

# The Right of Armed Self-Defense in International Law and Self-Defense Arguments Used in the Second Lebanon War

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## INTRODUCTION

The 2006 Lebanon War also known as the Second Lebanon War or July War has its roots in the past Israeli-Arab conflicts, which led to occupation of southern Lebanon in 1982 by Israeli forces, during which a buffer zone was created to cease the bombardment of Israel's border-towns and to hold off possible Palestine and Lebanon invasions. In 1985 the Lebanese Shi'a militia called *Hezbollah* ("the party of God") declared an armed struggle to end Israeli occupation. Constant fighting led to the collapse of Southern Lebanese Army and in 2000 Israel had to withdraw from Lebanon, thus finally honoring Security Council's Resolution 425 of 1978.

Encouraged by Hezbollah's success, Lebanon's government secretly transferred full control of Southern Lebanon to the militia. Strong support from the Islamic Republic of Iran allowed to continue the border attacks and successfully implement hostage "capture and exchange" tactics. In September 2004 the Security Council adopted Resolution 1559, which called for disarmament of all Lebanese militia, but Hezbollah refused to lay arms "while Israel remains a threat"<sup>1</sup> and the government decided not to apply pressure, since the Party of God runs a network of educational and medical facilities, thus serving interests of the State.

On 12 July 2006 Hezbollah launched several rockets from Lebanese territory across the so-called Blue Line towards Israel Defense Forces positions near the coast and in the area of Israeli town of Zar'it.<sup>2</sup> At the same time Hezbollah's ground troops crossed the border into enemy territory, attacked two patrolling armored vehicles and seized two soldiers. The Party stated that they had captured the belligerents for use as bargaining chips in indirect negotiations for the release of the three Lebanese detained without due process and in defiance of the Supreme

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<sup>1</sup> ABC TV program transcript "Hezbollah Rejects Call to Disarm" (2005), <[www.abc.net.au/7.30/content/2005/s1354922.htm](http://www.abc.net.au/7.30/content/2005/s1354922.htm)> (5.4.2008).

<sup>2</sup> Report from Secretary-General on the United Nations Interim Force in Lebanon (for the period from 21 January 2006 to 18 July 2006), UN Doc. S/2006/560.

Court in Israel. The raid had been planned for months, and the party made at least one earlier attempt to capture soldiers.<sup>3</sup> Precedents for such negotiations had already been set, as in 2004 Hezbollah managed to strike a prisoner exchange with Israel, and it was able to secure the release of 400 Arab captives.<sup>4</sup> Nevertheless Israel suddenly initiated a large-scale military operation, which lasted for 34 days until Security Council's Resolution 1701 entered into force on 14 August 2006.

The conflict claimed more than a thousand lives and displaced 1.4 million people,<sup>5</sup> it crippled Lebanon's civilian infrastructure and left a large part of southern Lebanon uninhabitable for years. The July War sparked many debates among legal scholars, amidst them a question, whether Israel's actions fall within the scope of self-defense under article 51 of the UN Charter. Currently, two years after the conflict, there is nothing but a few articles written on this matter and academics tend to avoid the issue, although the question requires utmost attention.

The aim of this paper is to determine whether the events prior to the Israeli attack can be considered valid grounds for self-defense under article 51 of the UN Charter and whether Israel's retaliation complies with public international law. For these purposes the contemporary position of self-defense shall be analyzed, which has become rather unstable and shaky during the recent years, especially in relation to terrorism.

## 1. SELF-DEFENSE IN INTERNATIONAL LAW<sup>6</sup>

### 1.1. *The Classic Concept*

The International Military Tribunal at Nuremberg held that aggressive war is the "supreme international crime". That was affirmed by the United Nations and upheld in many legal decisions. Nazi leaders argued that they acted only in self-defense against a presumed attack by the Soviet Union. Their justification for mass murder was rejected and responsible leaders were hanged after a fair trial.<sup>7</sup>

Article 2(4) of the United Nations Charter defines that "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". Unlike Briand-Kellogg pact, the Charter bans not only war, but the use of force of any kind.<sup>8</sup> The rule received universal acknowledgment and quickly became part of customary international

<sup>3</sup> Middle East Report Online, Lara Deeb, "Hizballah: A Primer" (2006), <[www.merip.org/mero/mero073106.html](http://www.merip.org/mero/mero073106.html)> (5.4.2008).

<sup>4</sup> National Public Radio, "Hezbollah's Role in Lebanon's Government" (2006), <[www.npr.org/templates/transcript/transcript.php?storyId=5554992](http://www.npr.org/templates/transcript/transcript.php?storyId=5554992)> (5.4.2008).

<sup>5</sup> BBC News webpage, "Middle East Crisis: Facts and figures", (2006), <[www.news.bbc.co.uk/2/hi/middle\\_east/5257128.stm](http://www.news.bbc.co.uk/2/hi/middle_east/5257128.stm)> (5.4.2008).

<sup>6</sup> "Self-defense" will be used in the meaning of "individual self-defense" hereinafter.

<sup>7</sup> Benjamin B. Ferencz webpage, "Benjamin B. Ferencz response to Amnesty International question on fair standards to prosecute terrorism" (2006), <[www.benferencz.org/arts/88.html](http://www.benferencz.org/arts/88.html)> (5.4.2008).

<sup>8</sup> Douglas P. Lackey, *Moral Principles and Nuclear Weapons* (Lanham: Rowman & Littlefield, 1984), p. 23.

law, as pointed out by ICJ in *Nicaragua v. USA* case.<sup>9</sup> Article 51 provides an exception for this rule, as it states: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense 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”. Therefore *use of any force* other than an *armed attack* is still considered illegal, although “armed attack” is now understood to be a wider concept and it has been suggested that the right of self-defense may exist even in cases where there has been no previous use of force.<sup>10</sup>

The traditional definition of the right of self-defense in customary international law occurs in the *Caroline* case. This dispute revolved around an accident in 1837 in which British subjects seized and destroyed a vessel in an American port. This had taken place because the *Caroline* had been supporting groups of American nationals, who had been conducting raids into Canadian territory. In the correspondence with the British authorities which followed the incident, the American Secretary of State laid down the essentials of self-defense. There had to exist “a necessity of self-defense, instant overwhelming, leaving no choice of means, and no moment for deliberation”. This principle was accepted by the British government at that time and later it became accepted as part of customary international law.<sup>11</sup> Alongside necessity and “no choice of means” prerequisite another principle developed that too has become an indispensable condition for self-defense – the principle of *jus ad bellum* proportionality (as opposed to principle of proportionality in humanitarian law), which due to its disputable nature now has to be interpreted through the prism of State practice and *opinio juris*, assisted by the jurisprudence of the International Court of Justice and the views of commentators.<sup>12</sup> These “three whales” – necessity, proportionality and lack of alternatives form the criteria by which the right of self-defense is measured today.

## 1.2. Anticipatory Self-Defense

### 1.2.1. Interceptive, Preventive and Preemptive Self-Defense

Ever since the adoption of the Charter there has been a major debate on whether *anticipatory* self-defense would be permissible under Article 51. There are two schools of thought on this subject. One school argues that Article 51 is the only relevant law on self-defense and properly interpreted it prohibits anticipatory

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<sup>9</sup> Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn, New York: Routledge, 1997), p. 309.

<sup>10</sup> Ingrid Detter, *The Law of War* (2nd edn, Cambridge University Press, 2000), p. 85.

<sup>11</sup> Malcolm N. Shaw, *International Law* (4th edn, Cambridge University Press, 1997), p. 787.

<sup>12</sup> Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press, 2004), p. 155.

self-defense. The other school of thought rejects this view and draws upon the failure of collective security in the post-1945 period.<sup>13</sup> In general there are three main types of anticipatory self-defense: *interceptive*, *preemptive* and *preventive*. Each has its supporters and its opponents.

Interceptive self-defense (or as Dinstein called it *incipient* self-defense)<sup>14</sup> stands for a retaliatory strike to an attack which is imminent and unavoidable with purpose of preventing the consequences of an offensive already in motion. Although it requires clear and convincing evidence, as necessary to avoid greater harm, the use of force outside the limits of the Charter in that case is lawful and justified.<sup>15</sup>

Although the arguments that the Charter permits preemptive strikes have not been proven so far, several states and legal authors have more plausibly and successfully defended the right of preemptive self-defense under customary international law.<sup>16</sup> The distinction between preemption and prevention is made by reference to the notion of an immediate threat. The right to preempt is an extension of the right of self-defense, if, and only if, it is indisputably the case that there is an imminent threat of an unprovoked aggression. Prevention, on the other hand, involves action in response to some putative future rather than immediate threat.<sup>17</sup> In brief, if interceptive strike is carried out to prevent an attack from being successfully concluded, then the preventive self-defense is designed to prevent an attack from being launched in the first place.<sup>18</sup> *Lex scripta* and close observation by the Security Council could help achieve the legality of the preventive self-defense, as suggested by Professor Dinstein,<sup>19</sup> but international community still does not seem to be willing to accept the new doctrine mainly due to the high possibility of future abuse.

### 1.2.2. Israel's Practice Before 9/11

The Cuban Crisis, which can be considered the first serious precedent of preventive actions since 1945 and the following UNSC's confusion inspired Israel to consider anticipatory attacks of its own. Since then, Israel has been a major "contributor" of armed conflicts, where the argument of anticipatory self-defense was the main justification for engagement. In 1967 Egypt and other Arab states were attacked after President Nasser had moved his army across the Sinai toward Israel, forced the UN to withdraw its peacekeeping force from the Sinai border, and closed the port of Aqaba to Israeli shipping, and after Syria, Iraq, Jordan, and Saudi

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<sup>13</sup> John O'Brien, *International Law* (London: Routledge Cavendish, 2001), p. 683.

<sup>14</sup> Ellen O'Connell, *The Myth of Preemptive Self-Defense* (Washington: The American Society of International Law Task Force Papers, 2002), p. 11.

<sup>15</sup> Roger Normand *et al.*, *Tearing up the Rules: The Illegality of Invading Iraq* (New York: Center for Economic and Social Rights, 2003), p. 6.

<sup>16</sup> René Värk, "The Use of Force in the Modern World: Recent Developments and Legal Regulation of the Use of Force", 2 *Baltic Defence Review* (2003) 27-43, p. 36.

<sup>17</sup> Chris Brown, "Self-Defense in an Imperfect World", 17 *Ethics & International Affairs* (2003), <[www.cceia.org/resources/journal/17\\_1/roundtable/851.html](http://www.cceia.org/resources/journal/17_1/roundtable/851.html)> (5.4.2008).

<sup>18</sup> Stephen C. Neff, *War and the Law of Nations: A General History* (Cambridge University Press, 2005), p. 127.

<sup>19</sup> Yoram Dinstein, *War, Aggression, and Self-Defence* (Cambridge University Press, 2005), p. 185.

Arabia all began moving troops to the Israeli borders. In six days it routed Egypt and its Arab allies and had occupied the Sinai Peninsula, the West Bank, and the Gaza Strip. Israel claimed its attack was defensive in nature and necessary to forestall an Arab invasion. Although this has been described as a preemptive war, in the absence of an imminently anticipated armed attack, it fits more closely the definition of a preventive strike. Both the Security Council and the General Assembly rejected proposals to condemn Israel for its "aggressive" actions. The Security Council, instead, adopted Resolution 242 calling on Israel to withdraw from the territories and for the termination of all claims or states of belligerency and the acknowledgment of the territorial integrity and the right of every State in the region to live in peace.<sup>20</sup>

The following year Israel raided the Beirut airport, claiming that this was a response to earlier terrorist attacks on an Israeli aircraft in Athens airport, carried out by terrorists based in Lebanon. Beside that Israel asserted that the giving of sanctuary to terrorists is a kind of "passive assistance" that does give rise to a right to respond by force. The UN Security Council unanimously condemned the action (Resolution 262) and refused to accept Israel's justifications. The USA, while voting for the resolution, pointed out that it had done so only because (1) Lebanon was not responsible for the Athens action and (2) the Israeli response had been disproportionate.<sup>21</sup> The Security Council never openly approved preventive strikes against terrorism, however some authors find that the consequences of breaches arising out of a failure by a State to effectively curtail terrorist organizations based or operating out of its territory have *expanded sharply*, permitting not just financial reparations or other traditional benign countermeasures, but even the extensive use of deadly military force.<sup>22</sup>

In June of 1981, Israel destroyed an Iraqi nuclear reactor near Baghdad. Israel asserted the attack was undertaken in self-defense, claiming that Iraq planned to use the Osirak reactor to build nuclear weapons for use against Israel.<sup>23</sup> Israeli ambassador Yehuda Blum asserted that "Israel was exercising its inherent and natural right of self-defense, as understood in general international law and well within the meaning of Article 51 of the Charter". A number of delegations spoke against Israel, with several taking a restrictionist approach to Article 51 yet, more liberal states supported the lawfulness of anticipatory self-defense, but believed that Israel had failed to meet the necessity requirement.<sup>24</sup> Another argument made by, or on behalf of, Israel was that nuclear weapons were not foreseen by Article 51, and that the danger they pose, a danger of instantaneous annihilation, is so grave that a State is justified to stop an attack before it started. This would mean

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<sup>20</sup> David M. Ackerman, "International Law and the Preemptive Use of Force Against Iraq" (2002), <digital.library.unt.edu/govdocs/crs/permalink/meta-crs-4328:1> (5.4.2008).

<sup>21</sup> Antonio Cassese, *International Law* (2nd edn, Oxford University Press, 2005), p. 472.

<sup>22</sup> Jackson N. Maogoto, "War on the Enemy: Self-Defence and State-Sponsored Terrorism", 4 *Melbourne Journal of International Law* (2003) 406-438, p. 406.

<sup>23</sup> Council on Foreign Relations, William H. Taft, "The Legal Basis for Preemption" (2002), <www.cfr.org/publication.html?id=5250> (5.4.2008).

<sup>24</sup> Anthony C. Arend, "International Law and the Preemptive Use of Military Force", 26 *The Washington Quarterly* (2003) 89-103, p. 95.

that there is a different immanency standard for situations involving nuclear weapons.<sup>25</sup> The Security Council implicitly rejected this argument; it concluded that there was no overwhelming necessity of self-defense and condemned the attack as an act of aggression “in violation of Charter of the United Nations and the norms of international conduct” (Resolution 487). Upon closer inspection, Iraq’s nuclear incident reveals that it was not a case of preemptive self-defense, but a strike of preventive nature against unforeseeable future threat. It seems to be the reason why many states did not specifically name it as anticipatory self-defense and reject it as such. Nevertheless, a number of states including the Soviet Union, Brazil, Egypt, Spain, Pakistan and Yugoslavia in very strong words condemned the attack, while calling it “preemptive” and “preventive”.<sup>26</sup> Despite the fact that UNSC condemned Israel for its actions, argument on the new standard sparked a debate among academics and, the idea of new standard for nuclear threats gained supporters – e.g. Professor Beres viewed the Israeli destruction of the Osirak nuclear facility as a justified act of preventive self-defense; while Professor D’Amato disagreed, stating that the use of this doctrine is narrowly limited to situations involving an imminent threat to survival,<sup>27</sup> thus to the right to preempt. There can be a parallel drawn here: in a two-year period between the Cuban Missile Crisis and China’s first test in October 1964, preventive use of force against China was considered by both the United States and most likely by the Soviet Union, however, unlike Israel, neither used force to stop it from developing nuclear weapons, since both understood that a policy of preventive use of force was unnecessary for either state’s security and it would have been unlawful.<sup>28</sup>

Multiple legal issues were raised by the 1982 Israeli operation in Lebanon, but most member-States limited discussion to the legitimacy and scope of military measures in response to terrorist attacks, without deliberating on the nature of Lebanon’s responsibility for Palestinian terrorist activity. Many Arab and developing States regarded the Israeli invasion as aggressive rather than defensive in nature, while many others treated it as wholly disproportionate to the attacks that preceded it, and some sought to justify PLO violence as legitimate resistance.<sup>29</sup> Legal scholars such as Donald Greig also concluded that the loss of life and damage to the environs were far greater than could reasonably have been justified by reference to the right of self-defense: they were out of proportion to the objectives that Israel could reasonably have been entitled to achieve.<sup>30</sup>

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<sup>25</sup> Sergey Aleksandrov, *Self-Defense against the Use of Force in International Law* (The Hague: Martinus Nijhoff, 1996), p. 162.

<sup>26</sup> Abdul G. Hamid, “The Legality of Anticipatory Self-Defence in the 21<sup>st</sup> Century World Order: A Re-Appraisal”, 54 *Netherlands International Law Review* (2007) 441–490, pp. 470–471.

<sup>27</sup> Joshua E. Kastenbergh, “The Use of Conventional International Law in Combating Terrorism: A Maginot Line for Modern Civilization Employing the Principles of Anticipatory Self-Defense & Preemption”, 55 *Air Force Law Review* (2004) 87–125, p. 98.

<sup>28</sup> Bart M. J. Szewczyk, “Pre-emption, Deterrence, and Self-Defence: A Legal and Historical Assessment”, 18 *Cambridge Review of International Affairs* (2005) 119–135, p. 119.

<sup>29</sup> Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Oxford: Hart Publishing, 2006), p. 194.

<sup>30</sup> Don W. Greig, “Self-Defence and the Security Council: What Does Article 51 Require?”, 40 *International and Comparative Law Quarterly* (1991) 366–402, p. 393.

Furthermore, in 1985 Israel attacked PLO headquarters in Tunisia. The international response to military strikes was strongly against Israel. The Security Council in Resolution 573 “vigorously” condemned the air attack on PLO headquarters as an “act of armed aggression in flagrant violation of the Charter of the United Nations, international law and norms of conduct”. This was despite Israel’s argument that Tunisia’s acts of harboring, supplying and assisting non-state actors who they claimed committed terrorist acts in Israel should be sufficient to attribute the acts of those non-state actors to it.<sup>31</sup>

Other cases where countries relied on grounds of preemptive or preventive self-defense to justify their attacks – South Africa’s raids on Zambia, Lesotho and Swaziland between years 1976 and 1983, the US bombings in Tripoli (Libya) in 1986, invasion of Panama and the Noriega situation in 1989, attacks against Afghanistan and Sudan in 1998, in response to terrorist attacks carried out on US embassies in Kenya and Ethiopia – also failed to prove the legitimacy of preemptive or preventive self-defense and were condemned by the international community.

### 1.3. Armed Self-Defense as Means to Protect Nationals Abroad

States sometimes justify intervention for protecting nationals abroad as a form of self-defense. This is done by widening the interpretation of the wording “armed attack against the Member [State]” of Article 51 to cover the attack against a citizen of a member State (“since population is an essential ingredient of the State”<sup>32</sup>). Customary international law in this case does not provide a stable back-up, but the theory is nonetheless supported by some leading scholars (e.g. Arend and Beck).

As self-defense, the right of intervention must comply with 3 general principles described earlier – necessity, proportionality and lack of other means. Natalino Ronzitti therefore brings out 6 conditions States must follow in order to comply with international law:<sup>33</sup> (1) the intervention must not be a punitive measure or a reprisal, (2) there must be “failure or inability” of the local sovereign to give the required protection, (3) intervention must be limited in time and space (the State must not prolong its presence in foreign territory), (4) the violence to the citizens of the “attacked” State must be “arbitrary”, that is, not justified, and against the rule of the *minimum standard* applicable to aliens, (5) there is no way to rescue the citizens by less aggressive means (e.g. peaceful negotiations or other State’s permission to intervene), and (6) a State cannot resort to armed action, pending an international judicial proceeding for the peaceful settlement of the dispute. Most important of these conditions is limitation in time and space – the pure rescue of nationals should be of a “get in and get out” nature, otherwise, if the forces “get in, but stay”, this becomes political aggression. Intervention by Belgian forces in Congo in

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<sup>31</sup> Jackson N. Maogoto, *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror* (Hampshire: Ashgate Publishing, 2005), p. 111.

<sup>32</sup> Antonio Cassese, *The Current Legal Regulation of the Use of Force* (The Hague: Martinus Nijhoff, 1986), p. 41.

<sup>33</sup> Natalino Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity* (The Hague: Martinus Nijhoff, 1985), pp. 69–72.

1964 and US forces in the Dominican Republic in 1965, in Grenada in 1983, and in Panama in 1989 were criticized as unlawful on this basis.<sup>34</sup>

Examples of “active” self-defense by Israel to protect its nationals include Suez Crisis in 1956, Lebanon Crisis in 1958, operation Entebbe in 1976. The international response to these interventions, as well as to the failed hostage-rescue mission in Iran in 1980 by the USA shows a clear division between states, with few states accepting a legal right to protect nationals abroad. The Security Council has generally not taken a collective view or has been prevented by the veto from condemnation. Its debates however, show the radical divisions between states on the doctrinal issue of the permissibility of the use of force to protect nationals.<sup>35</sup>

#### 1.4. 9/11 and Its Impact on International Law

While claims of self-defense for the protection of nationals abroad go back to the pre-Charter era, the combat against *international* terrorism on the basis of right to self-defense is mainly a new<sup>36</sup> and developing phenomenon. It would be an understatement to say that the events of 11 September 2001 and its aftermath have projected, in starkest relief, some fundamental aspects of the current international legal regime, in particular its adequacy as an instrument for States to respond to the international terrorist threat as manifested in the contemporary environment.<sup>37</sup> Coming in the wake of the immediate sympathy for the victims and the rather impulsive solidarity with the United States that followed<sup>38</sup> the willingness of states and the UN Security Council to invoke and affirm the right of self-defense in response to the September 11 terrorist attacks on the United States contrasted sharply with previous decisions. Never before has the UN Security Council approved a resolution explicitly invoking and reaffirming the inherent right of individual and collective self-defense in response to a particular terrorist attack. It is significant, then, that while the UN Security Council stated that it „unequivocally condemned in the strongest terms the horrifying terrorist attacks which took place on 11 September“, and it explicitly and unanimously „recognized the inherent right of individual or collective self-defense in accordance with the Charter“. Sixteen days later, the UN Security Council again unanimously condemned the terrorist attacks on the United States, explicitly „reaffirming the right of individual or collective self-defense as recognized by the Charter of the United Nations as

<sup>34</sup> Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (Philadelphia: University of Pennsylvania Press, 1996), p. 16.

<sup>35</sup> Christine Gray, *International Law and the Use of Force* (Oxford University Press, 2000), p. 109.

<sup>36</sup> Carsten Stahn, “Nicaragua is dead, long live Nicaragua” – Christian Walter *et al.* (eds), *The Right to Self-Defense Under Art 51 UN Charter and International Terrorism. Terrorism as a Challenge for National and International Law: Security versus Liberty?* (Oxford University Press, 2004), p. 828.

<sup>37</sup> Chris Moraitis, “Countering Terrorism, International Law and the Use of Force”, Speech at National Law Security Symposium, Sydney, 2005, <[www.alrc.gov.au/events/events/securitysymposium/Moraitis.pdf](http://www.alrc.gov.au/events/events/securitysymposium/Moraitis.pdf)> (5.4.2008).

<sup>38</sup> Frank E. Loy, “U.S. Approaches to International Conflict Prevention and the Role of Allies and International Institutions” – John J. Kirton & Radoslava N. Stefanova (eds), *The G8, the United Nations and Conflict Prevention* (Hampshire: Ashgate Publishing, 2004), p. 4.

reiterated in Resolution 1368 (2001).<sup>39</sup> Although formally the right to resort to force has been expired by this Resolution (and also Resolutions 1373 and 1378),<sup>40</sup> the USA (assisted by the UK), using the momentum, initiated operation “Enduring freedom” in Afghanistan. Both countries claimed that this was response to the 9/11 attack, but no State except for Iraq and Iran openly and expressly challenged the legality of the USA’s actions.<sup>41</sup>

### 1.5. “Bush Doctrine” and Invasion of Iraq in 2003

On 15 September 2002 George W. Bush presented a new National Security Strategy of the United States.<sup>42</sup> Following previous promises of the US President (e.g. putting state sponsors of terror on notice, as “any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime”),<sup>43</sup> NSS expressed ideas which later became known as the “Bush Doctrine.” Realizing that preemptive self-defense has more chances to be approved by the world community than the preventive one, creators of the “Bush Doctrine” tried to expand the definition of preemptive attacks to include preventive strikes.

A great many judicial experts have concluded that the new doctrine rides roughshod over all existing precedents and precepts about the acceptable reasons to go to war.<sup>44</sup> While commentators such as McLain have criticized the NSS as far from falling within any accepted view of anticipatory self-defense,<sup>45</sup> others noted that in the past the threat to states was unambiguous and in the early 21st century this situation has changed, thus new approach towards anticipatory self-defense is allowed.<sup>46</sup>

In the aftermath of Afghanistan, attention in the following years shifted to Iraq and its alleged possession and development of weapons of mass destruction.<sup>47</sup> In March 2003 USA attacked. Whilst the US has never released any official documentation setting out the legal basis for the Iraq campaign, the writings of the US State Department Legal Advisor make it clear that “preemption” (prevention) was the

<sup>39</sup> Jack M. Beard, “America’s New War on Terror: the Case for Self-Defense Under International Law”, 25 *Harvard Journal of Law & Public Policy* (2002) 559–590, p. 4.

<sup>40</sup> Robin Miller, “U.S. Self-Defense Claim Doesn’t Fly” (2001), <[www.robincmiller.com/afghan2.htm](http://www.robincmiller.com/afghan2.htm)> (5.4.2008).

<sup>41</sup> Cassese, *International Law*, *supra nota* 21, p. 474.

<sup>42</sup> The National Security Strategy of the United States of America, <[www.whitehouse.gov/nsc/nss.html](http://www.whitehouse.gov/nsc/nss.html)> (5.4.2008).

<sup>43</sup> Ben. N. Dunlap, “State Failure and the Use of Force in the Age of Global Terror”, 27 *Boston College International and Comparative Law Review* (2004), <[www.bc.edu/schools/law/lawreviews/meta-elements/journals/bcicl/27\\_2/09\\_FMS.htm](http://www.bc.edu/schools/law/lawreviews/meta-elements/journals/bcicl/27_2/09_FMS.htm)> (5.4.2008).

<sup>44</sup> Richard Jackson, *Writing the War on Terrorism: Language, Politics and Counter-Terrorism* (Manchester University Press, 2005), p. 126.

<sup>45</sup> Alex Conte, *Security in the 21st Century: The United Nations, Afghanistan, and Iraq*, (Hampshire: Ashgate Publishing, 2005), p. 106.

<sup>46</sup> Malcolm Brailey, “The Use of Pre-Emptive and Preventive Force in an Age of Terrorism”, 2 *Australian Army Journal* (2004) 149–156, p. 154.

<sup>47</sup> Dominic MacGoldrick, *From “9-11” to the “Iraq War 2003”: International Law in an Age of Complexity* (Oxford: Hart Publishing, 2004), p. 11.

foundation for the military action.<sup>48</sup> While addressing the nation,<sup>49</sup> the US President highlighted 3 objectives to be achieved during the conflict: disarm Iraq of WMDs, end Saddam Hussein's support for terrorism, and free Iraqi people, thus basing the intervention on the already disputable NSS.

The War in Iraq produced a new wave of criticism of the "Bush Doctrine". Some believe that arguments of self-defense and will to "help the Iraqi" people served as a cover-up for less noble operations to control the oil resources of Iraq, to consolidate the US domination of the Middle East by enlarging its military presence there, by enhancing security for Israel.<sup>50</sup> The position of the "Bush doctrine" among international law scholars was weakened also by the fact that the US failed to provide tangible empirical evidence that Iraq possessed weapons of mass destruction, thus that it posed "imminent" threat to the US.<sup>51</sup> Nevertheless a number of countries, while maintaining that military intervention in Iraq was wrong, believe that the use of force might have been justifiable if the US had proven these two facts beyond doubt.<sup>52</sup>

Although the "Bush doctrine" was mostly unwelcome by the world community and international law specialists, it initiated political changes in the world, which could lead to a new era in the concept of anticipatory self-defense. Throughout history the behavior of the powerful has exerted a major impact on whether prevailing international norms were permissive or restrictive. Thus, the Washington response to global terrorism has an enormous influence on the behavior of others.<sup>53</sup> Although Israel has quite a record of invoking preemptive and preventive self-defenses in the past (see above), its attack on Syria on October 5, 2003, so soon after the invasion of Iraq, can qualify as proof for this theory.

## 2. ISRAEL-HEZBOLLAH CONFLICT

### 2.1. *What's Hezbollah?*

As can be seen from previous examples, the reaction of international community to self-defense can be softened if clear evidence of terrorist activities is presented, therefore the question, whether Hezbollah is a terrorist organization or not, is of great importance. It is known, that the UK and Australia make a distinction between Hezbollah's political and terrorist wings, while the Netherlands, Israel, Canada and the USA claim, that the entire Hezbollah perpetrates acts of terror. The

<sup>48</sup> Don R. Rothwell, "Anticipatory Self-Defence in the Age of International Terrorism" 24 *University of Queensland Law Journal* (2005), <[www.austlii.edu.au/au/journals/UQLJ/2005/23.html](http://www.austlii.edu.au/au/journals/UQLJ/2005/23.html)> (5.4.2008).

<sup>49</sup> The speech is available online at The White House, <[www.whitehouse.gov/news/releases/2003/03/20030322.html](http://www.whitehouse.gov/news/releases/2003/03/20030322.html)> (5.4.2008).

<sup>50</sup> John Kim, "The Crime of Aggression Against Iraq" (2005), <[www.codepink4peace.org/downloads/CrimeofAggression-Iraq2.pdf](http://www.codepink4peace.org/downloads/CrimeofAggression-Iraq2.pdf)> (5.4.2008).

<sup>51</sup> Thoman J. Haidon, "Iraq's Right of Self-Defense and Preemption: an Apology" (2002), <[www.islamonline.net/english/Views/2002/10/article05.shtml](http://www.islamonline.net/english/Views/2002/10/article05.shtml)> (5.4.2008).

<sup>52</sup> Chris Richter, "Pre-emptive Self-Defence, International Law and US Policy", 1 *Dialogue* (2003) 55-66, p. 60.

<sup>53</sup> Howard Hensel, *The Law of Armed Conflict: Constraints on the Contemporary Use of Military Force* (Ashgate Publishing, Hampshire, 2007), p. 13.

US Deputy Secretary of State Richard Armitage even called it the “A-team of terrorists”, while Al-Qaeda was only a “B-team”.<sup>54</sup> In Muslim world the group is considered to be a liberation movement and some scholars<sup>55</sup> point out that the West completely ignores the UN General Assembly Resolution on terrorism (42/159) which states that “nothing in the present resolution could in any way prejudice the right to self-determination, freedom, and independence, as derived from the Charter of the United Nations”. According to the Russian Defense Minister Sergei Ivanov statement, made shortly after the start of July War, Hezbollah is an organization which “resorts to terrorist methods”.<sup>56</sup>

Hezbollah moved to a new level when, after the 2005 elections, it won fourteen seats in the 128-member Lebanese Parliament and obtained two minister-positions in the government.<sup>57</sup> Nevertheless, Hezbollah always differentiated itself from Lebanon and vice-versa, with the Party of God acting more like an independent autonomy within the country, emphasizing its non-state actor status, which provided the Lebanese State with additional security on the international arena. This paradox forced certain countries (namely the UK and Australia) to highlight a “terrorist”-element in Hezbollah – that being the Party’s External Security Organization.

Although currently there is no universal definition of terrorism, most scholars would agree that the key argument lies in attempts or threats to physically harm the civilian population (noted also by the UN Panel in 2005)<sup>58</sup>. Out of the goals, included in the Hezbollah manifesto<sup>59</sup>, the aim to “completely destroy the state of Israel” may already seem aggressive and suggest that no distinction between civilians and combatants will be made. And indeed the hijacking of TWA flight 847 in 1985, the 1992 bombing of the Israeli Embassy and the 1994 bombing of a Jewish community center, as well as multiple kidnappings of Western citizens in 1980s<sup>60</sup> reveal the terroristic nature of the organization. However, in the last 10 years, Hezbollah transformed itself into a political and social entity of Lebanon and confined itself to fighting the Israel military and lately, trying to abduct Israeli soldiers (clearly military targets) to force prisoner exchange. It should be noted, that according to public knowledge, the Party of God never threatened to kill the soldiers or harm them in any other way. It would not be too prudent to assume that the terrorist-nature of an organization expires after a certain period of time, however, this highly influences the self-defense necessity component. One could argue, that from the standpoint of the “Bush doctrine”, in the world, where “terrorists can

<sup>54</sup> CBS News webpage, Ed Bradley, “Hezbollah: “A-Team of Terrorist”” (2003), <[www.cbsnews.com/stories/2003/04/18/60minutes/main550000.shtml](http://www.cbsnews.com/stories/2003/04/18/60minutes/main550000.shtml)> (5.4.2008).

<sup>55</sup> See Hala Jaber, “Consequences of Imperialism: Hezbollah and the West”, 6 *Brown Journal of World Affairs* (1999) 109–197, p. 174.

<sup>56</sup> Environmentalists Against War, “Hezbollah, Israel, US Condemned for Escalating Violence” (2006) <[www.envirosagainstar.org/know/read.php?itemid=4382](http://www.envirosagainstar.org/know/read.php?itemid=4382)> (5.4.2008).

<sup>57</sup> Council of Foreign Relations, “Hezbollah (a.k.a. Hizbollah, Hizbu’llah)” (2008), <[www.cfr.org/publication/9155/#1](http://www.cfr.org/publication/9155/#1)> (5.4.2008).

<sup>58</sup> “UN Reform”, <[www.un.org/unifeed/script.asp?scriptid=73](http://www.un.org/unifeed/script.asp?scriptid=73)> (5.4.2008).

<sup>59</sup> Stand With Us, “The Hizballah Program. An Open Letter” (1988), <[www.standwithus.com/pdfs/flyers/hezbollah\\_program.pdf](http://www.standwithus.com/pdfs/flyers/hezbollah_program.pdf)> (5.4.2008).

<sup>60</sup> Council of Foreign Relations, “Hezbollah”, *supra nota* 57.

strike from any place, at any time”, Israel should be always on guard, especially when it comes to an organization, which performed acts of terror in the past, and that necessity argument therefore does not decrease in power. This could have been true, if not for the similar episodes in the past. The raids on Israel’s border territories had become a common practice and there was already an attempt launched on November 21, 2005 to abduct soldiers, which gave Israel ample reason to suspect Hezbollah would repeat that attempt.<sup>61</sup>

## 2.2. Operation “Truthful Promise” and Israeli Retaliation

When withdrawing in 2000 from southern Lebanon, Israel requested security guarantees and ardently stated that one of its primary goals will be to secure the safety of its northern communities from terrorist attack as well as the safety of its SLA allies.<sup>62</sup> Israel saw its promise in retaliatory action and indeed has responded by force to any incident which have happened since then. On July 12, 2006, by firing its rockets and abducting two soldiers, Hezbollah initiated operation “Freedom for Samir Al-Quntar and his brothers” which was later renamed “Operation Truthful Promise.”<sup>63</sup> Immediately after that, the Israeli Prime Minister Ehud Olmert and Defense Minister Amir Peretz ordered a forceful reaction.<sup>64</sup> Israel sent a group of soldiers into Lebanon in hot pursuit in “Operation Just Reward”. After the Israeli soldiers crossed the border they were killed in an ambush by Hezbollah guerillas when their tank drove over a mine. In retaliation Israel launched another operation named “Change of Direction” in which the Israeli army Chief of Staff, Lt. Gen. Dan Halutz, threatened to “turn back the clock in Lebanon by twenty years.”<sup>65</sup> It is important to stress from the outset that there were two military operations undertaken by the Israeli army in July 2006: “Operation Just Reward” was in response to the kidnapping and was arguably consistent with the Israeli army’s rules of engagement in a cross-fire situation as the reaction was both necessary and proportionate to the initial incident even though it would not have amounted to an armed attack for the purposes of Article 51 of the UN Charter. However, the second operation, “Change of Direction”, was different.<sup>66</sup> Apart from the more absurd versions (e.g. that Israel’s attack was carried out in order to

<sup>61</sup> Andrew Exum, “Hizballah at War. A Military Assessment”, *Policy Focus* (2006), <[www.washingtoninstitute.org/download.php?file=PolicyFocus63.pdf](http://www.washingtoninstitute.org/download.php?file=PolicyFocus63.pdf)> (5.4.2008), p. 2.

<sup>62</sup> La’Rae Holling-Hendrix, “Israel and the Hezbollah” 3 *Florida Coastal Law Journal* (2000), <<http://web.fcsl.edu/academics/journal/volumethree/israel.htm>> (16.08.2008).

<sup>63</sup> Polish Independent Media Center, “Samir Kuntar, Israel’s Longest Held Prisoner” (2007), <[www.poland.indymedia.org/pl/2007/08/31520.shtml](http://www.poland.indymedia.org/pl/2007/08/31520.shtml)> (5.4.2008).

<sup>64</sup> Efraim Inbar, “How Israel Bungled the Second Lebanon War”, 14 *Middle East Quarterly* (2007), <[www.meforum.org/article/1686](http://www.meforum.org/article/1686)> (5.4.2008).

<sup>65</sup> Elise Labott, “Israel authorizes “severe” response to abductions” (2006), <[www.cnn.com/2006/WORLD/meast/07/12/mideast](http://www.cnn.com/2006/WORLD/meast/07/12/mideast)> (5.4.2008).

<sup>66</sup> Victor Kattan, “The Use and Abuse of Self-Defense in International Law: The Israel-Hezbollah Conflict as a Case Study”, Working Paper (2007), <[www.papers.ssrn.com/sol3/papers.cfm?abstract\\_id=994282](http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=994282)>, pp. 6-7.

capture the southern Lebanese springs of fresh water),<sup>67</sup> it was the second Israeli operation, which led to the July War.

### 2.3. The “Three Whales” of Self-Defense

On 14 July 2006, during a Security Council meeting, the Lebanese ambassador Nouhad Mahmoud said that his country was suffering from a “continuous, widespread and barbaric Israeli aggression”.<sup>68</sup> What separates aggressive retaliation from self-defense is the three principles described earlier – necessity, proportionality and lack of other means. Although some state that an abduction of Israeli soldiers in order to use them as bargaining chips qualifies as hostage-taking,<sup>69</sup> this requires intent or threats to harm the captives, otherwise (like in this case, where no evidence of such intent is presented), seizure of enemy combatants is fully in compliance with *jus in bello*. Since “Operation Change of Direction” was initiated not as an instant response to the abduction, there was an opportunity for Israel to turn to “other means”. This was not done, however, and, as can be seen from Israel’s actions, diplomatic solution was not even considered.

According to Professor Frederic Kirgis, the intensity of force used in self-defense must be about the same as the intensity defended against.<sup>70</sup> Professor Capaldo extends<sup>71</sup> this theory by saying that the “principle of the proportionality of legitimate defense means that the degree of force used in self-defense must be commensurate with the end to be achieved – the restoration of the rights violated as the result of an armed attack”. This means that force must be “strictly necessary” in any situation and “directed” at the removal of the violation and at restoration of violated rights. After the 34-day campaign, Israeli soldiers are still being held by the Hezbollah and the course of war does not suggest that Israel’s actions were dictated by motives of saving the two ex-combatants. The punitive nature of “Operation Change of Direction” therefore suggests that both principles of necessity and proportionality were ignored by Israel as well.

It should be mentioned that this is not the first time Israel has resorted to disproportional responses. In 1993 Israel led a seven-day bombing campaign of Lebanon in retaliation for Hezbollah rocket attacks in northern Israel and it was condemned by the international community for violating the rules of proportionality.<sup>72</sup> Furthermore, before the conflict between Israel and Hezbollah exploded on the international scene, Israel was battling Palestinian militants in the Gaza Strip over

<sup>67</sup> Stephen Lendman, “Israel Must Be Held Accountable for Its International Law Violations” (2006), <[www.globalresearch.ca/index.php?context=va&aid=2943](http://www.globalresearch.ca/index.php?context=va&aid=2943)> (5.4.2008).

<sup>68</sup> UN Doc. SC/8776.

<sup>69</sup> Human Rights Watch, “Questions and Answers on Hostilities Between Israel and Hezbollah” (2006), <[www.hrw.org/english/docs/2006/07/17/leban013748.htm](http://www.hrw.org/english/docs/2006/07/17/leban013748.htm)> (5.4.2008).

<sup>70</sup> Frederic L. Kirgis, “Some Proportionality Issues Raised by Israel’s Use of Armed Force in Lebanon”, ASIL Insight, <[www.asil.org/insights/2006/08/insights060817.html](http://www.asil.org/insights/2006/08/insights060817.html)> (5.4.2008).

<sup>71</sup> Giuliana Ziccardi Capaldo, “Providing a Right of Self-Defense Against Large-Scale Attacks by Irregular Forces: The Israeli-Hezbollah Conflict”, 48 *Harvard International Law Journal* (2007) 101–112, p. 103.

<sup>72</sup> Council on Foreign Relations, Lionel Beehner, “Israel and the Doctrine of Proportionality” (2006), <[www.cfr.org/publication/11115](http://www.cfr.org/publication/11115)> (5.4.2008).

their capture of an Israeli corporal. Israel sent its troops back in to rescue the soldier, killing hundreds of Palestinians in the process and increasing its bombing campaign of the Strip (home to 1.4 million Palestinians, and one of the most densely populated places on Earth),<sup>73</sup> which once again clearly violated the “3 principles” and once again suggests punitive nature of attacks. As though proving this, Kobi Marom, a retired Israeli army colonel who guided a group of security analysts organized by the American Jewish Committee around the battlefield near the Lebanese border, said “Something has happened to our society when we think losing eight soldiers is a tough day (3 were killed during the Hezbollah attack and 5 during Israeli counter-attack afterwards). Well, I’m sorry, it’s not”.<sup>74</sup>

#### 2.4. Lebanon Responsibility

Nothing in the UN Charter excludes “armed attacks” emanating from private non-state actors from the operation of Article 51. New theories and state practice (as described above) in recent times seem to have confirmed the rule that such actors can indeed be held accountable. The circumstances leading to the US invasion of Afghanistan in 2001 were ground-breaking in themselves, with the UN recognizing 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.<sup>75</sup> Following the same example, which sets today’s standards, to deem a state responsible for a terrorist attack, it must provide support to terrorist organizations. According to the so-called due diligence requirement set in Security Council Resolution 1373, states must “refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts”. State responsibility is excluded only when it is *unable* to exercise an effective control over the terrorist group. Since Hezbollah is representing 1/5 of the Lebanese parliament, its acts can well be considered to be those of Lebanon, notwithstanding that the Christian elements have categorically disassociated themselves from the Hezbollah attack. Some elements of the Lebanese Army have collaborated with Hezbollah while as to the Lebanese government as such, at the very least it can be affirmed that they have taken no measures to prevent Hezbollah activity.<sup>76</sup> Article 8 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts declares that any illegal 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. There was never any suggestion from Israel that Lebanon “instructed” Hezbollah to attack,<sup>77</sup> nevertheless

<sup>73</sup> Arab Media Watch, “Israel, Hezbollah, and the Use and Abuse of Self-Defence in International Law” (2006), <[www.arabmediawatch.com/amw/Default.aspx?tabid=324](http://www.arabmediawatch.com/amw/Default.aspx?tabid=324)> (5.4.2008).

<sup>74</sup> Max Boot, “The Second Lebanon War” (2006), <[www.cfr.org/publication/11363/second\\_lebanon\\_war.html](http://www.cfr.org/publication/11363/second_lebanon_war.html)> (5.4.2008).

<sup>75</sup> Brendan Ryan, “Jus ad Bellum in Response to Non-State Aggression: Article 51, State Responsibility & the Israel-Hezbollah Conflict” (2007), <[www.colr.ucc.ie/index.php?option=com\\_content&task=view&id=117&Itemid=48](http://www.colr.ucc.ie/index.php?option=com_content&task=view&id=117&Itemid=48)> (5.4.2008).

<sup>76</sup> Robbie Sabel, “Hezbollah, Israel, Lebanon and the Law of Armed Conflict”, <[www.jurist.law.pitt.edu/forumy/2006/07/hezbollah-israel-lebanon-and-law-of.php](http://www.jurist.law.pitt.edu/forumy/2006/07/hezbollah-israel-lebanon-and-law-of.php)> (5.4.2008).

<sup>77</sup> Ryan, “Jus ad Bellum”, *supra nota* 75.

Israel issued a statement, that it “holds the sovereign government of Lebanon as responsible for the action which emanated from its territory and for the safe return of the abducted soldiers”<sup>78</sup> Here the “due diligence” requirement comes into play. As pointed out by René Värk,<sup>79</sup> “if a State tolerates the presence of a private armed group and takes advantage of its activities abroad — i.e., the terrorist group is “doing the job” instead of the State — that state should bear some responsibility for such activities”. This theory is supported by the UN General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, which constitutes, that “no State shall organize, assist, foment, finance, incite or tolerate terrorist activities”. Therefore, if we unite the Declaration on Friendly Relations with SC Resolution 1373, toleration can be regarded as passive support of terrorism and thus, Israeli statement is fully justified. This is also confirmed by the *Tehran Hostages* case: although the unlawful occupation of the embassy could not be attributed to Iran solely by virtue of its “approval” of the occupation, it condemned Iranian officials on the basis that they “were fully aware of their obligations to protect the premises of the United States embassy and its diplomatic and consular staff from any attack” and “were fully aware of the urgent need for action on their part”.<sup>80</sup>

The Israeli offensive only consolidated the relationship between the Lebanese government and Hezbollah because of the heavy civilian casualties, thus strengthening the Israeli argument even more. As Peter Bouckaert noted, it’s very unlikely that officials will move away from Hezbollah, take an independent position and join an international effort to demilitarize southern Lebanon and create Hezbollah-free zones. And it’s very unlikely that Hezbollah itself will agree to any such step because its backers in Iran won’t agree to it.<sup>81</sup>

### 2.5. *The Right of Self-Defense and the Needle Prick Theory*

Article 3(g) of the General Assembly Resolution 3314 asserts that “sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts [of aggression]” is aggression *per se*. Therefore, it is most important to determine whether Hezbollah’s “Operation Truthful Promise” amounted to an “armed attack” required to invoke Article 51 of the Charter. Professor Michael Kelly writes: “Killing few people and kidnapping another 2 at the border is not the equivalent of killing 3000 people and destroying two skyscrapers in downtown Manhattan. So if this becomes a question of scale, is Hezbollah’s provocation the same as al Qaeda’s? No. But al Qaeda did not continue attacking the U.S. as Hezbollah continues attacking Israel causing more death and destruction with its hundreds of rocket firings all the way to Haifa. Consequently, the question of scale eventually

<sup>78</sup> Stand With US, “Reserve IDF Division Called Up in Wake of Attack” (2006), <[www.standwithus.com/news\\_post.asp?NPI=897](http://www.standwithus.com/news_post.asp?NPI=897)> (5.4.2008).

<sup>79</sup> René Värk, “State Responsibility for Private Armed Groups in the Context of Terrorism”, 11 *Juridica International* (2006) 184–193, p. 192.

<sup>80</sup> Ryan, “Jus ad Bellum”, *supra nota* 75.

<sup>81</sup> Council on Foreign Relations, “Both Israel and Hezbollah Committing “War Crimes” (2006), <[www.cfr.org/publication/11252](http://www.cfr.org/publication/11252)> (5.4.2008).

becomes moot, as more and more armed attacks bolster Israel's reliance on Article 51's terms".<sup>82</sup> While the attack alone does not trigger Article 51, Israel could invoke the Needle Prick doctrine (*Nadelstichtaktik*), also known as the "accumulation of events theory". According to this doctrine, each specific act of terrorism though it may not independently qualify as an armed attack, could, taking into consideration the totality of incidents, amount to an armed attack entitling the victim-State to respond with armed force.<sup>83</sup> However, if Israel would be allowed to invoke the Needle Prick theory, it could just as easily be used by Lebanon, for Israel frequently enters Lebanon's territorial waters without its consent. Furthermore, the Lebanese government accuses Israel of having regularly violated its airspace between May 2000 and July 2006. Lebanon considers these incursions "a form of international terrorism", alleging that these low-altitude flights break the sound barrier over civilian-populated areas and "instill terror among Lebanese civilians, especially children".<sup>84</sup>

## 2.6. World Response and the Aftermath

A week after the Second Lebanon War had begun, the UN Secretary General Kofi Annan addressed the Security Council by saying: "Israel's disproportionate use of force and collective punishment of the Lebanese people must stop", implicitly rejecting the notion that Israel has "no choice of means" in its actions. Neither the escalation of the Israeli campaign under the cover of the US veto, nor the killing and terrorizing of Lebanese civilians were therefore justified by the argument of self-defense in the eyes of the ex-Secretary General.<sup>85</sup>

The Security Council itself, halted by a US veto, could not stop the hostilities from escalating until finally after 34 days of combat, it was able to bring Resolution 1701 into force. The new Resolution was met with scorn for its belatedness and with skepticism because of the Security Council's past history of lacking political will to do what is necessary to sustain a ceasefire agreement and to enforce its own resolutions.<sup>86</sup> It leaves certain questions unanswered, e.g. how to define Hezbollah's actions on July 12 – it is not clear if it is considered a terrorist attack or whether it is attributable to the Lebanese Government, or to Syria or Iran. Neither is there any precise position on whether Hezbollah attacks can be imputed to the State of Lebanon. The force exercised by Israel is generically referred to in terms of "offensive military operations" and there is no reference to "aggression" or "occupation". Nevertheless, the Resolution seems to exclude hypothesis of a preventive Israeli self-defense against terrorists in Lebanon,<sup>87</sup> thus once again demonstrating that it does not want to succumb to the new doctrine of anticipatory self-defense.

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<sup>82</sup> Michael Kelly, "Israel v. Hezbollah: Article 51, Self-Defense and Pre-emptive Strikes", <[www.jurist.law.pitt.edu/forumy/2006/07/israel-v-hezbollah-article-51-self.php](http://www.jurist.law.pitt.edu/forumy/2006/07/israel-v-hezbollah-article-51-self.php)> (5.4.2008).

<sup>83</sup> Victor Kattan, "The Use and Abuse of Self-Defense", *supra note* 66, p. 13.

<sup>84</sup> *Ibid.*, pp. 13–14.

<sup>85</sup> Nicholas Davies, "Israel in Lebanon and the "War on Terror" – The Limits of Self-Defense" (2006), <[www.onlinejournal.com/artman/publish/article\\_1044.shtml](http://www.onlinejournal.com/artman/publish/article_1044.shtml)> (5.4.2008).

<sup>86</sup> Richard Bagudu, *Judging Annan* (Bloomington: AuthorHouse, 2007), p. 172.

<sup>87</sup> Capaldo, "Providing a Right of Self-Defense", *supra nota* 71, p. 102.

The Israel-Hezbollah conflict in the year 2006 did not change much in the legal world. It served as another example of the controversy around the new theory of self-defense against terrorism and highlighted the same positions of *pro* and *con* of the same countries. On March 8, 2007, Israel's Prime Minister Ehud Olmert admitted to the Winograd commission of inquiry that his government had decided "at least four months in advance" that any kidnap of Israeli troops on its borders would trigger war.<sup>88</sup> This can be regarded as evidence that whether the Security Council likes it or not, the "Bush doctrine" is being put into practice, at least by Israel.

## CONCLUSION

The contemporary concept of self-defense is complex and confusing. Every country recognizes the right of self-defense under Article 51 of the UN Charter, however, when it comes to any deviation from its wording, disputes arise. The main questions today which remain quite controversial are whether preemptive and preventive strikes are allowed in international law, does desire to protect nationals qualify as a suitable reason for invoking self-defense and whether the self-defense against "terrorism of global reach" is a new, individual concept of international law or if it is an extension of the classic theory, and whether it is self-defense at all. These questions have become of high importance after the 9/11 attacks, which forced the United States to review its position on these matters and turn to an even more liberal path. The Iraq Invasion in 2003 marked a new era for self-defense, as the United States provided the rest of the world with a Hobson's choice – either to accept the new reality and join up with the "winning team" or to remain on the "sinking ship". Today there are three camps – the more liberal countries including the USA, the UK, Israel and a few others, the more conservative one, composed mostly of countries of the third world, Germany and France, with the third camp being represented by a few states without a stable position on the questions of self-defense, which lean more towards the liberal path, but who must remain neutral for political reasons (e.g. Russia).

The question whether Israel had a right of self-defense in the Second Lebanon War is controversial with the same camps supporting their previous positions. The problem is complicated by the fact that Hezbollah is not exactly a State actor, but it is not exactly a terrorist organization either. This problem can be solved by distinguishing the terrorist element (External Security Organization), which is not under direct control of the political element thus, which is not covered by command responsibility. It was this very same element that conducted operation "Truthful Promise" during which Israeli settlements were bombed, military patrol attacked, three soldiers killed, two injured and two more abducted. The State of Lebanon is responsible for Hezbollah actions, because it tolerated its presence on its territory which already can be regarded as passive support for terrorism.

Since the incident took place not within the disputed Shebaa farms region, but on Israeli territory, it can indeed be considered an *aggressive attack*. Israel therefore,

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<sup>88</sup> "Ehud Olmert says "Israel pre-planned war"" (2007), <[www.aqsa.org.uk/news\\_detail.aspx?newsid=1073](http://www.aqsa.org.uk/news_detail.aspx?newsid=1073)> (5.4.2008).

could try to invoke the right of self-defense in three ways: (1) by claiming that its counter-strike is based on protecting its nationals abroad, (2) by announcing that a preventive attack against terrorists in Lebanon is necessary and, (3) by basing their arguments on the classic concept of self-defense under Article 51 of the Charter. Israeli officials chose the latter. Hezbollah actions on July 12, 2006 would not amount to an "armed attack" required to invoke Article 51, however according to the needle prick theory, the damage Hezbollah has done to Israel altogether, accumulates to the required amount to use the article. Although strikes carried out by Israel do not suggest that their only aim was to rescue the abducted soldiers, the State of Israel did enjoy this right. The prolonged presence does not make it illegitimate, since as noted above, Israel obtained its right to classic self-defense also. To further reinforce the argument, preventive self-defense could indeed be exercised on the same grounds as Afghanistan and Iraq invasions – to eliminate a "Sword of Damocles" in the face of constant terrorist threat from Hezbollah. Although Israeli retaliation goes beyond necessity and proportionality limits from the viewpoint of classic self-defense, it is in compliance with these principles and the "no other means" requirement in the preventive war case, therefore, if we consider all three described aspects together, a conclusion can be made that Israel did have the right of self-defense and actually exercised it proportionally to the threat and in accordance with necessity and "lack of other means" principles.

Many people argue that apart from the public disputes on the topic today, there exists a covert controversy on who may exercise the right of self-defense and who may not. This position is wrong, international law does not allow *quod licet jovi non licet bovi* thoughts. Although it is doubtful that if a similar situation would occur with Israel kidnapping two Lebanese soldiers and Lebanon would launch a counter-attack of the same magnitude, the US and Israel would acknowledge that there was an act of self-defense. However, if there was a terrorist cell operating from within the State of Israel and it was responsible for the abductions, there is no question that such right would exist and that its application would not be condemned by the more liberal states. The Charter of the United Nations is a "living instrument" and it was intended to adapt to the changing conditions in the world, therefore the international community must admit that such a threat as terrorism of global reach is a new concept and effective ways are required to combat this new danger.