When Close Doesn't Count: An Analysis of Israel's *Jus Ad Bellum* and *Jus In Bello* in The 2006 Israel-Lebanon War

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I. Introduction

On 12 July 2006, Israel launched missiles and deployed armed troops into Lebanon, its neighbor to the north.[1] Israel's acts were in response to Hezbollah guerillas operating out of Lebanon, who earlier that day had killed five Israeli soldiers and kidnapped two more from an Israeli outpost near the Lebanese border.[2] The international community initially responded by condemning Hezbollah for its attack on Israel, and by voicing support for Israel's right to respond with force in self-defense.[3] However, the world community expressed concern at Israel's attack on Lebanon, a state actor, in response to actions by Hezbollah, a non-state actor.[4] Even more pundits voiced distress over Israel's decision to target areas in Lebanon with significant civilian populations.[5] Israel's actions raise a number of questions under international law: Did Hezbollah's attacks justify Israel's use of force in self-defense? Was Israel justified in using force against Lebanon, a sovereign state? Did Israel's methods of warfare comply with norms of international law?

This article analyzes Israel's claim to self-defense and the actions it took in light of the just war theory, customary international law, and the U.N. Charter. First, this article reviews the Israel-Lebanon War of 2006, including Israel's stated reasons for attacking Lebanon.[6] Then, this article examines the definitions of "lawful war" under the just war theory,[7] customary international law,[8] and the U.N. Charter.[9]

After exploring the foundational definitions of lawful war, this article analyzes Israel's actions under these three paradigms, paying particular attention to Israel's decision to hold a state responsible for a non-state actor's behavior.[10] This article shows that under both the just war theory[11] and the U.N. Charter,[12] Israel was justified using force in self-defense against the state of Lebanon for the actions of Hezbollah. However, Israel's *methods* of warfare were not in compliance with customary international law.[13] Therefore, Israel failed to prosecute a just and lawful war.

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[1] Greg Myre & Steven Erlanger, *Israelis Enter Lebanon after Attack*, N.Y. TIMES, July 13, 2006, *available at* http://www.nytimes.com/2006/07/13/world/middleeast/13mideast.html.

[2] *Id.*

[3] *See, e.g.*, U.N. Doc. S/PV.5488 (July 13, 2006); U.N. Doc S/PV.5493 (July 21, 2006).

[4] Tom Ruys, *Crossing the Thin Blue Line: An Inquiry into Israel's Recourse to Self-Defense Against Hezbollah*, 43 STAN. J. INT'L L. 265, 270 (2007).

[5] *Id.*

[6] *See infra* Part II (discussing the lead up to and facts of the Israel-Lebanon War).

[7] *See infra* Part III (examining the just war tradition).

[8] *See infra* Part IV (examining the use of force under customary international law).

[9] *See infra* Part V (exploring lawful war under the U.N. Charter and subsequent documents).

[10] *See infra* Part V.B.2 (analyzing the lawfulness of Israel's decision to hold Lebanon responsible for Hezbollah's attack).

[11] *See infra* Part V.A.

[12] *See infra* Part V.B.

[13] *See infra* Part V.C.

II. The 2006 Israel-Lebanon War

The political situation present along the Israel-Lebanon border on 12 July 2006 did not appear overnight. Israel and Hezbollah's contentious and often bloody relationship began the moment that Hezbollah announced itself to the world. Thus, a brief history of the two-decade Israeli/Hezbollah struggle is in order.

In 1982, Israeli forces invaded and occupied southern Lebanon in an attempt to halt continuing Palestine Liberation Organization (PLO) raids across Israel's northern border and in retaliation against the PLO for its recent assassination attempt on Israel's ambassador in London.[14] Angered by this incursion into its land, a group of Islamic clerics in Lebanon responded by founding Hezbollah.[15]

Hezbollah was disorganized in its first few years, but by 1985 it had become a coherent organization with an efficient chain of command that enjoyed considerable support from Iran.[16] In 1985, Hezbollah published its manifesto to the world via an "open letter"[17] which revealed its expanded goal to destroy Israel: "Israel's final departure from Lebanon is a prelude to its final obliteration from existence and the liberation of venerable Jerusalem from the talons of occupation."[18] Lest any doubt remain regarding its intentions to carry out such a threat, Hezbollah proclaimed, "Our struggle will end only when this entity is obliterated. We recognize no treaty with it, no cease fire, and no peace agreements."[19] This nihilistic goal has not changed throughout the past twenty years, and Hezbollah has continued to assert its intent to destroy the state of Israel.[20]

Were Hezbollah merely a terrorist group that happened to be located within the territory of Lebanon which the government of Lebanon opposed, the situation today might be different. Yet Hezbollah is not simply an outlying "terrorist" organization. Rather, it is a recognized political party within the Lebanese system, its members holding twenty-three of the 128 seats in Lebanon's Parliament.[21] In southern Lebanon, wherein lies its greatest support, social welfare is an integral part of its efforts: Hezbollah has founded hospitals, schools, clinics, and agricultural centers in this part of the country.[22] Notably, it is the only faction within Lebanon that the government permits to carry weapons.[23]

Hezbollah considers itself a legitimate resistance group, initially asserting that it existed to fight Israel's occupation of the southern part of Lebanon.[24] When Israel withdrew from southern Lebanon in 2000, however, Hezbollah's attacks did not cease. Instead, Hezbollah claimed that Israel also unlawfully occupies the Shebaa Farms region, a small area located on the border between Lebanon and Syria.[25] As long as Israeli forces remain at Shebaa Farms, warns Hezbollah, Israel and her citizens can expect continued attacks.[26]

Throughout the years, Hezbollah has lived up to its threats. From 2000 to 2006, while little violence occurred along the northern Israel/southern Lebanon border, Israel and Hezbollah continuously traded attacks at other locations. Several times,

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[14] Wilson Lam, *Hezbollah, Israel, and the Lessons of 1982*, ANGUS REID GLOBAL MONITOR, July 26, 2006, *available at* http://www.angus-reid.com/analysis/view/hezbollah_israel_and_the_lessons_of_1982/.

[15] Kathryn Westcott, *Who Are Hezbollah?*, BBC NEWS ONLINE, Apr. 4, 2002, http://news.bbc.co.uk/2/hi/middle_east/1908671.stm.

[16] AUGUSTUS RICHARD NORTON, HEZBOLLAH: A SHORT HISTORY 34–35 (Princeton Univ. Press 2007).

[17] *Id.* at 39 (citing Open Letter from Hezbollah, *Downtrodden in Lebanon and in the World* (Augustus Richard Norton trans. 1987), *in* AUGUSTUS RICHARD NORTON, AMAL AND THE SHI'A: STRUGGLE FOR THE SOUL OF LEBANON 167–87 (Univ. of Texas Press 1987)).

[18] *Id.*

[19] Nass al-Risala al-Maftuha allati wajahaha Hizballah ila-l-Mustad'afin fi Lubnan wa-l-Alam, AL-SAFIR (Beirut), Feb. 16, 1985, *reprinted in* An Open Letter: The Hizbollah Program, 48 JERUSALEM Q. (trans. Fall 1988), *available at* http://www.standwithus.com/pdfs/flyers/hezbollah_program.pdf.

[20] *See id.*; Andrea Levin, *Death and Destruction are Hezbollah's Goals*, B. GLOBE, Aug. 8, 2006, *available at* http://www.boston.com/news/world/middleeast/articles/2006/08/08/death_and_destruction_are_hezbollahs_goals.

[21] IRIN Middle East, *Lebanon: The Many Hands and Faces of Hezbollah* (Mar. 29, 2006) [hereinafter IRIN], *available at* http://www.irinnews.org/report.aspx?reportid=26242.

[22] *Id.*

[23] Kevin Sites, *Positioning for Politics: Hezbollah Denies Terrorist Ties, Increases Role in Government*, SCRIPPS HOWARD NEWS SERVS., Jan. 14, 2006, *available at* http://www.redding.com/redd/nw_columnists/article/0,2232,REDD_17528_4389698,00.html (stating ostensibly that the government allows Hezbollah to carry weapons to protect itself against Israel).

[24] IRIN, *supra* note 21.

[25] *Focus: Shebaa Farms*, BBC NEWS, May 25, 2000, *available at* http://news.bbc.co.uk/2/hi/middle_east/763504.stm.

[26] *Id.*

Israeli warplanes flew into Lebanon's airspace. Hezbollah, not Lebanon, routinely responded by shelling both Israeli army and civilian areas.[27] In 2002, Hezbollah shot and killed seven Israeli civilians near the Matsuba kibbutz in Israel.[28] In May 2003, Israeli soldiers on foot patrol allegedly crossed the "Blue Line," the boundary between Israel and Lebanon. Hezbollah responded by attacking Israeli positions at Shebaa farms with rockets, mortars, and small arms fire.[29] Hezbollah periodically fired rockets and small arms on Israeli Defense Force positions in northern Israel, though rarely causing significant damage.[30] Both Israeli soldiers and Hezbollah forces often kidnapped each other's members to be used in subsequent prisoner exchanges.[31] Tensions remained high. Attacks were scattered but consistent. Yet in southern Lebanon itself, no major problems had arisen since Israel's 2000 departure. The situation at the border of Lebanon had been calm.[32] Israel patrolled the Israeli side, Hezbollah the Lebanese side, while the United Nations Interim Force in Lebanon (UNIFIL) observed.[33]

The calm broke on 12 July 2006, when Hezbollah attacked a small Israeli military post near the Israeli/Lebanese border, killing five Israeli soldiers and capturing two more as prisoners.[34] Meanwhile, Hezbollah's forces fired diversionary rockets into northern Israel, injuring three people.[35] Hezbollah's intent in these attacks, its leaders later asserted, was to seize Israeli soldiers to use as leverage in a subsequent prisoner exchange.[36]

However, this plan quickly spun out of control. To the surprise of Hezbollah's leadership, Israel responded by sending armored forces into Lebanon for the first time since 2000.[37] Israeli forces fired rockets at the Beirut airport runways, shutting down all transportation, and into southern Lebanon, where civilian casualty numbers grew uncomfortably high.[38] Israeli Prime Minister Ehud Olmert promptly and publicly stated, "Lebanon is responsible and Lebanon will bear the consequences of its actions."[39] He added, "The Lebanese government, of which [Hezbollah] is a member, is trying to undermine regional stability."[40] Meanwhile, Israeli Ambassador Dan Gillerman notified the Security Council that Israel was asserting its right to self-defense under Article 51 of the U.N. Charter, and that Israel held Lebanon responsible for Hezbollah's actions.[41]

While most of the fifteen Security Council members generally supported Israel's invocation of self-defense, many also expressed concern at Israel attacking Lebanon, particularly given that Israel appeared to be targeting civilians and civilian property.[42] Indeed, Israel inflicted substantial damage to the Lebanese civilian infrastructure and population in the thirty-three day conflict. By the time that Israel and Lebanon reached a ceasefire agreement on August 14, 2006,[43] 116 Israeli

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[27] Mitchell Bard, *Hezbollah Attacks Since May 2000*, AIJAC, July 24, 2006, *available at* http://www.aijac.org.au/resources/hezb_00-06.html. (AIJAC is the Australia/Israel & Jewish Affairs Council).

[28] Sarah Honig, *In Love with Barricades*, JERUSALEM POST, July 26, 2006, at 10.

[29] Bard, *supra* note 27.

[30] *Id.*

[31] *Id.*

[32] *Hezbollah Not to Blame for War, Report Shows*, MALAYSIA SUN, Aug. 4, 2006, *available at* http://story.malaysiasun.com/index.php/ct/9/cid/b8de8e630faf3631/id/189088/cs/1/.

[33] *Id.*

[34] Myre & Erlanger, *supra* note 1.

[35] *Id.*

[36] *See Hezbollah Not to Blame for War, Report Shows*, *supra* note 32; *Hezbollah Seizes Israeli Soldiers*, BBC NEWS, July 12, 2006, *available at* http://news.bbc.co.uk/2/hi/middle_east/5171616.stm (referencing a Hezbollah statement that the purpose of seizing the Israeli soldiers was to trade them for Hezbollah prisoners in Israel).

[37] *See* Nicholas Blanford, *Israel Strikes May Boost Hizbullah Base: Hizbullah Support Tops 80 Percent Among Lebanese Factions*, CHRISTIAN SCI. MONITOR, July 28, 2006, *available at* http://www.csmonitor.com/2006/0728/p06s01-wome.htm (quoting Mahmoud Komati, Deputy Head of Hezbollah's politburo, "[T]he truth is—let me say this clearly—we didn't even expect [this] response . . . that [Israel] would exploit this operation for this big war against us." (alteration in original)).

[38] Myre & Erlanger, *supra* note 1.

[39] Press Release, Prime Minister Ehud Olmert, Israel, Lebanon is Responsible and Will Bear the Consequences (July 12, 2006) [hereinafter Olmert Press Release], *available at* http://www.mfa.gov.il/MFA/Government/Communiques/2006/PM+Olmert+-+Lebanon+is+responsible+and+will+bear+the+consequences+12-Jul-2006.htm.

[40] *Id.*

[41] Ambassador Dan Gillerman, *Identical Letters Dated 12 July 2006 from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General and the President of the Security Council*, U.N. Doc. S/2006/515 (July 12, 2006).

[42] Ruys, *supra* note 4, at 270.

[43] S.C. Res. 1701, U.N. Doc. S/RES/1701 (Aug. 11, 2006).

soldiers and forty-three Israeli civilians had lost their lives.[44] Yet those numbers pale in comparison to the northern casualties: In Lebanon, forty-three soldiers and 1,140 non-Hezbollah civilians perished, thirty percent of whom were children, and several of whom were U.N. peacekeepers killed in an Israeli artillery attack.[45] Over one million Lebanese civilians were internally displaced.[46]

Israel's justification for attacking Lebanon in response to Hezbollah's actions contained two elements. First, Israel argued that it had been the victim of an armed attack; therefore, under Article 51 of the U.N. Charter, Israel possessed the inherent right to act in self-defense.[47] Second, and more controversially, Israel asserted that Lebanon, a sovereign state, was the proper object of its use of force, because Lebanon bore the responsibility for Hezbollah's actions.[48]

Israel's first argument, as to its right to use military force in self-defense under Article 51, was straightforward: An armed attack had occurred against it, a member nation. "This morning," explained Ambassador Gillerman, "Hezbollah terrorists unleashed a barrage of heavy artillery and rockets into Israel, causing a number of deaths."[49] Simultaneously, "the terrorists infiltrated Israel and kidnapped two Israeli soldiers, taking them into Lebanon."[50] Presumably, Ambassador Gillerman considered both the rocket attacks and the attacks on the Israeli soldiers to qualify as "armed attacks," though it is not clear in his letter to the Security Council. Regardless, the Ambassador asserted that an armed attack had occurred, citing both incidents. As a member state, Israel possessed the inherent right to act in self-defense, he concluded.[51]

Israel also argued that it was justified responding with military force against Lebanon as a whole, not simply against the terrorist organization Hezbollah. Prime Minister Olmert plainly asserted, "This was an act of war [by Lebanon] without any provocation on the sovereign territory . . . of the state of Israel."[52] In his letter on behalf of Israel to the Security Council, Ambassador Gillerman chimed,

> Responsibility for this belligerent act of war lies with the Government of Lebanon, from whose territory these acts have been launched into Israel. . . . The ineptitude and inaction of the Government of Lebanon has led to a situation in which it has not exercised jurisdiction over its own territory for many years.[53]

This argument was more complicated than Israel's basic assertion of its right to respond to an armed attack in self-defense. To employ force in self-defense is one thing; but when the aggressor is a non-state actor, against *whom* and *how* to respond in self-defense are entirely different matters. That Israel's position in this regard was controversial is evidenced by the Security Council's reaction to it—a much more tepid response than its philosophical agreement with Israel's right to respond in self-defense.[54]

Ambassador Gillerman, in an open debate at the Security Council two days after the Hezbollah attacks, elaborated upon Israel's position. Notably, he did not accuse Lebanon of explicit involvement, active participation, or even public encouragement of Hezbollah. He did not reference the fact that Hezbollah members sat in the Lebanese Parliament. Instead, he imputed culpability to Lebanon due to its "ineptitude and inaction" in properly controlling its territory in the south, and blamed Lebanon for its failure to implement Security Council Resolution 1559.[55]

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[44] Ruys, *supra* note 4, at 270.

[45] *Timeline of the July War 2006*, DAILY STAR: LEBANON, *available at* http://www.dailystar.com.lb/July_War06.asp (last visited Mar. 28, 2009).

[46] INTERNAL DISPLACEMENT MONITORING CTR., LEBANON: DISPLACED RETURN AMIDST GROWING POLITICAL TENSION (2006), *available at* http://www.unhcr.org/refworld/country,,IDMC,,LBN,4562d8cf2,459e5e902,0.html. By mid-December 2006, nearly 200,000 of these civilians remained internally displaced. *Id*.

[47] *See, e.g.*, Gillerman, *supra* note 41; *see infra* Part V(B) (discussing the inherent right to self-defense under Article 51 of the U.N. Charter).

[48] *See, e.g.*, Olmert Press Release, *supra* note 39.

[49] Gillerman, *supra* note 41.

[50] *Id.*

[51] *Id.*

[52] Olmert Press Release, *supra* note 39.

[53] Gillerman, *supra* note 41.

[54] *See* Ruys, *supra* note 4, at 270.

[55] *Id.* at 277–78 (citing Ambassador Dan Gillerman, *Statement Before the Security Council During Open Debate on "The Situation in the Middle East,"* at 6, U.N. Doc. S/PV.5489 (July 14, 2006)). Security Council Resolution 1559 required, among other things, that Israel withdraw from southern Lebanon, and that Lebanon dismantle the Hezbollah militia. S.C. Res. 1559, U.N. Doc. S/RES/1559 (Sept. 2, 2004).

But were Israel's attacks on Lebanon justified under the U.N. Charter? Though Israel did not explicitly invoke either just war theory or customary international law (apart from the inherent right of self-defense that exists in Article 51), what role do these traditions play in determining the legality of Israel's actions? In short, under any of the recognized paradigms allowing the use of military force against another entity, were Israel's actions, both its decision to go to war and its conduct within that war, lawful? But first, an examination of the just war, customary international law, and U.N. Charter paradigms is in order.[56]

III. Lawful Wars: Just War Tradition

The roots of the just war theory were laid hundreds of years before the founding of Christianity, fittingly among Greek philosophers. As these thinkers attempted to bring reason, order, and meaning to their society, they also sought to justify warfare on moral, religious, and juridical grounds.[57] The great philosopher Aristotle was the first to coin the phrase "just war," proclaiming that such a conflict must further "the moral ends of peace and justice." Men do not fight a just war simply for the sake of going to battle, he asserted, but for higher goals—ultimately, for peace, justice, or unity.[58]

The Roman statesman Cicero, who lived in the century prior to Christ, built upon the Aristotelian theory of just war, adding the concept of "just causes."[59] According to Cicero, war is only just when it is "declared and waged to recover lost goods."[60] A just cause is not a "willful exercise of violence but a just and pious endeavor occasioned by delict or injustice of the enemy."[61] Cicero was the first just war thinker to label the decision to go to war under the term "just cause," and to link that concept with Aristotle's definition of "just war."[62]

The first Christian thinker to grapple with and expand the just war concept was Ambrose of Milan, bishop and mentor to Saint Augustine of Hippo. According to Ambrose, courage alone is not enough; the cause itself must be just, and acts within the war (*jus in bello)* must be ethical.[63]

A. Saint Augustine of Hippo (c. 354–430 AD)

The first Western thinker systematically to expand upon these ideas was Saint Augustine of Hippo, who, due to his enormous contributions to the subject, is known as "the father of the Western theory of just war."[64] Augustine penned his thoughts over a period of several decades,[65] as Rome slowly was coming apart at the seams, battle victims of barbarians such as the Visigoths and the Vandals.[66] Indeed, it is believed that Augustine himself perished, either from starvation or exposure, as the Vandals were tearing down the walls of his hometown.[67]

Within this framework, well aware of the alarming enemies that Rome faced and the continuing decline of the Roman army, Augustine provided his just war theory. He proposed that wars are just only when they promote or preserve the peace,

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[56] To explore "lawfulness" under the U.N. Charter requires examining subsequent International Court of Justice opinions, as well as U.N. Security Council Resolutions (as Israel referenced in its justification for attacking Lebanon). In analyzing Israel's actions under the U.N. Charter, therefore, this article will also consider these influences.

[57] FREDERICK H. RUSSELL, THE JUST WAR THEORY IN THE MIDDLE AGES 1 (Cambridge Univ. Press 1975).

[58] *Id.* at 4.

[59] *Id.* at 5.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.* at 14–15.

[64] JOHN MARK MATTOX, SAINT AUGUSTINE AND THE THEORY OF JUST WAR 1–2 (Continuum Books 2006).

[65] LOUIS J. SWIFT & LOUIS SWIFT, EARLY FATHERS ON WAR AND MILITARY SERVICE 110 (Michael Glazier, Inc. 1983).

[66] ALEX J. BELLAMY, JUST WARS: FROM CICERO TO IRAQ 26 (Polity Press 2006).

[67] *Id.*

punish the evildoers in other nations, or recover possessions wrongfully taken.[68] Further, the sovereign must engage in war as a last resort, as the competent authority, and with the right intention.[69] Each of these elements of Saint Augustine's just war theory will be considered in turn.

Secure the peace. To Augustine, a just war ultimately must be fought to secure the peace. War never should be an end in itself.[70] As Augustine advised Roman general Boniface,

> Peace should be your aim; war should be a matter of necessity so that God might free you from necessity and preserve you in peace. One does not pursue peace in order to wage war; he wages war to achieve peace. And so, even in the act of waging war be careful to maintain a peaceful disposition.[71]

In his seminal work, *City of God*, Augustine noted, "Hence it is an established fact that peace is the desired end of war. For every man is in quest of peace, even in waging war, whereas no one is in quest of war when making peace."[72]

Punish Evildoers. Perhaps Augustine's most interesting remarks regarding just war, given our analysis of Israel's conduct in Lebanon, center upon his mandate of punishing evildoers if the evildoers' own state neglects to do so. Said Augustine, "As a rule just wars are defined as those which avenge injuries, *if some nation or state against whom one is waging war has neglected to punish a wrong committed by its own citizens*, or to return something that was wrongfully taken."[73] Taking this concept a bit further, Augustine even suggested a duty element to the punishment of evildoers: "It is the other side's wrongdoing that *compels* the wise man to wage just wars."[74]

Last Resort. War should be the last resort. In a letter to the Roman ambassador Darius, Augustine asserted, "Preventing war through persuasion and seeking or attaining peace through peaceful means rather than through war are more glorious things than slaying men with the sword."[75]

Competent Authority. For Augustine, no war was just unless undertaken by the state sovereign. Believing that human governments are ordained by God, he asserted that the right to wage war therefore belongs exclusively to sovereigns, not to individuals.[76] "It makes a difference for what reasons and under whose authority men undertake wars that are to be waged. . . . [T]he planning of it [rests] with the chief of state."[77]

Right Intention. Even if all other conditions exist to merit a just war, a wrong intention can invalidate the pursuit. A war fought with the right intention is one that is "waged by the good in order that, by bringing under the yoke the unbridled lusts of men, those vices might be abolished which ought, under a just government, to be either extirpated or suppressed."[78] No sovereign should delight in violence, and Augustine asserts that such will not occur for the sovereign who takes action with right intention.[79]

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[68] Joseph L. Falvey, Jr., *Our Cause Is Just: An Analysis of Operation Iraqi Freedom Under International Law and the Just War Doctrine*, 2 AVE MARIA L. REV. 65, 67 (Spring 2004). The recovery of possessions wrongfully taken does not apply as directly to the Lebanon War; thus it will not be addressed separately in this article.

[69] MATTOX, *supra* note 64, at 45–60.

[70] *See* LARRY MAY ET AL., THE MORALITY OF WAR: CLASSICAL AND CONTEMPORARY READINGS 16–17 (Pearson Prentice Hall 2006) (quoting SAINT AUGUSTINE, CITY OF GOD bk. 12 (A.D. 412–422)) ("Peace is the Instinctive Aim of All Creatures, and is Even the Ultimate Purpose of War.").

[71] SWIFT & SWIFT, *supra* note 65, at 114–15 (quoting Saint Augustine, *Letter 189.6*).

[72] MAY ET AL., *supra* note 70, at 16–17 (quoting AUGUSTINE, *supra* note 70, bk. 12).

[73] SWIFT & SWIFT, *supra* note 65, at 135 (emphasis added) (quoting Saint Augustine, *Questions on the Heptateuch 6.10*); *see infra* notes 83–87 and accompanying text (describing Saint Thomas Aquinas' revision of this definition by explicitly allowing for one state to use military force against another state for the wrongs of its citizenry).

[74] SWIFT & SWIFT, *supra* note 65, at 116 (quoting AUGUSTINE, *supra* note 70, bk. 19.7).

[75] *Id*. at 115 (quoting Saint Augustine, *Letter 229.2*). However, Saint Augustine did not require that all means short of war must first be exhausted. *See* MATTOX, *supra* note 64, at 79.

[76] *See* MATTOX, *supra* note 64, at 56.

[77] SWIFT & SWIFT, *supra* note 65, at 129 (quoting Saint Augustine, *Against Faustus 22.75*).

[78] MATTOX, *supra* note 64, at 54 (quoting AUGUSTINE, *supra* note 70, bk. 19.7).

[79] *Id*. at 55. In addition to Saint Augustine's robust proposals regarding *jus ad bellum*, he also was one of the first theorists to suggest the importance of just conduct *within* war (i.e., *jus in bello*). Saint Augustine believed that for a war to be just, it must not only be entered into, but also fought, in a just manner.

B. Saint Thomas Aquinas (c. 1225–1274 AD)

Saint Thomas Aquinas, philosopher, theologian, and Italian priest, burst upon the scene after years of relative silence regarding Augustine's just war concepts. The crusade era was at its zenith, with both popes and laity equating "just war" with "crusade."[80] With few original thoughts provided on the concept of just war and with Augustine now hundreds of years behind them, church and secular leaders "construct[ed] . . . a just war built on the strength of traditional and accepted notions as is witnessed by the calls of a holy war or crusade as a way to internal peace."[81]

Enter Thomas Aquinas. Well-versed in the philosophies of both Augustine and Aristotle, he seasoned the Western world with original and well-developed thought, not only about just war, but about a multitude of theological subjects. In his seminal work *Summa Theologica,* Aquinas revisited the just war theory.[82] Instead of parroting the religious and military leaders of his day, indeed without addressing crusades at all, Aquinas fused Aristotelian and Augustinian thought, added his own elaborations, and, in a brief but rich explanation, laid the theory of just war that the Western world still holds today.[83]

Aquinas addressed the criteria for just war (*jus ad bellum*) by anticipating several objections to military violence. Most of his thoughts centered on the response to his question, "Whether it is always sinful to wage war."[84] Aquinas responded in the negative, but qualified that response by asserting that for a war to be just, three criteria must exist: proper authority, just cause, and rightful intention.[85] Each of Aquinas' elements will be discussed in turn.

Proper Authority. As did Augustine, Aquinas held that only the state sovereign possesses the authority to engage in warfare. A private individual cannot on his own initiative declare war. It is the authority that "beareth the sword" that is divinely appointed to declare and wage war.[86]

Just Cause. Those being attacked must "deserve it on account of some fault."[87] Relevant to our later discussion, Aquinas reinforced Augustine's earlier position[88] regarding what "faults" create a just cause for going to war: "A just war is wont to be described as one that avenges wrongs, *when a nation or state has to be punished for refusing to make amends for the wrongs inflicted by its subjects,* or to restore what has been seized unjustly."[89]

The acute eye will notice that differences emerge here between Aquinas and Augustine. First, while Augustine held that the *negligence* of a state is enough to rise to a level meriting punishment by military force, Aquinas raised the bar, espousing that only the *refusal* of a state to punish its own wrongdoers justifies another nation's use of force.[90] Apparently, to Aquinas, only another nation's *willfulness*, not its negligence, would make it the lawful object of military force. On the other hand,

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Id. at 60. His words suggest a belief that "just manner" is the fruition of right intention; it includes abiding by the doctrine of military necessity and minimizing the taking of lives to the greatest possible extent.

> For he whose aim is to kill is not careful how he wounds, but he whose aim it is to cure is cautious with his lancet; for the one seeks to destroy what is sound, the other that which is decaying. . . . [W]hat is important to attend to but this: who were on the side of truth, and who were on the side of iniquity; who acted from a desire to injure, and who from a desire to correct what was amiss?

Id. at 61 (quoting Saint Augustine, *Letter 93.8*).

[80] RUSSELL, *supra* note 57, at 39.

[81] *Id.*

[82] *Id.* at 25.

[83] *See id.* at 258–59.

[84] SAINT THOMAS AQUINAS, SUMMA THEOLOGICA, II.2.40, *quoted in* ST. THOMAS AQUINAS ON POLITICS AND ETHICS 64 (Paul E. Sigmund, ed. & trans., W.W. Norton & Co. 1988), *available at* http://www.ccel.org/a/aquinas/summa/SS/SS040.html.

[85] *Id.* at 64–65.

[86] *Id.* at 64.

[87] *Id.*

[88] *See supra* note 71 and accompanying text.

[89] ST. THOMAS AQUINAS ON POLITICS AND ETHICS, *supra* note 84, at 64–65.

[90] *See* SWIFT & SWIFT, *supra* note 65, at 135 (quoting Saint Augustine, *Questions on the Heptateuch 6.10*). However, Augustine's quote also simply may have been a translation issue. If so, it is a critical word that can make the difference as to whether or not a war is perceived as just under Augustine's just war theory.

Aquinas asserted what Augustine did not explicitly address: Once that state reaches the "willfulness" threshold, the *state itself*—not merely the "evildoers" within that state—is a lawful object of military attack.[91]

Rightful Intention. The sovereign must possess a "rightful intention, so that they intend the advancement of good, or the avoidance of evil."[92] Again quoting Augustine, Aquinas explained that wars fought with the right intention are those waged "for the sake of peace, to restraint the evildoers and assist the good."[93] Indeed, a war may be declared by the proper authority, with a just cause, but still be unlawful if the intentions are not right.[94] Securing the peace, in particular, is essential to rightful intention. As did Augustine, Aquinas asserted that the goal of all wars is peace. Indeed, drawing upon Augustine's "duty" language, Aquinas similarly linked defense of the common good to a moral imperative,[95] indicating that *inaction* in the face of attack is as sinful as *action* by attack when unwarranted. Duty compels the just sovereign to act justly; when attacked, the sovereign must defend his community.

Yet Aquinas did not stop here. Instead, he introduced the concept now commonly known as "double-effect."[96] Namely, an action taken can produce two consequences, "only one of which is intended and the other outside our intention."[97] Explained Aquinas, "Moral acts are classified on the basis of what is intended, not of what happens outside of our intention since that is incidental to it."[98] For example, a sovereign may choose to attack another nation's enemies, knowing that innocent bystanders may also be killed in the process. The "double effect," then, is the hastening of the war's end through the killing of enemy soldiers (a "good"), and the death of innocent bystanders, perhaps even children (an "evil"). Whether the decision to attack is good or evil depends upon the intent of the sovereign.[99] If the sovereign's goal is to end the war by killing soldiers, he possesses a rightful intention.[100] If his goal is to cause suffering to the civilian population, he does not possess a rightful intention, and thus the war is not just.[101] The question then becomes: Is the sovereign's purpose in going to war to promote the good by bringing peace to the state, or is it to make the enemy, particularly noncombatants, suffer? The answer to this question bears on a determination of rightful intention.[102]

IV. Lawful Wars: Customary International Law

While just war theory is a more philosophical approach to studying the lawfulness of using military force, customary international law looks to past *practice* that states have deemed legally acceptable. Customary international law is commonly

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[91] This argument is quite similar to that now espoused by international law scholars who opine that state actors may be held responsible for the actions of their non-state actor citizenry. *See, e.g.*, *infra* notes 163–70 and accompanying text.

[92] ST. THOMAS AQUINAS ON POLITICS AND ETHICS, *supra* note 84, at 64.

[93] *Id*. at 65.

[94] *Id.* Saint Aquinas, albeit indirectly, also provided critical tenets for the *methods* of waging war in his "rightful intention" prong. To Aquinas, even if the sovereign enters a war with the rightful intention—for example, to defend his nation—should that intention become evil, then just war no longer exists. R.J. Araujo, *Anti-Personnel Mines and Peremptory Norms of International Law: Argument and Catalyst*, 30 VAND. J. TRANSNAT'L L. 1, 8 (1997). Intending evil rather than good reasonably includes killing noncombatants; Aquinas echoes this thought in his statement on the "evil" of "slaying the innocent." AQUINAS, *supra* note 84, at II.2.64.6, *available at* http://www.ccel.org/a/aquinas/summa/SS/SS064.html#SSQ64OUTP1. Or a rightful intention could be sullied by destroying more than what military necessity requires, perhaps out of rage or a desire for revenge. *Id*. Quoting Augustine regarding "rightful intention," Aquinas reminds his readers, "True religion looks upon as peaceful those wars that are waged *not for motives of aggrandizement,* or cruelty . . . . The passion for inflicting harm, the cruel thirst for vengeance, . . . and suchlike things, all these are rightly condemned in war." *Id*. at II.2.40.1 (emphasis added).

[95] RUSSELL, *supra* note 57, at 262.

[96] ST. THOMAS AQUINAS ON POLITICS AND ETHICS, *supra* note 84, at 70–71.

[97] *Id.* at 70.

[98] *Id.*

[99] *See id.*

[100] *See id.* at 70–71.

[101] *See id.* at 71.

[102] *See, e.g.*, Paul Ramsey, *Contemporary Problems in Thomistic Ethics: War and the Christian Conscience*, *in* ST. THOMAS AQUINAS ON POLITICS AND ETHICS, *supra* note 84, at 226, 227. While Aquinas' calculus does not explicitly address the issue of proportionality, this "double-effect" description suggests that such a calculus is necessary as a matter of course. *See also supra* note 94 (discussing Aquinas' prohibition against destroying more than military necessity requires). The most helpful modern definition of proportionality is found in Protocol I of the Geneva Conventions. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 52(5)(b), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; *see infra* note 308 and accompanying text.

defined as "a general and consistent practice of states followed by them from a sense of legal obligation."[103] The Statute of the International Court of Justice (ICJ) echoes that it is "evidence of a general practice accepted as law."[104] Thus customary international law forms, or ripens,[105] when the elements of general practice and acceptance as law exist.[106]

These elements, however well-recognized in theory, have proven elusive; particularly challenging has been creating a consensus for comprehensive definitions of "general" and "practice."[107] For "practice," the primary debate centers upon what evidence should be considered as legitimate.[108] For "general," the primary focus is upon how consistent or widespread such practice must be—both across the 194 states in the world, and over time.[109] Some scholars hold that "general practice must be general, but it need not be universal";[110] others insist that "the number of states involved in the custom-forming process" does not matter in determining whether a general practice exists.[111] The Third Restatement of Foreign Relation's view on this question is that:

> [t]he practice necessary to create customary law may be of comparatively short duration, but . . . it must be "general and consistent." A practice can be general even if it is not universally followed . . . but it should reflect wide acceptance among the states particularly involved in the relevant activity. Failure of a significant number of important states to adopt a practice can prevent a principle from becoming general customary international law though it might become "particular customary law" for the participating states.[112]

Despite its definitional challenges, customary international law is not as elusive as it may seem. One letter from 1841 has proven the sturdiest base for consensus on customary international law norms. Known as the *Caroline* incident, many scholars and historians view its doctrine as providing for nearly two centuries the essential guidelines of customary international law on the use of force.[113] The *Encyclopedic Dictionary of International Law* notes, "Under customary international law, it is generally understood that the correspondence between the USA and UK of 24 April 1841, arising out

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[103] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) [hereinafter RESTATEMENT OF FOREIGN RELATIONS]; *see also* JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 21, 23 (2005).

[104] Statute of the International Court of Justice art. 38, June 26, 1945, *available at* http://www.icj-cij.org/documents/index.php?p=4&p2=2&p3-0#CHAPTER_II..

[105] Custom is said to *ripen*, *crystallize* or *harden* into customary international law. *See, e.g.*, Major Nicholas F. Lancaster, *Occupation Law, Sovereignty, and Political Transformation: Should the Hague Regulations and the Fourth Geneva Convention Still be Considered Customary International Law?*, 189 MIL. L. REV. 51, 68 n.127 (2006) (ripens); Vincy Fon & Francesco Parisi, *International Customary Law and Articulation Theories: An Economic Analysis*, 2 B.Y.U. INT'L L. & MGMT. REV. 201, 206 n.5 (2006) (same); Leah M. Nicholls, *The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and Its 161 Rules of Customary International Humanitarian Law*, 17 DUKE J. COMP. & INT'L L. 223, 240 (2006) (crystallizes); Robert Cryer, *Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study*, 11 J. CONFLICT & SECURITY L. 239, 243 (2006) (same); Christiana Ochoa, *The Individual and Customary International Law Formation*, 48 VA. J. INT'L L. 119, 148–49 (2007) (hardens); Anthea E. Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 784 (2001) (same).

[106] RESTATEMENT OF FOREIGN RELATIONS, *supra* note 103, § 102(2); *see also* YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 5 (2004); Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AM. J. INT'L L. 817, 817 (2005) ("[T]hat, at least in the field of humanitarian law, customary law continues to thrive and to depend in significant measure on the traditional assessment of both state practice and *opinio juris*."). *But see* GOLDSMITH & POSNER, *supra* note 103, at 14–15, 84–106, 185–203, 225 (rejecting the traditional assumption that States comply with international law out of good faith instead of self-interest).

[107] *See* Michelle M. Kundmueller, *The Application of Customary International Law in U.S. Courts: Custom, Convention, or Pseudolegislation?*, 28 J. LEGIS. 359, 360–65 (2002).

[108] *See, e.g.*, GOLDSMITH & POSNER, *supra* note 103, at 23 ("There is little agreement about what type of state action counts as state practice."); Kundmueller, *supra* note 107, at 363.

[109] *See, e.g.*, GOLDSMITH& POSNER, *supra* note 103, at 24.

[110] Kundmueller, *supra* note 107, at 362.

[111] *Id.* (quoting KAROL WOLFKE, CUSTOM PRESENT IN INTERNATIONAL LAW 53 (2d. rev. ed. 1993)); *see also* GOLDSMITH & POSNER, *supra* note 103, at 24.

> It is practically impossible to determine whether 190 or so states in the world engage in a particular practice. Thus, customary international law is usually based on a highly selective survey of state practice that includes only major powers and interested states. . . . Increasingly, courts and scholars ignore the state practice requirement altogether.

Id.

[112] RESTATEMENT OF FOREIGN RELATIONS, *supra* note 103, at 21.

[113] Timothy Kearley, *Raising the Caroline*, 17 WIS. INT'L L. J. 325, 325 (1999).

of the *Caroline Incident* expresses the rules on self-defense."[114] Before examining the contents of that correspondence, a historical overview is in order.

During the 1837 Canadian Rebellion against Great Britain, many U.S. citizens sympathized with Canada.[115] In December 1837, a group of armed men, including several U.S. citizens, seized Navy Island, located on Canada's side of the Niagara River and began to use the island as a base from which to attack British forces.[116]

On 29 December 1837, the *Caroline*, a seized Navy Island ship, made several trips between New York and Canada, carrying arms and fighting men.[117] The commander of the local British forces, Colonel Alan McNab, determined that he would attack the ship once it reached Canadian territory.[118] However, by nightfall the *Caroline* had managed to return again to the United States.[119] Despite this turn of events, Colonel McNab decided to continue with his plan to attack the ship, deeming it a threat to his forces.[120] The attack met no resistance from those on board,[121] which included twenty-three American citizens who had requested permission to sleep on the ship due to their inability to find lodging at a nearby tavern.[122] Two men on board were killed, and the British burned the ship and sent it over Niagara Falls.[123]

Then-Secretary of State Daniel Webster responded to the incident by sending a series of letters to his British counterpart, Lord Ashburton.[124] Webster's letters form the *Caroline* doctrine—the basis for customary international law governing the use of force in self-defense.[125]

To Britain's claims of self-defense,[126] Webster responded that the use of force against another nation is permissible only when the attacking state can "show a necessity of self-defense, *instant, overwhelming*, leaving *no choice of means*, and *no moment for deliberation*."[127] Even if such necessity exists, Webster argued that the principle of *proportionality* still applies. The attacking state also must show how,

> even supposing the necessity of the moment authorized them to enter the territories of the United States at all, [that they] did nothing *unreasonable* or *excessive*; since the act justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it. It must be strewn that admonition or remonstrance to the persons on board the "*Caroline*" was impracticable, or would have been unavailing; it must be shown that daylight could not be waited for; that there could be no attempt at discrimination, between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her, in the darkness of night, while moored to the shore, and while unarmed men were asleep on board, killing some, and wounding others . . . .[128]

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[114] *Id.* at 329 (quoting ENCYCLOPEDIC DICTIONARY OF INTERNATIONAL LAW 361 (Clive Parry et. al. eds., 1988)).

[115] *Id.* at 328.

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] Louis-Phillipe Rouillard, *The Caroline Case: Anticipatory Self-Defense in Contemporary International Law*, 1 MISKOLC J. INT'L L. No. 2, 104 (2004), *available at* http://www.uni-miskolc.hu/~wwwdrint/20042rouillard1.htm.

[123] Kearley, *supra* note 113, at 328.

[124] *Id.*

[125] *Id.* at 328–29.

[126] *Id.* at 325. It is interesting to note the many parallels between the United Kingdom claims to the United States in 1837−1841, and the Israel claims to Lebanon in 2006.

[127] Letter from Sec'y of State Daniel Webster to Lord Ashburton (Apr. 24, 1841) [hereinafter Webster Letter] (emphasis added), *available at* http://avalon.law.yale.edu/19th_century/br-1842d.asp.

[128] *Id.* (emphasis added).

Hence, the *Caroline* incident introduced the customary international law requirements of weighing *necessity* and *proportionality*.[129] For the use of force to pass the "necessity" test, articulated Webster, an immediate and overwhelming threat unequivocally must exist, with no other option but force available in response. The mere possibility, even the *strong* possibility, of a threat is not enough to create the right.[130]

That Webster did not stop with the necessity test is important to recognize, particularly when we subsequently analyze the 2006 Israel-Lebanon War.[131] The existence of necessity alone is not enough to justify using whatever methods a state has at its disposal to defend itself. Instead, the *actions* of the state in its use of military force matter, and must be tempered to ensure no needless loss of innocent life. The principle of proportionality applies. Unreasonable or excessive force, or force used prematurely without considering other options, delegitimizes a state's actions, even when necessity is present. In the *Caroline* incident, innocent men lost their lives. Other options were available to the British government. Britain violated the proportionality principle through its conduct *within* its decision to attack, and thus violated international law.

The principles espoused in the *Caroline* incident have continued for nearly two centuries to be the "universally accepted standard for lawful self-defense."[132] As with the just war theory, many scholars view the principle of proportionality as overlapping the distinction between *jus ad bellum* and *jus in bello*, because it includes both the initial decision to resort to arms, and the conduct of hostilities once that decision is made:[133]

> "Proportionality" in the self-defense context could mean either that the intensity of force used in self-defense must be about the same as the intensity defended against, or it could mean that the force, even if it is more intensive than that, is permissible so long as it is not designed to do anything more than protect the territorial integrity or other vital interests of the defending party.[134]

V. United Nations Charter

Article 2(4) of the U.N. Charter provides, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[135] Since 1945, this provision has been the core guiding principle for states' use of military force.[136] The drafters' choice of the term "use of force" instead of "war" was deliberate.[137] It reflected their broad intent to outlaw *any* type of military action against another state, not simply to outlaw *declared war*.[138] The negotiating history of the U.N. Charter further reveals that "Article 2(4) was intended to be a comprehensive prohibition on the use of force by one state against the other."[139]

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[129] Even for those scholars who have argued for limiting the *Caroline* doctrine to similar circumstances, certainly the crises between Israel and Lebanon, and Israel's decision to attack Lebanon under the self-defense argument, is such a "similar circumstance," meriting the application of the *Caroline* doctrine. *See* Kearley, *supra* note 113, at 325 (advocating a more limited view of the applicability of the *Caroline* doctrine).

[130] Webster Letter, *supra* note 127 (emphasis added).

[131] *See infra* Part VI.C (analyzing whether Israel violated the *jus in bello* customary international law principles of necessity and proportionality).

[132] Ryan Schildkraut, *Where There are Good Arms, There Must Be Good Laws: An Empirical Assessment of Customary International Law Regarding Preemptive Force*, 16 MINN. J. INT'L L. 193, 199 (2007). Presumably, the men killed were U.S. citizens and perhaps innocent of any wrongdoing on their part; either way, Webster seems particularly concerned with the fact that at the time of the attack, they were unarmed.

[133] Frederic L. Kirgis, *Some Proportionality Issues Raised by Israel's Use of Armed Force in Lebanon*, 10 ASIL INSIGHT, No. 20, Aug. 17, 2006, *available at* http://www.asil.org/insights/2006/08/insights060817.html.

[134] *Id.*

[135] U.N. Charter art. 2, para. 4.

[136] Stephanie Bellier, *Unilateral and Multilateral Preventive Self-Defense*, 58 ME. L. REV. 507, 508 (2006). Some scholars have asserted that Article 2(4) was "revolutionary" because in outlawing the use of force, it prohibited what people always had assumed was a natural part of life, namely conflict and war. *See id.* However, that position is somewhat untenable, as evidenced by the two exceptions to Article 2(4) within the Charter itself. Furthermore, that war was to be accepted as a normal part of life is not found in the just war theory, as evidenced by Aquinas' question as to whether it "is . . .*always* sinful" to wage war, indicating that war is an abnormality to be avoided in most cases.

[137] Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HARV. INT'L L. J. 41, 42 (2002); *see* Albrecht Randelzhofer, *Article 51*, *in* 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, 788, 790 (Bruno Simma et al. eds., 2d ed. 2002). The Briand-Kellogg Pact in 1928 had outlawed war in Article I; however, Article 2(4) expanded the prohibitions on the use of force to include all types of conflicts. *Id.* at 789.

[138] Murphy, *supra* note 137, at 42.

[139] *Id.* at 42–43 (citations omitted).

The Charter provides two exceptions to this general prohibition against the use of force. The first exception is U.N. Security Council authorized action pursuant to Chapter VII; the second is the inherent right to self-defense under Article 51.

A. U.N. Security Council Authorized Action Pursuant to Chapter VII

Regarding the first exception, the Security Council may authorize a state to use military force under Chapter VII in order to "maintain or restore international peace and security."[140] Such authorization, from the state's perspective, is unassailable, as the Security Council explicitly approves the use of military force, and as member states have agreed to support the Security Council's decisions.[141]

B. Inherent Right to Self-Defense Under Article 51

Because U.N. Security Council authorizations to use military force are relatively rare,[142] Article 51, the second exception, has "become the pivotal point upon which disputes concerning the lawfulness of the use of force in inter-state relations usually concentrate."[143] Article 51 provides:

> 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 . . . .[144]

Article 51, therefore, allows for the "inherent right" of self-defense if "an armed attack occurs." A strict textual reading of the article places three conditions on the use of force by an individual state.[145] First, an individual state's use of force is permitted only when an "armed attack" on its territory has occurred.[146] Second, the Security Council is to supervise any state's use of force, evidenced by the requirement for states to "immediately report" their use of force to the Security Council.[147] Third, the right to use force is temporary; it terminates when the Security Council becomes involved by taking "measures necessary to maintain international peace and security."[148]

The continuing challenge of Article 51, particularly in the post 9/11 world, lies in determining what constitutes an armed attack,[149] and whether the article applies to attacks by non-state actors (as opposed to applying exclusively to attacks by other

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[140] U.N. Charter art. 42.

[141] *See id.* arts. 25, 48(1), 49.

[142] The U.N. Security Council has authorized the use of broad military force only twice in its history. *See* Jutta Brunnee, *The Use of Force Against Iraq: A Legal Assessment*, 59 BEHIND THE HEADLINES, No. 4 (2002); S.C.Res. 83, U.N. Doc. S/RES/83 (June 27, 1950) (authorizing military force in Korea); S.C. Res. 678, U.N. Doc. S/RES/0678 (Nov. 29, 1990) (authorizing military force to eject Iraq from Kuwait). The U.N. Security Council has also authorized force in a few peacekeeping missions in the 1990s (e.g., Somalia, Haiti, Rwanda, and Bosnia). However, as peacekeeping missions, they differ significantly from the nature of the conflicts that we are examining here. *See* Lawyers' Comm. on Nuclear Policy, Inc., *The United Nations Charter and the Use of Force Against Iraq* (Oct. 2, 2002), *available at* http://lcnp.org/global/Iraqstatemt.3.pdf.

[143] Randelzhofer, *supra* note 137, at 790; *see infra* Part V.B.1 (discussing Judge Simma's Commentary to the U.N. Charter).

[144] U.N. Charter art. 51.

[145] Bellier, *supra* note 136, at 513. Judge Simma interprets a fourth requirement in Article 51, that "the State acting in self-defense must observe the principle of 'proportionality.'" Randelzhofer, *supra* note 137, at 790. While it is true that a state must observe this principle, it is the view of the present author that this principle is not found in Article 51, but rather in the just war theory and customary international law.

[146] U.N. Charter art. 51.

[147] *Id.*

[148] *Id. But see* Randelzhofer, *supra* note 137, at 804. Claiming that

> Since the [Security Council] has, for a long time, been far from performing its intended function, self-defence has become the regular course of action. Therefore, the restriction envisaged by the reporting duty, as well as the related duty to discontinue defensive measures, has so far been almost devoid of practical significance.

Id.

[149] Ironically, or perhaps sagely, the U.N Charter provides no definition of "armed attack." While the Charter uses the term "attack" or "aggression" in articles 1, 39, 51, and 53, it never defines either term's meaning. *See id.* at 794. *But see* G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (Dec. 14, 1974); *infra* note 155 and accompanying text (U.N. General Assembly Resolution defining *aggression*).

states).[150] Put another way, can the actions of a non-state actor trigger responding in self-defense against another sovereign state, and if so, under what circumstances? Several sources assist us in addressing these issues, and to these sources we now turn.

1. Commentary on the United Nations Charter and Nicaragua

Judge Bruno Simma's Commentary is widely cited as the preeminent interpretive authority for the U.N. Charter.[151] In his work, Judge Simma's examination of Article 51 includes exploring the meaning of armed attack, and the level of responsibility and culpability that a state bears for the actions of non-state actors within its borders.[152] Much of his analysis centers upon the ICJ's decision in *Nicaragua v. United States*.[153] In this section, we will examine Judge Simma's Commentary, particularly in light of his interpretation of the *Nicaragua* case.

The *Nicaragua* court provided no definition of armed attack, and no source prior to *Nicaragua* had done so. However, the ICJ noted in its opinion, "There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks."[154] The ICJ then provided several examples of activities that would constitute armed attacks, stipulating that such attacks include not only cross-border actions by regular forces, but also a state's participation in the use of force by "military organized unofficial groups," as reinforced by U.N. General Assembly Declaration 3314 (1974), *Definition of Aggression*.[155] Explained the *Nicaragua* court:

> [I]t may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also the "sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of

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[150] Ruys, *supra* note 4, at 274.

[151] *See* Andreas L. Paulus, *Professor Bruno Simma to be Judge at the International Court of Justice in the Hague,* 4 GERMAN L.J. 2 (Feb. 1, 2003); *The Court: All Members*, INT'L COURT OF JUSTICE, *available at* http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=2 (last visited Mar. 29, 2009).

[152] Randelzhofer, *supra* note 137, at 788–806.

[153] In the *Nicaragua* case, the Court addressed the issue of the United States providing assistance to Nicaraguan "contras" (fighting to overthrow the established Nicaraguan government) and the United States' position that it was lawfully acting in collective self-defense. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. LEXIS 4, at *18, *33–34 (June 27). Nicaragua brought suit against the United States at the International Court of Justice, alleging that throughout the early 1980s, the United States had assisted the contras by providing military equipment and tactical information to assist them in their struggle. *Id.* at *4, *18. The crowning frustration, according to Nicaragua, was that in early 1984, the United States had assisted the contras in laying mines in several Nicaraguan harbors, resulting in two lives lost, fourteen people injured, and twelve fishing vessels destroyed, all without prior warning. *Id.* at *82–83. The United States, though asserting that the Court had no jurisdiction to hear the case, submitted a written justification for its actions: that it was acting in collective self-defense of neighboring El Salvador because Nicaragua was aiding guerrillas in that country. *Id.* at *8, *21. The Court determined that the United States' use of force was both out of scale to the threat, and continued after any perceived threat had been neutralized. *Id.* at *262. Thus the court ruled that the United States had violated the customary international law principle of proportionality. *Id.*

[154] *Id.* at *215.

[155] *Id.*; *see* G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (Dec. 14, 1974).

> Article 1. Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition. . . .
>
> Article 3. Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:
>
> (*a*) The invasion or attack by the armed forces of a State of the territory of another State . . . ;
>
> (*b*) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
>
> . . . .
>
> (*d*) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State . . . ;
>
> . . . .
>
> (*g*) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Id. arts. 1, 3. Regarding the ICJ's decision to refer to a definition of "aggression" when providing an example of "armed attack": "Even though the GA's Definition of Aggression does not as such define the notion of 'armed attack,' its Art. 3 does in fact give some useful indications on how to interpret this term." Randelzhofer, *supra* note 137, at 796.

such gravity as to amount to" . . . an actual armed attack conducted by regular forces, "or its substantial involvement therein."[156]

Judge Simma notes, "The ICJ strongly hints that it does not see any difference in content between the term 'armed attack' under customary international law and that used in Art. 51 of the U.N. Charter."[157] The key for determining whether an activity qualifies as an armed attack is whether "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."[158]

The concept of scale and effects is critical. The Court in *Nicaragua* was not suggesting that should an attack happen on a frontier, it is *ipso facto* not an armed attack.[159] Instead, in determining whether an armed attack has occurred, the issue is the level of force used and the result of that force (i.e., its "scale and effects"), not the location of the incident itself.[160] "An armed attack must involve at least the use of force producing (or liable to produce) serious consequences, epitomized by territorial intrusions, human casualties or considerable destruction of property."[161]

Using this scale and effects test to determine the level of force does not permit a non-state actor to stay below the threshold of an armed attack simply by launching a series of smaller attacks over an extended period of time, none of which individually might qualify as an armed attack. Instead, a series of incidents may be accumulated over time to determine whether the threshold of armed attack has been reached.[162] This theory is known as the *Nadelstichtaktik* (Needle Prick) Doctrine or the "accumulation of events theory."[163] According to this doctrine, "each specific act of terrorism, or needle prick, though it may not independently qualify as an armed attack, could, taking into consideration the totality of incidents, amount to an armed attack entitling the victim state to respond with armed force."[164]

To determine whether to hold a *state* liable for the activities of a non-state entity, whether those activities consisted of one large-scale attack or a series of smaller incidents, the attacked state must also show "substantial involvement" on the part of the sending state.[165] The Court in *Nicaragua* indicated that substantial involvement must be interpreted restrictively.[166] "[I]t did not consider assistance for rebels in the form of the provision of weapons or logistical support to suffice for the assumption of an 'armed attack.'"[167] Thus, under the ICJ's rationale in *Nicaragua*, most demonstrations of aggression by non-state actors do not rise to the level of an armed attack; instead, the scale and effects of the act of aggression must be restrictively weighed in determining whether to respond with force.

Judge Simma's Commentary then takes an interesting turn, under the lens of a post 9/11 world. While acknowledging that, prior to 9/11, he supported the view of the ICJ in *Nicaragua*, that an attacked state must demonstrate substantial involvement in a non-state actor's aggression, he since has changed his position. Judge Simma now asserts that due to the

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[156] Nicar. v. U.S., at *215 (quoting G.A. Res. 3314, art 3, para. (g), U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1974)).

[157] Randelzhofer, *supra* note 137, at 800.

[158] *Id.* (emphasis added). A "mere frontier incident" is the paradigm of an unlawful use of force violative of Article 2(4), but not rising to the level of an armed attack justifying actions in self-defense. *See* MICHAEL N. SCHMITT, COUNTER-TERRORISM AND THE USE OF FORCE IN INTERNATIONAL LAW 18 (2002).

[159] Ruys, *supra* note 4, at 273.

[160] *Id.*

[161] *Id.* at 272 (citing YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 193 (4th ed. 2005)).

[162] *See id.* (citing D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 898 (5th ed., Sweet & Maxwell, 1998)); Michael Kelly, *Forum: Israel v. Lebanon: Article 51, Self-Defense, and Preemptive Strikes*, JURIST, July 29, 2007, *available at* http://jurist.law.pitt.edu/forumy/2006/07/israel-v-hezbollah-article-51-self.php.

[163] Victor Kattan, *Israel, Hezbollah, and the Conflict in Lebanon: An Act of Aggression or Self-Defense?*, 14 HUM. RTS. BR. 26, 27 (2006). German international lawyers coined the term "Nadelstichtaktik" for this doctrine at least thirty-five years ago. *See* Yehuda Z. Blum, *Operation Kadesh: A Legal Perspective*, *in* THE SUEZ-SINAI CRISIS, 1956: RETROSPECTIVE AND REAPPRAISAL 230, 233 (Moshe Shemesh & Selwyn Ilan Troen eds., 2007) (citing P. Wittig, *in Der Aggressionsbegriff im Internationalen Sprachgebrauch*, *in* VÖLKERRECHTLICHES GEWALTVERBOT UND FRIEDENSSICHERUNG 33, 55 (W. Schaumann ed., 1971)).

[164] Kattan, *supra* note 163, at 27 (citing Norman Menachem Feder, *Reading the UN Charter Connotatively: Toward a New Definition of Armed Attack*, 19 N.Y.U. J. INT'L L. & POL. 415 (1986–1987)).

[165] "Sending state" is usually a term of art used in international agreements regarding liability for the actions of government officials, such as military servicemembers. However, as used in this context, it refers to the state from which the attacks emanate, or from which the attackers operate.

[166] Randelzhofer, *supra* note 137, at 801.

[167] *Id.*

advent and spread of terrorism, the ICJ's statement in *Nicaragua* is far "too sweeping" and requires "further clarification."[168] Otherwise, a loophole exists in Article 51, allowing state actors to provide indirect support to terrorists, perhaps just below the substantial involvement level, threatening another state's safety and "eroding the very purpose of this rule."[169] Incorporating both the notion of armed attack and of state culpability for a non-state actor's activities, Judge Simma concludes:

> Acts of terrorism committed by private groups or organizations as such are not armed attacks in the meaning of Art. 51 of the UN Charter. But if large scale acts of terrorism of private groups are attributable to a State, they are an armed attack in the sense of Art. 51. But they are also attributable to a State if they have been committed by private persons and the State has encouraged these acts, has given its direct support to them, planned or prepared them at least partly within its territory, *or was reluctant to impede these acts.*[170]

Judge Simma is not alone in his position. Some scholars assert that to prohibit the use of force against non-state actors unduly restricts Article 51's meaning.[171] These advocates point to the prohibition against the use of force in Article 2(4), noting that its language explicitly refers to military action by one state against another *state*. Article 51's self-defense language contains no such restrictive language requiring both parties to be state actors. Had the drafters wished the right of self-defense to apply only to state actors, the argument goes, they would have put that language in Article 51, as they did in Article 2(4).[172]

A team of international law scholars has concluded similarly, asserting that "Article 51 is not confined to self-defence in response to attacks by states. The right of self-defence applies also to attacks by non-state actors."[173] In such cases, however, the attack by the non-state actor must be "large scale;"[174] if the attacked state intends to enter the territorial space of another state, "it must be evident that that state is unable or unwilling to deal with the non-state actors itself," and this force must be both necessary and proportional.[175]

2. Security Council Resolutions 1368 and 1373

We have examined the strict view of the *Nicaragua* Court on state responsibility, as well as Judge Simma's newly-revised and more expansive theory. We now will categorize the three primary theories within the spectrum of belief as to when a non-state actor's aggression may be imputed to a state.[176] To do so, we first must consider the significant effect of U.N. Security Council Resolutions 1368 and 1373.

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[168] *Id*. at 800. In his separate opinion in *Democratic Republic of Congo v. Uganda*, Judge Simma notes, "From the *Nicaragua* case onwards the Court has made several pronouncements on questions of use of force and self-defence which are problematic less for the things they say than for the questions they leave open, prominently among them the issue of self-defence against armed attacks by non-State actors." Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 1, 3 ¶ 9 (Dec. 19) (separate opinion of Judge Simma).

[169] Randelzhofer, *supra* note 137, at 801.

[170] *Id.* at 802 (emphasis added).

[171] *See* Josef L. Kunz, Editorial Comments, *Individual and Collective Self-Defence in Article 51 of the Charter of the United Nations*, 41 AM. J. INT'L L. 872, 878 (1947) ("The text of the Article does not explicitly restrict the scope of 'armed attacks' to acts of state agents, yet it has traditionally been interpreted this way."). *But see* Ruys, *supra* note 4, at 274 (citing J. Brunnee, *The Security Council and Self-Defence: Which Way to Global Security*, *in* THE SECURITY COUNCIL AND THE USE OF FORCE 122 (Neils Blokker & Nico Schrijver eds., 2005)).

[172] *See* Murphy, *supra* note 137, at 51; Ruys, *supra* note 4, at 274 (citing Ian Brownlie, *The Use of Force in Self-Defence*, 1961 BRIT. Y.B. INT'L L. 183, 245; Pierluigi L. Zanardi, Indirect Military Aggression, *in* THE CURRENT LEGAL REGULATION ON THE USE OF FORCE 111, 111 (Antonio Cassese ed., 1986)).

[173] Elizabeth Wilmshurst, *Principles of International Law on the Use of Force by States in Self-Defense* 11(Chatham House, ILP WP 05/01, Oct. 2005), *available at* http://www.chathamhouse.org.uk/files/3278_ilpforce.doc. The Chatham House is an independent think tank on international affairs and is composed of senior international law experts from a variety of fields. Participants in this statement included at least thirteen of such scholars. *Id*. at 3.

[174] *Id.*

[175] *Id.*

[176] The author has categorized and labeled these theories in an attempt to explain them in a more orderly fashion.

The U.N. Security Council passed Resolutions 1368 and 1373 within days of 9/11. Directly addressing the terrorist attacks, Resolution 1368 affirmed combating "by all means threats to international peace and security caused by terrorist acts."[177] The Security Council proclaimed that it regarded "any act of international terrorism, as a threat to international peace and security," endorsed "all necessary steps . . . to combat all forms of terrorism," and recognized "the inherent right of individual or collective self-defense in accordance with the Charter."[178] Resolution 1373 reaffirmed the rhetoric of Resolution 1368, and exhorted all states to "[r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, . . . deny safe haven to those who finance, plan, support, or commit terrorist acts," and "prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens."[179] While these Resolutions did not authorize the United States to use military force against terrorists,[180] "they both affirmed, in the context of such incidents, the inherent right of individual and collective self-defense and the need 'to combat by all means' the 'threats to international peace and security caused by terrorist acts.'"[181]

Many scholars, and some members of the ICJ, have asserted that these resolutions taken together add a "completely new element" to self-defense, one found neither in Article 51 nor in *Nicaragua*'s examples of armed attack.[182] The new element is the understanding that attacks by *non-state* actors—not only attacks by states—may trigger the right to use force in self-defense.[183] According to Judge Kooijmans in the *Wall* opinion:[184]

> This new element is not excluded by the terms of Article 51 since this conditions the exercise of the inherent right of self-defense on a previous armed attack without saying that this armed attack must come from another State even if this has been the generally accepted interpretation for more than 50 years. The Court has regrettably by-passed this new element, the legal implications of which cannot as yet be assessed but which marks undeniably a new approach to the concept of self-defense.[185]

What remains, despite this potentially new element that U.N. Security Council Resolutions 1368 and 1373 introduce, is the requirement for some nexus, some level of "involvement" to exist, between the state and the non-state actors responsible

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[177] S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001). Since this determination by the U.N. Security Council was in the preambular paragraphs (or *chapeau*) of Resolution 1368, and since the U.N. Security Council was not taking action pursuant to Chapter VII, this language cannot be construed as specifically authorizing the use of military force either in response to the 9/11 attacks or to combat terrorism.

[178] *Id.*

[179] S.C. Res. 1373, U.N. Doc. S/RES/1373, Sept. 28, 2001. Although acting under Chapter VII of the U.N. Charter, the U.N. Security Council was careful not to "authorize all necessary means" in combating terrorism, which would have authorized the use of military force to do so. The closest the U.N. Security Council came to authorizing military force in Resolution 1373 was in paragraph 2(b) in which it "[*d*]*ecides also* that all States shall . . . Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information." *Id.* para. 2(b) (emphasis added).

[180] *See supra* notes 177–79 and accompanying text (citing specific language in U.N. Security Council Resolutions 1368 and 1373).

[181] Murphy, *supra* note 137, at 48 (quoting S.C. Res. 1368, *supra* note 177, pmbl.; S.C. Res. 1373, *supra* note 179, pmbl.).

[182] *See, e.g.*, Iain Scobbie, *ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: Words My Mother Never Taught Me—"In Defense of the International Court,"* 99 AM. J. INT'L L. 76, 81 (Jan. 2005); Ruys, *supra* note 4, at 279 (citing Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131 (July 9) (dissenting opinions of Judge Kooijmans and separate opinion of Judge Buergenthal));.

[183] Michael N. Schmitt, Charles H. Stockton Prof. of Int'l Law, U..S. Naval War College, 56th Graduate Course Visiting Lecture at TJAGLCS, Charlottesville, Va. (Feb. 22, 2008) [hereinafter Schmitt Lecture].

[184] The *Wall* opinion determined whether Israel could erect a protective wall within the Palestinian Occupied Territory. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131 (July 9). The ICJ found that because Israel was exercising control over this territory, and hence this situation did not involve a foreign invasion, Israel could not invoke Resolutions 1368 and 1373. *Id.* Interestingly, the ICJ in *Wall* further found that Article 51 recognizes a right to self-defense only in the case of armed attack by one state against another state. *Id.* In Judge Kooijmans' dissent to this opinion, he stated that the Court's finding was an aberration from the clear direction of international law since 9/11. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 229–30 ¶ 35 (July 9) (dissenting opinion of Judge Kooijmans); *see also* Wilmshurst, *supra* note 173, at 11 (asserting that it is impossible for the *Wall* opinion to limit the right of force in self-defense to attack from other states, despite the Court's efforts to do so; Article 51 is not that restrictive). "There is nothing in the text of Article 51 to demand, or even to suggest, such a limitation." *Id.*; *see also* Judge Simma's response to the *Wall* opinion: "Security Council resolutions 1368 (2001) and 1373 (2001) cannot but be read as affirmations of the view that large-scale attacks by non-State actors can qualify as 'armed attacks' within the meaning of Article 51." Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 1, 3 ¶ 11 (Dec. 19) (separate opinion of Judge Simma).

[185] Scobbie, *supra* note 182, at 81 (quoting Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 229–30 ¶ 35 (July 9) (dissenting opinion of Judge Kooijmans)).

for the attack.[186] The significance of these Resolutions, however, should not be underestimated. Resolutions 1368 and 1373 echo Judge Simma's position that a non-state actor's attack *can* trigger a state's right to respond in self-defense, including the right to use military force against the *state* harboring, aiding, or potentially, failing to prevent, the terrorist attacks.[187]

3. Three Theories of State Responsibility

The U.N. Security Council Resolutions 1368 and 1373 expanded the spectrum of opinions regarding state responsibility. To the emerging theories of the level of involvement that potentially trigger the use of military force we now turn. While scholars in the past have not articulated these theories as they are described below, the ideas supporting these three views are well-represented on the continuum of opinion regarding when a state may be held liable for the actions of non-state actors.

a. View #1: Effective Control

Under the "effective control" theory, if a state can attribute the acts of non-state actors to the state from whose territory the attacks were launched, then the difficulty of using force against that state is surmounted.[188] The challenge, however, is "attributing" the acts to the state itself. Proponents of this position read the Draft Article 8 of the General Assembly's Responsibility of States for Internationally Wrongful Acts strictly[189] which asserts that the conduct of a non-state actor "'shall be considered an act of a State under international law' if the actor 'is in fact acting *on the instructions of, or under the direction and control of*, that State.'"[190] Under this relatively high standard, it is difficult to attribute the actions of a non-state actor to a state.[191] For example, says one scholar, in Afghanistan the Taliban "essentially made Afghanistan's territory available to Al Qaeda."[192] However, this action is not enough to demonstrate that the Taliban government had effective control over Al Qaeda, and under this standard the United States was not justified to attribute responsibility for Al Qaeda's 9/11 attacks to the Taliban government in Afghanistan.[193]

b. View #2: Harboring and Assisting

A less restrictive view than that of effective control is that of harboring and assisting. Under this view, a state can be held liable for a non-state actor's acts when the state "has a role in organizing, coordinating or planning the military actions of a military group."[194] Many legal scholars now accept the notion that the right of self-defense "includes military responses against bases of non-state actors located in another state, from which an attack has been launched or directed, provided that the latter state *willingly harbored* the non-state group."[195] Such was the United States' primary argument, for instance, for

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[186] *See, e.g.*, Allen S. Weiner, *The Use of Force and Contemporary Security Threats: Old Medicine for New Ills*, 59 STAN. L. REV. 415, 437 (2006). For Judge Simma, as well as under the just war theory, this nexus could be as simple as the state's "reluctance to impede" the acts of non-state actors on its territory. Randelzhofer, *supra* note 137, at 802.

[187] *See* Ruys, *supra* note 4, at 282–83 (asserting that "harboring" a non-state actor is the threshold requirement for using force against the state, and that such "harboring" is not mere acquiescence, but also assistance to the non-state actor); Weiner, *supra* note 186, at 431–32 (asserting that the threshold is much higher; not only does it include "assisting," but also the sponsoring state having "effective control" over the operations of the non-state actor); Interview with Michael N. Schmitt, Charles H. Stockton Prof. of Int'l Law, U.S. Naval War College, at TJAGLCS, in Charlottesville, Va. (Feb. 22, 2008) [hereinafter Schmitt Interview] (differentiating between a higher level of state involvement needed to justify taking actions in self-defense against the state, versus a lower threshold for taking actions in self-defense against the terrorists themselves, albeit in the other state's territory).

[188] *See* Weiner, *supra* note 186, at 431.

[189] Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Draft Article 8, G.A. Res. 56/83, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10(SUPP) (Dec. 12, 2001).

[190] Weiner, *supra* note 186, at 431 (emphasis added) (quoting G.A. Res. 56/83, *supra* note 189, draft art. 8, at 103). *Contra* Schmitt Interview, *supra* note 187 (arguing that the draft articles on state responsibility were intended to resolve the legal liability of a state in a court of law, *not* as a justification for using military force against that state).

[191] *See infra* notes 294–95 and accompanying text (arguing that this view of state responsibility is overly-restrictive, since if a non-state actor is effectively controlled by a state, then it is effectively, if not actually, an *instrument* of that state—this theory essentially defines away the definition of a non-state actor).

[192] Weiner, *supra* note 186, at 433; Schmitt Interview, *supra* note 187.

[193] Weiner, *supra* note 186, at 432–33.

[194] *Id.* at 432 (citing Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, at 131 (July 15, 1999), *available at* http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf).

[195] Ruys, *supra* note 4, at 282 (emphasis added) (citing MICHAEL BYERS, WAR LAW 67 (2005)); Randelzhofer, *supra* note 137, at 801. *Contra* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. LEXIS 4, at *215 (June 27).

intervening militarily in Afghanistan. Namely, the United States claimed that the Taliban government had harbored Al Qaeda terrorists and therefore would be held liable for Al Qaeda's attacks on 9/11.[196]

c. View #3: State Unwilling or Unable to Prevent

A more liberal reading of Draft Article 9 on Responsibility of States for Internationally Wrongful Acts[197] presents this view.[198] While Draft Article 8 imputes state responsibility to those governments exercising effective control over the non-state actor, Draft Article 9, somewhat ambiguously, adds:

> The conduct of a person or group of persons shall be considered an act of the State under international law if the person or group of persons is in fact exercising elements of governmental authority in the absence *or default* of the official authorities and in circumstances such as to call for the exercise of those elements of authority.[199]

Some scholars have interpreted this article to purport that if a government is unable to control the actions of its non-state actors (i.e., "defaults" on its state responsibility[200] because it has lost control), and less forceful measures—such as diplomacy—have been exhausted, then the victim state may attribute responsibility and liability to that state and consider the attack of the non-state actor as an attack from the state itself.[201]

C. Do the Just War Theory and Customary International Law Survive the U.N. Charter?

The advent of the U.N. Charter in 1945, which addresses the lawful use of force in self-defense,[202] trumps neither the just war theory nor customary international law. Instead, the just war theory, customary international law, and the U.N. Charter are best viewed as a trifecta, each serving a vital purpose in the grand scheme of regulating war, and each reliant on the other, to some extent, for its legitimacy. This section analyzes how, despite the existence of "black letter law" in the U.N. Charter governing the use of force, both the just war theory and customary international law still hold sway.

1. Just War Theory

Although some scholars claim that the U.N. Charter has eclipsed the just war theory,[203] the just war tradition retains its viability in the post-Charter world. Political and international leaders continue to employ just war language in their rhetoric regarding use of force.[204] Scholars and theorists continue to examine military actions under the just war paradigm.[205] The

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[196] *See*, *e.g.*, Bellier, *supra* note 136, at 510.

[197] This draft article is a part of the same International Law Commission report that created Draft Article 8, discussed previously. *See supra* notes 189–90 and accompanying text.

[198] G.A. Res. 56/83, *supra* note 189, Draft Art 9.

[199] *Id.* (emphasis added).

[200] A perhaps related concept to this notion is the "responsibility to protect." Under this theory, a state has primary responsibility to protect its citizens. However, if a population within a state is suffering serious harm, and the state is "unwilling or unable to halt or avert it," then the international community is responsible for stepping in and protecting those citizens, overriding the principle of nonintervention. *See* THE RESPONSIBILITY TO PROTECT, REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (Dec. 2001), *available at* http://www.iciss.ca/report2-en.asp#synopsis.

[201] *See, e.g.*, Ruys, *supra* note 4, at 290. *Contra* Schmitt Interview, *supra* note 187 (arguing that the draft articles on state responsibility were intended to resolve the legal liability of a state in a court of law, *not* as a justification for using military force against that state).

[202] *See* U.N. Charter art. 51.

[203] *See, e.g.*, Yoram Dinstein, *The Rule of Law in Conflict and Post-Conflict Situations: Comments on War*, 27 HARV J.L. & PUB. POL'Y 877, 879–80 (2004); Schmitt Interview, *supra* note 187.

[204] *See, e.g.*, President George W. Bush, Remarks on the War on Terror at Fort Bragg (June 28, 2005) [hereinafter Bush Remarks at Bragg] (transcript available at http://thinkprogress.org/2005/06/28/breaking-full-text-of-bush-speech); President George W. Bush, Ultimatum to Iraq (Mar. 18, 2003); *see infra* notes 207–12 and accompanying text.

[205] *See, e.g.*, Michael Walzer, Presentation at Radboud Universiteit Nijmegen: War and Death: Reflecting on the Meaning of Just War Theory Today (2007). MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS (Basic Books 2000) (1977); PAUL RAMSEY, WAR AND THE CHRISTIAN CONSCIENCE: HOW SHOULD MODERN WAR BE CONDUCTED JUSTLY? (Duke Univ. Press 1961); *see infra* notes 213–18 and accompanying text.

just war tradition continues to provide the moral compass by which to analyze issues critically and to make decisions regarding the use of force—or at least to explain those decisions to the civilian population.[206]

a. Rhetoric from Political/International Leaders

"Whenever we argue about aggression or military intervention or the conduct of battles, we regularly use the language of just war."[207] Michael Walzer's recent assertion has proven itself repeatedly since the advent of the U.N. Charter, particularly within the last few years. During the Kosovo conflict, British Prime Minister Tony Blair unequivocally declared, "This is a just war, based not on any territorial ambitions but on values."[208] In the build-up to and aftermath of the invasion of Iraq in 2003, President George Bush and his administration regularly employed just war rhetoric, specifically that introduced by Saint Thomas Aquinas, in justifying a preemptive strike on the Iraqi Army and Saddam Hussein.[209] Both George Bush and John Kerry used the principle of "last resort" in their debates prior to the 2004 Presidential elections.[210] In 2006, then-Secretary General of the United Nations, Kofi Annan, on the U.N. General Assembly floor, justified Israel's decision to invade Lebanon under the just war tradition, proclaiming that Israel had a right to defend itself and was fighting a just war against Lebanon.[211]

Thus, despite the U.N. Charter's preeminence, politicians and other international leaders routinely employ just war language. The just war principles remain the moral imperative for the use of force. Perhaps leaders use this rhetoric because the principles of just war, with inspirational ideas of morality and justice, prove more effective for rallying citizens[212] and allies than do specific provisions found in an international treaty (i.e., the U.N. Charter).

b. Continued Use of Just War Language by International Law Scholars

Not only is just war rhetoric employed by just war theorists, but also by international law scholars, who are well aware of the relevant and obligatory articles of the U.N. Charter.[213] These scholars have examined the continued significance of the just war theory from several different perspectives.

Some authors have asserted that the just war tradition inserts the critical moral dimension into any analysis of a state's decision whether to use military force.[214] Others have advocated analyzing the scope of noncombatant immunity by placing precedence on the "just cause" prong of just war analysis.[215] At least one scholar has applied the just war theory to assert that

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[206] Schmitt Interview, *supra* note 187.

[207] Walzer, *supra* note 205.

[208] Prime Minister Tony Blair, Address at the Economic Club, in Chicago, Ill. (Apr. 24, 1999) (transcript available at http://www.number-10.gov.uk/output/Page1297.asp).

[209] *See, e.g.*, Bush Remarks at Bragg, *supra* note 204; President George W. Bush, Ultimatum to Iraq (Mar. 18, 2003) ; President George W. Bush, Address to the Nation on the Start of the Iraq War (Mar. 20, 2003) (transcript available at http://guardian.co.uk/Iraq/Story/0,,918031,00.html); President George W. Bush, Address to the Woodrow Wilson International Centre for Scholars (Dec. 14, 2005); Presidential Letter to the Speaker of the House and President Pro Tempore of the Senate (Mar. 21, 2003; President George W. Bush, State of the Union Address (Jan. 29, 2002; *'Moral Case' for Deposing Saddam,* BBC NEWS (Aug. 15, 2002), *available at* http://news.bbc.co.uk/1/ hi/world/americas/2193426.stm.

[210] Major Richard P. Dimeglio, *The Evolution of the Just War Tradition: Defining Jus Post Bellum*, 186 MIL. L. REV. 116, 124 (Winter 2005).

[211] Walzer, *supra* note 205. Annan later qualified those remarks, as he came to believe that Israel's conduct within the war (*jus in bello*) violated the principle of proportionality. *Id*.

[212] Schmitt Interview, *supra* note 187.

[213] *See, e.g.*, Walzer, *supra* note 205; RAMSEY, *supra* note 205; Thomas C. Wingfield, *The Convergence of Traditional Theory and Modern Reality: Just War Doctrine and Tyrannical Regimes*, 2 AVE MARIA L. REV. 93, 121 (2004) ("Just war theory in this context is more relevant today than it has ever been, due largely to the rapidly-changing nature of war and the threats faced by civilized nations."). *Contra* Dinstein, *supra* note 203, at 880.

> The U.N. Charter has wiped out the pre-existing permissive legal norms concerning recourse to inter-State force and has introduced a whole new set of legal norms based on *jus contra bellum*. It is totally irrelevant today whether or not a war is just. The sole question is: is war legal, in accordance with the Charter?

Id.

[214] *See, e.g.*, John F. Coverdale, *An Introduction to the Just War Tradition*, 16 PACE INT'L L. REV. 221 (Fall 2004).

[215] *See* Richard J. Arenson, *Global Justice, Peace, and Security: Just Warfare Theory and Noncombatant Immunity*, 39 CORNELL INT'L L. J. 663, 688 (2006) ("What one may permissibly do to combatants and noncombatants in the course of war depends to a very large extent on the justice or injustice of one's case.").

President George W. Bush possessed the authority, notwithstanding the lack of U.N. Security Council approval, to use military force in Iraq.[216] Professor Antonio Perez has asserted that just war theory is still relevant because the U.N. Charter is unable to properly address the prongs of legitimate authority and rightful intention.[217] That these scholars examine current military action through the lens of just war theory demonstrates that the tradition remains vibrant and germane.[218]

2. Customary International Law

The U.N. Charter itself recognizes the continued relevance of customary international law in Article 38(1)(b) of the Statute of the International Court of Justice:[219] "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply . . . international custom, as evidence of a general practice accepted as law."[220] The U.N. Charter also implicitly supports the continued vitality of customary international law in Article 51's language recognizing the "inherent right of self-defense."[221]

In addition to the U.N. Charter's recognition of its continued relevancy, customary international law remains pertinent for at least three other reasons. First, a couple of states are not members of the United Nations; thus, they are not bound by the U.N. Charter.[222] They continue, however, to be bound by customary international law as provided in the *Caroline* doctrine.[223]

Second, some states have chosen not to submit to the jurisdiction of the ICJ, the primary forum for resolving disputes over the interpretation of multilateral treaties,[224] while other states have chosen not to adhere to certain treaties, to include the Additional Protocols to the Geneva Conventions.[225] For states in either of these two categories, the ICJ must interpret the lawfulness of the use of military force under customary international law provisions, which are binding on all states.[226] Indeed, this scenario occurred in *Nicaragua v. United States*,[227] where the ICJ, due to the United States withholding

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[216] *See* Ronald J. Rychlak, *Just War Theory, International Law, and the War in Iraq*, 2 AVE MARIA L. REV. 1 (2004).

> When just war theory is properly understood, one is led to the conclusion that the authority to make the final decision to go to war rests with national sovereigns. They have the obligation to protect their citizenry from outside threats. For that reason, they must determine when war is just. Alternative institutions, like the United Nations, the Church, or an international tribunal, are not necessarily superior decision-makers, and they may even be less qualified to fill this role due to political or pastoral reasons.

Id. at 2.

[217] *See* Antonio F. Perez, *The Modern Relevance of Legitimate Authority and Right Intention in the Just War Tradition*, 51 CATH. U. L. REV. 15 (2001).

[218] It is also interesting to note that the Roman Catholic Church, with one billion members worldwide, explicitly has incorporated the just war tradition into its official teaching. *See* U.S. CATHOLIC CHURCH, CATECHISM OF THE CATHOLIC CHURCH: SECOND EDITION 615 (Doubleday 1995).

[219] This statute is incorporated into the U.N. Charter via Article 92. *See* U.N. Charter art. 92.

[220] Statute of the International Court of Justice art. 38, June 26, 1945, *available at* http://www.icj- cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II.

[221] U.N. Charter art. 51; *see supra* note 144 and accompanying text.

[222] As of this publication, only the Holy See and the newly independent state of Kosovo are not members of the United Nations. *See generally* United Nation Member States, http://www.un.org/members/nonmembers.shtml (last visited Apr. 7, 2009); United Nation Member States, *List of Member States*, http://www.un.org/members/list.shtml (last visited Apr. 7, 2009); Conor Sweeney & Christian Lowe, *Russia's Options Limited for Kosovo's Retaliation,* SAN DIEGO UNION TRIBUTE, Feb. 15, 2008, *available at* http://www.signonsandiego.com/news/world/20080215-0733-kosovo-serbia-russia-response.html. While technically the Cook Islands is not a member of the United Nations (yet is a signatory to the Geneva conventions), the Cook Islands fall under New Zealand for national security and U.N. purposes, and New Zealand is a member of the United Nations. *See generally* CIA: THE WORLD FACTBOOK: COOK ISLANDS, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/cw.html#Govt (last visited Mar. 29, 2009); ICRC, *Cook Islands: Constitutional Structure and Position of IHL in Domestic Law*, *available at* http://www.icrc.org/ihl-nat.nsf/162d151af444ded44125673e00508141/baf346b55e6c3589c1256af1004575f1!OpenDocument (last visited Mar. 29, 2009).

[223] Kearley, *supra* note 113, at 326.

[224] *Id*. at 326–27. The United States, for instance, is a state that has withheld this jurisdiction (known as the Vandenberg Reservation). *See* John Norton Moore, *Appraisals of the ICJ's Decision:* Nicaragua v. United States *(Merits),* 81 AM. J. INT'L L. 151, 155 (Jan. 1987); Anthony D'Amato, *The United States Should Accept, by a New Declaration, the General Compulsory Jurisdiction of the World Court*, 80 AM. J. INT'L L. 331 (1986).

[225] *See generally* ICRC, *Treaties*, *available at* http://www.cicr.org/ihl.nsf (follow "Tables showing the States party to selected treaties" hyperlink) (last visited Mar. 29, 2009).

[226] Kearley, *supra* note 113, at 326–27.

[227] *Supra* note 153.

jurisdiction on U.N. Charter interpretation, was required to rely strictly on the customary international law principles of proportionality and necessity in reaching its opinion.[228]

Third, many scholars believe that the inherent right to self-defense recognized in Article 51 of the Charter refers to the interpretation of that right at the time the U.N. Charter was ratified in 1945. Given that the *Caroline* doctrine was the prevailing authority on the lawfulness of self-defense at that time, it retains significant relevance in interpreting Article 51 and thereby, arguably, is incorporated into the U.N. Charter.[229]

In addition to these three reasons, customary international law remains relevant in the post-Charter world because it keeps the principles of necessity and proportionality central to the equation of whether the use of force is justified.[230] These principles are not found within the U.N. Charter. However, they "are of outstanding legal and practical importance for the right of self-defence,"[231] particularly in the *jus in bello* context. Explains Judge Simma:

> Although Art. 51 does not expressly state that these principles [of proportionality and necessity] limit the right of self-defence, it does not follow that these principles, which are recognized for the traditional right of self-defence, have been rendered inapplicable by the Charter provision. According to the better and prevailing view, any recourse to the right of self-defence laid down in Art. 51 is likewise subject to these principles of proportionality and necessity.[232]

Customary international law, as established by the *Caroline* doctrine, thus remains a significant force in determining the lawfulness of a state's actions.

VI. Analysis

This article has examined the use of force in self-defense under the just war theory, customary international law, and the U.N. Charter. With these paradigms in sight, the remainder of this article will analyze whether Israel was justified in going to war *(jus ad bellum*).[233] Then, this article will shift focus to Israel's conduct within the war (*jus in bello*).[234] Ultimately, this article concludes that although Israel was justified acting in self-defense against Lebanon for the actions of Hezbollah under both the just war theory and the U.N. Charter, its methods were not in compliance with customary international law.[235] Therefore, Israel waged an unjust war, which led to considerable approbation by the international community.[236]

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[228] Kearley, *supra* note 113, at 327.

[229] *Id.*; *see also* MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW 3–4 (1999) ("[C]ustomary international law would seem to exist alongside many treaty provisions, influencing the interpretation and application of those provisions, and in some cases modifying their content."). While Byers does not directly address the interpretation of Article 51's inherent right under customary international law, he asserts in general that customary international law can aid in the interpretation of treaty law. *Id.*

[230] *See, e.g.*, Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. LEXIS 4, at *122 (June 27) (discussing the criteria of "necessity" as a prerequisite to the use of force); Wilmshurst, *supra* note 173, at 10.

[231] Randelzhofer, *supra* note 137, at 805.

[232] *Id.* However, Judge Simma does not believe that customary international law remains relevant in the *jus ad bellum* context: "[T]he continuing existence of the wide customary law is of practical impact merely for the few non-members of the UN. As regards UN members, it stands that Art. 51, including its restriction to armed attack, supersedes and replaces the traditional right to self-defence." *Id.* at 806.

[233] *See infra* Parts VI.A.–B.

[234] *See infra* Part VI.C.

[235] *See infra* Part VII.

[236] *See*, *e.g.*, Walzer, *supra* note 205 (discussing then-Secretary General of the United Nations Kofi Annan's statements that Israel's actions within war violated the principle of proportionality); Sarah E. Kreps, *The 2006 Lebanon War: Lessons Learned*, 37 PARAMETERS, NO. 1, 72, 81 (Spring 2007) (discussing Hezbollah's use of the media to convince some international leaders that Israel had violated the principle of proportionality, and how international reaction to these images of civilian casualties, coupled with collateral damage that Israel inflicted on the Lebanese village of Qada, resulted in Israel suspending airstrikes for forty-eight hours).

A. Was Israel's Use of Force Justified Under the Just War Theory?

Laying aside for the moment the issue of state responsibility, which will be examined subsequently,[237] we first approach Israel's putative action of self-defense under the just war theory. Specifically, we will consider the principles of: (a) just cause, (b) proper authority, (c) rightful intention, and (d) use of force as a last resort. When we apply these principles to Israel's action in 2006 against Lebanon, Israel appears to have met the just war criteria. Therefore, Israel was justified under the just war theory to act in self-defense.

1. Just Cause

a. Secure the Peace

In examining whether Israel's cause to secure the peace was just, we must look not only to Hezbollah's actions on July 12, 2006, but to the whole of Hezbollah's behavior and rhetoric towards Israel. The issue, then, is whether Israel used force legitimately believing that it was necessary to secure the peace based on the aggregate of its interactions and experience with Hezbollah since 1982.[238] The key to examining this issue is first to recall Hezbollah's goals and reasons for existence, and to couple that with its actions towards Israel.

As discussed previously, from its earliest days Hezbollah has publicly proclaimed that its goal is the complete destruction of Israel.[239] As recently as 2002, Hezbollah's spokesman, Hassan Ezzeddin, asserted, "Our goal is to liberate the 1948 borders of Palestine."[240] In other words, Hezbollah's goal is to restore the Middle Eastern map to pre-1948, when Israel came to exist as a nation.[241]

Based on Hezbollah's rhetoric alone, Israel had legitimate reason to believe that it was required to use force in order to secure the peace by defending itself. When we couple Hezbollah's rhetoric with its actions towards Israel, focusing specifically on its actions *after* Israel had withdrawn its troops from southern Lebanon in 2000,[242] we find even more evidence that Israel's use of force, examined under the lens of securing the peace, was justified.

Perhaps more disturbing than Hezbollah's past attacks was the widely-held belief, not only by Israeli intelligence officers but also by sources close to Hezbollah, that Hezbollah was in the process of accumulating over 8,000 rockets, with a range of up to forty-five miles, at the Lebanese/Israeli border.[243] Such rockets could reach south of Haifa, into Israel's industrial heartland.[244] Israelis feared, and with good cause, a large-scale Hezbollah attack aimed at destroying its country.

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[237] *See infra* Part VI.B.2.

[238] Israel's comprehensive interaction with Hezbollah, discussed here, will be revisited when discussing the definition of "armed attack." Here, however, the discussion is a bit more broad, as the just war theory does not specifically require an armed attack prior to the use of force; rather, it requires, most on point with the concept of armed attack, a just cause and use of force as a last resort.

[239] *See supra* notes 17–20 and accompanying text.

[240] Levin, *supra* note 20.

[241] On 14 May 1948, Israel declared its independence from Palestine. *See* The Declaration of the Establishment of the State of Israel (May 14, 1948), *available at* http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Establishment +of+State+of+Israel.htm. The Arab-Israeli War started that same day; Israel's surrounding Arab neighbors invaded the new state immediately, hoping to abolish it before it fully could be established. *See* James Burk, *From Wars of Independence to Democratic Peace: Comparing the Cases of Israel and the United States*, *in* MILITARY, STATE, AND SOCIETY IN ISRAEL 81–101 (Daniel Maman et al. eds., 2001). The war ended by the year's end, with heavy casualties on both sides, but with Israel successfully defending its independence and establishing its new statehood. *Id.*

[242] *See supra* notes 27–32 and accompanying text. Hezbollah, since 2000, has continued to put its rhetoric into action. After Israel's May 2000 withdrawal from Lebanon, Hezbollah's aggressive action against Israel allegedly included multiple incidents of killing soldiers by firing small arms weapons, rockets, and mortars at Israeli Defense Force [IDF] positions near Sheeba farms; detonating charges near IDF vehicles; firing on IDF convoys; and launching mortars over the border into Israeli defensive positions. Bard, *supra* note 27. Further, Hezbollah has attacked and killed Israeli civilians, to include stabbing an Israeli woman to death near Haifa (April 2001), blowing up two civilian houses (August 2001), using small arms to attack and kill Israeli school children in Metzuba, Israel (March 2002), firing anti-aircraft shells into the town of Shlomi, Israel, killing one child and wounding four others (August 2003), and firing Katyusha rockets into homes in Israel (December 2005). *Id.*

[243] Jeffrey Goldberg, *A Reporter at Large: In the Party of God (Part I)*, N. YORKER, Oct. 14, 2002, *available at* http://www.jeffreygoldberg.net/articles/tny/a_reporter_at_large_in_the_par.php.

[244] *Id.*

Combining all of these factors with Hezbollah's actions on 12 July 2006, presents a more comprehensive view of Israel's position when Hezbollah attacked that summer day. Given Hezbollah's rhetoric expressing its intent to destroy Israel, its attacks from May 2000 to July 2006, and Israel's belief that Hezbollah possessed thousands of sophisticated rockets with considerable range, Israel was justified under the just war theory to use force to secure the peace and to protect its citizens. We now turn to *against whom* that force could be used under the just war theory.

b. Punish Evildoers

Both Saints Augustine and Aquinas focused on punishing evildoers as a just cause, and thus a permissible reason to wage war.[245] Saint Augustine explained that a just war may be one that punishes another party for injuries "if some nation or state against whom one is waging war has neglected to punish a wrong committed by its own citizens."[246] Saint Aquinas, lest any doubt remain regarding *against whom* such force could be used, added that the *state itself*, in refusing to punish its citizenry, was a legitimate object in this calculus.[247]

Hezbollah's members are not merely "citizens" within Lebanon, but also members of a recognized political party holding eighteen percent of parliamentary seats.[248] Indeed, joining with Hezbollah, the state of Lebanon officially has refused to abide by U.N. Security Council Resolution 1559,[249] which mandated that all militia organizations within Lebanon must disband and disarm.[250] In the immediate aftermath of Hezbollah's actions on July 12, 2006, Lebanon proclaimed that it did not condone the acts, but took no steps to censure or punish Hezbollah.[251] A few days later, Lebanon's president publicly vowed to stand by Hezbollah leader Sayyed Hassan Nasrallah.[252]

To Israel, the very reason that it was forced to act in self-defense was because Lebanon, at best, had refused to take responsibility for its citizenry.[253] At worst, Lebanon itself, albeit indirectly, had assisted Hezbollah.[254] Yet regardless of whether Lebanon's claim of innocence or Israel's scathing indictment was more accurate, under the just war theory Israel lawfully used force to "punish evildoers." Lebanon had rejected its obligations under U.N. Security Council Resolution 1559. Further, it neither prevented nor censured Hezbollah for its attack on Israel; instead, Lebanon voiced its support within days. Both of these incidents demonstrate that Lebanon "refus[ed] to make amends for the wrongs inflicted by its subjects."[255] Arguably, then, not only Hezbollah, but Lebanon itself was the "evildoer." Regardless, due to Lebanon's own explicit refusal to punish Hezbollah, Israel was justified in using force against Lebanon for the actions of this non-state actor.

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[245] *See*, *e.g.*, SWIFT & SWIFT, *supra* note 65, at 135 (quoting Saint Augustine, *Questions on the Heptateuch 6.10*); ST. THOMAS AQUINAS ON POLITICS AND ETHICS, *supra* note 84, at 64–65. It is interesting to note that, to some extent, this argument has come full circle in the argument for imputing state responsibility to a non-state actor when that state is unwilling or unable to take action itself. State responsibility will be discussed later in this analysis section, under the Article 51 justification for use of force. *See infra* Part VI.B.

[246] SWIFT & SWIFT, *supra* note 65, at 135 (quoting Saint Augustine, *Questions on the Heptateuch 6.10*). Today, the concept of citizenship is arguably more fluid, and perhaps the modern-day equivalent would be domiciliaries, that is persons who regularly reside in one state.

[247] *See supra* note 89 and accompanying text.

[248] IRIN, *supra* note 21.

[249] S.C. Res. 1559, U.N. Doc. S/RES/1559 (Sept. 4, 2004).

[250] *See* Lauren Rivera, *Hezbollah Disarmament Unclear*, CNN.COM INT'L, May 7, 2005, *available at* http://edition.cnn.com/2005/WORLD/meast/05/06/lebanon.report/index.html. Lebanon's response was that Hezbollah is a legitimate "resistance movement" against Israel, not a militia. *Id.* However, the fact that the Security Council itself disagrees with Lebanon's claim demonstrates its lack of credibility. *See id*. Indeed, Lebanon's response that Hezbollah is a resistance movement further demonstrates its unwillingness to punish Hezbollah for its various attacks against Israel.

[251] *See*, *e.g.*, Statement by Prime Minister Fouad Siniora, DAILY STAR (Leb.), July 17, 2006 [hereinafter Siniora Statement], *available at* http://www.dailystar.com.lb/article.asp?edition_ID=1&article_ID=74027&categ_id=2#.

[252] *Lebanon Evacuation Gathers Pace*, BBC NEWS, July 18, 2006, *available at* http://news.bbc.co.uk/2/hi/ middle_east/5189988.stm.

[253] *See supra* notes 51, 53 and accompanying text (Ambassador Gillerman's statement).

[254] *See supra* notes 39–40 and accompanying text (Prime Minister Olmert's statement).

[255] *See* ST. THOMAS AQUINAS ON POLITICS AND ETHICS, *supra* note 84, at 64–65.

2. Proper Authority

Israel, as a sovereign state, possessed the proper authority to use force.[256] Thus, Israel satisfied this just war prong.

3. Rightful Intention

Recall Saint Aquinas' concept of "double-effect" in determining whether a sovereign possesses rightful intention.[257] Applied here, Israel's apparent intent in going to war was to accomplish the positive good of protecting its citizens. Its goal in making this decision was not to cause suffering to noncombatants.[258] Indeed, given Hezbollah's rhetoric and its many attacks in the past, Aquinas likely would assert that Israel was morally *obligated* to defend the common good.[259] Duty compelled the sovereign state of Israel to act. Its use of force, then, was just under the rightful intention prong—to protect its citizens from further, perhaps decimating, attack.

4. Last Resort

While the "last resort" prong may appear to be Israel's most challenging hurdle under the just war tradition, this concept does not require Israel first to attempt all means short of using military force. Rather, it requires the state to *consider* all means and to determine that no lesser means are available.[260]

Given these parameters, Israel's use of force was its last resort. The most glaring evidence supporting this position was Lebanon's refusal to abide by U.N. Security Council Resolution 1559,[261] even though years earlier, Israel had withdrawn from Lebanon as required.[262] Despite Resolution 1559, Lebanon continued to allow Hezbollah to remain an organized, armed militia, and did not prevent Hezbollah from continuing to launch rockets at both military and civilian targets within Israel.[263] Given Hezbollah's continued attacks, Lebanon's apparent inability to control Hezbollah, the intelligence that Israel possessed regarding Hezbollah, and Hezbollah's continued rhetoric proclaiming its intent to destroy Israel, Israel was justified under this just war prong to use force against Lebanon for Hezbollah's attacks.

Therefore, Israel was justified acting in self-defense against Lebanon for the actions of Hezbollah under the just war tradition. We will now examine the lawfulness of Israel's use of force through the lens of Article 51 of the U.N. Charter.

B. Was Israel's Use of Force Justified Under Article 51 of the U.N. Charter?

As we have seen from our previous discussion of Article 51 of the U.N. Charter,[264] the critical issues are: (a) determining what constitutes an "armed attack," and (b) determining the level of state responsibility required before another state can impute to it the actions of its non-state citizenry. If an armed attack occurred, and if Israel rightfully held Lebanon responsible, then Israel was justified under Article 51 to use force against Lebanon in self-defense. Therefore, we first will examine whether Hezbollah's actions rose to the threshold of armed attack. Then, we will analyze whether Israel was correct in holding Lebanon responsible under the post-U.N. Charter theories of state responsibility.

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[256] Some might argue that in a post-U.N. Charter world, only the Security Council possesses the proper authority to use force. Yet this argument is belied by Article 51 of the Charter, which acknowledges the "inherent right" of a sovereign state to use force in self-defense. U.N. Charter art. 51.

[257] *See supra* notes 96–102 and accompanying text.

[258] It is important to keep in mind at this point the distinction between *jus ad bellum* and *jus in bello*. Israel's targeting decisions, once *in* war, are another matter that will be fully addressed in Part C of this section. *See infra* Part VI.C.

[259] RUSSELL, *supra* note 57, at 262; *see supra* note 95 and accompanying text (discussing Aquinas' understanding of moral obligation and duty).

[260] *See* DAVID L. CLOUGH & BRIAN STILTNER, FAITH AND FORCE: A CHRISTIAN DEBATE ABOUT WAR 61 (Georgetown Univ. Press 2007); MATTOX, *supra* note 64, at 79.

[261] *See* Rivera, *supra* note 250.

[262] *See supra* notes 27–32 and accompanying text (providing examples of Hezbollah's continued attacks on Israel, despite the mandate in U.N. Security Council Resolution 1559 for Lebanon to disband Hezbollah).

[263] For example, Hezbollah fired Katyusha rockets at an IDF army base in Galilee (May 2006); launched a heavy attack of mortars and rockets near Rajar village in Israel, killing nine soldiers and two civilians (November 2005); and fired over twenty mortars across the Lebanon/Israel border, killing one soldier and wounding four others, to include an IDF medical officer (June 2005). *See Hezbollah Attacks Since May 2000*, *supra* note 27.

[264] *See supra* Part V.B.

1. Armed Attack

In determining whether Hezbollah's actions constituted an armed attack, we must recall the previous discussion regarding whether Israel's response was necessary to "secure the peace" under the just war theory.[265] Namely, we look to the aggregate actions of Hezbollah over the six-year period since Israel had withdrawn from southern Lebanon, Hezbollah's continued rhetoric regarding its intent to destroy Israel, and intelligence reports indicating that Hezbollah was storing thousands of long-range missiles at the Lebanese/Israeli border.

Further, when dealing with the definition of armed attack under Article 51, we must examine these issues under the scale and effects doctrine of *Nicaragua*,[266] the doctrine that some scholars label the *Nadelstichtaktik* or accumulation of events theory.[267] Recall from the examination of this topic earlier,[268] the basic doctrine holds that in determining what qualifies as an armed attack by a non-state actor, while each specific act may not rise to that level, the attacks could, "taking into consideration the totality of incidents, amount to an armed attack entitling the victim state to respond with armed force."[269] The caveat, asserts Judge Simma, harkening back to the scale and effects doctrine, is that such attacks as a whole must be "large scale." They cannot, in the words of *Nicaragua*, amount to "mere frontier incident[s]."[270]

Some scholars have argued that the nature of Hezbollah's attacks on 12 July 2006, even standing alone, rose to the threshold of armed attack. "[T]he premeditated and well-organized character of the Hezbollah ambush, the ongoing nature of the abduction, combined with the diversionary rocket attacks suggest that this was a deliberate 'armed attack' rather than a mere 'incident.'"[271] Yet while these factors assist in determining the nature of Hezbollah's aggressive acts (whether armed attack or mere frontier incident), we also should consider *all* of Hezbollah's activities against Israel between 2000 and 2006.[272] We must keep in mind that Lebanon refused to disarm Hezbollah in accordance with the provisions of U.N. Security Council Resolution 1559.[273] Given not only Hezbollah's attack on 12 July 2006, but also its attacks in the past on Israeli civilians, its capacity to fire rockets as far as Haifa (not only derived from intelligence reports but now proven on 12 July 2006),[274] and its continued expressed desire to "obliterate" Israel,[275] the scale and effects of Hezbollah's actions were of a magnitude to constitute, in the aggregate, a large-scale armed attack. Had Israel not responded under Article 51, it would have left itself vulnerable to another inevitable Hezbollah attack, perhaps of even greater magnitude.

Thus, due not only to the extent of the strikes on July 12, 2006, but also to the continued attacks throughout the years preceding 2006, Hezbollah's actions had reached the threshold of an "armed attack." Israel's right to respond with force in self-defense was triggered under Article 51.

2. State Responsibility

Recall that on the spectrum of beliefs regarding what constitutes state responsibility for terrorist attacks, we have examined three guideposts: effective control, harboring and assisting, and unwilling or unable to control non-state actors.[276] In the case of Lebanon and its relationship to Hezbollah, state responsibility may be imputed to Lebanon under either the harboring and assisting theory or the unwilling or unable theory. A colorable though weaker argument may be made for imputing state responsibility under the effective control notion as well. We will examine these theories from the most narrow (effective control) to the most expansive (unwilling or unable to prevent attacks).

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[265] *See supra* notes 238–44 and accompanying text.

[266] *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. LEXIS 4, at *216 (June 27).

[267] Kattan, *supra* note 163, at 27.

[268] *See supra* notes 163–64 and accompanying text.

[269] Kattan, *supra* note 163, at 27.

[270] Randelzhofer, *supra* note 137, at 802.

[271] Ruys, *supra* note 4, at 273.

[272] *See supra* notes 27–30, 259 and accompanying text.

[273] *See* Rivera, *supra* note 250.

[274] *See* Roee Nahmias, *Long-Range Rocket Lands Near Jenin*, YNETNEWS.COM, Aug. 2, 2006, *available at* http://www.ynetnews.com/ articles/0,7340,L-3285259,00.html.

[275] *See supra* note 19 and accompanying text.

[276] *See supra* Part V.B.3.

a. Effective Control

As a recognized political party, holding over twenty of the 128 seats in Lebanon's Parliament, Hezbollah can be viewed as a participant in the Lebanese government. Thus, to some extent it is a misnomer to label Hezbollah a non-state actor.[277] Recall that effective control does not require that the state completely control the non-state actor. Rather, it requires that the non-state actor "is in fact acting on the instructions of, *or under the direction and control of*, that State."[278] Here, Hezbollah, as a putatively legitimate political party within a sovereign state's political system, is to some extent under the effective control of Lebanon. One may legitimately assert that, because Lebanon has chosen not only to recognize but also to embrace Hezbollah as part of its government, it exercises effective control over this organization. Because it has legitimized Hezbollah and made it part of the Lebanese government, it has demonstrated that it exercises control, and that Hezbollah as a political party acts under the control of the state of Lebanon.

This argument's weakness is readily apparent, however. Effective control refers to the nature of the *specific act* in question, not to the *general relationship* between the state and non-state actor.[279] Lebanon has never asserted that it "ordered" Hezbollah to attack Israel, or provided "directions" to that effect.[280] Indeed, according to Lebanese Prime Minister Siniora, "The [Lebanese] government . . . was not aware of what was to take place and does not adopt the operation carried out by Hizbullah to capture the two Israeli soldiers."[281] Thus, the argument that Lebanon effectively controlled Hezbollah, or that Hezbollah was acting under the control of Lebanon in this attack, meets with scant evidence. We now turn to the two stronger arguments for imputing state responsibility to Lebanon.

b. Harboring and Assisting

Under the harboring and assisting view, a state can be held liable for a non-state actor's acts when the state "has a role in organizing, coordinating or planning the military actions of a military group"[282] *or* has "willingly harbored"[283] the non-state group. That Lebanon has at least "harbored" Hezbollah is readily apparent. Lebanon has not only permitted Hezbollah to exist, both as a political party and as a militia, but further exclusively has allowed it to carry weapons within Lebanon.[284] Given that Hezbollah continues to attack Israel with mortars, rockets, and small arms fire, Lebanon's decision suggests a condoning of these attacks and an encouragement of continued attacks against Israel. By arming Hezbollah, Lebanon itself has a role in the military actions of the group. Additionally, simply by allowing Hezbollah to continue to exist, particularly in light of U.N. Security Council Resolution 1559, Lebanon continues to willingly harbor this non-state group. Thus, under the harboring and assisting theory, Israel was justified to hold Lebanon liable for the actions of Hezbollah.

c. Unwilling or Unable to Prevent Attacks

Lebanon itself, at least early in the Israel-Lebanon War, claimed the unwilling position.[285] Israeli Ambassador Gillerman seconded that notion, noting that Lebanon's "ineptitude and inaction . . . has led to a situation in which it has not exercised jurisdiction over its own territory for many years."[286] Lebanon's refusal or inability to dismantle the Hezbollah militia in

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[277] Indeed, it appears that Israel makes this very argument: that Hezbollah is not a non-state actor, but rather is a part of the Lebanese government; thus, Lebanon is responsible. *See*, *e.g.*, Olmert, *supra* note 39. For our purposes, however, we will examine Israel's actions not on the basis of its rhetoric, but under all possible readings of Article 51.

[278] Weiner, *supra* note 186, at 431 (quoting Report of the International Law Commission, U.N. GAOR Supp. No. 10, at 103, U.N. Doc. A/56/10) (emphasis added).

[279] *See supra* notes 188–91 and accompanying text.

[280] *See*, *e.g.*, Siniora Statement, *supra* note 251.

[281] *Id*.

[282] Weiner, *supra* note 186, at 432 (citing Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, at 131 (July 15, 1999), *available at* http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf); *see supra* note 193 and accompanying text.

[283] Ruys, *supra* note 4, at 282 (citing MICHAEL BYERS, WAR LAW 67 (2005)); Randelzhofer, *supra* note 137, at 801.

[284] Sites, *supra* note 23.

[285] *See, e.g.*, Siniora Statement, *supra* note 251 ("The [Lebanese] government . . . was not aware of what was to take place and does not adopt the operation carried out by Hizbullah to capture the two Israeli soldiers.").

[286] Gillerman, *supra* note 41.

accordance with Security Council Resolution 1559 provides stark evidence of its powerlessness—or acquiescence—in the face of this political and military faction within its borders. That Hezbollah, for six years after Israel withdrew from Lebanon, continued to barrage Israeli citizens with military attacks while the Lebanese government remained notably silent, again demonstrates Lebanon's unwillingness or inability to prevent such attacks.

d. Is "Harboring and Assisting" or "Unwilling or Unable" Enough?

Judge Simma and other legal scholars correctly note that in light of U.N. Security Council Resolutions 1368 and 1373, Article 51 is not restricted to "state vs. state" conflicts.[287] Indeed, given the nature of modern conflict, where more and more non-state actors take center stage in large scale attacks, a state vs. state limited reading on Article 51 is anachronistic and not in keeping with the spirit of the article. According to some scholars—including at least two ICJ judges—the *Nicaragua* opinion is outdated and bad law, despite the ICJ's refusal directly to address that issue.[288]

The realities of the nature of conflict, particularly post-9/11, are manifested in the explicit language of U.N. Security Council Resolutions 1368 and 1373. No longer may only state actions constitute a threat to international peace and security, but those of non-state actors may qualify as well.[289] The Security Council passed these resolutions in the aftermath of 9/11, knowing full well that *non-state actors* had committed these attacks.[290] Yet the Security Council chose to use the language that triggers Chapter VII of the U.N. Charter dealing with enforcement actions (threat to international peace and security)[291] to condemn the attacks.[292] Thus, the U.N. Security Council engaged in a major paradigm shift, one that must inform our reading of Article 51's scope. No longer is this article interpreted as applying only to state actors, but to non-state actors as well.[293]

Returning, then, to whether Lebanon was responsible for the actions of the non-state actor Hezbollah[294] within its borders, the answer must be in the affirmative. To assert the effective control theory is to erase the border between the definitions of state and non-state actor entirely. Put another way, if a non-state actor is effectively controlled ("under the direction and control of"[295] the state) in its attack, then it is effectively, if not actually, an *instrument* of that state. Indeed, the definition of non-state actor does not exist under this theory. The theory is not simply overly-restrictive—it defines the term away entirely.

Harboring and assisting also can be too restrictive. Under this theory, a state is excused for acquiescing to the non-state actor by refusing to take action against it, so long as the state does not "organiz[e], coordinat[e] or plan[] the military actions" of the non-state actor,[296] and the victim state has no recourse. It must continue to suffer attacks by the non-state actor who enjoys safety within the borders of the acquiescent, apathetic, or anemic state. The purpose of Article 51 is thwarted, as the victim state can do nothing but continue to watch casualties mount, or to raise the issue to the U.N. Security Council as a

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[287] *See, e.g.*, Randelzhofer, *supra* note 137, at 802; Schmitt Interview, *supra* note 187.

[288] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, 219–34 (July 9) (separate opinion of Judge Kooijmans); Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), 2005 I.C.J. 1, 2-3 ¶¶ 9–13 (Dec. 19) (separate opinion of Judge Simma); Schmitt Lecture, *supra* note 183. *But see* Statute of the International Court of Justice art. 59 (providing that ICJ opinions in contentious cases are only binding on the states involved for that particular case, and thus do not serve as binding precedent for future ICJ decisions). Statute of the International Court of Justice art. 59, June 26, 1945, *available at* http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II.

[289] *See* S.C. Res. 1368, *supra* note 177; S.C. Res. 1373, *supra* note 179.

[290] Schmitt Lecture, *supra* note 183.

[291] S.C. Res. 1368(1), *supra* note 177.

[292] *See* U.N. Charter art. 39.

[293] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, 219-34 (July 9) (Kooijmans, J., Separate Opinion); Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), 2005 I.C.J. 1, 2–3, ¶¶ 9–13 (Dec. 19) (Simma, J., Separate Opinion); Schmitt Lecture, *supra* note 183. *But see* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, 194, ¶ 139 (July 9).

[294] *See supra* note 277 and accompanying text (arguing that since Hezbollah is a political party in Lebanon, it may not be accurate to label it a non-state actor).

[295] Weiner, *supra* note 186, at 431 (quoting Report of the International Law Commission, U.N. GAOR Supp. No. 10, at 103, U.N. Doc. A/56/10).

[296] *See supra* note 194 and accompanying text.

potential threat to international peace and security.[297] It can hope that perhaps the non-state actor, instead of firing missiles and rockets from safety, will enter the victim state's territory, thereby constituting an armed attack and allowing for "legitimate" use of force in self-defense under Article 51.[298] But it can attack neither the non-state actor nor the state itself until the actions constitute an armed attack. The non-state actor's actions are absolved perpetually, by virtue of its location within a state that is either unwilling or unable to stop the unlawful attacks. This scenario cannot be within the spirit of Article 51 and a state's "inherent right to self-defense."[299]

This scenario, in fact, existed in Afghanistan when the Security Council passed Resolutions 1368 and 1373. Namely, the weak Afghan government appeared to be unable to control Al Qaeda.[300] Yet the Security Council proclaimed the actions of this non-state actor, located within Afghanistan, to be a "breach of international peace and security."[301] As such, its attacks satisfied Article 39's threshold requirement for the U.N. Security Council to take action under Chapter VII,[302] and potentially set the stage for the use of force in response.

For these reasons, even at the lower threshold of unwilling or unable to prevent terrorist attacks, Israel was justified in holding Lebanon responsible for the actions of Hezbollah. Notably, we thus have come full circle back to a union of Saint Augustine's and Saint Aquinas' theories—that in some circumstances, if all other just war criteria are met, a state can attack another state that refuses, or perhaps even neglects, to punish its own "evildoers."[303]

C. Did Israel Violate the *Jus in Bello* Customary International Law Principles of Necessity and Proportionality?

Despite Israel's justification for holding Lebanon responsible for Hezbollah's actions and its right to use force in self-defense, one still must examine Israel's actions *within* the 2006 Israel-Lebanon War (i.e., the *jus in bello*). If a state unlawfully uses force while engaged in war, its decision to go to war itself may remain "just," but it is no longer prosecuting the war "justly." *Jus ad bellum* and *jus in bello*, while examined separately, are thus inexorably linked. Neither one, standing on its own, can justify a war in its totality (i.e., in both the adjectival and adverbial sense).[304]

Here Israel falls short. Though under both the just war theory and Article 51, Israel was justified acting in self-defense, the manner in which it chose to act did not comport with international law norms. Instead, Israel violated the customary international law principles of necessity and proportionality, and thus ultimately failed to comply with international law.

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[297] U.N. Charter art. 35.

[298] *See supra* notes 146–47 and accompanying text.

[299] *See* U.N. Charter art. 51.

[300] *See, e.g.*, John Ward Anderson, *Attacks by Taliban Increase, Approach Afghanistan Capital*, WASH. POST, Sept. 28, 2007, *available at* http://www.boston.com/news/world/middleeast/articles/2007/09/28/attacks_by_taliban_increase_approach_afghanistan_capital/.

[301] S.C. Res. 1368, *supra* note 177; S.C. Res. 1373, *supra* note 179.

[302] U.N. Charter art. 39.

[303] *See supra* notes 73–74, 89–91 and accompanying text (discussing the views of Saint Augustine and Saint Aquinas on the scope of punishing evildoers).

[304] *See* WALZER, *supra* note 205, at 21.

> The moral reality of war is divided into two parts. War is always judged twice, first with reference to the reasons states have for fighting, secondly with reference to the means they adopt. The first kind of judgment is adjectival in character: we say that a particular war is just or unjust. The second is adverbial: we say that a particular war is being fought justly or unjustly. . . . The two sorts of judgment are logically independent. It is perfectly possible for a just war to be fought unjustly and for an unjust war to be fought in strict accordance with the rules. But this independence, though our views of particular wars often conform to its terms, is nevertheless puzzling. It is a crime to commit aggression, but the resistance is subject to moral (and legal) restraint. The dualism of *jus ad bellum* and *jus in bello* is at the heart of all that is most problematic in the moral reality of war.

Id. This view of a strict separation between *jus ad bellum* and *jus in bello* is more restrictive than the present author's view; yet the conclusion remains the same even if *jus ad bellum* and *jus in bello* are entirely independent: Israel was justified to use force against Lebanon in self-defense (satisfying the *jus ad bellum* criteria), but failed to prosecute a just war (violating the *jus in bello* criteria). *Contra* Schmitt Lecture, *supra* note 183 (expressing concern about the convergence between *jus ad bellum* and *jus in bello*).

1. Necessity

"Let necessity, therefore, and not your will, slay the enemy who fights against you," proclaimed Saint Augustine. [305] Saint Aquinas echoes this sentiment, asserting that rightful intention can be sullied by destroying more than what military necessity requires.[306] Article 52 of Additional Protocol I, providing a modern definition of military necessity, asserts that parties to a conflict must take special care to ensure that their targets are military objects, not civilian objects.[307] Should doubt exist as to the nature of an object, the parties are to presume that it is civilian and are not to attack it.[308] Military objects are those "which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[309]

The death toll that Israel exacted on the Lebanese civilian population was high. Approximately 1,190 Lebanese civilians died from Israeli rocket and mortar attacks; about thirty percent of these casualties were children.[310] These numbers are even more staggering when compared with the relatively few Israeli civilian casualties at the hands of Lebanon: only about forty-three Israeli civilians were killed in the war.[311]

Most of the Lebanese civilians perished when Israel targeted civilian homes, civilian vehicles, and roads and highways upon which Lebanese civilians were attempting to evacuate.[312] Israel asserted that Hezbollah was using these civilians as "human shields," hiding behind the civilian populace and infrastructure in order to launch rocket and mortar attacks against Israel.[313]

However, after extensive on-the-ground research and interviews with survivors and eyewitnesses, corroborated by international journalists, Human Rights Watch "found no cases in which Hezbollah deliberately used civilians as shields to protect them from retaliatory IDF attack."[314] Instead, the objects of Israeli fire appeared to be purely civilian, with little to no military value.[315]

Military necessity did not clearly exist to support Israel's choice of targets. Little evidence suggests that the civilian towns, homes, and persons that Israeli warplanes and rockets destroyed were military objectives.[316] Moreover, Israel several times launched artillery and warplane fire onto roads upon which Lebanese civilians were attempting to flee—after receiving

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[305] SWIFT & SWIFT, *supra* note 65, at 61.

[306] AQUINAS, *supra* note 84, II.2.40. Quoting Augustine regarding "rightful intention," Aquinas reminds his readers, "True religion looks upon as peaceful those wars that are waged *not for motives of aggrandizement,* or cruelty. . . . The passion for inflicting harm the cruel thirst for vengeance, . . . and suchlike things, all these are rightly condemned in war." *Id.*

[307] Additional Protocol I, *supra* note 102, art. 52(1).

[308] *Id.* art. 52(3).

[309] *Id.* art. 52(2).

[310] Haider Rizvi, *Israel/Lebanon: Probe of 2006 War Ignored Civilian Deaths,* IPSNEWS.NET, Jan. 31, 2008, *available at* http://ipsnews.net/news.asp?idnews=41031; *Timeline of the July War 2006*, *supra* note 45.

[311] Ruys, *supra* note 4, at 270.

[312] FATAL STRIKES: ISRAEL'S INDISCRIMINATE ATTACKS, 18 HUMAN RIGHTS WATCH No. 3, at 35–42 (Aug. 2006) [hereinafter HRW REPORT], *available at* http://www.hrw.org/sites/default/files/reports/lebanon0806webwcover.pdf.

[313] ISRAEL MINISTRY OF FOREIGN AFFAIRS, *Behind the Headlines: Legal and Operational Aspects of the Use of Cluster Bombs* (Sept. 5, 2006), *available at* http://www.mfa.gov.il/MFA/About+the+Ministry/Behind+the+Headlines/Legal+and+operational+aspects+of+the+use+ of+cluster+bombs+5-Sep-2006.htm.

[314] HRW REPORT, *supra* note 312, at 3.

[315] *Id.*

> Since the start of the conflict, Israeli forces have consistently launched artillery and air attacks with limited or dubious military gain but excessive civilian cost. In dozens of attacks, Israeli forces struck an area with no apparent military target. In some cases, the timing and intensity of the attack, the absence of a military target, as well as return strikes on rescuers, suggest that Israeli forces deliberately targeted civilians.

Id.; *see also* AMNESTY INT'L. MDE 02/025/2006, ISRAEL/LEBANON: UNDER FIRE: HIZBULLAH'S ATTACKS ON NORTHERN ISRAEL, Sept. 2006, *available at* http://www.amnesty.org/en/report/info/MDE02/025/2006.

[316] HRW REPORT, *supra* note 312. That Hezbollah also exercised indiscriminate attacks is well-documented. *See id.* However, the focus of this paper is not upon the *jus in bello* actions of Hezbollah, but only those of Israel.

and complying with warnings from Israel to evacuate.[317] At least twenty-seven Lebanese civilians were killed in this barrage of fire.[318]

2. Proportionality

The U.S. Secretary of State Daniel Webster, in the nineteenth century *Caroline* incident, insisted that even if necessity applies, proportionality still must be taken into account. "Unreasonable or excessive force, or force used prematurely without considering other options delegitimizes a state's actions, even when necessity exists.[319] We find a helpful definition of non-proportionality in Additional Protocol I, Article 52(5)(b): An attack lacking proportionality is one "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be *excessive in relation to the concrete and direct military advantage anticipated*."[320]

If one concludes that Israel targeted civilian objects, not military objects, a proportionality analysis is hardly necessary. Yet even if military necessity did exist, Israel failed to exercise the principle of proportionality. In its proportionality analysis, the party considering its targets must balance the concrete and direct military advantage gained against the potential civilian deaths, injuries, or damage anticipated. Incidental or unavoidable damage to civilian personnel and property is legally permissible, as long as it is expected to be proportional and not excessive to the military advantage to be gained.[321]

Perhaps Israel's greatest lack of proportionality was displayed in its firing cluster rockets into southern Lebanon, particularly as the war drew to a close. In the last seventy-two hours prior to the August 14, 2006 ceasefire, Israel rained 1,800 cluster rockets on Lebanon.[322] According to Amnesty International, since the war ended, about forty people have been killed by these munitions and over 240 have been injured.[323] A U.N. Commission of Inquiry investigating the war found "a significant pattern of excessive, indiscriminate and disproportionate use of force by the Israel Defence Forces against Lebanese civilians and civilian objects, failing to distinguish civilians from combatants and civilian objects from military targets."[324] A separate investigation by four U.N. independent experts asserted that the evidence "strongly indicates that, in many instances, Israel violated its legal obligations to distinguish between military and civilian objectives; to fully apply the

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[317] *Id.*

[318] *Id.*

> Israel has justified its attacks on roads by citing the need to clear the transport routes of Hezbollah fighters moving arms. Again, none of the evidence gathered by Human Rights Watch, independent media sources, or Israeli official statements indicate that any of the attacks on vehicles documented in this report resulted in Hezbollah casualties or the destruction of weapons. Rather, the attacks killed and wounded civilians who were fleeing their homes, as the IDF had advised them to do.

Id. at 6.

[319] *See* Webster Letter, *supra* note 127.

[320] Additional Protocol I, *supra* note 102, art. 51(5)(b) (emphasis added).

[321] *See* Rome Statute of the International Criminal Court para. 8(2)(b)(iv), U.N. Doc. A/CONF.183/9 (July 17, 1998), *available at* http://untreaty.un.org/cod/icc/statute/romefra.htm.

[322] Rizvi, *supra* note 310. In the aftermath of the war, the Israel Ministry of Foreign Affairs correctly noted: "Both international law and accepted practice do not prohibit the use of the family of weapons popularly known as 'cluster bombs.' Consequently, the main issue in a discussion of Israel's use of such weaponry should be the method of their use, rather than their legality." ISRAEL MINISTRY OF FOREIGN AFFAIRS, *supra* note 313. The current author agrees with this statement, but asserts that it was indeed in Israel's *use* of these cluster bombs (both in its timing at the end of the war and its target choice near civilian populations) that it failed to exercise proportionality. *See infra* notes 322–28.

[323] Rizvi, *supra* note 310. Victims are killed by buried unexploded ordinance which does not explode upon initial impact, but later detonates when disturbed. *See infra* note 328 and accompanying text. After the war, the Israel Ministry of Foreign Affairs claimed:

> Immediately after the cease-fire the IDF gave UNIFIL maps indicating the likely locations of unexploded ordnance, to aid the international attempt to clear these areas and avoid injury to the population. Furthermore, immediately after the cease-fire the IDF distributed warning notices to the residents in the areas of warfare, and recommended that they wait a few days before returning to the south until the UNIFIL forces were deployed there and the area had been cleared of unexploded ordinance.

ISRAEL MINISTRY OF FOREIGN AFFAIRS, *supra* note 313. However, such remedial efforts do not excuse Israel from using the bombs in the first place, thus setting the conditions for future death and injury to innocent civilians. That many civilians have since perished demonstrates the fruitlessness of Israel's post-war attempt to put the proverbial cat back in the bag.

[324] REPORT OF THE COMMISSION OF INQUIRY ON LEBANON PURSUANT TO HUMAN RIGHTS COUNCIL RESOLUTION S-2/1, Finding 13 (Nov. 10, 2006), *available at* http://www.reliefweb.int/rw/rwb.nsf/db900SID/YAOI-6VS3P3?OpenDocument.

principle of proportionality."[325] The International Committee of the Red Cross publicly expressed concern with Israel's use of these cluster munitions in and around civilian areas.[326]

Even some Israeli experts agree that Israel's use of cluster bombs against Lebanon was legally untenable. According to the Winograd Commission,[327] Israel's use of the cluster bomb failed to comply with international law. The Commission found that "[t]he cluster bomb is inaccurate, it consists of bomblets that are dispersed over a large area, and some of the bomblets do not explode [on impact] and can cause damage for a long period afterward."[328]

Indeed, the Israeli Defense Force itself later admitted to targeting civilian areas in Lebanon with cluster bombs. The IDF justified this targeting by claiming that "the use of cluster munitions against built-up areas was done only against military targets where rocket launches against Israel were identified and after taking steps to warn the civilian population."[329] However, such does not excuse Israel's use of cluster munitions. If true, it merely satisfies the *military necessity* prong of *jus in bello*. Given the indiscriminate nature of cluster bombs, fired into a densely populated target area, Israel failed to meet the *proportionality* criteria. According to Israeli colonel MK Cohen,

> This is a very serious matter. If cluster bombs were used in populated areas, this constitutes an indescribable crime. There is no target that cannot be hit without cluster bombs. The massive use by the IDF of cluster bombs during the war suggests an absolute loss of control and hysteria.[330]

The military advantage to be gained by targeting civilian property appears minimal at best. Perhaps, had Israel correctly assessed that Hezbollah itself was firing rockets into Israel from civilian homes and using Lebanese civilians as human shields, a direct and concrete military advantage might have been gained by destroying these homes. Perhaps, had Israel correctly concluded that the roads upon which Lebanese civilians were attempting to escape also provided transportation for combatants to avoid being killed or captured, a direct and concrete military advantage might have been gained by destroying these roads.

However, in balancing this putative direct and concrete military advantage, Israel would have been compelled to take into account the massive civilian deaths, injuries, and damage anticipated. Dropping warning leaflets is not enough when those civilians who flee their homes are killed by Israeli warplanes and rockets on the exit roads. The excessive loss of civilian life that Israel should have anticipated is borne out in the actual number of Lebanese civilian casualties. That over one million Lebanese civilians became internally displaced persons because of Israel's strikes, even if these targets offered a legitimate military advantage, further demonstrates that Israel violated the principle of proportionality.[331]

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[325] Human Rights Council, Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council," Mission to Lebanon and Israel, Oct. 2, 2006, A/HRC/2/7, para. 99, *available at* http://www.universalhumanrightsindex.org/documents/841/1022/document/en/pdf/text.pdf.

[326] Interview with Mr. Phillip Sundel, Deputy Legal Advisor to the Washington Regional Delegation of the International Committee of the Red Cross at Charlottesville, Va. (Mar. 13, 2008); *see also* ICRC, *Lebanon: Where Childhood Games are Dangerous*, Nov. 2, 2006, http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/lebanon-story-021106?opendocument (noting that since 2000, the ICRC has proposed banning the use of cluster munitions against any targets located near the civilian population).

[327] In September 2006, the Israeli government appointed the Winograd Commission, chaired by retired Israeli judge Eliyahu Winograd, to investigate the Israeli government's conduct of war. *See* Dana Blander, *Main Issues in the Interim Report of the Winograd Commission*, ISRAEL DEMOCRACY INSTIT., July 5, 2007, *available at* http://www.idi.org.il/english/article.asp?id=07052007123937 (last visited Feb. 19, 2008). On 30 January 2008, the Commission released its findings. Some organizations, such as Amnesty International, criticized the Commission's findings as "deeply flawed" for not addressing what it considers to be IDF war crimes against the Lebanese populace during the 2006 war. *See* Rizvi, *supra* note 310. Other than its findings regarding cluster bombs, the Winograd Commission did not address any other of Israel's questionable *jus in bello* practices, stating, "We did not find it appropriate to deal with issues that are part of a political and propaganda war against the state." Yuval Yoaz, *Committee: Use of Cluster Bombs Does Not Conform to International Law*, HAARETZ.COM, Feb. 1, 2008 (quoting WINOGRAD COMMISSION REPORT (Jan. 30, 2008)).

[328] Yoaz, *supra* note 327 (quoting WINOGRAD COMMISSION REPORT (Jan. 30, 2008)). *Contra Israel: Cluster Bombs Used Legally Against Terrorist Targets*, ISRAEL NEWS AGENCY, Dec. 26, 2007, *available at* http://www.israelnewsagency.com/lebanonwarhizbullahhezbollahterrorattacksisraelidfclusterbombsdefensekatusha48122607.html (citing an investigatory finding by the IDF Military Adjutant General (MAG) that "the IDF's use of cluster munitions during the war was in accordance with international humanitarian law as it directly defended innocent Israeli civilians from the barbaric actions of Islamic terrorists."). The IDF MAG self-serving conclusions ignore the principle of proportionality altogether. The issue is not whether the IDF was justified in using force to "defend[] innocent Israeli civilians," but whether the use of cluster munitions in areas populated with civilians could have been anticipated to lead to civilian deaths disproportionate to the military advantage to be gained.

[329] Nir Hasson & Meron Rapoport, *IDF Admits Targeting Civilian Areas in Lebanon with Cluster Bombs,* HAARETZ.COM, Nov. 21, 2006, http://www.haaretz.com/hasen/spages/789876.html (quoting a release by the IDF Spokesman's Office).

[330] *Id.* (quoting MK Cohen).

[331] *See* Blanford, *supra* note 37.

VII. Conclusion

Israel's decision to attack Lebanon in its pursuit of Hezbollah was justified under both the just war theory and Article 51 of the U.N. Charter. In accordance with the just war tradition, a just cause existed—to secure the peace and to punish the evildoers. As the victim and sovereign state, Israel possessed the proper authority; by all appearances, it used force with the rightful intention; and it did so as the last resort. In keeping with Article 51 of the U.N. Charter, Israel had experienced an armed attack, and it lawfully held Lebanon responsible.

Yet because Israel's methods were not in compliance with customary international law, Israel, in the end, failed to wage a just and lawful war. Instead, it fell prey to its enemy's tactics, firing indiscriminately and disproportionately upon areas populated by civilians, rightfully drawing the ire and condemnation of the international community, and violating the law of war.

The operational difficulty of how Israel properly and effectively could have used military force against Lebanon while still abiding by *jus in bello* principles of customary international law should not be underestimated. Yet despite these challenges, a fundamental principle of international law dictates that indiscriminate firing on civilian-populated areas, resulting in disproportionate civilian casualties—even if some military gain is realized—is never permissible.

States facing circumstances similar to that of Israel, particularly states bordering anemic or apathetic states containing militant non-state actors, walk a thin line, if not indeed a tightrope. Even if a state may lawfully use military force in self-defense against another state for the actions of its non-state actors, the critical balance involves taking extreme caution to avoid unnecessary civilian casualties. States can learn from the 2006 Israel-Lebanon War that the traditional notions of warfare—with the highest emphasis on destroying the enemy and a seemingly casual acceptance of collateral damage—can only serve in the twenty-first century to isolate the victim state from the international community. They can only serve, ironically, to turn the international community's support *away from* the state that suffered the harm, and in sympathy *toward* the non-state actor and its harboring state.[332] Thus, not only from the standpoint of the inherent moral legitimacy of fighting a just and lawful war, but also from the more pragmatic stance of maintaining international support, does the need for careful and precise fighting, at a level not seen before, inevitably surface.

The challenges of responding to attacks by non-state actors will continue to plague modern states as they face the realities of a multi-dimensional, non-state enemy who himself may be more than willing to violate norms of international law,[333] hoping to entice state actors into doing the same in retaliation, and thereby leveling the moral playing field. Abiding by the rules arguably has not been this challenging since Saint Augustine's time, when the Vandals and Visigoths pressed in on the Romans, committing horrific acts on civilians in their path and showing no mercy to surrendering soldiers. Yet the principles remain the same: civilized nations fight just wars, abide by international law, and treat enemy civilians humanely. To do otherwise is to give up that which distinguishes the civilized state from the non-state actor—an abiding sense of justice, and a faith that adhering to these principles ultimately will reinforce their strength and efficacy for future generations.

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[332] Schmitt Lecture, *supra* note 183 (discussing the "bully syndrome," whereby the state that has suffered the attack from a non-state actor is often still considered the "bully" by the international community due to that victim state's military response to the smaller state containing the militant non-state actors. Often, a primary reason for the emergence of the bully syndrome is the perception that the bully state uses more force, and causes more collateral damage, than necessary.).

[333] *Id.*