Hezbollah neutralization.” Robin Wright, *Strikes are Called Part of a Broad Strategy: U.S., Israel Aim to Weaken Hezbollah, Region’s Militants*, WASH. POST, July 16, 2006, at A15.

147. *Human Rights Council Report on Lebanon*, *supra* note 13, ¶ 61. The mandate of the Commission was: “(a) To investigate the systematic targeting and killings of civilians by Israel

The Council noted that self-defense “is subject to the conditions of necessity and proportionality,” citing *Nicaragua* and *Nuclear Weapons* as support.<sup>148</sup> The discussion of the escalation from riposte to general attack implies that the Commission believed a violation of the latter criterion had occurred. Yet, the report failed to explain how a riposte, or even a border action, would have sufficed to meet Israel’s pressing defensive needs. In particular, the Commission did not consider escalation in the context of Hezbollah’s ongoing rocket attacks. Without such granularity, its appraisal was purely conclusory; absent a mandate to render such an evaluation, it was irresponsible.

Curiously, a normatively more mature review came from Israeli official corners. According to the April 2007 interim report of the Winograd Commission, which Prime Minister Olmert established (and which was approved by the Cabinet) following widespread criticism of the conduct of the war,

The decision to respond with an immediate, intensive military strike was not based on a detailed, comprehensive and authorized military plan, based on careful study of the complex characteristics of the Lebanon arena. A meticulous examination of these characteristics would have revealed the following: the ability to achieve military gains having significant political-international weight was limited; an Israeli military strike would inevitably lead to missiles fired at the Israeli civilian north; there was not another effective military response to such missile attacks than an extensive and prolonged ground operation to capture the areas from which the missiles were fired—which would have a high “cost” and which did not enjoy broad support. These difficulties were not explicitly raised with the political leaders before the decision to strike was taken.

Consequently, in 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

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in Lebanon; (b) To examine the types of weapons used by Israel and their conformity with international law; and (c) To assess the extent and deadly impact of Israeli attacks on human life, property, critical infrastructure and the environment.” Human Rights Council, Resolution S-2/1, 2d Special Sess., ¶ 7, *The Grave Situation of Human Rights in Lebanon Caused by Israeli Military Operations*, U.N. Doc. A/HRC/S-2/2 (Aug. 17, 2006). This mandate hardly represented an unbiased tasking. Canada, Czech Republic, Finland, France, Germany, Japan, Netherlands, Poland, Romania, Ukraine, and the United Kingdom voted against the resolution. *Id.* at 6.

148. *Human Rights Council Report on Lebanon*, *supra* note 13, at 131 n. 37 (citing *Nicaragua*, 1986 I.C.J. 14, at 94 (June 27) and *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, at 245).

combining political and diplomatic moves with military strikes below the ‘escalation level’, or military preparations without immediate military action—so as to maintain for Israel the full range of responses to the abduction. This failure reflects weakness in strategic thinking, which deprives the response to the event from a more comprehensive and encompassing picture.<sup>149</sup>

Ultimately, the Winograd Commission concluded that the Prime Minister displayed “serious failure in exercising judgment, responsibility and prudence.”<sup>150</sup>

This criticism could be interpreted as reflecting elements of both necessity and proportionality; necessity in the sense that diplomatic and political moves should have been employed, and proportionality in that military action below the “escalation level” might have sufficed. But it is necessary to distinguish between legal violation and strategic failing. The law does not mandate selection of the best option; it requires that the choice made be reasonable in the circumstances as reasonably perceived by the actor at the time. Thus, although the Winograd Interim Report articulated sensible alternatives, the mere existence of such alternatives does not establish a breach of the proportionality criterion. On the contrary, recall that: the 2000 incident involving the capture of Israeli soldiers had ended tragically, the Hezbollah missile arsenal had grown since the Israeli withdrawal, the Lebanese Army had failed to deploy south, the Lebanese government was fractured and in disarray, and Hezbollah enjoyed the ability to sit on the border and dictate escalation. The situation had become so complex by the summer of 2006 that no particular course of action was self-evidently optimal.

Assuming, *arguendo*, that the Israeli defensive actions were both necessary and proportional, and assuming for the sake of analysis that the Hezbollah attacks cannot be classed as a Lebanese “armed attack,” the question of whether Israel had the right to cross into sovereign Lebanese territory to conduct counter-terrorist operations remains. The conundrum lies in the existence of conflicting international law rights—Israel’s right of self-defense, discussed above, and Lebanon’s right of territorial integrity.<sup>151</sup>

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149. Isr. Ministry of Foreign Aff., *Winograd Commission Submits Interim Report*, ¶ 10 (Apr. 30, 2007), <http://www.mfa.gov.il/MFA/Government/Communiques/2007/Winograd+Inquiry+Commission+submits+Interim+Report+30-Apr-2007.htm>; see also Council on Foreign Relations, Announcement, *Winograd Commission Final Report* (Jan. 30, 2008), available at [http://www.cfr.org/publication/15385/winograd\\_commission\\_final\\_report.htm](http://www.cfr.org/publication/15385/winograd_commission_final_report.htm).

150. Isr. Ministry of Foreign Aff., *supra* note 149, ¶ 12.

151. The conduct of major military operations against non-State armed groups in another State’s territory is not unprecedented. For instance, Turkey has repeatedly conducted opera-

Territorial integrity lies at the core of the State-centric international legal architecture, and, thus, the general inviolability of borders is well-entrenched in international law. Indeed, the U.N. Charter’s *sine qua non* principle, the prohibition on the use of force found in Article 2(4), expressly bars cross-border uses of force by singling out territorial integrity.<sup>152</sup> On the other hand, self-defense is no less a cornerstone of international law; it represents the sole use of force unambiguously permitted without Security Council sanction.

Beyond possessing rights, States also shoulder obligations in international law. Of particular relevance with regard to Operation Change Direction is the duty to police one’s own territory to preclude its use to the detriment of other States. As John Basset Moore noted in the classic 1927 Permanent Court of Justice case, *The S.S. Lotus*, “it is well settled that a State is bound to use due diligence to prevent the commission within its dominions of criminal acts against another nation or its people.”<sup>153</sup> The International Court of Justice reaffirmed this obligation in its very first case, *Corfu Channel*.<sup>154</sup> In relevant part, the underlying incident involved two British warships, which struck mines in Albanian waters while transiting the Corfu Strait. The Court concluded that since the mines could not have been laid without its knowledge, Albania bore responsibility based on “certain general and well recognized principles,” including “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of others.”<sup>155</sup> The Court reiterated the point in *United States Diplomatic and Consular Staff in Tehran*, which involved seizure by Iranian radicals of the U.S. Embassy in Tehran and consulates in Tabriz and Shiraz, as well as the taking hostage of American diplomats and other citizens.<sup>156</sup> There, the Court held that

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tions against the Kurdish Worker’s Party (PKK) in northern Iraq, including bombing attacks in December 2007 following requests that the United States and Iraq act to stop PKK attacks on Turkey. Sebnem Arsu, *Turkish Warplanes Attack Kurdish Rebel Camps in Iraq*, N.Y. TIMES, Dec. 27, 2007, at A14. In response to questions on the incidents, a State Department spokesman noted that “[w]e have a common enemy—Turkey, Iraq, and the United States—in the form of the PKK. It’s a terrorist organization.” Tom Casey, U.S. Department of State Daily Press Briefing (Dec. 28, 2007), available at <http://www.state.gov/t/pa/prs/dpb/2007/dec/98143.htm>.

152. It has been correctly asserted that the Article 2(4) prohibition extends to non-consensual penetrations of a State’s territory not otherwise justified within the framework of the Charter. Albrecht Randelzhofer, *Article 2(4)*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 112, 123 (Bruno Simma ed., 2d ed. 2002).

153. *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), at 88 (dissenting opinion of Judge Moore) (citing for support the U.S. Supreme Court case, *United States v. Arjona*, 120 U.S. 479 (1887)).

154. *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4 (Apr. 9).

155. *Id.* at 22. The British subsequently swept the strait, justifying its action in Albanian waters as self-help. *Id.* at 13–25; see generally BROWNLIE, *supra* note 3, at 283–89.

156. *Consular Staff in Tehran*, 1980 I.C.J. 3.

Iran's failure to protect the diplomatic premises and subsequent refusal to act to free the hostages violated its "obligations under general international law."<sup>157</sup>

Soft-law instruments further support an obligation to police one's territory. For instance, the International Law Commission's 1954 *Draft Code of Offences against the Peace and Security of Mankind* labels "the toleration of the organization of . . . [armed] bands in its own territory, or the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another State . . ." an offence against "the peace and security of mankind."<sup>158</sup> Similarly, the 1970 General Assembly *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations* Resolution provides that "[e]very State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force."<sup>159</sup>

In terms of State practice, the most useful contemporary reference point is al Qaeda's use of Afghanistan as a base of operations. In 1999, the Security Council imposed sanctions on the Taliban government for, in part, granting sanctuary to Osama bin Laden and for permitting al Qaeda "to operate a network of terrorist training camps from Taliban-controlled territory and to use Afghanistan as a base from which to sponsor international terrorist operations . . ."<sup>160</sup> It insisted that the Taliban "cease the provision of sanctuary and training for international terrorists and their organizations, take appropriate effective measures to ensure that the territory under its control is not used for terrorist installations and camps, or for the preparation or organization of terrorist acts against other States or their citizens, and cooperate with efforts to bring indicted terrorists to justice." Included was a specific demand that the Taliban turn over Osama bin Laden.<sup>161</sup> The following year, the Council levied

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157. *Id.* at 31; see also Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261; Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

158. *Draft Code of Offences Against the Peace and Security of Mankind*, [1954] 2 Y.B. INT'L L. COMM'N 149, 150, U.N. Doc. A/CN.4/SER.A/1954/Add.1.

159. G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, 123, U.N. Doc. A/8028 (Oct. 24, 1970). The resolution was adopted by acclamation.

160. S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999). The sanctions included a ban on flights to and from Afghanistan and an international freeze on Taliban assets. *Id.*

161. *Id.* The previous year it had also demanded that the "Taliban stop providing sanctuary and training for international terrorists and their organizations, and that all Afghan factions

additional sanctions after the Taliban failed to expel al Qaeda; it established a sanctions monitoring mechanism in 2001.<sup>162</sup>

Of even greater normative weight was the absence of international condemnation when the United States attacked Afghanistan after the Taliban failed to heed post-9/11 warnings to turn over Bin Laden and rid the country of terrorists.<sup>163</sup> While, as discussed, the legitimacy of translating the non-reaction into a new norm regarding State support of terrorism is questionable, it is certainly evidence of a community conviction that Afghanistan had not met its obligations to police its territory.

Given the aforementioned hard law, soft law, and State practice, any formula for resolving a conflict between one State's right to self-defense and another's right of territorial integrity must include the fact that the need for conducting the defensive operations arises only when the latter fails to meet its policing duties. But territorial integrity must equally be factored into the formula. Therefore, before a State may act defensively in another's territory, it must first demand that the State from which the attacks have been mounted act to put an end to any future misuse of its territory.<sup>164</sup> If the sanctuary State either proves unable to act or chooses not to do so, the State under attack may, following a reasonable period for compliance (measured by the threat posed to the defender), non-consensually cross into the latter's territory for the sole purpose of conducting defensive operations. The victim State may not conduct

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cooperate with efforts to bring indicted terrorists to justice." S.C. Res. 1214, U.N. Doc. S/RES/1214 (Dec. 8, 1998); *see also* S.C. Res. 1193, U.N. Doc. S/RES/1193 (Aug. 28, 1998).

162. SC Res. 1363, U.N. Doc. S/RES 1363 (July 30, 2001); S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000).

163. On September 28, the Security Council adopted Resolution 1373. The resolution prohibits States from providing "any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists" and obligates them to, *inter alia*, "[t]ake the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information; [d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens; [and] [p]revent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens." S.C. Res. 1373, *supra* note 97, ¶ 2.

164. The United States did so following the attacks of September 11, 2001, both through Pakistan, which had maintained relations with the Taliban and thereby served as a useful intermediary, and publicly, for example in President Bush's address to a joint session of Congress. Bush demanded that the Taliban "[c]lose immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist and every person in their support structure to appropriate authorities" and "[g]ive the United States full access to terrorist training camps, so we can make sure they are no longer operating." Address Before a Joint Session of the Congress on the United States, Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347, 1348 (Sept. 20, 2001). The President of the United States issued an address stating "[f]ull warning has been given, and time is running out" the day before Operation Enduring Freedom began. The President's Radio Address, 37 WEEKLY COMP. PRES. DOC. 1429, 1430 (Oct. 6, 2001).

operations directly against sanctuary State forces and must withdraw as soon as its defensive requirements have been met.<sup>165</sup> Since the victim State has a legal right to act defensively, the sanctuary State may not interfere with the defensive operations so long as they meet the aforementioned criteria. If it does, it will have itself committed an armed attack against which the victim State may use force in self-defense.

This proposition is far from novel; rather, it is, reduced to basics, the *Caroline* case.<sup>166</sup> Recall that the United Kingdom demanded the United States put an end to the use of its territory by rebel forces. It was only after U.S. authorities failed to comply that British forces crossed the border in a form of self-help. Those forces withdrew immediately on capture and destruction of the *Caroline*. As noted by Lord Ashburton in his correspondence with Secretary of State Webster,

I might safely put it to any candid man, acquainted with the existing state of things, to say whether the military commander in Canada had the remotest reason, on the 29th day of December, to expect to be relieved from this state of suffering by the protective intervention of any American authority. How long could a Government, having the paramount duty of protecting its own people, be reasonably expected to wait for what they had then no reason to expect?<sup>167</sup>

The facts underlying the British actions were even less compelling than those in the instant case. Although New York authorities were sympathetic to the Canadian rebels, they were not in breach of international demands that control be established over the territory in question. Further, the United States was actively enforcing the laws of neutrality.<sup>168</sup>

In their separate opinions in the *Congo* case, Judges Kooijmans and Simma took a stance similar to that presented here. As Simma perceptively noted,

Judge Kooijmans points to the fact that the almost complete absence of governmental authority in the whole or part of the territory of certain States has unfortunately become a phenomenon as familiar as international terrorism. I fully agree with his conclusions that, if armed attacks are carried out by irregular forces from such territory against a neighbouring State, these activities are still armed attacks even if they cannot be attributed to the territorial State, and, further, that it “would be unreasonable

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165. On directing actions only against the terrorists, see BOWETT, *supra* note 93, at 56.

166. See *supra* notes 93–95 and accompanying text.

167. Letter from Mr. Webster to Lord Ashburton, *supra* note 119, at 195–98.

168. See summary and accompanying letters to the Avalon Project, *supra* note 94.

to deny the attacked State the right to self-defence merely because there is no attacker State and the Charter does not so require so.<sup>169</sup>

How could it be otherwise?<sup>170</sup>

The standards set forth apply neatly to Operation Change Direction. Following its withdrawal from Lebanon in 2000, Israel repeatedly demanded that Lebanon move south to secure the area from Hezbollah and other terrorist attacks. The international community did so as well. However, Lebanon took no steps to put an end to the misuse of its territory; on the contrary, it seemed to embrace, albeit somewhat guardedly, Hezbollah. Either it chose not to police the south or it could not, but whatever the case, it did not, thereby opening the door for Israeli defensive action.

Moreover, Israel moved in a very measured, stepped fashion. Its initial operations were mostly limited to air attacks and the naval blockade. Ground force operations took place only in the border areas. It was not until September 9 that the IDF launched large-scale ground operations into southern Lebanon, and, even then, they were confined geographically to the area south of the Litani River. Operation Change Direction was also confined temporally. The entire operation lasted a mere thirty-four days, at which point a ceasefire was negotiated that provided for an Israeli withdrawal and, at least in theory, safeguarded Israel's security along its northern border. Finally, although Israel did strike Lebanese military targets, it is at least arguable that the facilities struck supported Hezbollah operations, as in the case of the radar stations used in support of the strike on the Israeli warship.

#### IV. CONCLUSION

Operation Change Direction remains a subject of continuing controversy, although most criticism centers on the *jus in bello*. With regard to the *jus ad bellum*, there is relative agreement that Israel had the right to respond to the Hezbollah attacks pursuant to the law of self-defense. Its

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169. *Congo*, 2005 I.C.J. 116, at 3 (separate opinion of Judge Simma); *see also id.* at 7 (separate opinion of Judge Kooijmans).

170. This position appears to be increasingly prevalent in academia. In particular, see RANDELZHOFFER, *supra* note 152, at 802.

A special situation arises if a State is not reluctant but incapable of impeding acts of terrorism committed by making use of its territory. Although such terrorist acts are not attributable to that State, the State victim of the acts is not precluded from reacting by military means against the terrorist within the territory of the other State. Otherwise, a so-called failed State would turn out to be a safe haven for terrorists, certainly not what Articles 2(4) and 51 of the Charter are aiming at.

response comported with the various requirements set forth in that body of law. Operation True Promise rose to the level of an “armed attack” as that term is understood normatively, and the Israeli response met both the necessity and immediacy criteria. Although disagreement exists over compliance with the criterion of proportionality, when Operation Change Direction is considered in the context of not only the July 12 Hezbollah attacks, but also those which had preceded them and those which likely would have followed, the standard was met.

A colorable argument can be fashioned that Lebanon also bore legal responsibility for the attacks, perhaps even to the extent that it could be treated as having conducted them itself. This is especially so in light of the heightened scrutiny to which State support of terrorism is subject in the aftermath of the September 11, 2001, attacks against the United States. However, such an argument, which can be questioned as a matter of law, need not be made, for the law of self-defense provided an adequate foundation for the Israeli actions.

In terms of the continuing construction of the normative architecture governing the use of force, Operation Change Direction is relevant in two important regards. First, it serves as further evidence of an operational code extending the reach of self-defense to armed attacks conducted by non-State actors. Despite the apparent unwillingness of the International Court of Justice to acknowledge that the law of self-defense now reaches such actions, State practice demonstrates acceptance by the international community. Second, Operation Change Direction serves as an excellent illustration of the growing acceptability of cross-border counter-terrorist operations when the State in which terrorists are located fails to comply with the duty to police its own territory.

These issues loomed large on the international legal horizon following the attacks of September 11. Reaction to the Coalition response, Operation Enduring Freedom, suggested that the international community had come to interpret Article 51 as allowing an Article 51 response against non-State actors, including a non-consensual penetration of another State’s territory to carry it out. However, operations against al Qaeda and the Taliban made for weak precedent because both groups were globally reviled. Operation Change Direction, therefore, serves as an important milestone in crystallizing the operational code in such matters.