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# Providing a Right of Self-Defense Against Large-Scale Attacks by Irregular Forces: The Israeli-Hezbollah Conflict

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## I. INTRODUCTION

During the escalation of the conflict between Israel and Hezbollah, the U.N. Security Council ("SC") intervened with Resolution 1701 on August 11, 2006.[1] The ambiguity of this resolution does not appear to provide any help in the debate among political scientists and legal scholars on the highly complex Israeli-Lebanese crisis in understanding the positions of the two parties to the dispute on the basis of norms of international law.

One particularly controversial matter is the legality of Israel's use of armed force in Lebanon. In this regard, Resolution 1701 expresses generic "concern at the continuing escalation of hostilities in Lebanon and in Israel since Hizbollah's attack on Israel on 12 July 2006;"[2] "[*c*]*alls for* a full cessation of hostilities based upon, in particular, the immediate cessation by Hizbollah of all attacks and the immediate cessation by Israel of all offensive military operations";[3] "[*c*]*alls for* Israel and Lebanon to support a permanent ceasefire and a long-term solution"[4] based, in part, on "the disarmament of all armed groups in Lebanon"[5] so that, pursuant to the Lebanese cabinet decision of July 27, 2006, "there will be no weapons or authority in Lebanon other than that of the Lebanese State;"[6] and decides "to authorize an increase in the

[1] S.C. Res. 1701, U.N. Doc S/RES/1701 (Aug. 11, 2006).
[2] *Id.*, preamble.
[3] *Id.*, ¶ 1.
[4] *Id.*, ¶ 8.
[5] *Id.*
[6] *Id.*

force strength of UNIFIL [the United Nations Interim Force in Lebanon]," which shall assist the government of Lebanon.[7]

This resolution gives rise to certain questions, such as how to define "Hizbollah's attack" of July 12. It is not clear if it is considered a terrorist attack or whether it is attributable to the Lebanese Government, or to Syria or Iran. Also, the force exercised by Israel is generically referred to in terms of "offensive military operations,"[8] but there is no reference to "aggression" or "occupation." It appears to me obvious from the entire tenor of Resolution 1701 and the reference to "Hizbollah's attack on Israel" that this resolution is intended to exclude the hypothesis of a preventive Israeli self-defense against terrorists in Lebanon. The resolution seems to consider the Israeli military action as a response to Hezbollah's "attack." However, it cannot be qualified as an "armed attack," according to Article 51 of the U.N. Charter; therefore, the Israeli "military operations" are qualified as "offensive" since they cannot be regarded as an implementation of the right to self-defense, lacking the necessary requirement of the armed attack.

In addition, the resolution makes no reference to any chapter of the U.N. Charter, giving rise to debate among legal scholars about where it should be placed in the U.N. framework.[9]

The present study is directed at addressing an important issue—the right of self-defense in the case of armed attack by a non-state armed group.[10] The analysis provides a conceptual framework for describing and critically assessing the contribution of Resolution 1701 to this crucial issue in normative and practical terms. It concludes that Resolution 1701 has actually made a step in the direction of allowing states attacked by non-state actors to retaliate. Some reflections on the position of the resolution in the Charter system are also contained below.

But, first of all, mention should be made of an issue in the analysis of the legality of Israel's use of armed force in Lebanon. This obviously includes the concept of proportionality in the context of legitimate self-defense, which raises questions of methodology as well as others of interpretation and thus requires priority.

## II. THE PROPORTIONALITY OF SELF-DEFENSE

Scholars, diplomats, and political leaders have concentrated their attention on the "proportionality" of the Israeli intervention in Lebanon: they have put forward arguments both for and against, with some commentators considering the Israeli reaction to be disproportionate and therefore illegitimate. The discussion about

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[7] *Id.*, ¶ 11(f).
[8] *Id.*, ¶ 1.
[9] *See* Anthony D'Amato, *The UN Mideast Ceasefire Resolution Paragraph–by–Paragraph*, JURIST'S FORUM (Aug. 13, 2006), *available at* http://jurist.law.pitt.edu/forumy/2006/08/un-mideast-ceasefire-resolution.php.
[10] William V. O'Brien, *Reprisals, Deterrence, and Self–Defense in Counterterror Operations*, 30 VA. J. INT'L L. 421 (1990); YORAM DINSTEIN, WAR, AGGRESSION AND SELF–DEFENCE (4th ed. 2005).

whether or not Israel's actions are proportionate to the actions of Hezbollah has been based on the traditional view, recently expressed by Professor Frederic Kirgis, according to which "the intensity of force used in self-defence must be about the same as the intensity defended against."[11]

In connection with this doctrinal opinion, I should like to propose an alternative reading of the relevant pronouncements of the International Court of Justice ("ICJ"). I submit that that the principle of the proportionality of legitimate defense could be taken to mean that the degree of force used in self-defense must be commensurate with the end to be achieved—the restoration of the rights violated as the result of an armed attack. This means that force must be "strictly necessary" in any situation and "directed" at the removal of the violation and the restoration of the violated rights.

For example, in the case of *Congo v. Uganda*, the ICJ considered that "the taking of airports and towns many hundred kilometers from Uganda's border would not seem proportionate to the series of transborder attacks it [Uganda] claimed had given rise to the right of self-defence, nor to be necessary to that end."[12] According to the Court, that the armed intervention of Uganda took place a great distance from where the violation occurred meant that the use of force for legitimate defense was not proportionate, since it was not suited to stopping the attacks along the border and therefore to achieving the object of restoring the rights of the state asserting a violation of its borders. The same reasoning underlies the advisory opinion on the *Threat of Use of Nuclear Weapons*, in which the Court even contemplated the use of nuclear armaments "in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."[13]

The proportionality principle also requires the action taken in self-defense to be halted when the "end" has been achieved. In *Military and Paramilitary Activities in and Against Nicaragua* ("*Nicaragua v. United States*"), the ICJ considered "not to have been proportionate" the United States' activities relating to the mining of Nicaraguan ports and attacks on ports and installations,[14] noting that "the reaction of United States in the context of what it regarded as self-defence (against Nicaraguan-supported rebels in El Salvador) was continued long after the period in which any presumed armed conflict by Nicaragua could reasonably be contemplated."[15]

An analysis of the proportionality of the Israeli military action raises a methodological issue. Clearly, implicit in any discussion of proportionality is compliance with Article 51 of the U.N. Charter since, if it were to be found that the preconditions for the exercise of the right to self-defense were lacking, it would make

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[11] *See* Frederic Kirgis, *Some Proportionality Issues Raised by Israel's Use of Armed Force in Lebanon*, ASIL INSIGHT (Aug. 17, 2006), *available at* http://www.asil.org/insights/2006/08/insights060817.html.

[12] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, ¶ 147 (Dec. 19).

[13] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1995 I.C.J. 95, ¶ 97 (July 8).

[14] Military and Paramilitary Activities in and Against Nicaragua (Nic. v. U.S.), 1986 ICJ 14, 122, 237 (June 27).

[15] *Id.* at 123, 237.

no sense to discuss whether Israel's military operations were proportionate. This was the pronouncement of the ICJ in the *Congo v. Uganda* case.[16] From a methodological point of view therefore, there is a need to establish as a matter of priority whether Israel made proper use of force in self-defense (since it is not obvious!), and, in the case of an affirmative response, to establish whether the Israeli military action was necessary and proportionate under international law.

## III. LEGAL BASIS FOR ISRAEL'S RIGHT TO RESORT TO SELF-DEFENSE

### A. *The Requirement that an "Armed Attack" be Attributable to a State*

The U.N. Charter and general international law provide for an absolute prohibition on the use of force by states, except in the case of legitimate self-defense laid down by Article 51 of the Charter (a norm of general international law, according to the ICJ).[17] Self-defense is "legitimate" according to Article 51 when a state is subject to an "armed attack" or act of aggression. One particularly complex point is whether the "attack" by Hezbollah may be characterized as an "armed attack" pursuant to Article 51.[18]

In general, the Security Council and the international community have discussed whether attacks by terrorist organizations and groups or irregular forces can be considered "armed attacks" or acts of aggression, which would allow for the exercise of the right to resort to armed force pursuant to Article 51. In connection with international terrorism, an affirmative interpretation, supported above all by Israel and the United States (and recently also by Uganda and Congo[19]) has generally been rejected in the past. In the late 1980s, the U.N. denied that Article 51 could justify the use of force or the right of self-defense as a response to terrorist attacks such as the bombing of Tripoli and Bengasi by the United States (1986) and the bombing of the Palestine Liberation Organization offices in Tunisia by Israel (1985 and 1988).[20]

In contrast, after the attack on the United States by Al-Qaeda on September 11, 2001, the Security Council, which was immediately convened, recognized the United States' right of legitimate self-defense and, as a result, deemed legitimate the armed intervention by the United States against Afghanistan.[21] Still, in the advisory opinion *Construction of a Wall*,[22] the ICJ rejected Israeli claims that the construction of a wall in

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[16] *See supra* note 12, ¶ 147.
[17] *See* Nic. v. U.S., *supra* note 14, at 102-03, ¶ 193.
[18] *See, e.g.*, 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 (2002).
[19] *See* Dem. Rep. Congo v. Uganda, *supra* note 12, ¶¶ 147, 253, 254, 278, 286.
[20] *See*, *e.g.*, S.C. Res. 425, U.N. Doc. S/RES/425 (Mar. 19, 1978); S.C. Res. 573, U.N. Doc. S/RES/573 (Oct. 4, 1985); S.C. Res. 611, U.N. Doc. S/RES/611 (Apr. 25, 1988); G.A. Res. 41/38, U.N. Doc. A/RES/41/38 (Nov. 20, 1986).
[21] *See*, *e.g.*, Steven R. Ratner, Jus ad Bellum *and* Jus in Bello *After September 11*, 96 AM. J. INT'L L. 905 (2002).
[22] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131 (July 9, 2004).

Palestinian territory was legitimate. Israel, referencing the United States' armed intervention in Afghanistan, had claimed that the legitimacy for constructing the wall was founded on its right to self-defense.[23] The Court underlined the difference between the two situations and stated that "Article 51 of the Charter . . . recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State."[24]

B. *Standards for Attribution to a State of Non-State Acts*

In connection with the ICJ's interpretation, the right of self-defense has long required the "armed attack" to be imputable to a state. As a result, in cases in which an attack comes from a non-state armed group, there is a need to demonstrate that it can be attributable to a state. In *Nicaragua v. United States*, decided in 1986, the Court recognized "effective control" as the standard for the attribution to a state of the act of a non-state armed group.[25]

This line of reasoning was once again adopted in *Congo v. Uganda* (and, recently, in *Bosnia and Herzegovina v. Serbia and Montenegro*),[26] in which the Court found "that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the Democratic Republic of the Congo (DRC) were not present." Despite arguments by Uganda to the contrary, the Court found that "there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC . . . ."[27]

On the basis of these considerations, what might be the legal basis for Israel's right to resort to armed force in the recent conflict in Lebanon and northern Israel? It only remains to ascertain whether Hezbollah's "armed attacks" can be attributed to a state, be it Lebanon, Syria, or Iran, and whether these acts are of "such gravity" as to amount to large-scale armed attacks.

It appears to be difficult to claim, on the basis of the normative acts available, that the Hezbollah attacks on Israel can be imputed to a state. The acts of the U.N. organs (Security Council Resolution 1701 and the Secretary-General's Report on its implementation[28]) do not deal specifically with this point—neither the overall tone nor the language enables us to ascertain this element with a degree of certainty. Resolution 1701 does not provide an assessment of responsibility on the basis of the existence of "effective control" over the Hezbollah attacks by a state (under Article 39

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[23] *Id.*, ¶ 138-39.
[24] *Id.*, ¶ 139.
[25] Nic. v. U.S., *supra* note 14, at 65, ¶ 115.
[26] Dem. Rep. Congo v. Uganda, *supra* note 12. *See also* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 2007 I.C.J. 91, ¶¶ 377-415 (Feb. 26, 2007).
[27] Dem. Rep. Congo v. Uganda, *supra* note 12, ¶ 146.
[28] The Secretary-General, *Report of the Secretary-General on the Implementation of Security Council Resolution 1701*, U.N. Doc. S/2006/730 (Sept. 12, 2006).

of the Charter), nor does it make reference to support for Hezbollah by third-party states such as Syria and Iran. With regard to Lebanon, the context of the resolution leads us to rule out any involvement, either direct or indirect, on the part of the Lebanese government. Certain paragraphs memorialize the intention of the Lebanese government to disarm and render inoperative the Hezbollah fighters.[29] This leads us to rule out the possibility that the Israeli military operations can be founded on Article 51 of the Charter, even if the long list of deplorable actions on the part of the Hezbollah—such as launching missiles against Haifa—could be regarded as "cumulative in character"[30] and as having the characteristics of gravity pertaining to acts of war.

This is the case because, even if responsibility is assigned to the Lebanese government for having failed to take measures to prevent the action or to bring to justice those behind the terrorist actions, this would not grant Israel the right to resort to armed force (but rather to use other forms of international sanctions); such actions still remain non-attributable to Lebanon. In this case, the armed non-state activities cannot be attributed to a state according to current doctrinal opinion and case law rulings.[31]

If one reaches the conclusion that Hezbollah's "attack" is not imputable to a state, then the Israeli reaction cannot be founded on Article 51 of the Charter in conformity with contemporary international law. This seems to be confirmed also by the Security Council, which determined Israel's military operations to be "offensive," thus stating that they cannot be founded on the right of legitimate self-defense.

### C. *The Need for New Standards Less Rigid in Their Application*

The lack of a right of self-defense against armed attacks from irregular forces and/or terrorist groups not attributable to a state, even in the case of large-scale armed attack, is a grave lacuna in international law. This lacuna is all the more serious if we consider the widespread (but difficult to prove) connivances between states and terrorist organizations and their autonomy in terms of resources and action even in respect of states sponsoring.

"Effective control" as the basis for attribution to a state of non-state armed acts is too rigid a criterion. For a state to "effectively control" a non-state actor, *Nicaragua v. United States* requires "financing, organizing, supplying and equipping . . . the selection of its military or paramilitary targets and the planning of the whole of its operation."[32] A more recent decision requires "overall control," involving also

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[29] S.C. Res. 1701, *supra* note 1, ¶¶ 3, 12.

[30] *See* Dem. Rep. Congo v. Uganda, *supra* note 12, ¶ 146.

[31] *See, e.g.*, Jonathan Somer, *Acts of Non-State Armed Groups and the Law Governing Armed Conflict*, ASIL INSIGHT (Aug. 24, 2006), *available at* http://www.asil.org/insights/2006/08/insights060824.html; United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, at 16–34, ¶¶ 27–68 (May 24).

[32] *Supra* note 15, at 64, ¶ 115.

participation in the planning and supervision of military operations.[33] These high standards stand in contrast to the 1974 Resolution of the General Assembly, which required merely "substantial involvement."[34] Moreover, "effective control" is not easy to ascertain in concrete cases, as there is a need for "clear evidence" of a State having exercised such a degree of control "in all fields" so as to justify treating a non-state actor as acting on its behalf.[35]

This point is by no means easy to resolve because it is risky to argue for equating non-state actors to states, thereby providing an automatic extension of the right to legitimate defense under Article 51 of the Charter to armed attacks from non-state organizations. However, the emergency remains, and international law must find a way to deal with the fact that international society has grown to include new actors who possess and deploy military equipment comparable to that of sovereign states. Because of this danger, there is a need for new rules of attribution and standards less rigid in their application, together with objective institutional mechanisms, to allow for self-defense in the face of a non-state armed attack. This should act as a deterrent for terrorist groups and the states sponsoring them. It is for this reason that certain legal scholars have proposed adopting, in addition to "effective control," the standard of "due diligence" as a basis for attribution.[36]

Who should step in at an international level to fill this normative void? Certainly the U.N. bodies that, within the changing institutional framework of the international community that has evolved to deal with new international issues, have set in motion procedures to provide international norms that go beyond the classical procedures of customary law.[37] That the U.N. bodies should fill this gap aligns with Thomas Franck's forceful argument for "the capacity of law to adapt to new circumstances."[38]

In the 1970s, the U.N. General Assembly made an important contribution to the definition of aggression; it did so at a time when international terrorism had not taken on the global character that it has today. The General Assembly does not have binding normative powers, but, by means of its Declarations of Principle, it carries out the function of encouraging "the progressive development of international law" (Article 13, 1 (a) of the U.N. Charter), and it is the primary forum for the adoption of principles of international law of an instantaneous character.[39] However, a significant limit on the effective ability of the General Assembly to provide for a right of self-defense against non-state actors arose from a disagreement within the U.N. on the

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[33] Prosecutor v. Tadic, Case No. IT-94-1-A, ¶¶ 120, 122, 123, 131 (July 15, 1999).
[34] G.A. Res. 3314 (XXIX), Art. 3(g), U.N. Doc. A/RES/3314.
[35] Nic. v. U.S., *supra* note 14, at 62, ¶ 109.
[36] Robert P. Barnidge Jr., *States' Due Diligence Obligations with Regard to International Non–State Terrorist Organisations Post–11 September 2001: The Heavy Burden that States Must Bear*, 16 IRISH STUD. INT'L AFF. 103 (2005).
[37] *See*, *e.g.*, JOSÈ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS (2005).
[38] Thomas M. Franck, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 AM. J. INT'L L. 88, 104-05 (2006).
[39] *See, e.g.*, Bin Cheng, *UN Resolutions on Outer Space: "Instant" International Customary Law?*, 5 INDIAN J. INT'L L. 23 (1965).

definition of "terrorism"[40] and how to distinguish between terrorism, which it condemned, and violence on the part of national liberation movements, which it considered possibly legitimate.[41]

Even the ICJ has not specifically dealt with this matter. In the above-mentioned case of *Congo v. Uganda*, the Court did not consider it appropriate "to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces."[42] Even in the Advisory opinion *Construction of a Wall*, the Court failed to take advantage of the opportunity given to it by Israel's claim that the construction of a wall constituted an exercise of the right of self-defense in the face of terrorist attacks.[43]

One of the functions of the Court is to interpret the norms of international law and, therefore, Article 51 of the Charter. But the Court takes a cautious approach toward intervening in a matter entrusted primarily to the Security Council by Article 24 of the Charter. Thus, it hesitates to extend the application of Article 51 to non-state actors, which would be possible according to the language of Article 51. Commentators have underlined that the letter of this Article does not expressly require that an armed attack triggering the right to self-defense must come to be attributable to a state.[44] In the words of Article 51 of the U.N. Charter, "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations."[45]

So, the body that has really dealt with this, easing the way for future advances of the other two bodies–the ICJ and the General Assembly–is the Security Council.

## IV. A MECHANISM FOR ATTRIBUTION ESTABLISHED BY SECURITY COUNCIL RESOLUTION 1701

Although the Security Council has not made an explicit effort to change the standard for a right to self-defense from "effective control," it has made a step in the right direction by making it easier to attribute terrorist attacks to states.

The Security Council made provision for a more extensive application of Article 51 after the terrorist attacks of September 11, 2001 in the United States, considering as legitimate the exercise of the right of self-defense in response to an armed attack by a non-state group involved in terrorist activities.[46] In that case, the Security Council

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[40] *See generally* M. Cherif Bassiouni, *Legal Control of International Terrorism*, 43 HARV. INT'L L. J. 83, 101 (2002).
[41] *See*, *e.g.*, G.A. Res. 3314 (XXIX), *supra* note 34, at Art. 7.
[42] Congo v. Uganda, *supra* note 12, ¶ 147.
[43] Construction of a Wall, *supra* note 22, ¶ 139.
[44] *See, e.g.*, Karl Zemanek, *Self-Defence Against Terrorism*, *Reflexions on an Unprecedented Situation*, *in* EL DERECHO INTERNACIONAL EN LOS ALBORES DEL SIGLO XXI: HOMENAJE AL PROFESSOR JUAN MANUEL CASTRO-RIAL CANOSA 695, 702 (Fernando M. Mariño Menendez, ed. 2002).
[45] U.N. Charter.
[46] S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001); S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (reaffirmed in S.C. Res. 1440, U.N. Doc. S/RES/1440 (Oct. 24,

did so by attributing the actions of the Taliban to Afghanistan. Following from this proposition, Resolution 1701 introduces what may be considered to be a "rule-based model of attribution" that aims to overcome the legal obstacle of "effective control." This is especially appropriate in the unclear Lebanese situation in which Hezbollah appears to have close links with the Lebanese government. Although it has not yet been proven, there is a strong suspicion that there were links and a secret agreement with the government of Lebanon that Hezbollah's members would not be disarmed and would be allowed to continue to import arms.[47]

The Security Council approaches the question of attribution only indirectly and at a practical level. The resolution aims to re-establish effective control by the Lebanese government over its territory, to enable it to be free and, at the same time, to make it responsible for its political actions. To this effect, it "[*c*]*alls upon* the Government of Lebanon to secure its borders and other entry points . . . and *requests* UNIFIL . . . to assist the Government of Lebanon"[48] to prevent the entry into Lebanon of arms or related material "without its consent".[49] The resolution clearly states that "no foreign forces [may be] in Lebanon without the consent of its government [and that] no sales or supply of arms and related material [should go] to Lebanon except as authorized by its government."[50] The resolution's aims can be identified through the wording chosen: that of "assist" and "consent." On the basis of these provisions, the Lebanese government is permitted to make the voluntary choice as to whether to support the terrorist actions of Hezbollah or to oppose them. It alone has the power to decide whether to disarm the Hezbollah fighters or to allow weapons in to equip them—it all depends on the political will of the government, and UNIFIL cannot interfere with it.

In this way, the entire scenario can be seen as providing a sort of mechanism for attribution, a context within which any further armed activity on the part of terrorist groups based in Lebanon would be deemed the "deliberate official policy"[51] of the government of Lebanon. If the Lebanese government was forced to take responsibility for large-scale attacks, it would leave open the way for legitimate self-defense on the part of Israel under the terms of Article 51. These attacks will be imputable to the authorities of Lebanon, since the "consent" provides a clear and unequivocal act of "acknowledgment and adoption" of the conduct in question.

The "acknowledgement and adoption" standard of attribution, already adopted by the Security Council in Resolution 138 in the case of Eichmann's capture[52] and formalized by the International Law Commission ("ILC") in Article 11 of the Report

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2002)); S.C. Res. 1450, U.N. Doc. S/RES/1450 (Dec. 13, 2002); S.C. Res. 1452, U.N. Doc. S/RES/1452 (Dec. 20, 2002); and S.C. Res. 1465, U.N. Doc. S/RES/1465 (Feb. 13, 2003).

[47] *See* D'Amato, *supra* note 9.

[48] S.C. Res. 1701, *supra* note 1, ¶ 14. *See also* ¶¶ 6; 11(d), (e), (f); 12

[49] *Id.*, 14

[50] *Id.*, ¶ 8.

[51] Nic. v. U.S., *supra* note 14, ¶ 155.

[52] S.C. Res. 138, U.N. Doc. S/4349 (June 23, 1960).

on State Responsibility of 2001,[53] originated in the *Diplomatic and Consular Staff* case, in which the ICJ ruled that "the Iranian State . . . itself was internationally responsible"[54] for attacks by Iranian militants on the U.S. embassy in Teheran. These attacks were the outcome of a change in policy adopted by the Iranian authorities and of "the approval" given to the conduct of the militias that transformed the initial legal situation. The Court found that there was a substantive difference in terms of the legal consequences between the initial negligence of the Iranian State for having failed "to take appropriate steps" in order to prevent the attacks on the embassy, and the subsequent behavior, during which the Iranian authorities were "aware of their obligation," and, "due to more than mere negligence or lack of appropriate means," "failed to use the means which were at their disposal to comply with their obligations."[55] In essence, the Court made a distinction between "mere negligence" and what may be called "awareness/conscious negligence"—only in the latter case is the conduct in question to be attributed to the state.

The *Diplomatic and Consular Staff* standard of attribution has a far wider significance in connection with the standard laid down in Article 11 of the ILC Report, which "provides for attribution to a State of conduct that was not or may not have been attributable to it at the time of commission, but which is subsequently acknowledged and adopted by the State as its own,"[56] i.e., "retroactive" attribution.

The resolution seems to lay the legal basis for Lebanon's responsibility for possible armed attacks on Israel by Hezbollah on the "conscious negligence" (i.e., awareness and failure on the part of a state to use the means that were at its disposal to prevent terrorist activities) of the Lebanese government.

The Security Council consolidates a rule of attribution, around which there is much uncertainty, expressing a preference for the ICJ's interpretation. Moreover the Security Council has applied such a norm in an original manner, as a law-maker, setting it as the basis for a mechanism of shared governance and contributing to the gradual establishment of an integrated enforcement system, on which I have largely focused (and have systematically reconstructed) in previous writings.[57] Already, the substantial international community (i.e. the inter-state community) has developed mechanisms of integration with the organized international community (i.e. the international organizations and the global NGO community) and, above all, the United Nations.[58]

## V. CONCLUSION

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[53] Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, art. 11, *in* Int'l Law Comm'n, Report of the International Law Commission on the Work of Its Fifty-third Session, U.N. Doc. A/56/10 (2001).

[54] Diplomatic and Consular Staff, *supra* note 31, ¶ 74.

[55] *Id.*, ¶¶ 63, 68.

[56] Draft Articles on Responsibility of States, *supra* note 53, commentary to art. 11, at 119.

[57] Giuliana Ziccardi Capaldo, *The Law of the Global Community: An Integrated System to Enforce "Public" International Law*, 1 GLOBAL COMMUNITY YILJ 71, 97 (2001).

[58] I first used this difference in GIULIANA ZICCARDI CAPALDO, TERRORISMO INTERNAZIONALE E GARANZIE COLLETTIVE (1990), at 127-30

Security Council Resolution 1701, although characterized by ambiguity, makes an operative and normative contribution to creating an effective tool for providing the right of self-defense in response to an armed attack by a non-state armed group.

From an operational point of view, the resolution aims to provide a response to the problems posed by weak and/or acquiescent governments that offer sanctuary to terrorist networks preparing attacks on other states. It puts in place a mechanism to dissuade the Government of Lebanon from supporting Hezbollah fighters by setting up a U.N. support force to restore territorial control and to assist the Lebanese army while allowing the Lebanese government to decide whether to ensure respect for the arms embargo and disarm the terrorist groups or to allow weapons to enter and permit terrorist groups to equip themselves.

In normative terms, what I am arguing for is also a sort of mechanism for the attribution of the acts of armed groups operating on its territory to the Lebanese government. This attribution is based upon "acknowledgement and adoption" (with the meaning of "awareness/conscious negligence")—a less rigid standard than the criterion of "effective control," which itself was a more cautious approach than the earlier-espoused standard of "due diligence/mere negligence."

The resolution institutes a mechanism of law-enforcement that follows in the wake of the ongoing process of change in the system of international guarantee toward new forms. This is a change determined by the need to make up for the inability of classical forms of guarantee and the U.N. system itself to protect collectively new fundamental values of the global community (e.g., peace, human rights, self-determination, sustainable development, the environment, international commons, etc). The shortcomings of the Charter are well-known. It is not only those that are procedural, (blocking of the system due to vetoes, the lack of decision-making power of the General Assembly, etc); but also that the UN system of collective security foreseen by Chapter VII is solely focussed on safeguarding the peace in the event of "threats to peace, violation of the peace and acts of aggression". In any case, even for maintaining the peace, the United Nations does not possess the necessary tools, since the "special agreements" foreseen by the Charter (for instance, in Articles 43-47) for the creation of a permanent standing U.N. army have never been stipulated.

It is therefore particularly important to focus attention on mechanisms of joint governance and processes of multilateral authoritative decision-making between states and international organizations acting jointly. The United Nations participates in a position of superiority, carrying out the function of control and legitimization of multilateral activity, which is a new role for it compared to its strictly institutional one.

I believe the mechanism put in place by Resolution 1701 should be placed outside the normative system of the U.N. Charter, with regard to both Chapters VI and VII, as well as articles 42 and 51. It serves as the model for a more effective, integrated system for a new era in the enforcement of international law under the authority of the United Nations. It is a response to the problems arising from the conflict in Lebanon, which could also be effective in analogous unlawful territorial situations if the mechanism, currently in its embryonic form, is perfected and formalized.

This is only an initial step, and there remains a need for normative and operational interventions with a courageous reorganization of international law enforcement, through the formalization and institutionalization of integrated mechanisms.

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