Might Does Not Make Right: The Flawed Effort to Redefine Jus Ad Bellum Proportionality

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As the dimensions of the tree are not always regulated by the size of the seed, so the consequences of things are not always proportionate to the apparent magnitude of those events that have produced them. Thus the American Revolution, from which little was expected, produced much; but the French Revolution, from which much was expected, produced little.1

INTRODUCTION

In 1928, the Permanent Court of Arbitration2 promulgated the following principle of territorial sovereignty:3

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Territorial sovereignty … involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil [sic] this duty. Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian. (emphasis added) 

In today’s context, the Island of Palmas rule stands for the proposition that a State has an affirmative duty to actively police the terror organizations that reside within its borders – ensuring that these resident organizations do not infringe upon the territorial sovereignty of other States. An issue arises, however, when a State breaches this duty, either due to inability, negligence, or choice.

The United States and Israel, as highlighted by previous action and formal statements, believe it permissible for third-party States to compel host State compliance in the current campaign against terror through the threat of armed force. Should the threat fail to achieve the desired compliance, resulting in a

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4 Island of Palmas (U.S. v. The Netherlands), (Permanent Court of Arbitration, 1928, 2 REPORTS OF INTERNATIONAL ARBITRAL AWARDS 829, p. 839, available at <http://pea-cpa.org/showfile.asp?id=168> (last visited 15 October 2008). The case involved a dispute between the United States and the Netherlands over the ownership of an island located between the Philippines, a United States colony, and the northern most island of the Netherlands East Indies; ibid., p. 836. The arbiter held in favour of the Netherlands on the ground that territorial sovereignty must be maintained through a continuous display of authority; ibid., p. 870.

5 Louis Rene Beres, The United States and Nuclear Terrorism in a Changing World: A Jurisprudential View, 12 DICKINSON JOURNAL OF INTERNATIONAL LAW 327 (1994), pp. 362-63; Barry A. Feinstein, Paradigm for the Analysis of the Legality of the Use of Armed Force Against Terrorist and States that Aid and Abet Them, 17 TRANSNATIONAL LAW 51 (2004), P. 56. See also The Corfu Channel Case (United Kingdom v. Albania), I.C.J., 9 April 1949, noting “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.”

6 See infra Parts 1 and 3.

7 See infra Part 4.2.
breach of the duties associated with territorial sovereignty,\(^8\) *jus ad bellum* proportionality would temporarily give way, allowing the third-party State to prevent a future terrorist attack through the use of a disproportionate response in self-defence. Such a response would presumably serve the purpose of permanently removing the terrorist threat while also warning other potentially uncooperative host States of the cost of similar breaches.\(^9\)

Although this expansion to proportionality has some merit when examined in light of simple game theory and the need for host-State assistance in the ongoing “war on terror,”\(^10\) it, nevertheless, fails to overcome competing theory and practical considerations.\(^11\) Indeed, the opposing considerations are so strong as to render any expansion to proportionality not only unnecessary but also counterproductive to the ultimate goal of defeating terrorism.

This article begins with a description of the 2006 Lebanon-Israeli War.\(^12\) In particular, it argues that Israel’s use of force in self-defence in response to a Hezbollah\(^13\) cross-border raid was disproportionate and, therefore, unlawful under

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\(^8\) *See supra* note 5 and accompanying text.

\(^9\) *See supra* note 4 and accompanying text.


\(^11\) *See infra* Part 5.

\(^12\) *See infra* Part 1.

\(^13\) Hezbollah (also spelled Hizbollah or Hizbu’llah) is a Lebanon-based organization consisting of radical Islamic Shiite groups who have united in opposition to the West and Israel. *See, e.g.*, Council on Foreign Relations, *available at* <http://www.cfr.org/publication/9155/> (last visited 15 October 2008). Formed within days of Israel’s 1982 invasion of Lebanon, it was not until February 1984 that Hezbollah formally announced its existence. *See, e.g.*, Bronwen Maddox, Nicholas Blanford, Stephen Farrell and Ned Parker, *Hezbollah Is Fighting to the Death, But Who Is It?*, The TIMES (UK), 21 July 2006, p. 8. The group’s initial goals were “the destruction of Israel, the liberation of Jerusalem, and the establishment of an Islamic State in Lebanon;” *ibid.* However, following the end of the Lebanese civil war in 1990, Hezbollah made a conscious effort to abandon its radical goals, opting instead to work within the political framework of Lebanon; *ibid.* Currently, Hezbollah occupies 14 of the 128-seat Lebanese National Assembly. *See, e.g.*, United States Department of State, Office of the Coordination for Counterterrorism, *Country Reports on Terrorism 2005*, April 2006, p. 198 [hereinafter 2005 Country Reports], *available at* <http://www.state.gov/documents/organization/65462.pdf> (last visited 15 October 2008). Hezbollah has used this political power to transform itself into “a major provider of social services, operating schools, hospitals, and agricultural services, for thousands of Lebanese Shiites.” Council on Foreign Relations, *supra*. Despite this move towards legitimization, the United States
currently accepted interpretations of the international law governing the use of force.\(^\text{14}\) The article continues by examining how Israeli actions during the Lebanon conflict as well as U.S. statements in the wake of the 9/11 terror attacks have highlighted a concerted effort to redefine *jus ad bellum* proportionality.\(^\text{15}\) These efforts, although gaining some support in the form of simple game theory and the need for host-State assistance in the worldwide effort against terrorism,\(^\text{16}\) fail to stand up to competing theory and other practical considerations.\(^\text{17}\)

### 1. CONTEXT

During the daylight hours of 12 July 2006, Hezbollah militia, operating out of Southern Lebanon, staged a cross-border raid on Israeli military units in Northern Israel.\(^\text{18}\) The gunmen killed three Israeli soldiers and captured two others.\(^\text{19}\) Israel government has labelled Hezbollah a terrorist organization; *ibid.* According to the United States Department of State:

Hizballah is known to have been involved in numerous anti-U.S. and anti-Israeli terrorist attacks, including the suicide truck bombings of the U.S. Embassy and U.S. Marine barracks in Beirut in 1983 and the U.S. Embassy annex in Beirut in 1984. Four members of Hizballah, Imad Mughniyah, Hasan Izz-al-Din, Mohammed Hamadei, and Ali Atwa, are on the FBI’s list of most wanted terrorists for the 1985 hijacking of TWA flight 847, during which a U.S. Navy diver was murdered. Elements of the group were responsible for the kidnapping, detention, and murder of Americans and other Westerners in Lebanon in the 1980s. Hizballah also has been implicated in the attacks on the Israeli Embassy in Argentina in 1992 and a Jewish cultural centre in Buenos Aires in 1994. The U.S. Government has indicted a member of Lebanese Hizballah for his participation in the June 1996 truck bomb attack of the U.S. Air Force dormitory at Khobar Towers in Saudi Arabia. In 2000, Hizballah operatives captured three Israeli soldiers in the Sheba’a Farms area and kidnapped an Israeli non-combatant.

2005 Country Reports, *supra*.

\(^{14}\) See *infra* Part 2.

\(^{15}\) See *infra* Parts 1 and 3.


\(^{17}\) See *infra* Part 5.

reacted immediately, sending a small contingent of troops and unmanned aerial vehicles in pursuit of the gunmen and their captured comrades.\textsuperscript{20} The pursuit came to an abrupt halt when an Israeli tank struck a Hezbollah mine,\textsuperscript{21} but not before the incursion took Israeli troops across the Lebanese border in a force not seen during the previous six years.\textsuperscript{22}

Within hours, Israeli Prime Minister Ehud Olmert called the cross-border attack “an act of war by the State of Lebanon against the State of Israel.”\textsuperscript{23} Israeli Army Chief of Staff Lt. Gen. Dan Halutz was quoted as saying that if the kidnapped soldiers were not returned Israel would “turn back the clock in Lebanon by 20 years.”\textsuperscript{24}

The following day,\textsuperscript{25} the Israeli cabinet authorized the use of force at a level far exceeding the Hezbollah attack the day before – directed against Lebanon as well as Hezbollah.\textsuperscript{26} This authorization marked the start of a vast air offensive, which included the bombing of the Rafik al-Hairi International Airport in Beirut, Lebanon’s only international airport, as well as Hezbollah strongholds, Lebanese


\textsuperscript{20} Paul Kent, \textit{Waging War for Lost Sons}, \textit{Daily Telegraph} (Australia), 22 July 2006.


\textsuperscript{22} Israel invaded Lebanon in 1982 in an effort to eliminate the Palestinian Liberation Organization’s base of operations; The Memorial Institute for the Prevention of Terrorism’s Terrorism Knowledge Base, see <http://www.tkb.org/Group.jsp?groupID=3101> (last visited 15 October 2008). It was not until May 2000 that Israel withdrew due in large part to the financial costs of continued occupation; \textit{ibid}. It is widely accepted that Hezbollah was formed in 1982 in direct response to Israel’s occupation of Southern Lebanon; \textit{ibid}.

\textsuperscript{23} Barnard, supra note 19.


\textsuperscript{25} Kent, supra note 20.

\textsuperscript{26} Chazan, supra note 21. Israel held Lebanon responsible for the actions of Hezbollah because, according to Israeli Prime Minister Ehud Olmert, the raid was “not a terror act, but an act of a sovereign State that attacked Israel without reason. The government of Lebanon, of which Hezbollah is a part, is trying to shake the stability of the region.” Myre, supra note 18, quoting Israeli Prime Minister Ehud Olmert.
military bases, and major roadways that linked Lebanon to the outside world.27 The air offensive ultimately forced the complete shutdown of the Beirut airport and led to the wide scale destruction of civilian infrastructure in both North and South Lebanon.28 Israel further imposed an air and sea blockade against Lebanon.29 These measures were all part of what the Israeli Prime Minister called a “very painful” response to Hezbollah’s abduction of the two Israeli soldiers on 12 July.30

International reaction was swift and severe. Although Hezbollah’s actions were for the most part universally condemned,31 many world leaders expressed outrage over Israel’s decision to strike at Lebanese targets as opposed to limiting its defensive actions to Hezbollah.32 These critics regarded the Israeli use of force


29 Barnard, supra note 19. According to Lebanon’s finance ministry, the blockade cost Lebanon an estimated U.S. $150 million per month. Ilene R. Prusher and Nicholas Blanford, As U.N. Force Grows, Israel Lifts Air and Sea Blockade, CHRISTIAN SCIENCE MONITOR, 8 September 2006, p. 4.


against Lebanon – a seemingly innocent third-party, its infrastructure, and military – as disproportionate and thus in conflict with the rules of international law governing the use of force. The European Union, for instance, issued a stinging statement:

The European Union is greatly concerned about the disproportionate use of force by Israel in Lebanon in response to attacks by Hezbollah on Israel. The presidency deplores the loss of civilian lives and the destruction of civilian infrastructure. The imposition of an air and sea blockade on Lebanon cannot be justified.

Russia, France, and Great Britain all responded in a similar fashion. French President Jacques Chirac acknowledged that he was perplexed as to why Israel

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33 Greg Sheridan, *It’s a New Way of War and We’d Better Get Used to It*, AUSTRALIAN, 10 August 2006, p. 10, contrasting Lebanon to Afghanistan by arguing that “[t]he Taliban government of Afghanistan supported al-Qa’ida’s attacks on the West. The Lebanese Government did not authorise or support Hezbollah’s attacks on Israel.”

34 See infra notes 90-101 and accompanying text.

35 James A. Green, *Docking the Caroline: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defence*, 14 CARDOZO JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 429 (2006), p. 459, arguing that Israel’s defence was far from “universally accepted as a proportional one …”); Patricia Smith, *Israel vs. Hezbollah: What Was Their Month-Long War All About – And What Does It Mean for the Middle East and For America’s Role in the Region?*, N.Y. TIMES UPFRONT, 18 September 2006, p. 20.


37 *Ibid*. The Russian statement read: “One cannot justify the continued destruction by Israel of the civilian infrastructure in Lebanon and in Palestinian territory, involving the disproportionate use of force in which the civilian population suffers.” *Ibid*. French Foreign Minister Philippe Douste-Blazy said:

“We obviously condemn this disproportionate act of war, which moreover has two consequences. The first is that it forces anyone who wants to enter Lebanon from now on to go either by sea or via Syria. The second consequence is that it risks plunging Lebanon back into the worst years of the war.” *Ibid*. 
would resort to force against Lebanon.\textsuperscript{38} Italian Foreign Minister Massimo D’Alema was quoted as saying that Italy had “the impression that [Israel’s response] is a disproportionate and dangerous reaction in view of the consequences it could have.”\textsuperscript{39} Sweden, Denmark, and Norway also suggested that Israel’s actions were excessive.\textsuperscript{40} Even the United Nations Secretary-General spoke out against Israel’s disproportionate use of force.\textsuperscript{41}

Israeli Prime Minister Ehud Olmert defended his country’s decision to strike not only at Hezbollah, but Lebanon as well: “The events of [12 July 2006 were] not terror attacks but actions of a sovereign State that attacked Israel for no reason. The Lebanese government, of which Hizbullah is a member, is trying to undermine regional stability. Lebanon is responsible and it will bear responsibility.”\textsuperscript{42} Although this argument lacks even a hint of factual merit,\textsuperscript{43} it nevertheless highlights existing disagreement regarding the proper interpretation of \textit{jus ad bellum} proportionality.

\section*{2. The International Law Governing the Use of Force}

Any examination of proportionality must begin with a general discussion of the laws governing the use of force. Contemporary \textit{jus ad bellum} is embodied in Article 2(4) of the United Nations Charter, which expressly prohibits the use of force between Member States.\textsuperscript{44} This prohibition is not absolute; two exceptions exist.

\begin{itemize}
  \item \textsuperscript{38} “One may well ask if there isn’t today a kind of wish to destroy Lebanon – its infrastructure, its roads, its communications, its energy, its airport. And for what? I find honestly, as all Europeans do, that the current reactions are totally disproportionate.” David Williams, \textit{U.S. Allies Roundly Condemn Attack on Lebanon}, \textit{GLOBE AND MAIL}, 15 July 2006, p. A13.
  \item \textsuperscript{40} Ibid.
  \item \textsuperscript{41} U.N. Doc. S/PV.5492 of 20 July 2006, \textit{available at} <http://daccessdds.un.org/doc/UNDOC/GEN/N06/436/71/PDF/N0643671.pdf> (last visited 15 October 2008), [hereinafter Annan Statement]: “While Hizbollah’s actions are deplorable and, as I have said, Israel has a right to defend itself, the excessive use of force is to be condemned.”
  \item \textsuperscript{42} \textit{War and Peace}, \textit{JERUSALEM POST}, 13 July 2006, p. 13.
  \item \textsuperscript{43} See infra notes 105-107 and accompanying text.
  \item \textsuperscript{44} “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.” U.N. Charter, Article 2(4). ‘Force’ as used in the Charter is to be taken as meaning ‘armed force.’ \textit{Yoram Dinstein,}
The first exception is embodied in Articles 39 through 50. Under these articles, the United Nations Security Council may authorize the use of force in order to maintain international peace and security. Historically, the Security Council has been reluctant to authorize the use of force, doing so on only two occasions. This reluctance is due in large part to the composition of the five permanent Member States that retain veto powers.

The second, more widely invoked exception and the subject of this article, is codified in Article 51 of the Charter. This article provides in relevant part:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.

WAR AGGRESSION AND SELF-DEFENCE (Cambridge: Cambridge University Press, 2005), p. 86; Richard L. Griffiths, International Law, the Crime of Aggression and the Ius Ad Bellum, 2 INTERNATIONAL CRIMINAL LAW REVIEW 301 (2002), p. 317. Article 2(4) is not to be read as a prohibition of all force, in particular, the practice of one State placing economic or political pressure on another to achieve some desired result; DINSTEIN, supra.

Articles 39 to 51 of the United Nations Charter codify the concept of collective security whereby the U.N. Security Council is entrusted with the power to not only “determine the existence of any threat to the peace, breach of the peace, or act of aggression” but “shall make recommendations, or decide what measures shall be taken … to maintain or restore international peace.” DINSTEIN, supra note 44, p. 280, quoting Article 39 of the U.N. Charter.


Eric A. Posner and Alan O. Sykes, Optimal War and Use Ad Bellum, 93 GEORGIA LAW JOURNAL 993 (2005), p. 993, noting that one of the Security Council’s authorizations was the result of a tactical error by the Soviet Union.

Ibid. The five permanent member States are Russia, the United States, Britain, China, and France. The Charter requires an affirmative vote from nine of the fifteen Security Council members, including an affirmative vote or no vote at all from all five permanent members, in order to authorize the use of force; U.N. Charter, Article 27; see DINSTEIN, supra note 44, p. 291. Accordingly, any negative vote by any one of the five permanent members prevents a resolution to use force from passing.

U.N. Charter, Article 51.
Article 51 was drafted in recognition of a State’s fundamental right to survival.\(^{50}\) It merely preserves a State’s pre-Charter customary right to self-defence,\(^{51}\) adding the additional requirement of a triggering armed attack.\(^{52}\)

2.1 Armed Attack

Fundamental to any invocation of Article 51 is the actual presence of an armed attack.\(^{53}\) Most scholars agree that prior to 11 September 2001, an armed attack under Article 51 was not generally thought to include attacks by non-State actors that were not \textit{de-facto} organs of a particular State.\(^{54}\) This view is supported by the International Court of Justice, which held in the \textit{Nicaragua} case that an armed attack of the sort triggering Article 51 self-defence may only be committed by another State or “the sending by or on behalf of a State of armed bands, groups,

\(^{50}\) DINSTEIN, supra note 44, p. 175, noting that it is a very rare instance when a State’s very survival is placed in jeopardy. Nevertheless, “the exercise of self-defence is by no means confined to such catastrophic scenarios. The reality of self-defence in inter-State relations is much more prosaic: it transcends life-or-death existential crises and impinges on a host of commonplace situations involving the use of counter-force.” \textit{Ibid}.

\(^{51}\) Legality of the Threat or Use of Nuclear Weapons, I.C.J., Advisory Opinion of 8 July 1996; “[N]o system of law, whatever it may be, could deprive one of its subjects of the right to defend its own existence and safeguard its vital interests.”


\(^{53}\) There is an ongoing debate as to whether a State may exercise self-defence in the absence of an actual (as opposed to an impending) armed attack. Many scholars argue that because “the right of self-defence arises under Article 51 only ‘if an armed attack occurs’, it is clear that the use of force in self-defence is contingent on demonstrating that an armed attack has taken place.” DINSTEIN, supra note 44, p. 182. Yet others, including the current Bush Administration, argue that such a reading “would mean that the U.N. Charter extinguished the pre-existing right under customary international law to take reasonable anticipatory action in self-defence.” John Yoo, \textit{Using Force}, 71 \textit{UNIVERSITY OF CHICAGO LAW REVIEW} 729 (2004), p. 739. These scholars believe that Article 51 was meant to codify then existing customary international law; John Yoo, \textit{Force Rules: UN Reform and Intervention}, 6 \textit{CHICAGO JOURNAL OF INTERNATIONAL LAW} 641 (2006), p. 644. Because pre-Charter custom “permitted nations to use force in anticipation of an attack that had no yet occurred – so long as the attack was imminent,” they believe Article 51 cannot be read as narrowly as Dinstein and others suggest. \textit{Ibid}.

irregulars, or mercenaries” to carry out armed attacks “of such gravity as to amount to … an actual armed attack conducted by regular forces.” Under this interpretation terrorist activities without significant State involvement do not constitute an armed attack under Article 51.

In recent years there has been a growing chorus among scholars that an armed attack of the sort giving rise to self-defence may indeed be committed by non-State actors. “When non-State actors cause damage equivalent to that of an aggressive nation, they must not be allowed to hide behind their status as non-State

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55 Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.), I.C.J., 27 June 1986 (emphasis added). The I.C.J.’s holding in Nicaragua that non-State actors could not commit an armed attack of the sort giving rise to Article 51, may have been the reason Israel so vehemently argued that Lebanon was responsible for Hezbollah’s attack; Tom Ruys, Crossing the Thin Blue Line: An Inquiry into Israel’s Recourse to Self-Defense Against Hezbollah, 43 STANFORD JOURNAL OF INTERNATIONAL LAW 265 (2007), p. 276.


57 DINSTEIN, supra note 44, p. 204, noting that:

Whereas Article 2(4) of the Charter, in proscribing the use of force, refers solely to … State actors on both sides – Article 51 mentions a State (a Member of the United Nations) only as the potential target of an armed attack. The perpetrator of that armed attack is not identified necessarily as a State. An armed attack can therefore be carried out by non-State actors.

See also Tom Ruys & Sten Verhoeven, Attacks by Private Actors and the Right of Self-Defense, 10 JOURNAL OF CONFLICT AND SECURITY LAW 289 (2005), p. 290; Mark A. Drumbl, Self-Defense and the Use of Force: Breaking the Rules, Making the Rules, or Both?, 4 INTERNATIONAL STUDIES PERSPECTIVE 409 (2003), p. 420, noting that non-State actors may present more of a threat to national security than other States; Christopher Greenwood, International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaeda, and Iraq, 4 SAN DIEGO INTERNATIONAL LAW JOURNAL 7 (2003), p. 17, arguing that even the Caroline Doctrine supports the argument that an armed attack of the sort giving rise to Article 51 self-defence may be committed by non-State actors; Jami Melissa Jackson, The Legality of Assassination of Independent Terrorist Leaders: An Examination of National and International Implications, 24 NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION 669 (1999), p. 682, arguing that if armed attacks did not include those committed by non-State actors, terrorists would be able to target States with relative impunity. “There is nothing in the U.N. Charter or international practice that restricts the identity of aggressors against whom States may respond – private actors as well as governments may be the sources of catastrophic conduct.” Ruth Wedgwood, Responding to Terrorism: The Strikes Against Bin Laden, 24 YALE JOURNAL OF INTERNATIONAL LAW 559 (1999), pp. 563-64.
actors.” This view gains support from United Nations Security Council Resolutions 1368 and 1373, which implicitly recognized a State’s right to respond in self-defence to a terrorist attack. In addition, the International Criminal Tribunal for Former Yugoslavia (ICTY) found that an armed conflict exists “whenever there is a resort to armed force between States or protracted armed violence between government authorities and organized armed groups or between such groups within a State.” The position of the ICTY was borne out recently when the majority of States accepted the United States invocation of self-defence when it responded with military force against Al Qaeda in Afghanistan following the 11 September 2001 attacks.

Even assuming that an Article 51 armed attack can be committed by non-State actors, the existence of an armed attack does not automatically permit an Article 51 response in self-defence. It is imperative that the non-State actor’s attack

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I submit that all that these two resolutions do, however, is to ‘recognize the inherent right of individual or collective self-defence in accordance with the Charter’ in their preambles. The resolutions do not say that all, some, or any of the actions taken in response to the terrorist actions of 11 September 2001 are justified as acts of self-defence, or that this pronouncement wishes to change the Charter in this respect. The Council did not recognize the right of self-defence to act against private actors without attribution to a State, but only generally reaffirmed the right of self-defence irrespective of context.


originate from outside the victim State’s territory.\textsuperscript{62} For when the non-State entity acts from within, there exists either an internal armed conflict or domestic terrorism.\textsuperscript{63} Internal conflicts fall beyond Article 51’s reach.\textsuperscript{64}

It is undisputed that Hezbollah, a non-State actor, operated and staged a cross-border armed attack against Israel originating from within the sovereign territory of Lebanon.\textsuperscript{65} This unlawful, outside force\textsuperscript{66} triggered Israel’s inherent right to employ Article 51 self-defence against Hezbollah.\textsuperscript{67} This fully complies with the findings of an independent body of experts established by the United Nations Human Rights Council, which concluded that “[t]he hostilities that took place from 12 July to 14 August 2006 constitute[d] an international armed conflict …”.\textsuperscript{68}

\begin{itemize}
\item \textsuperscript{62} Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, I.C.J., Advisory Opinion of 9 July 2004, [hereinafter Wall]; Dinstein, supra note 44, p. 205; Orakhelashvili, supra note 59, p. 392.
\item \textsuperscript{63} Dinstein supra note 44, p. 204. Indeed, the United Nations Charter does not prohibit armed aggression between one entity within a country and another entity in that same country. Yoram Dinstein, The Thirteenth Waldemar A. Self Lecture in International Law, 166 MILITARY LAW REVIEW 93 (2000), p. 101, noting that it is often difficult to distinguish between an internal armed conflict and an international one.
\item \textsuperscript{64} Dinstein, supra note 44, pp. 204-05. See also the Wall case, supra note 62, noting that because Israel’s actions were taken to prevent attack from forces within the Israeli-controlled Occupied Palestinian Territory the conflict was internal in nature and did not trigger Article 51. But see W. Michael Reisman, Which Law Applies to the Afghan Conflict, 82 AMERICAN JOURNAL OF INTERNATIONAL LAW 459 (1988), p. 465, arguing that because States regularly conduct covert operations within another State’s internal affairs the line between international and internal conflicts is blurred.
\item \textsuperscript{65} Myer, supra note 18.
\item \textsuperscript{66} See Dinstein, supra note 44, pp. 91-92, arguing that the Article 2(4) prohibition against the use of force is applicable as a matter of customary international law to U.N. member States and non-members alike. See also Norman G. Printer, Jr., The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen, 8 UCLA JOURNAL OF INTERNATIONAL LAW AND FOREIGN AFFAIRS 331 (2003), pp. 344-52, demonstrating that the prohibition on the use of force, as set forth in Article 2(4) of the U.N. Charter, applies to States as well as non-States.
\item \textsuperscript{67} See supra notes 49-64 and accompanying text.
\end{itemize}
2.2 Self-Defence and State Sovereignty

At first glance, it would appear that Israel’s defensive actions against Hezbollah on Lebanese soil have violated the territorial sovereignty of Lebanon. However, customary international law provides that a State, having been the victim of a terror attack from abroad, may lawfully enter the sovereign territory of another, with or without the latter’s consent, to do what the harbouring State should have done had it possessed the means or desire to do so.

There existed substantial evidence that the Lebanese government, although aware of Hezbollah and its unlawful acts, was too militarily weak to completely disarm Hezbollah or stop its aggressive activities against Israel. Nevertheless, Israel could not be expected to continue to endure attack after attack.

69 Sovereign equality is “[t]he principle that nations have the right to enjoy territorial integrity and political independence, free from intervention by other nations.” BLACK’S LAW DICTIONARY (8th ed., 2004). Territorial integrity and political independence of States are the two key objectives protected by the prohibition on the use or threat of force contained in the U.N. Charter’s Article 2(4). See Dinstein, supra note 44, p. 86.


71 “The 70,000-member Lebanese Armed Forces have limited capabilities and largely obsolescent equipment.” United States Department of State, Congressional Research Service, Lebanon: The Israel-Hamas-Hezbollah Conflict, 15 September 2006, p. 9, available at <http://fpc.state.gov/documents/organization/75271.pdf> (last visited 15 October 2008). Approximately half of the Lebanese military are Shites, “and probably unwilling to turn against the powerful Shia Hezbollah.” Patrick Martin, Farewell to Arms for Hezbollah is Unlikely, Experts Say, GLOBE AND MAIL, 1 August 2006, p. A10. On the contrary, Hezbollah receives significant support in the form of funds, equipment, and personnel from both Iran and Syria; Congressional Research Service, supra, p. 14. It employs an “extensive network of fortified sites and underground facilities” and is “very well equipped with a range of modern weaponry that included antitank and anti-ship missiles, night vision equipment, and computer assisted targeting …” Ibid.
merely because Lebanon lacked the ability to fully control elements operating from within its territory. Therefore, Israel’s decision to respond with force in self-defence against Hezbollah armed aggression on Lebanese soil fully complied with international law.

2.3 Customary International Law

Once a State elects to exercise its Article 51 right to self-defence, it retains that right until the United Nations Security Council takes action.\(^{72}\) If the Security Council does not take decisive action, an action in self-defence can presumably be fought until the defending State, not the aggressor, wishes it to cease.\(^{73}\) During this time, the defending State must comply with the fundamental components of \textit{jus in bello}\(^{74}\) lest its lawful force become unlawful.\(^{75}\)

However, even assuming a State has been the victim of an armed attack, as required by Article 51, that State’s right to resort to counterforce is restricted by the \textit{jus ad bellum}. \textit{Jus ad bellum}, otherwise known as the use of force doctrine, is the legal framework governing when a State may lawfully resort to force.\(^{76}\) This


\(^{74}\) \textit{Jus in bello} is the law of international armed conflict. YORAM DINSTEIN, \textit{The Conduct of Hostilities Under the Law of International Armed Conflict} (Cambridge: Cambridge University Press, 2004), p. 14. All parties to an international armed conflict must comply with these rules during hostilities.


framework, as established under customary international law, consists of three fundamental components: necessity, proportionality, and immediacy. These elements ensure that the victim State’s response is not a reprisal but is instead taken to defend against the initial armed attack.

2.3.1 Necessity

‘Necessity’ consists of three requirements. First, the victim State must conclusively establish the source of the armed attack. Second, the victim State must determine whether the armed attack was genuine or merely a mistake or accident. Finally,


Orakhelashvili, supra note 59, pp. 396-97.

DINSTEIN, supra note 44, p. 209; Orakhelashvili, supra note 59, p. 389: “All the relevant [ICJ] cases show that the evidence has to be direct, straightforward and convincing and shall not leave open other possibilities. Presumptions and inferences drawn from the general context and reinforced by the political situation are not sufficient.” See also Case Concerning Oil Platforms (Islamic Republic of Iran v. U.S.), I.C.J., 6 November 2003; Case Concerning the Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), I.C.J., 19 December 2005. In Oil Platforms, the United States argued that a Kuwaiti tanker, the Sea Isle City, reflagged to the United States, was hit by an Iranian missile on 16 October 1987. In support of this contention, the United States offered satellite and aerial reconnaissance images, expert testimony regarding the imagery, as well as eye witness statements purporting to see the trajectory of the missile. This evidence was used to show that the missile was a “land-launched HY-2 cruise missile of Chinese manufacture” and that it was one of six-missiles launched “from Iranian-controlled territory in the Fao area.” In response, Iran asserted that any missile sites in the Fao area were heavily damaged and inoperable. Iran further argued that the imagery produced by the United States was neither clear nor resembled missile sites of type of missile that struck the Sea Isle City nor would the missile-type alleged to have struck the tanker travelled in the straight line making its viewed trajectory reliable. The Court held that the United States had failed to meet its burden in attributing the source of attack to Iran.

DINSTEIN, supra note 44, p. 209. The armed attack must be aimed specifically at the victim State. See Oil Platforms, supra note 79. Nevertheless, “the Court’s dictum ought to be
the victim State may only respond with force in self-defence if it perceives that there is little to no hope for a peaceful solution to the situation. If the victim State perceives a feasible peaceful solution, international law is clear that the State may not respond with force.

However, to require a State to allow an invasion to proceed without resistance on the ground that peaceful settlement should be sought first, would, in effect, nullify the right of self-defence. One is compelled to conclude that a State being attacked is under a necessity of armed defence, irrespective of probabilities as to the effectiveness of peaceful settlement.

There is no evidence suggesting that Israel was in doubt as to the source of the cross-border raid during the summer of 2006. It quickly surmised that the raid was an intentional attack committed by Hezbollah militia. A quick response was necessary to secure the release of the two captured Israeli soldiers before Hezbollah had the chance to hide their hostages. Further, a peaceful solution was not likely as history has shown that Hezbollah would continue to attack Northern Israel.

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81 Printer, supra note 66, p. 342; DINSTEIN, supra note 44, p. 237, arguing that ‘necessity’ obligates a State “to verify that a reasonable settlement of the conflict in an amicable way is not attainable” before resorting to full-scale hostilities.

82 DINSTEIN Remarks at ASIL, supra note 77, highlighting that before initiating armed hostilities during the first Gulf War, the coalition went out of its way, more so than necessary, to seek a peaceful solution to Iraq’s occupation of Kuwait.


84 See supra notes 20-24 and accompanying text.

85 Ruys, supra note 55, p. 290, commenting that Israel’s targeting of roads and bridges in Southern Lebanon were designed to prevent Hezbollah from transporting the captured soldiers further north.

86 See U.N. Commission Report, supra note 68, at 35, commenting that Hezbollah has vowed to continue to attack Israel until Israel withdraws from the Shab’a farms.
2.3.1 Immediacy

‘Immediacy’ requires a logical relationship in terms of time between the unlawful armed attack and the victim State’s response.\(^8^7\) Just what temporal relationship between the unlawful armed attack and the response in self-defence would satisfy the ‘immediacy’ requirement is the subject of some debate.\(^8^8\) However, the majority argue that a victim State need not respond “within a few minutes, or even a few days, from the original armed attack. A State under attack cannot be expected to shift gears from peace to war instantaneously.”\(^8^9\) Indeed, delays may result from a myriad of reasons including, but not limited to, a requirement that the civilian government sign off on any military action, attempts to negotiate a peaceful resolution, or the far-away location of the initiating aggressor.\(^9^0\) Clearly, Israel easily satisfied this element by responding immediately to Hezbollah’s raid.\(^9^1\)

2.3.3 Proportionality

Finally, customary international law mandates that any lawful use of force be proportionate to the unlawful armed attack that triggered Article 51.\(^9^2\) In particular, the defending response must not be greater than that which is necessary to mount an effective defence.\(^9^3\) In other words, “[a]cts done in self-defence must


\(^{8^9}\) Dinstein, supra note 44, p. 242, arguing that ‘immediacy’ must be considered in light of the circumstances; Baker, supra note 70, p. 34, contrasting an individual’s spontaneous response in self-defence to that of the more calculated responses of a State.

\(^{9^0}\) Dinstein, supra note 44, pp. 242-43.

\(^{9^1}\) See supra note 20 and accompanying text.


not exceed in manner or aim the necessity provoking them.”94 As such, a State acting in self-defence “cannot use a small border incursion as an excuse for launching a full-scale invasion.”95 This is not to say that proportionality requires an exact symmetry between the unlawful armed attack and the victim State’s response.96 For instance, it would be inconceivable to demand that Israel respond to Hezbollah’s attack by killing exactly three Hezbollah soldiers and kidnapping two others. Instead, quantity may equal quality.97 

If ... a State suffers a series of successive and different acts of armed attack from another State, the requirement of proportionality will certainly not mean that the victim State is not free to undertake a single armed action on a much larger scale in order to put an end to this escalating succession of attacks.98

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94 Schachter, supra note 83, p. 1637.
95 Posner, supra note 47, p. 994. “By its nature, war (as a comprehensive use of force) is virtually bound to be disproportionate to any measure ‘short of war’.” DINSTEIN, supra note 44, p. 238

An example of the proportionality requirements in action is provided in the rejection by the international community of Nazi Germany’s claim that its massive invasion of Poland in September 1939 was a response in self-defence to several border sniping incidents and minor skirmishes allegedly initiated by Polish frontier guards... Assuming for purposes of examination [that Nazi Germany’s depiction of the events leading up to invasion were accurate], a massive invasion was clearly disproportionate to the alleged Polish infractions.


96 Gina Heathcote, Article 51 Self-Defence as a Narrative: Spectators and Heroes in International Law, 12 TEXAS WESLEYAN LAW REVIEW 131 (2005), p. 136.

97 DINSTEIN, supra note 44, p. 238.

98 Ibid., p. 231, citing Roberto Ago, Addendum to Eighth Report on State Responsibility, II(1) ILC YEARBOOK 13 (1980), pp. 69-70). Indeed,

[T]he form of response to a terrorist attack often appears to be disproportionate to the actions which prompted it. ... If each of the terrorist attacks is viewed in isolation, then responses such as the Libyan bombings can easily be seen as disproportionate. But, when responding to a continuing series of attacks such a myopic view is inappropriate. The self-defensive measures should be weighed against all attacks immediately prior to the response, and, more importantly, the probability and size of future attacks.

Baker, supra note 70, p. 47.
This line of reasoning, however, fails to address a glaring problem for Israel. Instead of responding against targets that were distinctly Hezbollah in nature, such as Hezbollah strongholds or political installations, Israel responded with force that directly impacted Lebanon and its civilian infrastructure.\(^99\) While there is little dispute that these targets served to further Israel’s defence against Hezbollah,\(^100\) principles of proportionality required that Israel limit itself to a response against Hezbollah and not Lebanon, its government, or its infrastructure.\(^101\) By violating the territorial and political integrity of Lebanon, Israel’s attacks on Lebanon’s infrastructure and military were in clear contravention of United Nations Charter Article 2(4).\(^102\)

On the other hand, Israel would be well within its rights to target Lebanon if, as Israel has essentially argued, Hezbollah was a “de facto organ” of Lebanon.\(^103\)

\(^{99}\) See supra notes 25-30 and accompanying text.

Nonetheless, as Israel’s recourse to self-defence was a response to an attack by Hezbollah, which was not actively supported by the Lebanese government, the proportionality … would seem to imply that Israel’s military response should be direct only against Hezbollah targets. … Yet, if one looks at the actual use of force by Israel, it is clear that large parts of the Lebanese government and civilian infrastructure were destroyed. Lebanese military barracks were targeted, even though Lebanese soldiers did not participate in the fighting. A full naval and aerial blockade targeted not only Hezbollah, but the whole Lebanese population.

Ruys, supra note 55, pp. 291-92.

\(^{100}\) Israel advanced several justifications for the bombing of Lebanese infrastructure. First, Israel asserted that they had reason to believe Hezbollah would attempt to smuggle the captured Israeli soldiers out of Lebanon and into Iran; Martin Chulov, Israelis Cut the Route to Iran, AUSTRALIAN, 15 July 2006, p. 1. Accordingly, Israel bombed Lebanese bridges and roads as well as Lebanon’s Beirut airport in an effort to prevent the captured soldiers from being moved outside Lebanon; ibid. Furthermore, Israel imposed an air and naval blockade on Lebanon as a means to cut off supply routes to Hezbollah militants; Sam F. Ghattas, Israel Intensifies Attacks, Hits Beirut Airport Bases Near Syria Border Also Target of Airstrikes, BUFFALO NEWS, 13 July 2006, p. A1.

\(^{101}\) Victor Kattan, Israel, Hezbollah and the Conflict in Lebanon: An Act of Aggression or Self-Defence?, 14 HUMAN RIGHTS BRIEF 26 (2006), p. 29, arguing that Israel’s response was disproportionate because it did not restrict its response to Hezbollah, but attacked Lebanese targets as well; Gregory M. Travalio, Terrorism, International Law, and the Use of Military Force, 18 WISCONSIN INTERNATIONAL LAW JOURNAL 145 (2000), pp. 171-72, noting that where the terrorist organization is not a proxy for the armed forces of the host country, force may not be used “against facilities of the host country that only indirectly or collaterally support the terrorists.”

\(^{102}\) See Travalio, supra note 101, p. 172.

\(^{103}\) See supra note 42 and accompanying text.
As a *de facto* organ, Hezbollah’s unlawful attack would be imputed to the State of Lebanon and Israel would be justified in taking defensive action against Lebanon as well. Two international tribunals have weighed in, reaching two distinct conclusions, as to at what point a non-State entity may be considered a *de facto* organ of a State, thus imputing its actions upon that State. Despite the conflict between these two authorities, “the touchstone for both approaches is that States

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104 Jinks, *supra* note 105, p. 90. This arguably relaxed approach was promulgated by the United States in the wake of the September 11 Al Qaeda attacks. *Ibid.*, p. 84. The United States argued that the terrorist attacks constituted an armed attack within the meaning of Article 51. Furthermore, “the US asserted the right to act in self-defence against Afghanistan because the Taliban regime had supported and harboured leaders of the Al Qaeda terrorist network.” *Ibid.*, p. 89. Therefore, because Al Qaeda was deemed a *de facto* organ of Afghanistan, the United States argued it could exercise self-defence against not just Al Qaeda but Afghanistan as well; *ibid*. This line of reasoning has received either express or tacit support from the United Nations Security Council, North American Treaty Organization, Organization of American States, and many legal commentators; *ibid.*, p. 90.

105 DINSTEIN, *supra* note 44, p. 204. In Nicaragua the International Court of Justice held that for conduct of a non-State entity to be imputed upon a State, it would “have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.” *Supra* note 55 (emphasis added). The I.C.J.’s approach was criticized by the Appeals Chamber of the ICTY in *Prosecutor v. Tadic* which found the ‘effective control’ test to be much too narrow and allowed States, through the use of creative measures disclaiming association with the offending party, to escape responsibility; *Prosecutor v. Tadic*, ICTY, Case No. IT-94-1-A, Appeals Judgment of 15 July 1999, at 116–117. Instead, the Tribunal held:

[Control by a State over subordinate armed forces or militias or paramilitary units [so as to impute responsibility on that State for the non-State entity’s actions] may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training]. This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of *de facto* State organs regardless of any specific instruction by the controlling State concerning the commission of each of these acts.

must direct or control – rather than simply support, encourage, or even condone – the private actor.”106

Despite Israeli assertions to the contrary, evidence strongly suggests that Hezbollah was not a de facto organ of Lebanon. Lebanon does not control Hezbollah, nor could it if it wanted to.107 Therefore, it appears that Israel’s response against Hezbollah, in particular the targeting of Lebanese infrastructure, fails to conform to existing interpretations of jus ad bellum proportionality.108

3. AN EXPANSION OF PROPORTIONALITY

The attacks of 11 September 2001 marked the beginning of a drastic change in American foreign policy. Instead of promising to respond in self-defence against those parties directly responsible, the Bush Administration vowed to make no distinction between the terrorists and the States which knowingly permit the terror organizations to operate within their territory.109

[We] will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From

106 Derek Jinks, State Responsibility for the Acts of Private Armed Groups, 4 Chicago Journal of International Law 83 (2003), p. 89, noting that it is important to distinguish between a State that is merely complicit in the unlawful conduct and one that plays a more integral role in its execution.

107 According to Fawaz Gerges, Chair of Middle Eastern Studies and Arab Affairs at Sarah Lawrence College, “The political situation [in Lebanon] is very fragile. Hezbollah is more powerful than the Lebanese State.” Fawaz Gerges, Online discussion at washingtonpost.com to discuss the crisis in Lebanon and Israel, 25 July 2006, transcript available at <www.washingtonpost.com>. The views of Fawaz Gerges are in line with others including the Council on Foreign Relations, available at <http://www.cfr.org/publication/11135/lebanons_weak_government.html> (last visited 15 October 2008). In fact, the Lebanese government stated that “it had not known of the Hezbollah operation, did not condone it, and bore no responsibility for it.” Ghattas, supra note 100. This was confirmed by United Nations Security-General Kofi Annan; see Annan Statement, supra note 41. As such, Lebanese involvement does not rise to the requisite level of direction or control. See Jinks, supra note 105.

108 Kattan, supra note 101, arguing that Israel, having “killed over 1,000 civilians, destroyed 30,000 homes, 120 bridges, 94 roads, and 24 fuel stations (causing a shortage of supply) and 900 businesses,” fails to be proportional to Hezbollah’s initial attack.

this day forward, any nation that continues to harbour or support terrorism will be regarded by the United States as a hostile regime.110

President Bush was not suggesting that the United States would seek to label terrorist organizations residing in uncooperative or weak States as de facto organs of that State. For the reasons discussed above, this would ultimately prove difficult, if not impossible, to establish in most situations.111

Instead, the United States was implicitly arguing for an expansion to proportionality to confront what it believes is the changing nature of war.112 Its argument, if accepted as customary international law,113 would bring Israel’s use of force during the summer of 2006 into conformity with the international law governing the use of force by allowing victim States to engage in what is currently understood to be disproportionate force in self-defence of an attacking terrorist organization, striking host State targets so long as those targets are legitimate military objectives related to the belligerent terrorist organization.114

One of the main aims of United States policy post-9/11 has been to ensure that each State accepts its sovereign responsibility to act against terrorist

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111 See supra note 105, and accompanying text.


113 Customary international law is formed when:

[T]here is ‘evidence of a general practice accepted as law’. …. Two elements are condensed here: the (objective) practice of States and (the subjective) opinion juris sive necessitates (i.e. ‘a belief that this practice is rendered obligatory by the existence of a rule of law requiring it’).

DINSTEIN, supra note 44, pp. 92-93, quoting the Statute of the International Court of Justice.

114 Indeed, the United States expressly supports Israel’s incursion into Lebanon; Arsalan M. Suleman, Strategic Planning for Combatin Terrorism: A Critical Examination, 5 CARDOZO PUBLIC LAW, POLICY AND ETHICS JOURNAL 567 (2007), p. 582. When calls for a cease-fire were voiced around the world, the United States hedged – allowing the conflict to proceed for additional weeks; Marvin Kalb and Carol Saivetz, The Israeli-Hezbollah War of 2006: The Media as a Weapon in Asymmetrical Conflict, 12 HARVARD INTERNATIONAL JOURNAL OF PRESS/POLITICS 43 (2007), p. 48. Within days of Israel’s commencement of military action in Lebanon, the United States rushed a delivery of precision-guided bombs to Israel; David S. Cloud and Helene Cooper, U.S. Speeds Up Bomb Delivery for the Israelis, N.Y. TIMES, 22 July 2006.
groups located within its borders.115 Previously, there was arguably little to no incentive for a State host to these organizations to take measures to control or disarm these organizations. As the thinking goes, why should Lebanon or another weaker State spend money and risk making unpopular domestic decisions when wealthy and more powerful States are willing to do the policing for them? According to the United States and Israel, an expansion to *jus ad bellum* proportionality would presumably operate as a compellant, ending the complacency of States host to terror organizations, and compelling each to step up domestic policing and put a stop to the actions of these non-State actors.116 For it is only through effective domestic control that organizations such as Hezbollah will be forced out of the business of terrorism.117

Although not expressly spelled out, under the U.S. and Israeli proposed expansion, generally accepted principles of proportionality would yield when at least four conditions are met. First, when a State has been the victim of an armed attack by a particular non-State entity. Although a host State already has the affirmative duty of policing its territory, this armed attack officially puts the host State on notice of the resident terrorist organization.118

Second, when the victim State has unsuccessfully responded in self-defence within existing concepts of proportionality. The proposed exception should be a last resort. After all, if a proportional response would remove the threat there would be no reason for it to employ disproportionate force.

Third, when the victim State has sufficient reason to expect a continuation of the attacks.119 Clearly, there would be no need to respond disproportionately if the goal of that force, the prevention of future attacks, had already been achieved.

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117 See *infra* Part 4.1.

118 See *infra* Section Part 5.2.1.

119 This element is largely an extension to the second element as well as a general recital of *jus ad bellum* necessity; see *supra* notes 79-83 and accompanying text.
Fourth, when despite all of the above, the host nation has still failed to make serious efforts to prevent future attacks on the victim State. ‘Serious efforts’ should be reviewed on a case by case basis. There is no reason to believe that a developing country would possess both the financial and political capital to completely eradicate an entrenched terrorist organization. Nevertheless, that does not completely absolve the host State from taking alternative measures to combat the organization.

Assuming the victim State has conclusively established all elements, it may respond with disproportionate force in self-defence to any attack from the particular terrorist organization originating from within the host State. Such disproportionate force would entail not only strikes against the non-State entity, as argued by many, but also against legitimate military objectives\textsuperscript{120} that serve not only a purpose to the non-State entity, but might be of an integral part of the host State’s infrastructure as well. This right would presumably cease only when the host State has agreed to take measures to prevent future attacks or the victim State believes the threat of a future attack has ceased.

4. PRO-EXCEPTION ANALYSIS

4.1 The Necessity of Host State Support

Unilateral responses to terrorist attacks are largely ineffective in curbing the likelihood of future attacks.\textsuperscript{121} In fact, such responses often embolden the terrorist

\textsuperscript{120} Valid military objectives are “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 advantage.” Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Article 52(2).

organization. Even a coordinated countermeasure taken by a coalition of countries, while more effective than a unilateral response, fails to achieve the success of an operation that directly involves the cooperation of the State that is host to the terrorist organization. Nowhere is this more evident than in the success governments have achieved in curbing the activities of domestic terrorist groups.

“Successes in combating terrorism have been recorded in countries where the threat lay within those countries, not worldwide. … Where the terrorist danger is mainly indigenous, the power and inducements of the State, as well as information from local citizens, can be used to curtail attacks.” In addition, States attempting to combat terrorism abroad are often constrained by diplomatic and trade concerns. Indeed, research “indicates that terrorism does not occur in the communist dictatorships; and certainly repressive military regimes in Uruguay, Brazil, and Argentina have crushed terrorist organizations.” Despite being abhorred by large sections of the local populace, these countries have been able to

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122 See Shen, supra note 121; Robert Trager and Dessislava P. Zagorcheva, *Deterring Terrorism: It Can Be Done*, 30 INTERNATIONAL SECURITY 87 (2006), p. 101, noting that direct action by the foreign victim State can often serve to “create a harmony of interest between the [terrorist] group and more dangerous terrorist organizations … [or to] give these groups every incentive to cooperate with other groups and organizations whose interests are similarly opposed to the [foreign victim] State.” “It is time for the strong powers, whose excessively interventionist policies undermine efforts of international cooperation in combating terrorism, to realize that their policies may be the problem …” Shen, supra note 121.

123 See Phillip B. Heymann, *Dealing with Terrorism: An Overview*, 26 INTERNATIONAL SECURITY 24 (2001-2002), p. 37, noting that because terrorists spend more time at their “home base” than abroad, the host State is in a unique position to take action otherwise unavailable to countries abroad; William A. Niskanen, *The Several Costs of Responding to the Threat of Terrorism*, 128 PUBLIC CHOICE 351 (2006), p. 355, arguing that an effective counterterrorism campaign “requires good intelligence, good intelligence sharing, and good local police work …”.


125 Jeffrey D. Simon, *Misunderstanding Terrorism*, 67 FOREIGN POLICY 104 (1987), p. 117; Heymann, supra note 123, asserting that internal security forces of States that harbour terrorists are in a position to prevent and curb sustained terrorist campaigns.

126 Jenkins, supra note 124, distinguishing the additional concerns that come with combating terrorism abroad as opposed to domestically.

do domestically what military and intelligence giants such as the United States and Israel have been unsuccessful in doing internationally.\footnote{Heymann, \textit{supra} note 123, pp. 29-30; U.S. Terrorism Strategy, supra note 115, p. 16.}

Much of this success is due to the fact that States host to terrorist organizations can do things not otherwise available to foreign governments. Host States possess the means to successfully infiltrate domestic terror organizations, curb terrorist recruitment through State-organized educational or propaganda campaigns, and set up effective internal policing to arrest and prosecute terror suspects.\footnote{It has been argued that the success of authoritarian governments is due in large part to the government’s firm control of the nation’s media; Gary C. Gambill, \textit{The Balance of Terror: War by Other Means in the Contemporary Middle East}, 28 \textit{Journal of Palestine Studies} 51 (1998), p. 59. Terrorists are largely dependent upon the media to get their message out and disseminate the details of their attacks; \textit{ibid.}, pp. 58-59. If the media were to be prohibited from disseminating such information, as in an authoritative government, the terrorist attack would have little residual effect; \textit{ibid.}, p. 59, quoting former British Prime Minister Margaret Thatcher as explaining that terrorism depends on “the oxygen of publicity.” Accordingly, there would be little long term (or even much of short term) benefit to terrorist activities in these countries.}

While the strong-arm domestic tactics of police States come with their own problems, they demonstrate that even a hated government can successfully achieve domestically what is otherwise unattainable across borders: the wholesale destruction of terrorist entities. The problem then becomes how a victim State can compel a host State to take a stand against these organizations?

\subsection*{4.2 Game Theory}

Game theory\footnote{According Robert Aumann, winner of the 2005 Nobel Memorial Prize in Economics, \textit{Game theory is the study of interactions from a rational viewpoint. Even though the rationality does not have to be conscious, it is still there in the background. So we are interpreting what we see in the world from a rational viewpoint.}

\textit{In other words, we ask, what is best for people to do when there are other people, other decision makers, other entities who also optimize their decisions. Game theory is optimal decision making in the presence of others with different objectives.}}\footnote{See also Werner Raub, Thomas Voss and Jeroen Weesie, \textit{On the Usefulness of Game Theory for the Resolution of Real-World Collective Action Problems}, 4 \textit{Rationality and Society} 95} is appealing in its ability to express complicated, real-life problems in simple form.\footnote{Sergiu Hart, \textit{An Interview with Robert Aumann}, 9 \textit{Macroeconomic Dynamics} 683 (2005), p. 716. \textit{S. Hart}, \textit{An Interview with Robert Aumann}, 9 \textit{Macroeconomic Dynamics} 683 (2005), p. 716. See also Werner Raub, Thomas Voss and Jeroen Weesie, \textit{On the Usefulness of Game Theory for the Resolution of Real-World Collective Action Problems}, 4 \textit{Rationality and Society} 95} Indeed, it is precisely this simplifying ability that has promoted
the use of game theory in fields from political science to philosophy to biology.\textsuperscript{132} Game theory has been especially useful in the study of international relations and conflict for well over 40 years.\textsuperscript{133} Accordingly, games can be used to highlight what the United States and others believe to be the existing inadequacy of international law governing the use of force as well as how this law can be modified to provide efficient and desirable results.

As international law exists today there is little motivation for Lebanon, or any State in a similar situation, to make a legitimate effort to engage tighter internal policing in order to shut down terrorist organizations operating from within. Such measures often require making politically unpopular decisions or diverting resources from preferred national objectives. Such a problem and its corresponding solution can be illustrated by a simple game.\textsuperscript{134}

The game involves two players, a host State and a victim State, and is one of incomplete information.\textsuperscript{135} The host State is the State from which a third-party

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(1992), p. 96, describing game theory as “a general theory of rational behaviour that deals with strategic behaviour”.
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\textsuperscript{132} Harold W. Kuhn, Classics in Game Theory (Princeton, NJ: Princeton University Press, 1997), p. xi. “Political scientists use game theory to examine political institutions. Philosophers find game theory a tool for re-examination of norms and social institutions. Biologists find game theory a framework to analyze the conflicting interests between creatures in nature.” \textit{Ibid.}

\textsuperscript{133} Joel M. Guttman, International Politics: Syrian-Israeli Crisis Interactions, 1951-87, 9 Economics and Politics 71 (1997), p. 71, explaining the various conflicts between Israel and Syria in terms of game theory.

\textsuperscript{134} Simply put,

A ‘game’ is any interaction between players governed by a set of rules specifying the possible moves for each participant and a set of outcomes for each possible combination of moves. The decision-makers are assumed to be rational in the sense that they have certain goals, which they strive to attain through their actions. They have a consistent preference ordering of goals, know the rules of the game, and know that the other players are also rational.


\textsuperscript{135} Games of incomplete information are those in which one or both players are not sure of one or more of the following: the rules of the game, the payoff function, or the strategies available to them; see Aumann, \textit{supra} note 131, p. 65.
terrorist organization is launching armed attacks against the victim State. Following an attack on the victim State by the third-party organization, each player makes its move. For simplicity sake, these moves are exercised simultaneously. Each player’s move results in a particular payoff depending upon the combination of its own move and the move of the other player.\textsuperscript{136} The higher the payoff, the more desirable the result is for that particular player.

Turning to the moves available to each player: the host State may choose either to do nothing (Not Cooperate) or exercise internal policing (Cooperate). By doing nothing, the host State would either completely refrain from making any effort to curb the actions of the terrorist organization or feigning an attempt to take action. On the other hand, internal policing reflects the host State’s decision to take direct measures against the terrorist organization. These measures could consist of anything from the sharing of intelligence regarding the terrorist organization with the victim State to dispatching internal security forces to disarm and dissolve the terrorist organization.

Simultaneously, the victim State must decide whether to respond with a proportionate attack (Acquiesce) or a disproportionate attack (Not Acquiesce).\textsuperscript{137} A proportionate attack entails a response specifically tailored to striking the terrorist organization with little or no collateral damage to the host State, its infrastructure or other interests. This move insures compliance with existing notions of \textit{jus ad bellum} proportionality. Conversely, a disproportionate attack would involve not only a strike against purely terrorist targets but targets that serve a substantial purpose to the host State as well, such as bridges, roads, or public utilities.

Despite the simplicity of the game, its results are surprising. States generally expect that other States will comply with the fundamental principles of international law.\textsuperscript{138} Accordingly, the host State will believe that the victim State’s
only available move is to respond proportionately (Acquiesce) because a disproportionate strike (Not Acquiesce) would be in clear contravention of international law. Even Hezbollah’s leader, Hassan Nasrallah, expected Israel to respond proportionately to Hezbollah’s cross-border raid.139 This has a profound impact on the host State’s reasoning and, ultimately, which move it chooses to make.

The matrix below displays the possible outcomes, where the host State’s choice determines the row, the victim State’s choice determines the column, and the combination of the two choices determines the payoff of the interaction. The resulting payoffs are merely rough approximations of the values assigned by a State given a particular set of conditions. Obviously, these payoffs are bound to differ depending on the States playing the game. Nevertheless, the payoffs should remain roughly the same from player to player. The host State will always prefer that the victim State respond to the terrorist attack proportionately (Acquiesce).140 For its part, the host State will always prefer to do nothing (Not Cooperate), as the costs of internal policing are much greater than the costs of taking no action at all.141 Obviously, the victim State will greatly prefer the host State to cooperate in its campaign against the terrorist organization. Finally, both parties will view a disproportionate attack (Not Acquiesce) as a failure, both from an international standpoint but a domestic one as well. A disproportionate attack obviously results in the lowest payoffs for both parties to the game.


139 Charles Krauthammer, Hezbollah Presents a Real Opportunity, CHICAGO TRIBUNE, 4 September 2006, p. 23, quoting Hezbollah leader, Hassan Nasrallah, as saying, “We did not think, even 1 percent, that the capture would lead to a war at this time and of this magnitude.”

140 Clearly, a disproportionate attack would have a serious impact on the host State infrastructure and its ability to govern, assuming it has not been ejected by an invading victim State.

141 Internal policing involves not only the financial costs associated with building up and operating an organization to effectively combat the terrorist group, but also political ramifications of taking a stance against a domestic organization that may receive much support from the local populace.
Believing that the victim State has only one move (Acquiesce) – a move which it is forced to make – the host State must decide whether to do nothing (Not Cooperate) or to take efforts to curb the third-party’s aggression (Cooperate) in response to the victim State’s perceived proportionate response. Accordingly, the host State’s best move is to not cooperate as it results in a payoff greater than that which would result from cooperating. No matter how many times this game is played, the host State’s best and most rational move will be non-cooperation. Without the help of the host State, there is little reason to believe that the third-party terrorist organization’s unlawful actions will cease. This result is unacceptable as it fails to achieve any long term success.

Nevertheless, prominent game theorists suggest that this result would change if there were an internationally recognized compellance mechanism. Compellance, a complement to deterrence, was first introduced by Thomas Schelling to describe the coercive use of nuclear weapons. As originally used by Schelling, compellance “occurs when the threat of the use of [nuclear weapons] seeks to compel an adversary State to actually do something it would otherwise not do, rather than merely refrain from doing something it would like to do (which is

<table>
<thead>
<tr>
<th>Cooperate</th>
<th>Acquiesce</th>
<th>Not Acquiesce</th>
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<tr>
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<td>10</td>
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<tr>
<td></td>
<td>5</td>
<td>X</td>
</tr>
<tr>
<td>Not Cooperate</td>
<td>1</td>
<td>0</td>
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<tr>
<td></td>
<td>100</td>
<td>X</td>
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143 See supra Part 4.1.

144 See Andrew Goldman, Trade Associations: Toeing the Line Between Antitrust Concerns and Protected Speech, 16 George Mason University Civil Rights Law Journal 393 (2006), p. 414, noting that cooperation between players occurs due to the persistent threat of punishment.

the purpose of deterrence).” 146 When a State seeks to use compellance, it must give its adversary a chance to comply before it resorts to the use of force. 147 Over time compellance has been expanded to encompass situations outside the use of nuclear weapons. 148 Accordingly, compellance would arguably justify an expansion to *jus ad bellum* proportionality.

Assume the same game as before, only this time the victim State is permitted under international law to confront the host State for its failure to curb terrorists with a disproportionate attack. As before, the host State must first decide whether to choose internal policing (Cooperate) or to do nothing (Not Cooperate). Simultaneously, the victim State must decide whether, based on the host State’s prior performance, to respond proportionately (Acquiesce) or with a disproportionate attack (Not Acquiesce). 149 This game and its payoffs are illustrated in the below payoff matrix.

<table>
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<tr>
<th></th>
<th>Acquiesce</th>
<th>Not Acquiesce</th>
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<tbody>
<tr>
<td>Cooperate</td>
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<td>Not Cooperate</td>
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</table>

From the host State’s *short term* perspective, if the victim State responds with a proportionate attack (Acquiesce) the host State’s best move is to do nothing (Not Cooperate). Conversely, if the victim State were to respond with a disproportionate attack (Not Acquiesce), the host State’s best move is still to do nothing (Not Cooperate). Accordingly, the host State’s short term move will be to do nothing (Not Cooperate).

However, this game is not played only one time. Because neither State can reasonably predict when, nor even if, the threat posed by the third-party terrorist organization will cease, both players expect to play this game *ad infinitum*. This type

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147 *Art & Waltz, supra* note 145.
148 *Little & Smith, supra* note 145, citing compellance as examples of why Saddam Hussein withdrew from Kuwait during the first Gulf War and why Slobodan Milosevic left Kosovo.
149 *See* Aumann Lecture, *supra* note 142, p. 353.
of game is known as a repeated game.\textsuperscript{150} In repeated games, a player conditions its moves on the observed prior moves of its opponent.\textsuperscript{151} “As a result, a player may behave in a way that is not in his or her short run interests because any attempt to realize short run gains may lead to future losses if other players retaliate.”\textsuperscript{152} The reason for this change in behaviour is simple: ‘punishment’.\textsuperscript{153} If a player acts in his short-run interest to the detriment of the other player, the other player may punish that player in subsequent stages of the game.\textsuperscript{154} In other words, the repetitive nature of the game and the possibility of a direct confrontation for infractions act as an enforcement measure ensuring that neither party deviate from the cooperative solution.\textsuperscript{155}

Returning to the payoff matrix above, the host State will still prefer to do nothing (Not Cooperate). However, an expansion to proportionality would allow the victim State to threaten to respond disproportionately (Not Acquiesce) if the host State were to deviate from the cooperative solution. Accordingly, it will not be worthwhile for the host State to maximize its short term self interest because the threat of long term low payoffs is too great.\textsuperscript{156} Accordingly, equilibrium is

\begin{itemize}
\item In a repeated game “[o]ne can look at this situation as a single big game – the so-called supergame of \( G \), denoted \( G^\infty \) – which rules are, ‘play \( G \) every year.’ The idea is to apply … equilibrium concepts to the supergame \( G^\infty \), rather than to the one-shot game \( G \), and to see what one gets.” \textit{Ibid.}
\item Benoit, \textit{supra} note 151.
\item The term ‘punishment’ is used loosely to denote victim State’s right to attack host State targets so long as they are objective military targets in the victim State’s campaign against the particular terrorist organization. These ‘disproportionate strikes’ are not reprisals because the victim State’s “prime motive would be protective, not punitive.” Schachter, \textit{supra} note 83, p. 1638.
\item \textit{Aumann, supra} note 131, p. 237, positing that in repeated games one’s information is revealed by one’s actions.
\item \textit{See} Aumann Lecture, \textit{supra} note 142, p. 354: “People are much more cooperative in a long term relationship. They know that there is a tomorrow, that inappropriate behaviour will be punished in the future. A businessman who cheats his customers may make a short term profit, but he will not stay in business long.”
\item Paul G. Mahoney and Chris William Sanchirico, \textit{Norms, Repeated Games, and the Role of Law}, 91 \textit{California Law Review} 1281 (2003), p. 1288, acknowledging that repeated games are similar to real life because people remember the prior actions of others and tailor their subsequent actions based on those prior moves.
\end{itemize}
achieved, whereby the host State will assist the victim State in its efforts against the
terrorist organization so long as the victim State does not respond with
disproportionate force. In addition, the victim State will continue to respond
proportionately so long as the host State continues to support its anti-terror
campaign.\footnote{See Aumann Lecture, supra note 142, p. 354.}

But why would Israel, or any State for that matter, respond
disproportionately if it is dooming itself to the lowest available payoff? Nobel
Laureate Robert Aumann put it best:

\[ \text{[R]evenge, which in the short term may seem irrational; but in the}
\text{long term, it may be rational, because if you take revenge, then the}
\text{next time you meet that person, he will not kick you in the}
\text{stomach. Altruistic behaviour, revengeful behaviour, any of those}
\text{things, make sense when viewed from the perspective of a}
\text{repeated game, but not from the perspective of a one-shot}
\text{game.}\footnote{Hart, supra note 130, p. 692. As with the use of the term ‘punishment’, ‘revenge’ should not
be interpreted to mean ‘reprisals’ because the ‘disproportionate strike’, which may appear
to serve the purpose of revenge or punishment, has as its prime motive the future
protection of the victim State. See Schachter, supra note 83, p. 1638.}} \]

In essence, it is worth the short term sacrifice in order to realize any long term
gains.

While the games above will certainly not predict the behaviour of all States
in all situations, the overarching theory would still appear to hold. By allowing for
direct confrontation for lacklustre domestic counterterrorist efforts, victim States
will be able to compel States host to terrorist organizations to accept their
sovereign responsibility to cooperate in international campaigns against terror.

Despite this seemingly logical line of reasoning, compellance theory is not
the be all and end all of effective counterterrorism. Indeed, an expansion to \textit{jus ad bellum}
proportionality is ripe with problems. These problems are so strong as to
render the aggressive U.S. and Israeli policies counterproductive to the ultimate
goal of reducing worldwide terrorism.
5. ANTI-EXCEPTION ANALYSIS

5.1 Weak Host States

Weak States are those States that lack the ability to provide their citizens with one or more of the generally accepted statehood responsibilities: “physical security, legitimate political institutions, economic management, and social welfare.”159 “In the security realm, [weak States] struggle to maintain a monopoly on the use of force, control borders and territory, ensure public order, and provide safety from crime.”160

The absence of territorial control largely explains why terrorist organizations prefer to establish their bases of operation in weak States.161 Indeed, the majority of United States-labelled terrorist organizations reside in weak or failing States.162 “[Terrorist organizations] originate in, spread to, and disproportionately affect developing countries where governments lack the capacity, and sometimes the will, to respond.”163 Because of this preference, it follows that the threat or actual use of the U.S./Israeli-argued disproportionate response will be employed against weak States.

However, ensuring host State compliance in the fight against terrorism through the threat and use of a disproportionate response in self-defence necessarily depends upon a host State that is strong enough to take on the domestic terror organization. After all, no amount of pressure can compel a State to accomplish the impossible. As a result, an expansion to proportionality would have no effect persuading a weak State to police its borders. Putting this all

159 Stewart Patrick, Weak States and Global Threats: Fact or Fiction?, 29 WASHINGTON QUARTERLY 27 (2006), p. 32.

160 Ibid. See also K.J. Holsti, War, Peace, and the State of the State, 16 INTERNATIONAL POLITICAL SCIENCE REVIEW 319 (1995), p. 332, describing weak States as those that are “low in infrastructural power.”

161 Danish Report, supra note 70, p. 25, noting that terrorists prefer weak States to failed States as weak States provide more protection from outside interference.


together, an inability to compel weak States to do what is impossible and the
preference among terrorist organizations to reside in weak States, the U.S./Israeli
proposed expansion to proportionality will fail more often than it succeeds.

However, the problems do not end here. Where weak governments have
failed, terror organizations often rise to fill the void – devoting significant
resources to providing the populace with security, order, health care, and other
typical government services.\(^{164}\) For example, Hamas reportedly devotes more than
95 percent of its budget to providing social services and welfare to Palestinians.\(^{165}\)
The goodwill of these organizations serves to solidify the organization’s popular
support, further insulating it from what little chance the weak State may have had
at eradicating it. Accordingly, an expansion to proportionality is a clear recipe for
disaster; unlikely to result in any long term security gains, yet, likely to lead to a
drastic increase in unintended consequences.

5.2 Unintended Consequences

5.2.1 Aggressive counterterrorism policies as a boon for terrorists

Often overlooked is the double-edged nature of aggressive counterterrorism
policies. Even in today’s world of laser guided missiles, harsh counterterrorism
responses will ultimately have an adverse impact upon local civilian populations
and infrastructure. These populations are then left with the impression that the
responding government, whether foreign or domestic, cares little about their
welfare.\(^{166}\) This impression has the long term effect of driving the civilian
population towards a more radical viewpoint, often culminating in widespread
sympathy for the suppressed terrorist organization.\(^{167}\)


Following years of repeated clashes with Hezbollah fighters, Israel initiated “Operation Grapes of Wrath” on 10 April 1996.\textsuperscript{168} Israel devised this aggressive counterterrorist campaign with the goal to not only destroy Hezbollah’s military arm but to also make life so miserable for the entire Lebanese population that they would be compelled to rise up and exert pressure on Hezbollah to disarm.\textsuperscript{169} In order to accomplish this dual aim, Israel targeted Lebanese infrastructure, such as power plants and water reservoirs, as well as Hezbollah strongholds.\textsuperscript{170} However, Israel greatly miscalculated. At operation’s close, the Lebanese public did not turn against Hezbollah. Instead, the public rose up in near unanimous support of the organization.\textsuperscript{171} The campaign’s aggressiveness convinced many Lebanese that Israel’s actual aim was to topple the Lebanese government.\textsuperscript{172} As one scholar noted, “Operation Grapes of Wrath” did little to weaken Hezbollah, “but rather justified its continued existence.”\textsuperscript{173}

It should come as no surprise then that terrorist organizations often use violence to provoke harsh government responses similar to “Operation Grapes of Wrath.”\textsuperscript{174} It is believed that such responses will act to “radicalize and mobilize a population whose interests the terrorists claim to represent.”\textsuperscript{175} Indeed, it has been argued that one of Al Qaeda’s purposes for launching the 9/11 terror attacks was to provoke “the United States into lashing out indiscriminately against Muslims


\textsuperscript{170} Gambill, supra note 128, p. 63; Murden, supra note 169.

\textsuperscript{171} Gambill, supra note 128, p. 63; Murden, supra note 169, p. 37. To make matters worse for Israel, Hezbollah used the end of the operation to engage in a goodwill tour of sorts, repairing destroyed homes, roads, and other infrastructure. Usher, supra note 168.

\textsuperscript{172} Gambill, supra note 128, p. 63.

\textsuperscript{173} Murden, supra note 169, p. 37.


\textsuperscript{175} Bueno de Mesquita and Dickson, supra note 166, p. 364.
everywhere” so as to “politicize and radicalize groups that had hitherto remained passive and inert.”

It would stand to reason, then, that a terrorist organization is more likely to resort to violence if it believes its attack will elicit a harsh government response as opposed to a restrained response. Accordingly, governments that advocate expanding *jus ad bellum* proportionality, such as the United States and Israel, would likely see an increase in terror attacks as they implement more aggressive counterterrorism strategies.

### 5.2.2 The spiral model and game theory

Game theory, as discussed earlier, would tend to suggest that the threat of a disproportionate response in defence of a terrorist attack would compel host States to take affirmative steps to curb the transnational activities of resident terror organizations. However, many game theorists subscribe to a spiral model whereby one State’s attempt to secure its borders may inadvertently threaten the security of another. Central to this theory is a general feeling of uncertainty among all States as to the true intentions of others. This uncertainty produces an environment whereby States nearly always assume the worst.

In addition to a feeling of uncertainty, spiral theorists contend that once a State develops an image of another, no matter how unreasonable or untrue, that State will continue to view another State’s actions in light of this preconception.

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176 Stephen Holmes, *The Matador’s Cape: America’s Reckless Response to Terror* (Cambridge: Cambridge University Press, 2007), p. 51. See also Kydd and Walker, supra note 174, p. 71, noting that the United States made a good target for terrorists hoping to provoke a harsh response because the administration of George W. Bush was widely known to be hawkish.

177 De Figueiredo Jr. and Weingast, supra note 167, p. 27, arguing that if the government is not in a possession to suppress the terrorist group, the incentive for the group to engage in political violence is reduced; Kydd and Walker, supra note 174, p. 70, commenting that a State that championed human rights would be a poor target for terrorists hoping to illicit a harsh response.


181 Jervis, supra note 180, p. 68.
As one scholar put it, “people perceive what they expect to be present.” ¹⁸² Therefore, a State that has had a tumultuous history with another is likely to interpret the other’s actions with greater suspicion.

Further compounding this problem, States assume that other States are fully cognizant of their true intentions.¹⁸³ Therefore, a State A that begins to implement precautionary measures to secure its borders and maintain the status quo, either by increasing its arms supply, deploying troops to border areas, or making threats, will believe that its neighbour, State B, is fully cognizant of its non-aggressive intentions. For instance, as the United States military approached the Chinese border during the Korean War, Secretary of State Dean Acheson proclaimed that the Chinese would not intervene because the Chinese understood that the United States meant no harm to them.¹⁸⁴ Just as Secretary Acheson’s proclamation proved to be, the thinking of State A is naive.

Leaders commonly make the mistake of interpreting the behaviour of other countries in terms of their goals/motives, even though they understand their own behaviour differently, in terms of the situation they face. As a result, leaders fail to appreciate that other countries face a security dilemma and therefore interpret the actions of others as reflecting greed, even though a pure security seeker might have acted the same way.¹⁸⁵

As such, State A’s purely defensive posturing will likely appear hostile to State B, regardless of State A’s actual intentions.

As noted above, the mistrust between State A and State B is heightened if the States have had a tumultuous relationship. State A’s defensive posturing will

¹⁸² Ibid. See also Charles L. Glaser, Political Consequences of Military Strategy: Expanding and Refining the Spiral and Deterrence Models, 44 WORLD POLITICS 497 (1992), 499.
¹⁸³ Jervis, supra note 180, p. 68; Andrew Kydd, Game Theory and the Spiral Model, 49 WORLD POLITICS 371 (1997), p. 372: “[P]eople mistakenly assume that their own benign motivations are transparent to everyone, so that when others react negatively to their efforts at self-defence, they take it as a sure sign of hostile intent.”; Roe, supra note 179, noting that States are often unaware that they themselves could be causing insecurity in other States.
cause State B to protect itself from the perceived hostility of its neighbour, not because State B is intentionally aggressive but because it fears an attack from State A.\footnote{Jervis, supra note 178, p. 181.} In turn, State A will become concerned with State B’s response. Because State A knows that State B “is not menaced [by State A], there is no legitimate reason for it to object to [State A’s defensive posturing]; therefore, objection proves that [State B] is aggressive.”\footnote{Ibid.; JERVIS, supra note 180, p. 71: “If the State believes that others know that it is not a threat, it will conclude that they will arm or pursue hostile policies only if they are aggressive.” Even after China intervened in the Korean War, the United States, knowing that China had no reason to be concerned by the approaching U.S. troops, “assumed the only explanation for Chinese intervention ... was its unremitting hostility to the United States.” Jervis, War, supra note 184.} Thus begins the downward spiral whereby each State, wrongly believing the other to be hostile, will take action to ensure its own security.\footnote{Jervis sums it up best: “In the spiral model ... the danger is that each side will incorrectly see the other as a menace to its vital interests and will inadvertently encourage this belief by relying on threats to prevent war, thereby neglecting the pursuit of agreement and conciliation.” Jervis, War, supra note 184, p. 685.}

Consider the events leading up to the First World War. In 1907, Britain, France, and Russia formed the Triple Entente.\footnote{John A. C. Conybeare, A Portfolio Diversification Model of Alliances: The Triple Alliance and Triple Entente, 1879-1914, 36 JOURNAL OF CONFLICT RESOLUTION 53 (1992), p. 55.} The parties intended the alliance to function as a counterbalance to the perceived threat posed by Germany and its allies.\footnote{Keir A. Lieber, The New History of World War I and What It Means for International Relations Theory, 32 INTERNATIONAL SECURITY 155 (2007), p. 164. At the time, Germany was a member of the Triple Alliance, which also included Italy and Austria-Hungary. See Conybeare, supra note 189, noting that because Italy concluded a neutrality agreement with France in 1900 and 1902 as well as an entente with Russia in 1909 it was likely that Italy would not support the Triple Alliance in any action against the Triple Entente.} Despite the Triple Entente’s admittedly benign intention to maintain the status quo, the alliance “exacerbated German insecurity by generating fears of encirclement, causing Germany to increase its arms production in preparation for war, which only confirmed the Triple Entente’s perception of a hostile Germany …”.\footnote{Lieber, supra note 190, pp. 164-65. See also Glaser, supra note 182, p. 506.} The result was a spiral that played a large part in triggering the First World War.

Should the rules of proportionality be expanded, allowing a victim State to legitimately threaten a disproportionate response to a terror attack, the host State will fail to see the victim State’s posturing as a manifestation of its intent to secure
its borders. Instead, the host still will view it as an indication of the victim State’s hostility toward the host State. Therefore, fearing an invasion, the host State will likely ignore the demands of the victim State, choosing instead to devote its resources to the protection of its borders.

Problems are further compounded if the host State is a weak State and the victim State is a more powerful State. “The easier it is to destroy a State, the greater the reason for it … to join a larger and more secure unit …”.192 Therefore, aggressive military posturing may have the unintended effect of not only forcing the weak State to take affirmative defensive measures, but also to act as the catalysis driving the weak State into the arms of a powerful resident terrorist organization for protection.193

Regardless of the exact defensive measures employed by a host State, the victim State will almost always interpret the host State’s defiance as a sign that the host State actively supports the resident terrorist organization. This chain of events will increase the likelihood of an armed conflict between the two States. As such, expanding the rules of proportionality will not only increase the likelihood of conflict between the two States but also decrease the likelihood of inter-State cooperation in fighting international terrorism.

5.3 The Inadequacies of Compellance Theory and Terrorism

In order for compellance to work, a State must be willing to back up its threats with real action. According to Schelling, compellance “involves initiating an action (or an irrevocable commitment to an action) that can cease, or become harmless, only if the opponent responds.”194 This implies that compellance will only succeed if the host State has every reason to believe its present noncompliance will trigger a future disproportionate attack.195 It follows that the United States, Israel, and

192 Jervis, supra note 178, p. 172.

193 It is supremely ironic that the threat devised to force a host State to confront the resident terrorist organization may actually bring the host State and terrorist organization closer together as the pair share a mutual interest in protecting themselves from the perceived threat of the victim State. See Danish Report, supra note 70, p. 25. This largely occurred during the summer of 2006 as Lebanese President Emile Lahoud declared his full support of Hezbollah as a result of Israel’s actions; Lebanese President Gives Full Backing to Hezbollah, CBCNEWS, 31 July 2006, available at <http://www.cbc.ca/world/story/2006/07/28/lahoud-interview.html> (last visited 15 October 2008).

194 SCHELLING, supra note 145, p. 72.

others wishing to compel States into policing the terrorist groups which reside within must consistently respond with otherwise disproportionate force to a terror attack against those States who have shirked their policing duties. Absent such a showing of force, host States will likely elect to take their chances, refraining from often unpopular and costly internal policing, in the hopes that the victim State’s responding inconsistencies will spare them future harm.

As previously noted, victim States that make it a matter of national policy to apply the proportionality exception on a consistent basis would invariably be forced to employ disproportionate force more frequently against weak States than against those that are not. However, it has been shown that the use of force against weak States is counterproductive. Not only does it often play into the hands of the terrorist organization, strengthening the organization’s domestic support, but also the use of force, no matter how severe, can persuade a weak State to accomplish what is otherwise impossible.

Putting this all together, a victim State is faced with what is otherwise a lose-lose situation. On the one hand, it could respond with disproportionate force, potentially enabling it to compel future host State compliance. Unfortunately, this would come at the cost of any long term success with the current host State, as a disproportionate response would invariably sever any cooperative ties between the two States. On the other hand, the victim State could spare the current host State a disproportionate response. However, the victim State would then run the risk of being seen as inconsistent, encouraging the future noncompliance of other States. Consequently, the availability of a disproportionate response has no positive impact on a victim State’s ability to prevent future terrorist attacks.

5.4 Terrorism Accounts for a Relatively Small Number of Causalities

By all accounts, the number of terrorist incidents and resulting fatalities is low. Indeed, from 1968 through 2006, nearly a 40-year period, there were 46,906

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196 Ibid.
197 See supra notes 161-162 and accompanying text.
198 See supra notes 175-177 and accompanying text.
199 See supra notes 164-165, Part 5.2.1 and accompanying text.
200 See Part 5.1 and accompanying text.
terrorism-related fatalities worldwide.\textsuperscript{201} Of those fatalities, 18,749 or approximately 40\%, occurred in Iraq from 20 March 2003, the date of the United States-led invasion, through the end of 2006.\textsuperscript{202} Accordingly, there have been 28,157 fatalities as a result of terrorist acts outside Iraq in the past 40 years. That works out to approximately 741 terrorism-related deaths worldwide, per year. Furthermore, over the past decade fewer than 400 Americans have died per year as a result of domestic and foreign terrorism.\textsuperscript{203}

On the other hand, over 40,000 people have died each year for the past 15 years in the United States due to automobile accidents.\textsuperscript{204} In 2003 alone, 1,588 Americans died when they fell down steps, 730 died as a result of accidents involving fireworks, 875 from choking to death on food, and 1,140 from exposure to the forces of nature.\textsuperscript{205} Despite resulting in more deaths per year than terrorism, there has not been a similar outcry for the government to take steps to diminish the likelihood of choking or falling down stairs. Indeed, these fatalities are understood to be an acceptable risk of everyday life.

This is not to suggest that terrorism warrants no more international attention than the dangers of solid food or fireworks. To the contrary, terrorism is a serious problem that has a profound psychological impact affecting those who may otherwise not suffer any physical or economic harm.\textsuperscript{206} Nevertheless, its


\textsuperscript{202} Ibid.

\textsuperscript{203} William A. Niskanen, The Several Costs of Responding to Terrorism, 128 Public Choice 351 (2006), p. 352, noting that the average number of Americans killed each year as a result of terrorism is approximately equal to the number who drown from using a bathtub.


\textsuperscript{205} National Safety Council, What Are the Odds of Dying?, available at <http://www.nsc.org/1rs/statinfo/odds.htm> (last visited 15 October 2008).

\textsuperscript{206} Leonie Huddy (et al.), Threat, Anxiety, and Support of Antiterrorism Policies, 49 American Journal of Political Science 593 (2005), p. 593; Bradley D. Stein (et al.), The Emotional and Behavioural Impact of Terrorism on Children: Results from a National Survey, 8 Applied Developmental Science 184 (2004), p. 190: "Two to 3 months after the 11 September 2001 terrorist attacks, parents across the country reported that their children were
impact cannot be said to rise to a level warranting the expansion of a doctrine that limits the scope of armed conflict.\textsuperscript{207} For, as one commentator noted, “every use of force involves the large-scale destruction of lives and property, [therefore] the purpose of law is to contain the use of force …, rather than provide as many justifications for war as possible.”\textsuperscript{208}

**CONCLUSION**

The events that took place in Southern Lebanon on 12 June 2006, while tragic, may have been the much needed wake-up call to reign in current efforts to expand *jus ad bellum* proportionality. The ongoing expansion provides no incentive for States host to terrorist organizations to accept their sovereign responsibility to cooperate in worldwide campaigns against terror. Indeed, it likely produces the opposite effect of driving host States and terrorist organizations closer together all the while increasing the incentive for future terror attacks. Although the United States is correct to assert that the nature of international armed conflict has changed, it does not follow that existing international law is outmoded. Instead, it is incumbent upon all States to work within the existing system as opposed to relying upon the foolish assumption that the strongest uses of force can produce the grandest results.\textsuperscript{209

experience terrorism-related emotional and behavioural reactions and worries. Nearly four out of five parents reported at least one emotional or behaviour reaction in their child as a result of terrorism …”}; Nehemia Friedland and Ariel Merari, *The Psychological Impact of Terrorism: A Double-Edged Sword*, 6 *Political Psychology* 573 (1985), p. 592. However, the far reaching psychological impact of terror attacks owes much to the extensive media coverage it receives; Michelle Slone and Anat Shoshani, *Evaluation of Preparatory Measures for Coping With Anxiety Raised by Media Coverage of Terrorism*, 53 *American Psychological Association* 387 (2006), pp. 539-40. It stands to reason that if every choking death received as much media attention as terror attacks there may be a national outcry against the dangers of solid food.

\textsuperscript{207} Simon, *supra* note 125, p. 109: “[T]he perception more than the reality of the terrorist threat has risen to the point where national security and vital interests are considered at stake each time terrorists strike.”

\textsuperscript{208} Orakhelashvili, *supra* note 59.

\textsuperscript{209} See Colton, *supra* note 1.