

## **Assessing Israel's right to self-defence**

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### Introduction

Hizbullah's attacks in northern Israel on July 12, which opened the recent hostilities in the Middle East, initially attracted condemnation from most quarters, including almost unprecedented criticism in Arab capitals. As the conflict escalated, Israel's response was denounced by many – including French President Jacques Chirac and UN Secretary General Kofi Annan – as disproportionate. As has become customary in these situations, the parties to the conflict have exchanged accusations of violating international law; references to international law have also abounded in journalistic commentaries and in diplomatic interventions.

The starting point for assessing the international legal aspects of this crisis is the regulation of the use of force by states in the UN Charter. The general principle that states cannot resort to force for settling their disputes has two important exceptions: the 'inherent' right of self-defence under Article 51 and the authorisation of the Security

Council to use force under Chapter VII of the Charter. States have from time to time relied upon other exceptions, such as humanitarian intervention, invoked by NATO to justify the 1999 Kosovo war, or the doctrine of pre-emption, developed by the Bush administration. Opinions on the legality of these non-Charter exceptions are divided.

There is no need to look beyond the Charter this time though, for Israel's response rests squarely on Article 51. This is not a pre-emptive war; nor is it necessary to stretch the interpretation of existing UN Security Council resolutions in order to find a legal basis for it. Nevertheless, self-defence is not a blank cheque. It has to be proportionate to the attacks and the threats, and limited to the means that are necessary to avert them. In order to determine whether Israel has exceeded its right of self-defence, it is therefore necessary to consider, first, the scale of the attack mounted by Hizbullah and, secondly, the questions of proportionality and necessity. A separate question, which will also be briefly discussed, is whether the parties in the conflict have violated the laws of war.

### *Hizbullah's attack*

A prerequisite for the legitimate use of force in self-defence under Article 51 is the occurrence of an armed attack. There is no dispute on the fact that Israel was the victim of an unprovoked armed attack on July 12: three Israeli soldiers were killed by Hizbullah in an ambush on Israeli territory, while two were taken hostage; three more lost their lives while pursuing the terrorists. On that same day, in an apparent attempt to divert attention, Hizbullah launched Katyusha rockets against the Israeli town of Shelomi, near the Lebanese border. Some critics have pointed out that these attacks were not legally attributable to Lebanon and that, as a result, Israel had no right to target Lebanon in response. The question of attribution is important because there is some dispute under international law on the applicability of Article 51 of the UN Charter to the actions of non-state actors. The jurisprudence of the International Court of Justice favours a narrow reading, confined only to armed attacks by states. This approach is viewed by governments and scholars alike as legally wrong and as dangerously out of step with the realities of modern warfare. Moreover, resolutions adopted by the Security Council after

the terrorist attacks on September 11 – for example the resolutions on Afghanistan – clearly indicate that self-defence can be legitimately invoked in response to attacks by non-state actors. At a time when groups like Hizbullah or Al-Qaeda can deploy more well-armed combatants than many national armies, this is surely the correct approach.

The point however is that, even on a narrow reading of Article 51, Israel can exercise its right of self-defence against Lebanon, because there is a strong case for attributing Hizbullah's actions to Lebanon. In fact, under the rules on attribution of acts to states, which the International Law Commission has now codified, acts that do not emanate directly from the official government of the state can, in certain circumstances, still be attributed to the state. In the present case two facts are very significant for the purposes of attribution:

1. Hizbullah is part of the Government of Lebanon, and holds two important ministerial seats;
2. Hizbullah exercises governmental authority in south Lebanon in the absence or default of official Lebanese authorities.

These facts alone can form the basis for the attribution of responsibility to Lebanon. If it seems unfair to blame Lebanon, particularly given that a large part of the Lebanese population disapproved of Hizbullah's actions, it must be noted that legal attribution has nothing to do with popular support. It is decisive, on the other hand, that the national government includes Hizbullah, and that the South of the country is entirely controlled by them.

### Escalating the Conflict

Israel's immediate response to the attack included limited land operations, for example the hot pursuit of the group that had abducted its soldiers, and the aerial bombardment of targets in south Lebanon and of Beirut international airport the day after the attack. The Israeli government explained that Beirut airport was targeted for two reasons: in order to

prevent reinforcements from reaching Hizbullah – some of its key operational and political centres are in south Beirut – and in order to prevent Hizbullah from flying the kidnapped soldiers out of Lebanon. There is nothing *prima facie* implausible about this argument advanced to justify the most controversial of the Israeli actions in the first day of the conflict. Israel's initial military operations appear to have been well within the scope of its right of self-defence.

At the same time, Hizbullah sought to escalate, launching, within 24 hours of its first attack, around 120 Katyusha rockets against civilian targets in Israel. Haifa, Safed and Karmiel were hit, two people killed and over one hundred wounded. On 16<sup>th</sup> July, Hizbullah eerily warned of 'new surprises'. Its attacks on Israeli civilians have continued incessantly since the beginning of the conflict. Statements by its leadership reveal a clear intent to target civilians, while many rockets have been 'enhanced' with shrapnel and other devices in order to maximise the potential for death and serious injury.

Hizbullah's escalation is an important factor in the legal analysis of the situation, because, as mentioned, the scale of the armed attack is material to the determination of the measure of force that a state is entitled to use in self-defence. As a result of Hizbullah's swift escalation of the conflict, Israel had to defend itself not simply against attacks on its armed forces on its sovereign territory, but also against indiscriminate attacks on its civilian population. In light of this, Israel's expanded operational aims past the first 24 hours are justified.

#### Necessity and proportionality

It is well-established under international law that self-defence must be necessary and proportionate. These two attributes exclude the legality of reprisals, that is actions that are merely punitive, and limit the use of force to what is needed in order to repeal the attack and to what is justified by the seriousness of the danger. Contrary to what seems to be assumed by many commentators, proportionality is not based on an arithmetic calculation of pain suffered and pain inflicted: it is not the *lex talionis* applied to the law

on the use of force. In the present conflict one of the reasons why Israeli civilian casualties have been comparably low is that Israel has an infrastructure geared to protecting its civilian population from wanton attacks, while Lebanon does not. But the disparity in casualty rates is not what proportionality is about. The state that is acting defensively may in certain circumstances have no choice but to pursue a large-scale military operation in order to put an end to aggressions on a smaller scale.

In some cases, the accusations of a disproportionate response levelled against Israel are flawed because they rely on the wrong yardstick to assess proportionality. They are predicated on the notion that the attack to which Israel is responding is only the abduction of the soldiers on July 12. There can be little doubt that Israel could have used less force in legitimate self-defence than it is currently using, had the armed attack of Hizbullah been limited to the killing of six soldiers and the abduction of two others; serious as this attack undoubtedly is, one could argue that a proportionate and necessary response need not have gone beyond operations aimed at releasing the hostages and at securing the border area from future infiltrations.

The indiscriminate attacks on civilians carried out by Hizbullah radically changed this equation. Israel is, as a matter of law, entitled to do whatever it takes, in order to put an end to the indiscriminate attacks on its civilian population and to remove Hizbullah's recurring threat from its northern border, as long as it acts consistently with the rules of warfare. Those who criticise Israel's response as ineffective, in that it has not stopped Hizbullah from launching Katyusha against northern Israel, must accept, as a corollary to their criticism, that Israel is entitled to step up its military campaign until it succeeds in bringing these armed attacks to an end.

#### The *ius in bello*

The analysis above concentrates on the *ius ad bellum*, the rules that determine when it is lawful for a state to open hostilities. The other body of international law applicable to armed conflict is the *ius in bello*, the rules of conduct in warfare (also known as

international humanitarian law). Violations of the *ius in bello* are not linked to the *ius ad bellum* characterisation of the war. It is, in other words, possible for a state to violate a particular rule on the conduct of warfare in the context of a war that it entered into lawfully (for example in order to defend itself).

Both parties to the current conflict in the Middle East have been accused of violating international humanitarian law by targeting civilians. Article 52(2) of the Additional Protocol I of the Geneva Conventions is the key rule in this respect:

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military of advantage.

The presence of civilians within a legitimate military objective does not provide immunity from attack, although Article 52(3) states that, if there is doubt as to whether an object, which is normally civilian (like a place of worship or a dwelling), is being used for military purposes, 'it shall be presumed not to be so used'. Proportionality also has to be taken into account. If, for example, only a limited military advantage is expected, it may not be appropriate to launch an attack in circumstances in which heavy loss of civilian life is probable. If one of the belligerents, however, systematically shields its forces behind civilians, as Hizbullah has been accused of doing, it must bear the responsibility for the loss of civilian life that ensues.

Whether rules of international humanitarian law have been violated can only be assessed on a case-by-case basis. As for the attacks on Israel's civilian population the evidence of Hizbullah's specific intent to target Israeli civilians is conclusive. As far as the Israeli operations are concerned, serious questions have been raised specifically about the bombing of Qana. An internal Israeli investigation concluded that the building was a legitimate military objective because it was used as a basis for launching missiles, but that, had it been known at the time that civilians had sought shelter in it, the bombing would not have been authorised.

## Conclusion

The Security Council's last important resolution on Lebanon – resolution 1559 adopted in 2004 – called for the disarmament and disbandment of all armed militias in Lebanon. Had that call been heeded, the region would not be in the middle of a dramatic conflict today. The Council may now be on the verge of approving another resolution, based on the draft proposed by the US and France. This draft has one clear merit: it does not equate the defender to the aggressor. It calls for an immediate cessation of all attacks by Hizbullah, while calling on Israel only to cease 'offensive military operations' immediately. If approved, the resolution would not deprive Israel of its inherent right to undertake defensive operations in the very likely event that Hizbullah decided to ignore the resolution and to continue its attacks on Israel.