JUS AD BELLUM IN THE ISRAEL–HEZBOLLAH CONFLICT

Jus ad Bellum in Response to Non–State Aggression: Article 51, State Responsibility & the Israel–Hezbollah Conflict, 2006

Brendan Ryan[1]

> Liberty means responsibility. That is why most men dread it.
>
> – George Bernard Shaw

A SOURCES OF THE LAW ON SELF–DEFENCE AND STATE RESPONSIBILITY

Article 2(4) of the Charter of the United Nations promulgates a general prohibition on the use of force in the conduct of international affairs:

> 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.

No use of force outside of Security Council–sanctioned operations is permissible, unless a given situation falls within the Article 51 self–defence derogation:

> 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.
>
> Measures taken by Members in the exercise of this right of self–defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security. [Emphasis added.]

The UN Charter's conception of self–defence has its genesis in the devastation of the Second World War and was tailored to respond to state–on–state conventional attacks.[2] It goes without saying that the current international climate poses radically altered challenges to the security of states. Franck, writing as early as 1970, presciently notes two emergent phenomena in warfare which could act to neutralise a state's ability to defend itself adequately: namely, the paralysing effect of a 'first–strike' nuclear attack and the ability of non–state organisations to execute trans–frontier acts of war.[3]

---

[1] BCL (Law & French) IV.
[2] Cases & Materials on International Law, Dixon & McCorquodale, p. 539.
[3] Franck, "Who Killed Article 2(4)?" AJIL (1972).

A prima facie reading of Articles 2(4) and 51 might suggest that the bar for engaging in extra–Security Council military action is a high one – a state is debarred from engaging in the 'threat or use of force' unless an armed attack occurs against it. In fact, the Charter, being read in conjunction with customary international rules, casts the net somewhat more widely. All kinds of appeal are made to the role of the "inherent" right in building a case for self–defence,[4] many of them tantamount to allowing states a *carte blanche* to entirely subvert Article 2(4). Yet the resort to force is, and should remain, an extreme one. Thus great care ought to be accorded to the identification of customary principles which might lower the bar. Cassesse usefully states the rule in noting that a legally binding custom is to consist of two components: general practice (*usus*) and the understanding that this practice should equate to law (*opinio juris*).[5]

The present article proposes to bring together the new understandings of the self–defence and state responsibility regimes, which the author contends have been the subject of much pre– and particularly post–9/11 evolution, so as to examine the *jus ad bellum* (the 'right to war') which Israel claimed – and, furthermore, other rights which Israel might have claimed to enjoy in the 2006 conflict with Hezbollah. The author opines that more expansive norms of self–defence have emerged in inter–state relations but that when states seek to enforce the new standards against non–state actors on foreign territory, a second bolt – namely, the secondary rules of state responsibility – must also be unlocked. A failure on the second point negates any legitimate reliance on self–defence but the victim state may profitably avail of a Chapter VII UN Security Council enforcement measure[6] against the host state or may succeed in applying conventions relating to the financing of terrorism[7] or international criminal prosecution.[8]

While accepting that actions in self–defence are constrained by humanitarian conventions, the article steers clear of pronouncing on the legality of the tactics employed by the Israeli Defence Forces (ie the *jus in bello*, or the 'laws of war') once the war had commenced.

B HISTORICAL CONTEXT AND BACKGROUND TO THE ISRAEL–HEZBOLLAH CONFLICT

---

[4] See generally, AJIL, Vol. 95, No. 4. (2001), pp.839-843. Franck argues that Article 51 does not even legally authorise acts of self-defence as it is already "inherent" in the victim.
[5] Cassesse, International Law, Oxford 2001, p.119.
[6] For example, Article 42 reserves for the Security Council the right to: "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."
[7] For instance, the injured state may find assistance in the International Convention for the Suppression of the Financing of Terrorism (1999). Refer to http://untreaty.un.org/English/Terrorism/Conv12.pdf.
[8] Under the Rome Statute of the International Criminal Court. Refer to http://daccessdds.un.org/doc/UNDOC/GEN/N98/281/44/IMG/N9828144.pdf?OpenElement.

In the year 2000, Israel, which had been occupying Lebanon south of the River Litani since 1982, withdrew its forces from all internationally recognised Lebanese territory,[9] pursuant to Resolution 425. Lebanon failed to exercise its sovereignty over the newly evacuated territories allowing Hezbollah militias, hostile to the state of Israel (Hezbollah speaks of the "Necessity for the Destruction of Israel"[10]), to base themselves there.

Successive UN Security Council resolutions have called on Lebanon to deploy its troops over the entirety of its territory and to disarm all militias on its territory. Security Council Resolution 1559 called for "the disbanding and disarmament of all Lebanese and non–Lebanese militias." Lebanon failed to comply with these obligations, often refusing to recognise Hezbollah as a militia for the purposes of the resolutions.[11] The facts giving rise to the hostilities have been well recited in the media and are generally agreed upon (although it is worth noting that Hezbollah disputes them and offers an alternative chronicle of events).

At 09:00 on the morning of the 12 July 2006, Hezbollah initiated "Operation Truthful Promise". Units in southern Lebanon launched coordinated Katyusha rocket attacks directed at five Israeli border stations and the town of Shlomi. Simultaneously, an armed band of Hezbollah activists crossed Lebanon's southern frontier into Israeli territory. The invading party opened fire on two Israeli light personnel carriers, killing three troops and taking two others into captivity.[12] The same day, Israeli Prime Minister Ehud Olmert announced in a communiqué that Israel intended to exercise a right of self–defence against Lebanon in response to an armed attack.[13] The ensuing "July War" saw large–scale Israeli bombardment of Hezbollah installations and civilian infrastructure. Hezbollah for its part directed over 3,000 rocket attacks into northern Israel. The conflict concluded with the enactment, on 14 August, of UN Security Council Resolution 1701, which provided for an international force to enter Lebanon and secure its southern frontier with Israel.[14]

C THE PRIMARY RULE: SELF–DEFENCE

---

[9] Refer to Security Council Press Release 6878, "Security Council Endorses Secretary–General's Conclusion on Israeli Withdrawal from Lebanon as of 16 June." Available online at http://www.un.org/News/Press/docs/2000/20000618.sc6878.doc.html. The Security Council was *ad idem* with the Israeli stance that Resolution 425 was fully complied with, in spite of the continuing occupation of the Shebaa Farms. This land, although claimed as Lebanese territory by Hezbollah is, according to international law, occupied Syrian territory and so could not fall under the ambit of the Resolution.

[10] The Hezbollah Program: An Open Letter to the Downtrodden (1985). Available online at http://www.zionism-israel.com/hdoc/Hezbollah_Charter.htm.

[11] Available online at http://edition.cnn.com/2005/WORLD/meast/05/06/lebanon.report/index.html where Najib Mikati on a visit to the United Nations states that "Our terminology — Hezbollah — is not a militia. It's a resistance ... and there is a difference between resistance and militia."

[12] Available online at http://news.bbc.co.uk/2/hi/middle_east/5179434.stm.

[13] Published on the website of The Israeli Ministry of Foreign Affairs at http://www.mfa.gov.il.

[14] There exists significant disagreement as to the nature of the mandate held by the international force (United Nations Interim Force In Lebanon) with some parties, including Israel, propounding the view that it is possessed of a duty to confront and disarm Hezbollah.

Article 51is very short on detail and its wording – in particular, this "armed attack" (or "*aggression armée*" in the equally authentic French version of the Charter), is a very weak pointer in itself and it is left to customary international law to clarify the precise meaning of the phrase.[15] Even with the aid of existing customary rules, one is reduced to questions of fact and degree. In certain scenarios, a victim state may deny the existence of obvious armed conflict, as recognition of such may duly legitimise the activities of a paramilitary group in the eyes of the world. This is perhaps more true of a purely domestic conflict (eg Chechnya) where international law may recognise the right of peoples to self– determination.[16]

However, when an attack emanates from a foreign territory the aggressed state will be more inclined to magnify the significance of the attack so as to give rise to remedies under international law, principally rights pursuant to Article 51.

1 Can non–state actors perpetrate armed attacks?

There is nothing in the Charter which might exclude "armed attacks" emanating from private non–state actors from the operation of Article 51.[17] State practice in recent times seems to have confirmed the rule that such combatants can indeed be held accountable.

The circumstances leading to the US invasion of Afghanistan ("Operation Enduring Freedom") in 2001 were ground–breaking in themselves, with the UN recognising the atrocities of 11 September 2001 as "attacks" and a "threat to international peace and security" without any mention of state involvement, even before the perpetrators had been identified. On the 12 September 2001, the UN Security Council adopted Resolution 1368, condemning unreservedly the attacks in New York, Washington and Pennsylvania and recognising "the inherent right of individual or collective self–defence in accordance with the Charter." On the 28th September, a further Resolution re–stated the existence of this right and called for international co–operation in tackling terrorism. The invasion of Afghanistan enjoyed the backing of most of the international community: NATO and the Organisation of American States, for example, declared for the first time in those organisations' histories that a right of collective self–defence had been triggered under their respective constituent charters.

2 The territory on which the attackers are based must not be under the control of the aggressed state.

The decision in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case does not mince its words on the necessity of an international dimension, pronouncing that self–defence cannot arise out of attacks by actors based in territory over which the

---

[15] Evans, International Law p599.
[16] Chadwick "Self–defence, Terrorism and the International Humanitarian Law of Armed Conflict," Rogers International and Comparative Law Quarterly, Vol. 46, No. 4 [1997] p. 970.
[17] Franck, "Terrorism and the Right of Self–Defense," American Journal of International Law, Vol. 95, No. 4.

aggrieved state "exercises control". In the *Wall* case, Israel thus failed on the point that self–defence might be enforceable against irregulars in the occupied Palestinian Territories. In the case of the Israel–Hezbollah conflict, the former had, *a contrario*, vacated southern Lebanon since 2000,[18] and its forces were behind internationally approved lines at the time of the Hezbollah assaults. Therefore, the 'external origin' component can hardly be in dispute.

3 Was the gravity of such a magnitude as to amount to an armed attack?

The pivotal question, which falls to be determined in this section, is whether the scale of Hezbollah aggression was such as to amount to an "armed attack" as understood by customary rules. The most quoted supposed restriction to armed attack is the charge that "mere frontier incidents" cannot satisfy the wording of the Article.[19] However, little precision is accorded to meaning of this. The ICJ in *Nicaragua*[20] stated that:

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

Clearly, one can, for the purposes of the test, assume the militants were acting in regular military regalia. If, hypothetically, the Lebanese army had, unprovoked, in the situation of non–violence which was obtaining at the time, launched rocket attacks at Israeli army posts, shelled indiscriminately an Israeli village, sent troops across the border killing three Israeli soldiers and capturing another two, it is hard to imagine how this could be construed as being anything other than an armed attack under international law. The hostage taking alone was widely denounced by international bodies (including by the UN Secretary–General) as a war crime.[21]

In denying the existence of an Israeli right to self–defence, Professor Falk asserts that:

> [t]o justify legally a claim of self–defence requires a full–scale armed attack across Israeli borders. If every violent border incident or terrorist provocation were to be so regarded as an act of war, the world would be aflame.[22]

The reality is that the number of terrorist organisations attacking neighbouring countries with the acquiescence (or even support) of their host territory is not as widespread as the Professor might assume. In any case, it is

---

[18] Pursuant to the provisions of U.N. Security Council Resolution 425 (1978).
[19] Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Merits, Judgment, I.C.J. Reports 1986, p 14.
[20] *US v. Nicaragua*.
[21] Available online at www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.1985951/k.1BD7/.
[22] Falk, writing in the Turkish daily Zaman. Available online at http://www.zaman.com/?bl=commentary&alt= &trh=20060721&hn=34951

not the business of guerrilla fighters to launch "full–scale armed attack[s] across … borders", preferring instead regular and provocative confined attacks. It is imperative that states be put on notice that inaction will not be tolerated in this regard, and that attacks on the territorial rights of neighbouring nations by non–state combatants can impute responsibility to the state from whence the attack came just as if their official army were the aggressors. Between 1987 and 1988 (during the Iran–Iraq war), the US shelled a number of Iranian oil platforms in the Persian Gulf in retaliation for the sinking of US vessels by Iranian–planted mines. The ICJ in the resultant *Oil Platforms*[23] case considered the question of self–defence. On the existence of such a right the Court responded in the negative on the facts, although it would "not exclude the possibility that the mining of a single vessel might be sufficient to bring into play the 'inherent right of self–defence.'"

Reference was also made to the cumulative effect of minor attacks. In response to the decision, Taft made the useful observation that a requirement that an attack would reach a certain level of gravity before triggering a right to self–defence, would seem to make violence more, rather than less, necessary because it would "encourage States to engage in a series of small–scale attacks, in the hope that they could do so without being subject to defensive responses."[24] The Hezbollah attacks may not have been on a comparable scale to the al–Qaeda attacks on 11 September 2001, but they were more sustained. The continued targeting of rockets into Israel in the days after the initial strikes confirm, it has been suggested, that the "armed attack" point became academic.[25] The author notes, with disquiet, the often–perfunctory tendency in academic circles to frame the instant case within the "mere frontier incident" parentheses, seemingly by reason only of the fact that the event occurred at a frontier, to the exclusion from the debate of a proper discussion as to the degree of force employed. Far from accepting frontier engagements as an unfortunate reality in international relations, they should be decried loudly as abhorrent to the notion of "territorial integrity" (of which Article 2(4) is the guardian). They perhaps represent a greater affront to that notion than terrorist plots within the state proper, or attacks on national interests abroad.

4 Necessity and Proportionality

Although not set out in Article 51, the victim state is further constrained by the requirements of necessity and proportionality, a customary duty confirmed in *Nicaragua* and *The Legality of Nuclear Weapons* advisory opinion of the ICJ.[26] A clear line ought to be drawn again here between *jus ad bellum* (the 'right to war', which is the focal point of the present article) and

---

[23] Case Concerning Oil Platforms, *Islamic Republic of Iran v. United States of America* [2003]..
[24] William H. Taft IV: "Self–defence and the *Oil Platforms* Decision" 29 Yale Journal of International Law 295 [2004].
[25] Michael Kelly, "Israel v. Hezbollah: Article 51, Self–Defense and Pre–emptive Strikes", published at http://jurist.law.pitt.edu/forumy/2006/07/israel–v–hezbollah–article–51–self.php.
[26] "Legality of the Threat or Use of Nuclear Weapons Opinion", ICJ Reports 1996, para. 41.

jus in bello (or the 'laws of war', which police what tactics are proscribed once actual conflict has broken out). The view that self–defence cannot be "necessary" after the attack has ended is an often–misunderstood notion. The Charter does impose temporal restrictions on the conduct of self–defence: a state acting in self–defence must cease military actions once the Security Council "has taken measures necessary to maintain international peace and security."[27] In the Israel–Hezbollah conflict, no such measures were enacted until the adoption of Resolution 1701. However confusion arises with regard to the suggestion that necessity carries a concomitant "immediacy" requirement.[28]

The 1832 *Caroline* case is often appealed to, in particular a prerequisite that the attacking state must show: "a necessity of self–defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation."[29] Even if it is accepted that rules on the legality of the use of force can be extrapolated from cases and *usus* antedating the Charter (for instance, it is generally accepted that states no longer enjoy a right of 'reprisal'), *Caroline* ought to be distinguished on the grounds that the principle at issue was whether the United Kingdom had a right to exercise anticipatory or pre–emptive self–defence against a Canadian–flagged vessel docked in New York. Claims to a right of anticipatory self–defence will necessarily carry a heavier burden in establishing a case than is the situation when an armed attack has already occurred. It is only when necessity has been established definitively that the question of proportionality can be considered.[30] Whereas proportionality may be satisfied under the regime of self–defence, a state may still have to answer for contravening proportionality requirements as they exist under humanitarian law (eg if it cannot be shown that placing civilians or civilian interests at risk was proportionate to the military advantage to be gained).[31] However, the current article proposes to deal only with the former.

Two possible interpretations of proportionality exist. The first is a view that the degree of defensive force must be proportionate to the magnitude of force employed by the initial attacker. The second is that a stronger degree of retaliation may be exercised if the territorial integrity or vital interests of a state are challenged.[32] Thus, in *Nuclear Weapons* it was conceded that there could be an occasion to use nuclear weapons in a way not repugnant to international law and even if not in a response to a nuclear attack.[33] In the recent case of *Uganda v. DPR Congo*[34] the ICJ alluded to the strength of the

---

[27] Refer to Article 51.
[28] Supra n 15.
[29] 29 Brit & For St Papers.
[30] Kirgin, "Cruise Missile Strikes in Afghanistan and Sudan", ASIL Insight August 1998. Refer to http://www.asil.org/insights/insigh24.htm.
[31] Frederic L. Kirgis "Some Proportionality Issues Raised by Israel's Use of Armed Force in Lebanon," American Society of International Law Insight, Vol. 10, Issue 20, 17/9/2006.
[32] Ibid.
[33] supra n 24 para 42.
[34] Uganda sought to rely on Article 51 in support of its response to armed attacks carried out by the anti–Ugandan paramilitaries, the ADF and WNBF, which, it was alleged, were agents of the Congolese and Sudanese governments. *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*) ICJ Reports [2005]

Ugandan claim to proportionality on the premise *inter alia* of "the long history of terrorism and aggression by armed bands established on the territory of the Congo and the appalling effects of that aggression against the population of Uganda." One can draw obvious parallels to the circumstances prior to, and including, the Hezbollah attacks of July 2006.

D THE SECONDARY RULE: STATE RESPONSIBILITY ARISING OUT OF THE ACTIONS OF NON–STATE COMBATANTS

It is now well established that in cases where a non–state actor breaches a substantive rule of international law, responsibility can, in certain instances, be imputed to a state under the rules of state responsibility.[35] Evaluating whether culpability accrues to a state is an often–thorny task and is complicated by the fact that this pertains to an area of law in flux. The rules, which have matured, are customary, although the International Law Commission's *Draft Articles on State Responsibility for Internationally Wrongful Acts* (2001) went some way towards codifying the law as it existed at the time. Värk posits that four general levels of state involvement can be identified (direction, support, toleration and inaction) which determine the extent to which responsibility is engaged.[36] However, some commentators propound the idea that self–defence against trans–border attacks of non–state actors is a right prima facie exercisable once an armed attack has been carried out, although this contention carries little currency at present.[37]

Between those who still insist upon the reciprocity of the two regimes (self–defence and state responsibility) in such situations, disagreement has arisen as to the extent to which the "effective control" and "due diligence" benchmarks currently enjoy authority.[38] The author proposes that it is the latter test on which Lebanon fails.

1 Can the incapacity of the "host" state to tackle the non–state actor be taken as sufficient cause to justify the military intervention of an aggressed state?

In December 2004, an adjunct of the Rwandan army (ex–*Forces Armées Rwandaises)* entered DPR Congo and attacked Hutu militias, ostensibly under the guise of self–defence for aggressions perpetrated by the latter. It was implicitly accepted that the Congolese government was not in a position to restrain the Hutu groups and FAR activities were not directed at the Congolese army. Although DPR Congo had failed under Resolution 1565 to disarm Hutu paramilitaries, the FAR operation did incur the ire of the

---

[35] Dupuy, "Droit International Public" 7e édition[2004], Paris, pp 476–477.
[36] Värk, "State Responsibility for Private Armed Groups in the Context of Terrorism" Juridica International XI/2006, p 187.
[37] Ruys & Verhoeven, "Attacks by Private Actors and the Right of Self–Defence", Journal of Conflict and Security Law [2005] 10(3):289–320.
[38] Kirgis "Some Proportionality Issues Raised by Israel's Use of Armed Force in Lebanon," American Society of International Law Insight, Vol. 10, Issue 20, 17/9/2006.

Security Council, which stated that it "strongly condemns any and all such military action, recalling that they are contrary to its resolutions."[39]

Throughout the 1990's and up to the present time, Turkish troops have been subjected to attacks by the nationalist Kurd organisation, the Kurdistan Workers Party (PKK), based inside northern Iraq. Turkish military responses in the 1990's – though not directed at the Iraqi government – were widely condemned. The PKK seems to have been emboldened by the disarray inside Iraq since 2003, which has given it the impetus to step up its campaign in Turkey. The killing of fifteen Turkish troops by the PKK prompted Turkey to mobilise its forces on the Iraqi border in 2006. However, a military offensive inside Iraq at the present time would be even less likely to carry favour with the international community than similar actions in the 1990s.[40]

The above cases illustrate the absence of a *usus*, which would permit self–defence operations when the "host" state is incapable of dealing with the non–state aggressors on its territory. Evidently, the host state must have been found to have failed on a more substantive scale for responsibility to accrue to it.

2 Are the unlawful Hezbollah attacks attributable to Lebanon (ie did Lebanon exercise "effective control" over the organization)?

Article 8 of the Draft Articles declares that any wrongful actions carried out by non–state players and performed "on the instructions of, or under the direction or control of" a state, will serve to attribute those actions to the state in question. The political wing of Hezbollah held, in July 2006, two ministerial portfolios in the Lebanese government and twenty–three seats in Parliament. However, there was never any suggestion from Israel that Lebanon "instructed" Hezbollah to attack. Indeed, this would be a very difficult line of argument to maintain given the events of 2005 in that country following the assassination of the then Prime Minister, Rafic Hariri.[41]

Ruys and Verhoeven say the second clause – "direction or control" – poses greater difficulties and point towards *Nicaragua* by way of illustration. The conduct complained of must be inextricably linked to state behaviour, and not merely ancillary to it. Thus, "provision of arms" or "logistical support" cannot be considered "effective control."[42]

A final possibility, giving rise to attribution, is the scenario in which conduct is "acknowledged and adopted by a State as its own."[43] The *Tehran Hostages* case (in 1977, Iranian students entered the US embassy in Tehran, taking diplomatic staff hostage; Iran subsequently "approved" of the hostage

---

[39] See document SC/8263 (available at http://www.unis.unvienna.org/unis/pressrels/2004/sc8263.html) and document S/PRST/2004/45.
[40] Available online at http://news.bbc.co.uk/1/hi/world/europe/5294438.stm.
[41] Reference http://news.bbc.co.uk/1/hi/world/middle_east/4263893.stm.
[42] Nicaragua, para 230
[43] The Articles on State Responsibility, article 11.

taking) illustrates that the bar is set higher than mere "approval" of unlawful actions.[44] In the facts of the Israel–Hezbollah conflict, Prime Minister Fouad Siniora refused to condone "Operation Truthful Promise"[45] and so Lebanon ought not to be held to account on this point.

3 Did Lebanon fail in a duty to protect Israel (ie was the "due diligence" requirement not discharged)?

Due diligence is a responsibility for the acts of private entities in which the state had no involvement but which can, given certain facts and circumstances, according to Barnidge,[46] "'catalyse' the state's responsibility." He offers the example of international environmental protection law by way of analogy.[47] The modern rules relating to the "due diligence" requirement flow from the Declaration on Friendly Relations and Cooperation [1970],[48] a non–binding General Assembly resolution which has matured into a customary principle.[49]

Paragraph 1 would seem to be most damning for Lebanon's case, insisting that states must not: "organize, assist, foment, finance, incite or *tolerate* subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State … ."[emphasis added] Barnidge identifies in the *Youmans* case a duty of (i) prevention, and (ii) punishment as attaching to due diligence.[50] The facts of that case are that a house in Mexico, in which US citizens were residing, came to be surrounded by a threatening mob and the presence of Mexican soldiers only served to buoy up the crowd leading to the eventual deaths of the Americans. Support for the doctrine also flows from the ICJ's decision in the *Corfu Channel* case.[51] Damage and loss of life had resulted from British warships encountering mines during transit through the Corfu Channel in 1946, and it was argued by the UK that Albania should be held accountable for the mines. The ICJ refused a declaration of *prima facie* responsibility, stating that: "knowledge of the minelaying cannot be imputed to the Albanian government by reason merely of the fact that a minefield [was discovered] in Albanian territorial waters." But the ICJ, in concluding that Albania was in violation of the law, stated that the mine laying could not have happened without the knowledge and acquiescence of Albania, and that it had acted unreasonably in not warning third parties. In addition,

---

[44] *United States Diplomatic and Consular Staff in Tehran Case* (*United States v Iran*), [1980] ICJ Rep.
[45] Statement by Faoud Siniora, Daily Star, 17/7/2006.
[46] Barnidge Jr "States' Due Diligence Obligations with regard to International Non–State Terrorist Organisations Post–11 September 2001: the Heavy Burden that States must bear", Irish Studies in International Affairs, Vol. 16.
[47] Ibid.
[48] "Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations General Assembly" Resolution 2625 (XXV). The Resolution was adopted in the Assembly without dissent, indicating substantial international support for the tough line it envisages vis–à–vis terrorism.
[49] supra n 44 p 114 and also the dissenting opinion of Schwebel J in *Nicaragua*.
[50] Ibid p 118.
[51] *United Kingdom v. Albania* (Merits) ICJ Rep [1949]

the *Tehran Hostages* case also offers some very useful guidance in that, although the unlawful occupation of the embassy could not be attributed to Iran by virtue solely of its "approval" of the occupation, it condemned Iranian officials on the basis that they:

> (a) were fully aware of their obligations…to protect the premises of the United States embassy and its diplomatic and consular staff from any attack;
>
> (b) were fully aware…of the urgent need for action on their part.[52]

The terrorist attacks in the US in 2001 and the path leading to the eventual ousting of the Taliban régime brought into sharp relief the "due diligence" requirement to which States are bound for the behaviour of non–State actors (see above in section C for the facts).

Security Council Resolution 1373 requires that States:

> [r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by … eliminating the supply of weapons to terrorists.[53]

It goes on to require that states ensure "effective border controls"[54] with their neighbours.

4 Applying the due diligence test to the facts pertaining to the Israel–Hezbollah conflict

In establishing a case for the 2001 invasion of Afghanistan, much was made of the Taliban's stated refusal to abide by Security Council resolutions demanding suppression of Al–Qaeda activities on its territory. A parallel may indeed be drawn to Lebanon's unbending rejection of demands for Hezbollah to be disarmed as expressed inter alia in Resolution 1501. Quite apart from pleading its incapacity to deal with the militias, Lebanon objected in principle to calls for disarmament, instead dismissing Hezbollah's existence as a domestic resistance movement to what it considers the continued Israeli occupation of Lebanese territory. This attitude belies a contempt for the opinion of the international community (Israel had withdrawn from all Lebanese territory in the estimation of the Security Council), and the fact that provisions of successive Security Council resolutions have been nonchalantly cast aside would seem to undermine a defence of reasonableness which it may have sought to rely upon for its failure to discharge the due diligence standard required of it under international law. In dismissing the internationally proscribed organisation,[55] Hezbollah, as a mere domestic reality, Lebanon must bear a heavier responsibility when Hezbollah acts beyond the domestic

---

[52] *United States Diplomatic and Consular Staff in Tehran Case* (*United States v Iran*), [1980] ICJ Rep.
[53] Resolution 1373 at article 2(a).
[54] ibid at article 2(g).
[55] The US, the UK, Canada, Australia, Israel and the Netherlands list Hezbollah as a "terrorist organization," and the European Parliament has called for the EU to follow suit citing "clear evidence" of "terrorist activities by Hezbollah". Available online at www.isn.ethz.ch.

and transgresses the rights of another sovereign State. Specifically, Lebanon must have failed under the requirements of the Declaration on Friendly Relations (para 1, appealing to the 'toleration' of terrorism).

The resolutions, and particularly the most recent Resolution 1501, serve to place Lebanon on notice that acquiescence on its part in relation to Hezbollah activities could attach responsibility to it. Read in conjunction with Hezbollah's declared intent to destroy the state of Israel,[56] the inescapable conclusion is that Lebanon was "fully aware … of the urgent need for action on their part."[57] Its stated refusal to tackle Hezbollah, in defiance of international law, echoes the Taliban's inaction vis–à–vis al–Qaeda training camps, and it is further found wanting under the provisions of the widely–supported Resolution 1373 demanding inter alia "effective border controls."

E CONCLUDING OBSERVATIONS

To prevent the project of collective security from imploding, the Charter must seek to remain relevant. A conception of international law which allows sovereign states to descend to the status of sitting ducks at the mercy of terrorists, will not sit easy with states which have been victims of terrorist atrocities in recent years. Amending the Charter to respond to the changed climate is not a realistic proposition, requiring as it would the total unanimity of Member States. In reading Article 51, one must take cognisance of binding customary principles, which have emerged from state practice and other sources of law. Franck, in 1970, asked "Who Killed Article 2(4)?" The answer is that nobody did, according to Rosalyn Higgins, President of the ICJ, who declared in 2006 that "[t]he Charter is a living instrument."[58]

An overly rigid traditionalist approach can be self–defeating. For example, when viewed through the lens of humanitarian considerations, dismissing what should be legitimate claims to self–defence lends succour to terrorists and regimes sponsoring, or otherwise tolerating, their activities. *Ab initio* condemnation of such appeals to self–defence does nothing to encourage the aggressed state to adhere to humanitarian conventions once hostilities have broken out. The author is in absolute agreement with Barnidge's assessment that "[t]he exact nature of the due diligence obligation that has emerged since 11 September 2001 demands ongoing and substantial counter–terrorism efforts by states."

Lebanon has paid a heavy price for sitting on the fence; it is to be hoped that other bystanders have taken note.

---

[56] supra n 8
[57] *Tehran* (*Hostages*), cas. cit.
[58] Writing in a forward to Evan's International Law 2006.

SELECT BIBLIOGRAPHY

Bianchi, Enforcing international law norms against terrorism (Oxford, 2004).

Cassesse, International Law (Oxford University Press, 2001).

Dixon & McCorquodale, Cases & Materials on International Law (Oxford University Press,Fourth Edition, 2003).

Dupuy, Droit International Public (Paris, 7e edition, 2004).

Evans, International Law (Oxford University Press, Second Edition, 2006).

Harik, Hezbollah: The Changing Face of Terrorism (2004)

Barnidge, "States' Due Diligence Obligations with regard to International Non-State Terrorist Organisations Post-11 September 2001: the Heavy Burden that States must bear" Irish Studies in International Affairs, Vol. 16 (2005), 103-125.

Cassesse, "Terrorism is Also Disrupting Some Crucial Legal Categories of International Law" European Journal of International Law 12 (2001) 993-1001.

Chadwick, "Review of 'Self-defence, Terrorism and the International Humanitarian Law of Armed Conflict'" International and Comparative Law Quarterly, Vol. 46, No. 4. (Oct., 1997), p 970.

Franck, "Terrorism and the Right of Self-Defence," American Journal of International Law, Vol. 95, No. 4. (Oct., 2001) pp. 839-843

Franck, "What Future for the UN Charter System of War Prevention?" The American Journal of International Law, Vol. 97, No. 3. (July, 2003), pp. 590-598

Franck, "Who Killed Article 2(4)," The American Journal of International Law, Vol. 64, No. 4. (Oct., 1970), pp. 809-837.

Gardner, "Neither Bush nor the Jurisprudes" The American Journal of International Law, Vol. 97, (2003), p. 585.

Kelly, "Israel v. Hezbollah: Article 51, Self-Defence and Pre-emptive Strikes", published at http://jurist.law.pitt.edu/forumy/2006/07/israel-v-hezbollah-article-51-self.php.

Kirgis, "Cruise Missile Strikes in Afghanistan and Sudan", ASIL Insight August 1998

Kirgis "International Law Aspects of the 2005 World Summit Outcome Document," American Society of International Law Insight, October 2005/

Kirgis "Some Proportionality Issues Raised by Israel's Use of Armed Force in Lebanon," American Society of International Law Insight, Vol. 10, Issue 20, 2006.

Maogoto, "War on The Enemy: Self-Defense and State-Sponsored Terrorism," [2003] Melbourne Journal of International Law 3 Ruys & Verhoeven, "Attacks by Private Actors and the Right of Self-Defence".

Journal of Conflict and Security Law 2005 10(3):289-320.

Taft "Self-defence and the Oil Platforms Decision" 29 Yale Journal of International Law 295 (2004).

Tams, "Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case," European Journal of International Law, 2005 16(5):963-978.

Thomas "The Use of Force and Pre-Emption: A Legitimate Practice under the UN Charter?" Murdoch University Electronic Journal of Law, Vol. 11, No. 3, September 2004.

Värk, "State Responsibility for Private Armed Groups in the Context of Terrorism" Juridica International XI/2006, p. 187.