The Legality of the Use of Force against Non-State Actors in a Third State – A Case Study on Israeli Strikes against Hezbollah in Syria

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1 Introduction

1.1 The topic

In recent years, Israel has on numerous occasions conducted armed strikes against targets inside Syria, usually in the form of airstrikes. The targets have mostly been Hezbollah objects, but there have also been strikes against Iranian and Syrian targets. Most of these strikes seem to be of a preventive nature, and the question of whether force can be used in a preventive manner is a highly controversial one.

1.2 Background

1.2.1 Lebanese-Israeli relations 1948-1985

Lebanon was part of the coalition that fought Israel in the 1948 Arab-Israeli War, played only a minor part in the 1967 Six-Day War, and did not participate in the 1973 Yom Kippur War.

Tensions on the Israeli-Lebanese border rose in the early 1970s, as the Palestine Liberation Organization (PLO) established a presence in southern parts of Lebanon, from where it conducted assaults into Israel. Israel responded with assaults into southern Lebanon. After a terror attack by Fatah, a PLO-affiliated group, that resulted in 34 civilian deaths, Israel invaded southern Lebanon in 1978. The Lebanese government protested to the UN Security Council, who adopted Resolution 425, demanding the withdrawal of the Israeli military, and establishing the United Nations Interim Force in Lebanon (UNIFIL). When Israeli forces withdrew, they handed control of the border areas over to Israeli-allied Lebanese militias, instead of to UNIFIL.

Israel again invaded Lebanon in 1982, this time reaching Beirut. This led to the relocation of the PLO from Lebanon to Tunisia. Israel gradually withdrew its forces in the following years, and in 1985 retreated to the border area, where it established what it called a “security zone”, controlled by the Israeli Defense Forces (IDF) and the South Lebanese Army (SLA), a militia

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2 Sela (March 7, 2018).

3 UNIFIL (undated).

4 United Nations Department of Public Information (2003).
allied to and sponsored by Israel. The aim was to create a buffer area between northern Israel and hostile militias in Lebanon, preventing terrorists from crossing the border and reducing the threat of artillery fire against targets in northern Israel.\(^5\)

The 1982 War led to the expulsion of PLO-militias from Lebanon, but instead Israel now faced a new militant group, Hezbollah.

1.2.2 Hezbollah

Hezbollah (Arabic: حزب الله, meaning “Party of God”) is a shia muslim political and military organization based in Lebanon. According to Hezbollah’s leaders, the group was founded in 1982.\(^6\) In its open letter to the "Downtrodden in Lebanon and in the World" from 1985, it set itself out as a force for Islam, rejecting Western influence and ideas.\(^7\)

One of its main goals was freeing Lebanon from foreign occupation and influence, to accomplish “the final departure of America, France, and their allies from Lebanon and the termination of the influence of any imperialist power in the country”.\(^8\) It also opposed Israel’s existence, as its letter stated that "Israel’s final departure from Lebanon is a prelude to its final obliteration from existence and the liberation of venerable Jerusalem from the talons of occupation".\(^9\)

There were also other groups in Lebanon resisting the Israeli occupation, but over time, Hezbollah emerged as the most lethal and effective.\(^10\) It was from the start sponsored by Iran, and to a lesser degree by Syria.\(^11\) Its resistance has included armed strikes on Israeli military and civilian targets, both in the security zone and by cross-border rocket attacks into northern Israel. In Lebanon, some Israeli attacks against Hezbollah has led to civilian casualties.

Israel withdrew from the security zone in 2000, but this didn’t mean an end to the conflict with Hezbollah. There have been several armed incidents between them since then, the major one being the 2006 Lebanon War. What is commonly seen as the start of that conflict was a

\(^5\) Luft (2000).
\(^6\) Norton (2018), 39.
\(^7\) Norton (2018), 42.
\(^8\) Norton (2018), 44.
\(^9\) Norton (2018), 45.
\(^10\) Norton (2018), xxvi.
Hezbollah attack on forces in Israel, where three Israeli soldiers were killed, and two were abducted.\(^\text{12}\) Israel responded by again invading Lebanon. The war lasted for 34 days, and was ended by the Lebanese and Israeli governments approving UN Security Council Resolution 1701 (2006), which called for full cessation of hostilities.

Hezbollah was designated as a terror organization by the US in 1997,\(^\text{13}\) while the Israeli position is that "Hezbollah has been a terror organization acting under Iranian auspices since its inception".\(^\text{14}\) The EU has since 2013 designated Hezbollah as a terrorist organization, though only their military wing.\(^\text{15}\) The Gulf Cooperation Council\(^\text{16}\) (in 2013) and the Arab League\(^\text{17}\) (in 2016) has also designated Hezbollah as a terrorist organization.

Hezbollah is not a purely military organization. It also provides social services to citizens in parts of Lebanon, running schools, hospitals and other welfare services. It is also involved in Lebanese politics, and has since 1992 been represented in parliament, and it has been a part of the government coalition since 2005.

Hezbollah has in recent years toned down its rhetoric compared to what it stated in the 1985 founding letter, and some of its leaders have called the letter obsolete, though it has not been replaced.\(^\text{18}\) In 2009, Hezbollah released a manifesto\(^\text{19}\), in which it no longer called for Israel's obliteration, but stated: "We categorically reject any compromise with Israel or recognizing its legitimacy." The manifesto also emphasized that "(t)he history of the Arab-'Israeli' conflict proves that armed struggle and military resistance is the best way of ending the occupation." It is however not clear if the occupation refers to all of Israel, or just areas Israel has captured after its establishment in 1948. The manifesto furthermore called on the Palestinians to apply "the use of all means" in their resistance of "the Zionist enemy". However, the manifesto also seems to claim that Hezbollah's main purpose is the defence of Lebanon, as it is necessary to complement the Lebanese army, which is not strong enough to face Israeli aggression by

\(^{12}\) Gray (2018), 213.


\(^{14}\) Israeli Ministry of Foreign Affairs (2013).

\(^{15}\) European Council (2013).

\(^{16}\) Arab News (2013).

\(^{17}\) Al Arabiya English (2016); UN doc S/2017/361.

\(^{18}\) Norton, 55.

\(^{19}\) The New Hezbollah Manifesto (November, 2009).
itself. This defence includes the liberation of "what remains under the 'Israeli' occupation in
the Shibaa farms and Kfarshouba hills and the Lebanese town of Ghajar, (...) and participat-
ing in the role of defending and protecting the land and people." It should be noted that the
Shebaa farms are in the Golan Heights, and was under Syrian control until the Israeli
occupation. It is however a disputed area, as Lebanon and Syria has not agreed on how to
draw their border there.\textsuperscript{20}

1.2.3 Syrian-Israeli relations

Relations between Israel and Syria have been strained ever since the establishment of the state
of Israel in 1948. They have confronted each other in three major wars, the 1948 Arab-Israeli
War, the 1967 Six-Day War, and the 1973 Yom Kippur War. The state of war has not
formally ended, but a ceasefire was implemented by the Separation of Forces Agreement
between Israel and Syria in 1974,\textsuperscript{21} and this is still in effect today. This has however not
meant that there have been no armed confrontations between the parties since then. They were
on opposite sides in the 1982 Lebanon War, and there have also been other instances where
Syrian and Israeli forces have exchanged fire, but these have not escalated into a major war.

Israel has occupied parts of the Golan Heights since 1967. During the 1967 war, Israel
captured this area from Syria, and it remained under Israeli control in the ceasefire agreement
that ended the 1967 war. The ceasefire agreement in 1974 left this area under Israeli control,
and added a buffer zone on the Syrian side, which was to be, and still is, patrolled by a UN
peacekeeping force, the UNDOF.

1.3 The current situation

1.3.1 The situation in Lebanon

The 2006 Lebanon War ended when UN Security Council Resolution 1701 (2006) was
approved by both the Lebanese and Israeli governments. This resolution called for a cessation
of hostilities and Israeli withdrawal from southern Lebanon, and it confirmed the so-called
"Blue Line" as valid for assessing Israeli withdrawal. (The Blue Line was established by the
UN in 2000 for this purpose when Israel withdrew from the security zone, and functions as

\textsuperscript{20} Norton, 105.

\textsuperscript{21} Separation of Forces Agreement between Israel and Syria (1974).
the *de facto* border between Israel and Lebanon.) The resolution also authorized an increase in the UNIFIL forces, which were to be deployed in the south together with the Lebanese Armed Forces. It expanded UNIFIL’s mandate "to take all necessary action in areas of deployment of its forces and as it deems within its capabilities, to ensure that its area of operations is not utilized for hostile activities of any kind".\textsuperscript{22}

The resolution additionally called for a permanent ceasefire and long-term solution based upon specified elements, including "the disarmament of all armed groups in Lebanon, so that (...) there will be no weapons or authority in Lebanon other than that of the Lebanese State".\textsuperscript{23} It further decided "that all States shall take the necessary measures to prevent, by their nationals or from their territories (...) (t)he sale or supply to any entity or individual in Lebanon of arms and related materiel of all types", unless authorized by the Government of Lebanon or by UNIFIL.\textsuperscript{24}

The UN Secretary-General in his July 2018 Report on the Implementation of Security Council Resolution 1701 (2006), expressed concern "over the lack of full implementation of the resolution and the unfulfilled obligations of Lebanon and Israel." He cited almost daily violations of Lebanese airspace and the continued occupation of areas north of the Blue Line as Israeli violations.\textsuperscript{25} He also cited the maintenance of unauthorized weapons outside state control, by Hezbollah and other groups, as violations of the resolution.\textsuperscript{26}

Nevertheless, the situation between Israel and Lebanon has been relatively calm since 2006. There have been some incidents where Israeli forces have attacked targets inside Lebanon, and also incidents where Israeli targets have been attacked by either Lebanese forces, Hezbollah or other militias in Lebanon, but none that have escalated into major incidents. These include exchanges of fire over the border, rocket attacks into Israel and Israeli airstrikes inside Lebanon.\textsuperscript{27} At least two of the Israeli airstrikes on Hezbollah in Lebanon seem to have been aimed at stopping weapon convoys arriving from Syria.\textsuperscript{28}

\begin{flushleft}
\textsuperscript{22} Security Council Resolution 1701 (2006), para 12. \\
\textsuperscript{23} Security Council Resolution 1701 (2006), para 8. \\
\textsuperscript{24} Security Council Resolution 1701 (2006), para 15. \\
\textsuperscript{25} The occupied area is the village of Ghajar and an adjacent area. Ghajar was split by the Blue Line. Part of it lies on the Lebanese side, while the other part lies in the Israeli occupied Golan Heights. Israel controls the whole village. \\
\textsuperscript{26} UN doc S/2018/703. \\
\textsuperscript{27} For a list of incidents after 2006, see Wikipedia. Israeli-Lebanese conflict. Post-2006 war activity. \[https://en.wikipedia.org/wiki/Israeli%E2%80%93Lebanese_conflict#Post-2006_war_activity\] \\
\textsuperscript{28} BBC (February 26, 2014); The Jerusalem Post (May 10, 2016)
\end{flushleft}
1.3.2 The situation in Syria

Syria has been embroiled in a civil war after uprisings against President Bashar al-Assad started in March 2011. What started as pro-democracy protests has over time turned into a civil war with many competing groups fighting for control in different parts of the country. As both ISIL and al-Qaeda affiliated groups gained control over regions in Syria, the country has also been a battleground in the "war on terror", with a US-led coalition making several armed strikes against these groups. Assad has received military assistance from both Iran, Hezbollah and later Russia, and has regained control over most of the country, though as of October 2018 there remains pockets of resistance.

Since 2013, there have been a number of Israeli strikes on targets inside Syria. In January 2013 several media reported that Israeli aircraft struck an arms convoy carrying weapons meant for Hezbollah, and that this was the first Israeli attack in Syria since 2007, when it reportedly destroyed an unfinished nuclear reactor.\(^{29}\) Israel has a policy of not commenting on specific operations, so it has not confirmed its involvement in this or other specific strikes, with a few exceptions.

Israeli officials have however made general comments regarding the situation and the number of attacks. In August 2017 Maj. Gen. Amir Eshel, the outgoing commander of the Israel Air Force, confirmed that Israel had carried out almost 100 attacks against arms shipments to Hezbollah and other groups.\(^{30}\) Israeli Intelligence Minister Israel Katz said in September 2018 that "in the last two years Israel has taken military action more than 200 times within Syria itself".\(^{31}\) From this, and from specific attacks reported by the media, it appears that the situation has escalated during the last year, with an increasing number of attacks.

There also seems to have been a change in strategy, with more attacks against Iranian targets. During the first years, the Israeli attacks were mostly against Hezbollah targets, with the main goal being the prevention of Hezbollah acquiring advanced weapons, either transported from Iran via Syria to Lebanon, or manufactured in Syria. Recently, there has been a higher focus on preventing Iran, Hezbollah and other shia militias from establishing themselves in Syria.\(^{32}\)

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\(^{29}\) Khazan (January 30, 2013).
\(^{30}\) Harel (August 17, 2017).
\(^{31}\) Williams (September 4, 2018).
\(^{32}\) Jones and Markusen (2018), 6.
This shift in focus has led to attacks on bases in Syria belonging to Iran or shia militias allied to Iran, as well as their weapons systems.33

Targets belonging to Syria have also been hit. For the most part, this seems to have happened when the targets have links to Hezbollah or Iran, such as bases housing weapons meant for Hezbollah, or Syrian bases used by Hezbollah or Iranian forces. Center for Strategic & International Studies has analyzed 101 Israeli strikes in Syria. Their report states:

"Of the 101 Israeli strikes analyzed by the CSIS Transnational Threats Project through open-source research, more than two-thirds were against missile-related targets. CSIS found that at least 42 of the 101 strikes were on missile-related facilities, while 15 of the 101 strikes were on convoys allegedly carrying missile parts or technology. In addition, 34 of the 101 Israeli strikes were retaliatory. CSIS counted a total of 47 Israeli strikes against Hezbollah targets, 40 strikes against Syrian targets, and 14 strikes against Iranian targets. CSIS counted 12 strikes in 2013; 8 strikes in 2014; 21 strikes in 2015; 10 strikes in 2016; and 22 strikes in 2017. As of June 1, 2018, we recorded an unprecedented number of strikes—28—only five months into the year."34

For the first few years of the Israeli operations against Hezbollah in Syria, Israel met little resistance, and no retaliatory strikes. It seems the parties pursued a principle of "what happens in Syria, stays in Syria".35 But since January 2015, and especially from March 2017 and onwards, the Israeli operations have increasingly met a response in the form of Syrian anti-aircraft fire, and at a few occasions retaliatory strikes into Israel (or the Israeli-occupied Golan Heights). Only two cross-border strikes have been conducted by Hezbollah, and these have been conducted from Lebanese territory, though Hezbollah claimed they were in response to Israeli attacks against them inside Syria.36 There have however been other cross-border strikes against Israeli targets, sometimes in the form of cross-border fire or rocket-attacks by unknown perpetrators, and in 2018 by Iranian forces in Syria.37

1.4 The Prohibition of the Use of Force and the Right to Self-Defence

33 Harel (September 21, 2018).
34 Jones and Markusen (2018), 6.
37 Haaretz (May 11, 2018).
Article 2(4) of the UN Charter provides that

"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

The prohibition of the use of force is also a part of customary international law, something that has been confirmed by the ICJ.\(^{38}\) There are in the UN Charter two exceptions to this prohibition; use of force authorized by the Security Council in accordance with Chapter VII, and self-defence in accordance with Article 51. Regarding the Israeli operations against Hezbollah, only the right to self-defence is of interest. Article 51 states:

"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 measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

The right to self-defence is also considered part of customary international law, and Article 51 is not exhaustive. The ICJ in the Nicaragua case takes the phrase "inherent" as indicating that this is a right pre-existing the Charter, and therefore of a customary nature, and that "its present content has been confirmed and influenced by the Charter."\(^{39}\) The ICJ also states that the Charter does not "regulate directly all aspects of its content".\(^{40}\) For a fuller picture, one must turn to customary international law, which supplements the Charter rules.\(^{41}\) It is however not a one-way street, where custom only fills out what is lacking in the Charter rules – the influence works both ways. Christian Henderson describes it as a "reciprocal conditioning between the two sources", and the right to self-defence today may be seen as a fusion between the Charter rule and customary sources of international law.\(^{42}\)

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\(^{38}\) Nicaragua, paragraphs 188-190.  
\(^{39}\) Nicaragua, paragraph 176.  
\(^{40}\) Nicaragua, paragraph 176.  
\(^{41}\) Henderson, 227.  
\(^{42}\) Henderson, 207.
The principles of necessity and proportionality are "well established in customary international law".\textsuperscript{43} In \textit{jus ad bellum}, these principles work as limitations on the right to use force in self-defence. The principle of necessity limits actions by requiring that there be no alternatives to the use of force, such as more peaceful or diplomatic means.\textsuperscript{44} The principle of proportionality requires that defensive force must not go beyond what is needed to halt or repel the attack to which it is responding.\textsuperscript{45} It concerns the size, duration and targets of the response. The two principles are linked, in that, as Christine Gray points out, "(i)f a use of force is not necessary, it cannot be proportionate and, if it is not proportionate, it is difficult to see how it can be necessary".\textsuperscript{46}

Article 51 provides for the right of self-defence only "if an armed attack occurs". There is however disagreement as to what constitutes an armed attack, how and when states might respond, who can perpetrate an armed attack, and whether the threat of a future attack might trigger the right to self-defence.\textsuperscript{47}

There have been discussions about what amounts to "use of force", whether all uses of armed force are covered by the prohibition. Some commentators have argued that there is a \textit{de minimis} threshold, and that uses of force falling below this threshold, although they may be illegal on other grounds, do not violate the prohibition on the use of force. Targeted killings of single individuals, small-scale counterterrorist operations, the rescuing of nationals abroad and localized hostile encounters between military units are examples that have been used to illustrate what might not be grave enough to violate the prohibition of the use of force.\textsuperscript{48} There is disagreement as to whether such a threshold exists. However, when inter-state incidents involve the use of armed force, there is little support in state practice for the existence of such a threshold.\textsuperscript{49} Besides, most if not all, of the Israeli operations against Hezbollah, with airstrikes and ground-to-ground missile strikes, are unquestionably of such a gravity that they are above any such threshold. These strikes therefore violate the prohibition of the use of force, and thus need to be justified by an exception to the prohibition, such as self-defence.

\textsuperscript{43} Nicaragua, paragraph 176.  
\textsuperscript{44} Trapp (2007), 146.  
\textsuperscript{45} Trapp (2007), 146.  
\textsuperscript{46} Gray, 159.  
\textsuperscript{47} Henderson, 208.  
\textsuperscript{48} Henderson, 67.  
\textsuperscript{49} Henderson, 78.
1.5 The Scope of this Thesis

This thesis will examine the legality of the Israeli strikes against Hezbollah according to international law on the use of force. The focus will be on the *jus ad bellum*, the rules regulating when states are allowed to use armed force in international relations,\(^{50}\) and not on the *jus in bello*, which are the rules applying when an armed conflict is taking place, regulating the conduct of the parties.\(^{51}\) The question analyzed is therefore whether Israel has a basis in international law for conducting strikes against Hezbollah in Syria.

Israeli strikes have targeted Hezbollah, as well as both Syrian and Iranian objects. This thesis will only examine the legality of Israeli operations directed at Hezbollah's activities in Syria. The reasoning for this delimitation is that examining the legality of operations against non-state actors raises particular questions, and may be more legally interesting and currently relevant, than examining the use of force against states.

1.6 Outline

Chapter 2 will present some statements about the operations, to give an overview of different actors' positions on the strikes. It will focus mostly on Israeli statements regarding the legality of its operations as well as what they are meant to achieve or prevent, but will also look at the opinions of other actors involved, such as Hezbollah and Syria, as well as reactions from other actors in the international community.

There may be special considerations to be taken into account when using force against non-state actors. Whether the fact that Hezbollah is not a state is of relevance when assessing the legality of the Israeli strikes, is the subject of Chapter 3.

Chapter 4 will then examine if there is a possible legal justification in international law that may apply to the Israeli operations. As the use of force is prohibited, there needs to be an exception relevant to the Israeli strikes, for them to be lawful.

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\(^{50}\) Kolb and Hyde (2008), 13.

\(^{51}\) ICRC (2015).
2 Statements on the Strikes

2.1 Israeli Comments

Israel has on several occasions referred to its strikes in Syria as self-defence. In January 2015, after rockets had been fired from Syria into Israel, it wrote in a letter to the UN: "When confronted by the Iran-Syria-Hezbollah axis threat, Israel will exercise its right to self-defence and take all necessary measures to protect its population and sovereignty." In May 2018, Israeli Prime Minister Netanyahu said "We are acting against the transfer of lethal weapons from Syria to Lebanon or their manufacture in Lebanon, all of which is aimed at Israel, and it’s our right, based on the right to self-defense, to prevent their production or transfer".

As for what is the purpose of the Israeli strikes, Israel refers to the threat posed to it by Hezbollah, and that this threat increases with Hezbollah acquiring more weapons, and more advanced weapons. In December 2016, commenting on an Israeli strike in Syria, Defence Minister Lieberman said "we are first and foremost making efforts to maintain the security of our citizens and protect our sovereignty, and trying to prevent the smuggling of sophisticated weapons, military equipment and weapons of mass destruction from Syria to Hezbollah." In his speech to the UN in October 2015, Prime Minister Netanyahu said "Israel will continue to act to prevent the transfer of strategic weapons to Hezbollah from and through Syrian territory." He furthermore accused Iran of supplying Hezbollah "with precision-guided surface-to-surface missiles and attack drones so it can accurately hit any target in Israel." Netanyahu has also referred to this as "game-changing weapons".

Though not directly referring to the operations against Hezbollah, Israeli Prime Minister Netanyahu has made it clear that he thinks Israel has a right to act pre-emptively against what it considers its enemies. In a press release in September 2018, referencing the 1972 Yom Kippur War, he stated that before that war "the political leadership made a grievous mistake by not allowing a pre-emptive strike. We will never repeat this mistake." In another statement, when commenting on Israeli airstrikes into Syria after Israel alleged that Iranian forces in Syria had launched rockets at IDF forces in the Golan Heights, Netanyahu also said

52 UN doc S/2015/65.
53 Harel (May 29, 2018).
54 Cohen (December 7, 2016).
55 Israeli Prime Minister’s Office (October 1, 2015).
56 Israeli Ministry of Foreign Affairs (January 9, 2018).
57 Israeli Prime Minister’s Office (September 16, 2018).
Israel was prepared to act pre-emptively. "Whoever hurts us – we will hurt them sevenfold, and whoever is preparing to hurt us – we will act to hit them first."\(^{58}\)

In the same statement, Netanyahu also said that Israeli operations in Syria are not directed at Syria, but that Syrian objectives could still be targets of Israeli strikes. "Yesterday I delivered a clear message to the Assad regime: Our action is directed against Iranian targets in Syria; however, if the Syrian military acts against us, we will act against it. This is exactly what happened yesterday – Syrian military batteries fired surface-to-air missiles against us and, therefore, we attacked them."\(^{59}\) In several Israeli letters to the UN, Israel has also made it clear that it holds the Syrian Government responsible for all attacks originating from or involving its territory.\(^{60}\)

So far, Israeli leaders have hardly commented on the legality of their operations against Hezbollah in Syria. They have asserted Israel’s right to act in self-defence, but they have not offered much in the way of arguments as to why they consider these operations legal. As Christine Gray notes, it is unusual for states not to offer any legal justification for their uses of force on the international arena, and it can be seen as an indication that they doubt the legality of their actions. States will usually try to provide a legal argument for their uses of force, though their arguments might sometimes be weak and unconvincing.\(^{61}\)

### 2.2 Other Comments

As mentioned in Chapter 1.2.2, Hezbollah sees itself as a protector of Lebanon, complementing the Lebanese army in the fight against Israeli aggression. It has therefore declined any suggestions that it should disarm. As for the purpose of its weapons, Hezbollah leader Hassan Nasrallah said in 2006, that "(t)he purpose of our rockets is to deter Israel from attacking Lebanese civilians…The enemy fears that every time he confronts us, whenever there are victims in our ranks among Lebanese civilians, this will lead to a counter-barrage of our rockets, which he fears."\(^{62}\)

Both Lebanon and Syria have made statements indicating that they regard Hezbollah’s operations against Israel as legitimate. In a 2002 letter to the UN, Lebanon stated that Hezbollah is resisting Israeli occupation of parts of Lebanon, and that it only targets Israeli

\(^{58}\) Israeli Ministry of Foreign Affairs (May 10, 2018).

\(^{59}\) Israeli Ministry of Foreign Affairs (May 10, 2018).

\(^{60}\) For examples, see UN doc S/2015/65, S2015/293, S2018/111.


\(^{62}\) CSIS Missile Defense Project (undated).
military occupying Lebanese territory. Syria has echoed this position, while also stating that when Israel accuses others of terrorism, "Israel puts everyone else in the dock and presents its own behaviour – occupation, murders of innocent Arabs and destruction of their property – as being dictated by the needs of self-defence, whereas, in reality it is the so-called acts of terrorism that are a defence against occupation, persecution, repression and racial discrimination." More recently, Syria has stated that "Hizbullah is merely doing its part to combat terrorism in Lebanon and Syria in implementation of the relevant United Nations resolutions."

In a May 2018 letter to the Security Council, Syria protested against Israeli missile attacks on Syrian targets as part of Israel’s ongoing attacks against Syria. Syria also accused Israel of supporting terrorist groups in Syria. It said that this would not be possible without "the immunity from accountability that the United States, in coordination with the United Kingdom and France, provides Israel in the Security Council." It then called on the Security Council to "take resolute and immediate action to prevent the recurrence of Israeli aggression."

The international community has not said much regarding the legality of the Israeli strikes against Hezbollah. However, in 2014, the Non-Aligned Movement, then consisting of 120 member States, commented on two Israeli strikes in Syria, both of which reportedly targeted shipment of weapons to Hezbollah. The Non-Aligned Movement condemned the strikes as "acts of aggression", which it considered "a grave violation of international law and Syrian sovereignty."

63 UN doc S/2002/829.
64 UN doc S/2003/178.
65 UN doc S/2017/888.
67 Khazan (January 30, 2013); Evans and Holmes (May 5, 2013).
68 UN doc S/2017/573, paragraph 393.
3 Use of Force against Non-State Actor Hezbollah

For the Israeli strikes against Hezbollah to be lawful, there has to be an admission in international law for the use of force by a state against a non-state actor in a third state. This chapter will examine whether such an admission exists, and if there are any conditions or restrictions that may apply. Whether the Israeli strikes are legal also depends upon the existence of an exception to the prohibition of the use of force that may apply to these strikes, which will be examined in the next chapter.

Article 2(4) is concerned with only "international relations". A use of force by a state against a non-state actor does not in itself engage the prohibition of the use of force. Should the use of force take place on neutral ground, such as on the high seas or in outer space, the prohibition would not be engaged. But when the use of force takes place on another state's territory, then the prohibition is engaged, since it now concerns "international relations" as well as the "territorial integrity" of that state. It is therefore the fact that the Israeli strikes against Hezbollah take place on Syrian territory that engages the prohibition of the use of force, thereby requiring that the strikes must have a justification within *jus ad bellum* to be lawful.

Considering whether use of force against a non-state actor upon the territory of a third state should be allowed, is thus a matter of balancing two opposing considerations. On the one hand a state might have legitimate reasons or needs for their use of force against non-state actors in foreign territory, such as protecting its own territory or citizens from terrorist attacks. On the other hand, the third state has a right to respect for its sovereignty and territorial integrity, which is violated by any use of force that takes place within its territory without its consent. How to balance these considerations has been a contentious issue.

3.1 Effective control

In the Nicaragua case, Nicaragua accused the US of supporting military and paramilitary actions of the contras forces, who opposed the Nicaraguan government, and it claimed that this support amounted to a use of force by the US. Nicaragua also claimed that the US had used force directly against it, by the mining of ports and aerial incursions into Nicaraguan territory. The US claimed to be acting in collective self-defence of El Salvador, Costa Rica

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69 Henderson, 70.
70 Henderson, 36-37.
and Honduras, responding to armed attacks on those states by Nicaragua. It claimed that Nicaragua had promoted and supported armed groups, primarily in El Salvador, as well as conducted cross-border attacks on Costa Rica and Honduras.

The Court, citing the UN General Assembly Resolution 3314 (1974) (Definition of Aggression), decided that not only the direct use of force by a state could constitute an armed attack. An armed attack could also consist of "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to (...) an actual armed attack conducted by regular forces, or its substantial involvement therein".

It is therefore clear that actions by a non-state actor can be regarded as an "armed attack" within the meaning of Article 51, giving rise to a right of self-defence. There is however disagreement over what degree of state involvement is necessary for attributing the attack to the host state and justifying a response in self-defence on its territory.

In the Nicaragua case, the court said that "assistance to rebels in the form of the provision of weapons or logistical or other support" was not "of significant scale" to constitute an armed attack, though it might constitute a threat or use of force, or intervention. Stronger involvement from a state was needed. For acts of a non-state actor to be attributable to a state, the state must have "effective control of the military or paramilitary operations" of the non-state actor. This criterion of "effective control" would basically make the acts of the non-state actor the acts of the controlling state, and thereby provide the victim state with the right to respond in self-defence. In more general settings, the International Law Commission (ILC) in its Draft articles on Responsibility of States for Internationally Wrongful acts, considered what was needed for acts to be attributable to a state. Draft article 8 says: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

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71 Nicaragua, paragraph 126.
72 Nicaragua, paragraph 128.
73 Nicaragua, paragraph 195.
74 Gray, 137.
75 Nicaragua, paragraph 195.
76 Nicaragua, paragraph 115.
77 Henderson, 312.
78 The International Law Commission (2001), Article 8.
Judges Schwebel and Jennings offered separate opinions in the Nicaragua case, arguing that the Court's definition of armed attack was too narrow, that the conditions for lawful self-defence should not be so strict. Judge Jennings argued that although mere provision of arms would not be enough, it "may, nevertheless, be a very important element in what might be thought to amount to armed attack, where it is coupled with other kinds of involvement", such as "logistical or other support".

In the Armed Activities case, Uganda conducted military operations inside the territory of the DRC. Uganda claimed to be using self-defence in response to armed attacks performed by non-state actors that were supported by the DRC government, and who were based on DRC territory. The ICJ recognized that there had been cross-border attacks by the rebel groups against Uganda, but found no evidence of direct or indirect DRC involvement in these attacks. Like in the Nicaragua case, it referenced the Definition of Aggression, and said the "attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC", and found the attacks "non-attributable to the DRC". After finding "that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present", the Court saw "no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces". The Court therefore did not discuss what degree of state involvement would be necessary to generate a right to respond in self-defence against attacks from non-state actors.

The International Criminal Tribunal for the former Yugoslavia (ICTY) took a more lenient approach in the Tadić case in 1999, and applied a lower standard of attribution. For acts of non-state actors to be attributable to a state, the state would have to exercise "overall control". This meant "going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations". However, ICTY used this test when considering if the armed conflict was international or non-international, and ICTY's task was to determine individual criminal responsibility. In the Bosnia Genocide case in 2007, the ICJ rejected the use of the "overall control" standard for determining state responsibility, and upheld the "effective control" test. The ICJ said that a state is responsible

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79 Gray, 137-138.  
80 Nicaragua, Dissenting Opinion of Judge Sir Robert Jennings, 543.  
81 Armed Activities, paragraphs 131-140.  
82 Armed Activities, paragraph 146.  
83 Armed Activities, paragraph 146.  
84 Armed Activities, paragraph 147.  
85 Prosecutor v. Tadić, paragraph 145.
for acts committed by non-state actors "only if (...) they are attributable to it under the rule of customary international law reflected in Article 8" of the ILC's Draft articles on Responsibility of States for Internationally Wrongful acts. "This is so where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed."86

Defining "effective control" as an abstract concept is difficult. One has to look at the specific facts to determine whether a state can be said to exercise effective control over a non-state actor. It is however clear that the state involvement has to be substantial. In the Nicaragua case, the ICJ found that the US degree of control was not substantial enough "to justify treating the contras as acting on its behalf."87 US support to the contras was crucial, but "insufficient to demonstrate their complete dependence on United States aid."88 The question was whether the contras had any real autonomy in relation to the US government, as this would make their acts "imputable to the Government of the United States, like those of any other forces placed under the latter's command."89 Based on the evidence, the Court found that "the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself" to attribute the acts of the contras to the US.90 Even "general control" would not in itself mean "that the United States directed or enforced the perpetration of the acts" of the contras, as the contras could well have committed such acts without US control.91 If the US was to be considered to have legal responsibility for acts of the contras, "it would in principle have to be proved that that State had effective control of the military or paramilitary operations" of the contras.92 The Court therefore found the US not to be responsible for the acts of the contras, but only for their own acts against Nicaragua.93

This standard of "effective control" is quite strict, requiring not just considerable involvement by the state. It seems the Court’s view is that if the non-state actor's operation may have been performed without the state's involvement, then the operation cannot be attributed to the state. As Greg Henderson points out, there are hardly any examples in practice of armed attacks by

86 Ibid.
87 Nicaragua, paragraph 109.
88 Nicaragua, paragraph 110.
89 Nicaragua, paragraph 114.
90 Nicaragua, paragraph 115.
91 Nicaragua, paragraph 115.
92 Nicaragua, paragraph 115.
93 Nicaragua, paragraph 116.
non-state actors where a state exerts what may amount to effective control. And even should there be such a degree of control, it will hardly ever be possible to prove.\(^94\)

The question then is whether this standard of "effective control" can be applied to the relations between Hezbollah and Syria, thus justifying an Israeli response in self-defence. Israel has said it is "confronted by the Iran-Syria-Hezbollah axis threat"\(^95\), thus seeing them more or less as a coalition. Israel has also accused Syria of giving Hezbollah "freedom of movement and safe harbor"\(^96\). But Israel seems to view the Hezbollah-Syrian relationship more as a partnership than as that of a state controlling a non-state militia, and does not claim that Syria is exercising control over Hezbollah. That is a role Israel claims Iran has, as it has described Hezbollah as a terror group and a proxy of Iran, that Iran supports and funds, as Iran is the group's main benefactor.\(^97\)

Although Hezbollah has also been sponsored by Syria, Iran is its main sponsor.\(^98\) It seems clear that Hezbollah's activities are not directed by Syria, although there is cooperation between them. In the civil war in Syria, Hezbollah acts as a Syrian ally, not like a Syrian-controlled militia, and that is also how their relationship is usually characterized by analysts and politicians: Hezbollah is, together with Iran and Russia, Assad's allies in his fight to regain control of the country. The Israeli claim appears to be that Hezbollah is using its relationship with Syria to transfer weapons through the country, and to establish bases there.

It seems obvious that most of Hezbollah's actions or threats against Israel would take place irrespective of Syrian sponsorship or influence. Syria's involvement in the affairs of Hezbollah appears far less substantial than the US's involvement in the contras' affairs. It is therefore apparent that this involvement does not meet the strict standard of "effective control", as established by the ICJ in the Nicaragua case.

However, in recent years and especially since the terror attacks of September 11 2001, the notion that the "effective control" standard of attribution must be met before a state can forcibly respond to armed attacks by non-state actors, has increasingly been challenged by both states and commentators. This has been done in two ways: by claiming that a lower

\(^94\) Henderson, 313.
\(^95\) UN doc S/2015/65.
\(^96\) UN doc S/2003/96. Although that statement was related to the situation in 2003, it seems just as pertinent in today's situation.
\(^97\) UN doc S/2016/593; UN doc S/2017/356.
\(^98\) Norton (2018), 40.
standard of attribution to the host state is necessary, and by claiming that the use of force is directed only at the non-state actor and not at the host state.

3.2 Lowering the Standard of Attribution

Earlier state practice generally accepted the "effective control" standard put forward by the ICJ in the Nicaragua case.\textsuperscript{99} Both Israel and the US on some occasions used force in other states when responding to terrorist attacks, and based this on a wide understanding of Article 51. Such operations by Israel took place in Beirut (1968) and in Tunis (1985), and by the US in Libya (1986), in Iraq (1993), and in Sudan and Afghanistan (1998).\textsuperscript{100} They both claimed that force could be used to prevent further attacks in the future, and that force could be used in another state's territory. Although some of the US operations were met with understanding and sympathy, hardly any other state accepted their legal arguments.\textsuperscript{101}

As an example, when Israel in 1985 attacked the PLO headquarters in Tunis as a response to three Israelis being killed by gunmen in Cyprus, Israel claimed to be acting only against the terrorists, while still claiming some responsibility on the part of the host state. Israel stated "(i)t was against (the terrorists) that our action was directed, not against their host country. Nevertheless, the host country does bear considerable responsibility."\textsuperscript{102} But other states held that Tunisia could not be held responsible for acts of the PLO, and therefore condemned the Israeli attack.\textsuperscript{103}

In 1998 the US attacked an al-Qaeda base in Afghanistan and a pharmaceutical plant in Sudan (which it alleged was being used by al-Qaeda to produce biological weapons), in response to the bombing of the US embassies in Kenya and Tanzania. Like Israel, the US claimed to only target the terrorists and not the host states, while still claiming some host state responsibility. Some condemned the bombing of the pharmaceutical plant, due to lack of evidence that this had been used by terrorists. There was however little condemnation of the attack on the al-Qaeda base in Afghanistan, and few states rejected the US legal justification. On the other hand, no state expressly approved the US legal argument for the strikes.\textsuperscript{104} This lack of

\textsuperscript{99} Henderson, 318.
\textsuperscript{100} Gray, 202.
\textsuperscript{101} Gray, 202-206.
\textsuperscript{102} UN doc S/PV.2611, paragraph 66.
\textsuperscript{103} Henderson, 318.
\textsuperscript{104} Henderson, 318-319.
condemnation might therefore be due to sympathy and understanding, rather than due to an acceptance of the legal justification of the strikes.\textsuperscript{105}

This situation of general acceptance of the "effective control" standard, seems to have changed after the al-Qaeda attacks in the US on September 11, 2001, and in the following years. Today many states and scholars believe that non-state actors may perpetrate what amounts to an armed attack under international law, giving states a right to a respond in self-defence.\textsuperscript{106}

The day after the attacks of 9/11, the Security Council adopted Resolution 1368 (2001), and on September 28 - "Acting under Chapter VII of the Charter of the United Nations" - Resolution 1373 (2001). In the preamble of Resolution 1373, the Security Council reaffirms "the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts". It also reaffirms "the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations". Similar expressions were adopted in the preamble of Resolution 1368. It therefore seems that the members of the Security Council accepted that the US could respond to the terrorist attacks by using force in self-defence.\textsuperscript{107} Although the reference to self-defence is in the preamble, and not in the operative part of the resolutions, it is still significant, since the Security Council seldom makes any express reference to the right of self-defence in its resolutions.\textsuperscript{108} It is also significant that at the time of the adoption of the resolutions, there was yet no evidence of the extent of any state involvement in the terror attacks.\textsuperscript{109} Thus, the members of the Security Council were willing to allow for self-defence in response to these terror attacks, even if they did not know to what degree the attacks could be attributed to a state. This could be seen as a general affirmation of the right of self-defence irrespective of context, but it seems that the Security Council considered the terror attacks of 9/11 as an armed attack in the context of Article 51.\textsuperscript{110}

On October 7, 2001, a US-led coalition invaded Afghanistan in a response to the terror attacks (Operation Enduring Freedom). In its letter to the UN, the US referenced Article 51, and called the terrorist attacks "armed attacks". It accused the Taliban regime, which was the de facto government of Afghanistan, of supporting al-Qaeda. It further said that the attacks had

\textsuperscript{105} Gray, 206.
\textsuperscript{106} Henderson, 210.
\textsuperscript{107} Gray, 206.
\textsuperscript{108} Gray, 206.
\textsuperscript{109} Moir, 724.
\textsuperscript{110} Moir, 725.
"been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation." The US informed the Security Council that it had responded in self-defence by initiating actions that "include measures against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan." 111

The US did not claim that the Taliban was exercising effective control over al-Qaeda. It seems it rather suggested the opposite, that al-Qaeda was exercising influence on the Taliban. President Bush said that the US would make "no distinction between the terrorists who committed these acts and those who harbor them"112, and that any nation that harboured terrorists would be treated as a hostile regime.113 The US Congress adopted the Authorization for Use of Military Force, authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."114

In its justification for the use of force in Afghanistan, the US clearly attempted to lower the standard of attribution from "effective control" to one of "harbouring."115 It is worth noting that the US claimed that this was sufficient to target not only the non-state actor, but also the host state.

The US received wide international support for its operations in Afganistan. The US-led coalition was joined by the UK and Australia from the start, and later grew to over 40 states. The UK also used the language of harbouring, but both states were unclear on what degree of involvement, if any, was necessary by the host state.116 The only state expressly challenging the legality of the military action was Iraq.117

The international support for Operation Enduring Freedom can however not be seen as a support for a new harbouring standard of attribution. Cassese has argued that even though the widespread support at the time seemed to indicate acceptance of a broader right of self-

111 UN doc S/2001/946.
113 Gray, 207.
114 U.S. Congress (September 18, 2001).
115 Henderson, 315.
116 Gray, 208.
defence, the support could have been "motivated by the emotional reaction to the horrific terrorist action of 11 September, [and] may not amount to the consistent practice and *opinio juris* required for a customary change."\textsuperscript{118} Later state practice does not support a harbouring standard of attribution.\textsuperscript{119} Still, the acceptance of the US-led operations in Afghanistan seems to suggest that at least in some situations the "effective control" standard is too strict, and that force may be used in self-defence after attacks performed by non-state actors with a lesser degree of state involvement. But the exact scope of this right is difficult to establish.\textsuperscript{120}

There were elements that may lead one to conclude that 9/11 was an exceptional case. It may be essential that the Security Council adopted resolutions confirming the right of self-defence to the attacks. Had they not, it is reasonable to conclude that other states might not have been so willing to accept the US response. Additionally, the Security Council had on previous occasions passed several resolutions strongly condemning the use of Afghan territory for the sheltering and training of terrorists, as well as demanding that the Taliban regime stop providing sanctuary and training for international terrorists and their organizations.\textsuperscript{121} It is also worth noting that both the Armed Activities case (2005) and the Bosnian Genocide case (2007), in which the ICJ reaffirmed the "effective control" standard, were adjudicated by the court after 2001.

### 3.3 Unwilling or Unable

The harbouring standard of attribution has not been seen in state practice outside of the operations in Afghanistan. While those operations targeted both the non-state actor and the host state, more recent operations by states are more in line with the operations mentioned in the previous chapter (by Israel against the PLO, and by the US after the embassy bombings). States claim that their use of force is directed only against a non-state actor, while they still usually also claim some sort of responsibility on the part of the host state.\textsuperscript{122} Operation Enduring Freedom is thus exceptional, in that force was used both against the non-state actor and the host state, and that this received wide acceptance with no claims of al-Qaeda being under the effective control of the Taliban.

\textsuperscript{119} Henderson, 315-316.
\textsuperscript{120} Gray, 206-207.
\textsuperscript{121} Gray, 208-209.
\textsuperscript{122} Henderson, 319-320.
The "unable or unwilling" doctrine is based on states' obligations regarding non-state actors within its territory. States have a legal obligation not just to "refrain from providing assistance regarding the armed activities of non-state armed groups against other states, but also to take due diligence in ensuring that their territory is not used by non-state actors for such activities." In general terms, the ICJ in the Corfu Channel case asserted that "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" was a "general and well-recognized" principle in international law.

These obligations are not in themselves part of the jus ad bellum. If a host state fails to comply with them, this does not per se provide for a right to use force in self-defence by a state that is the victim of an armed attack from a non-state actor. But it is a factor when balancing the host state's right to territorial integrity and sovereignty versus the right of the victim state to protect itself against attacks. And under the "unable or unwilling" doctrine, it tips the scales in favor of the victim state. The host state is not held responsible for the actions of the non-state actor, but its inability or unwillingness to take effective action against the non-state actor means that its territorial integrity might be exposed to a limited breach by the victim state. The victim state may therefore use force in self-defence against the non-state actors, but not against targets belonging to the host state.

The reasoning behind arguing for a right to respond in self-defence even when there is no state complicity, is one of necessity. No matter who is the perpetrator of an attack – a state or a non-state actor – the victim state has the same need to protect its citizens and its territory. If the host state would take effective measures to prevent non-state actors from using its territory for organizing or launching attacks against other states, there would be no need for a potential victim state to act in self-defence. The principle of necessity would then mean that the victim state's use of force on the host state's territory would not be lawful. If, however, the host state is either unable or unwilling to take the necessary measures against terrorists operating from its territory, the victim state has little choice. "Either it respects the host State’s territorial integrity at great risk to its own security, or it violates that State’s territorial integrity in a limited and targeted fashion, using force against (and only against) the very source of the terrorist attack."

123 Henderson, 322.
124 Corfu Channel Case, 22.
125 Henderson, 323.
126 Trapp (2007), 147.
In 2002, Russia bombarded several Chechen positions in Georgia in a response to terrorist attacks in Russia.\textsuperscript{127} In a letter to the UN Secretary General, Russia claimed it had tried to cooperate with the Georgian authorities, but to no avail. It spoke of the general terrorist threat facing the world, with "territorial enclaves outside the control of national governments, which (...) are unable or unwilling to counteract the terrorist threat". It further reserved the right to act in accordance with Article 51, and concluded the letter "none of this will be necessary (...) if the Georgian leadership actually controls its own territory, carries out international obligations in combating international terrorism and prevents possible attacks by international terrorists from its territory against the territory of the Russian Federation.\textsuperscript{128} The US however protested these operations as they violated Georgian sovereignty, and characterized the Russian operations as being "under the guise of antiterrorist operations".\textsuperscript{129}

3.3.1 Operation Inherent Resolve

In 2014, the US led a coalition against ISIL in Syria. This operation, named Operation Inherent Resolve, was a broad US-led coalition, where states invoked both collective and individual self-defence as justification for their actions against ISIL. The operations started in Iraq at the request of the Iraqi government, but expanded into Syria in September 2014. The US-led operations in Syria was initially joined by Bahrain, Qatar, Saudi Arabia, Jordan and the United Arab Emirates. Other states who participated in the operations in Iraq, initially refrained from extending their action into Syria, but would join the coalition later.\textsuperscript{130}

The actions by ISIL, were obviously not attributable to Syria, as ISIL was one of many groups fighting against the Syrian regime in the Syrian Civil War. In a letter to the UN, the US justified the operations:

"ISIL and other terrorist groups in Syria are a threat not only to Iraq, but also to many other countries, including the United States and our partners in the region and beyond. States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence, as reflected in Article 51 of the Charter of the United Nations, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks. The Syrian regime has shown that it cannot and will not confront these safe havens ef-

\textsuperscript{127} Gray, 225.
\textsuperscript{128} UN doc S/2002/1012.
\textsuperscript{129} Gray, 226.
\textsuperscript{130} Henderson, 325.
fectively itself. Accordingly, the United States has initiated necessary and proportionate military actions in Syria in order to eliminate the ongoing ISIL threat.  

This was the first time the US invoked the "unwilling or unable" doctrine in a letter to the UN Security Council. Some of the other states later used similar language in their letters. Canada in its letter stated that "(i)n accordance with the inherent rights of individual and collective self-defence reflected in Article 51 of the United Nations Charter, States must be able to act in self-defence when the Government of the State where a threat is located is unwilling or unable to prevent attacks emanating from its territory", while also stressing that its actions were not aimed at Syria. Similarly, Australia said that "States must be able to act in self-defence when the Government of the State where the threat is located is unwilling or unable to prevent attacks originating from its territory", and that their operations were not directed at Syria. Turkey joined the coalition after a terrorist attack inside Turkey, and stated that "the regime in Syria is neither capable of nor willing to prevent these threats emanating from its territory".

After the terrorist attacks in Paris in November 2015, the UN Security Council unanimously passed Resolution 2249 (2015). It determined that ISIL "constitutes a global and unprecedented threat to international peace and security". It further called upon member states to take "all necessary measures" in "their efforts to prevent and suppress terrorist acts" committed by ISIL, al-Qaeda "and other terrorist groups, as designated by the United Nations Security Council". The resolution, however, was not passed under Chapter VII, and did not make any reference to Article 51 or the right to self-defence.

None of the letters from European states following the Paris terrorist attacks, made reference to "unwilling or unable". Some, when justifying their participation in Operation Inherent Resolve, made it clear that they saw this as a special or exceptional case. Some referenced the resolution passed by the Security Council. Germany argued that consent by the Syrian Government was not necessary when invoking self-defence against ISIL, as they occupied

131 UN doc S/2014/695.
132 Gray, 237-238.
133 UN doc S/2015/221.
134 UN doc S/2015/693.
135 UN doc S/2015/563
137 Gray, 239-240.
parts of Syria where Syria did not "exercise effective control", and emphasized that their measures were "directed against ISIL, not against the Syrian Arab Republic".\textsuperscript{138}

Syria protested to this use of force on its territory in several letters to the UN, calling it a violation of Syrian sovereignty.\textsuperscript{139} It said it was prepared to cooperate with any endeavor to eliminate terrorism, but "any attempt to invoke Article 51 of the Charter to justify military action on Syrian territory without coordination with the Syrian Government manipulates, distorts and misinterprets the provisions of that Article."\textsuperscript{140} Russia, in a UN Security Council meeting, said that in combating the threat of ISIL, "(a)n international anti-terrorist operation should be conducted either with the consent of the sovereign Governments or sanctioned by the Security Council. We consider other options to be unlawful and detrimental to international and regional stability."\textsuperscript{141}

According to a study by Chachko and Deeks in 2016, 10 states have explicitly endorsed the "unable or unwilling" doctrine, 3 states have endorsed it implicitly, while 4 states have objected to it.\textsuperscript{142} In the academic community, the doctrine has been endorsed by the Chatham House Principles\textsuperscript{143} and the Leiden Policy Recommendations\textsuperscript{144}. It was also endorsed by the so-called "Bethlehem Principles" which Daniel Bethlehem put forth in an article in 2012, "with the intention of stimulating debate on the issues". In the article, he asserts that they have "been informed by detailed discussions over recent years with foreign ministry, defense ministry, and military legal advisers from a number of states who have operational experience in these matters."\textsuperscript{145} It is worth noting that the Bethlehem Principles have been expressly endorsed by the US, the UK and Australia, as this shows that these states support a very wide right of self-defence against non-state actors.\textsuperscript{146}

3.3.2 ICJ Jurisprudence Revisited

\begin{itemize}
  \item \textsuperscript{138} UN doc S/2015/946.
  \item \textsuperscript{139} UN doc S/2015/719.
  \item \textsuperscript{140} UN doc S/2015/1048.
  \item \textsuperscript{141} UN doc S/PV.7271.
  \item \textsuperscript{142} Chacko and Deeks (2016).
  \item \textsuperscript{143} Wilmshurst, 963-972.
  \item \textsuperscript{144} Schrijver and Van Den Herik (2010).
  \item \textsuperscript{145} Bethlehem (2012), 770-779.
  \item \textsuperscript{146} Henderson, 299 and 332; U.S. Department of State (April 1, 2016); U.K. Attorney General (January 11, 2017).
\end{itemize}
The question then is if the "unable or unwilling" doctrine can be reconciled with the jurisprudence of the ICJ regarding the "effective control" standard. Recent years have seen a rise of more powerful non-state actors, and some have shown that they are capable of perpetrating attacks causing great damage and casualties. This might explain why some states have been arguing for a wider right of self-defence against non-state actors. If a state has been the victim of a grave attack, and further attacks are probable, it should in principle not matter whether the attack was carried out by a state or a non-state actor. The necessity to protect itself will exist regardless of the nature of the perpetrator.\(^{147}\)

When justifying their use of force against ISIL in Syria, several states stressed that their actions were only directed at ISIL and not at the Syrian state. However, in both the Nicaragua case and in the Armed Activities case, force was directed not only at the non-state actors alleged to have launched armed attacks, but also against the states on whose territory the non-state actors operated.\(^{148}\) As Trapp notes, "(i)t seems far less incredible that the Court required that the armed attacks mounted by non-State actors be attributable to the State in whose territory defensive force was being used when one considers that the territorial State was itself the subject of defensive measures".\(^{149}\) In the Armed Activities case, the Court expressly said it would not assess whether and under what conditions force may be used in self-defence against non-state actors.\(^{150}\) Judges Simma and Kooijmans in their Separate Opinions both argued that the Court should have taken the opportunity to clarify the state of the law on this matter.\(^{151}\) Judge Kooijmans argued that "(i)t would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State", and whether self-defence against non-state actors is available, relies upon whether "the armed action by the irregulars amount to an armed attack".\(^{152}\) Judge Simma stated that "Security Council resolutions 1368 (2001) and 1373 (2001) cannot but be read as affirmations of the view that large-scale attacks by non-State actors can qualify as 'armed attacks' within the meaning of Article 51".\(^{153}\)

In the Wall Advisory Opinion, the ICJ seemingly repeated its understanding that only an armed attack attributable to a state could trigger the right of self-defence. The Court stated that "Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does

\(^{147}\) Henderson, 211.  
\(^{148}\) In the Bosnia Genocide case, the right to use force in self-defence as a response to attacks by non-state actors was not an issue.  
\(^{149}\) Trapp (2007), 142.  
\(^{150}\) Armed Activities, paragraph 147.  
\(^{151}\) Gray, 141.  
\(^{152}\) Armed Activities, Separate Opinion of Judge Kooijmans, paragraph 30-31.  
\(^{153}\) Armed Activities, Separate Opinion of Judge Simma, paragraph 11.
not claim that the attacks against it are imputable to a foreign State.” 154 Many have interpreted this as a rejection of the possibility of self-defence against an armed attack that cannot be attributed to a state. Still, the Court does not say that the right to self-defence only arises when there has been an armed attack by a state, though Judges Higgins and Buergenthal seem to interpret it this way in their separate opinions. 155 The Court went on to note that the alleged threat to Israel originated within occupied territory, and that Israel therefore could not in any event invoke Security Council Resolutions 1368 and 1373 to support its claims of self-defence. 156 This could be interpreted as the Court denying the Israeli right to self-defence because it is an occupying power, and then leaving open the question whether there might be a right to self-defence against non-state actors responding to armed attacks akin to those considered in the Security Council resolutions. 157 This seems in line with Judge Kooijmans’ reasoning. He argued that the Security Council resolutions had confirmed that acts of international terrorism could amount to an armed attack giving right to self-defence, even without being ascribed to a state. He said this was a new element, one which the Court had by-passed. 158

It therefore seems that the ICJ has not yet made a decision on whether, and under what circumstances, force may be used in self-defence against non-state actors, when the defensive force is not directed at the host state. The Court has not engaged recent state practice where defensive force has been used against non-state actors, when the host state has been regarded as either unable or unwilling to take effective measures against the non-state actors. 159

3.4 Is there a Legal Basis for Israel to strike Hezbollah in Syria?

It has already been established that the "effective control" standard of attribution has not been met. The question then is if the Israeli strikes against Hezbollah in Syria can be justified by claiming that Syria is unwilling or unable to prevent Hezbollah from attacking Israel.

As shown in Chapter 3.1, although Syrian involvement in Hezbollah's activities doesn't meet the "effective control" standard, it is substantial. Israel claims that Syria is allowing the
transfer of weapons to Hezbollah both via and from Syria, as well as allowing it to establish bases in Syria, and this seems to be true based on media reports cited earlier. It is therefore clear that Syria is unwilling to prevent Hezbollah from operating in Syria. If Hezbollah's operations can be seen to justify an Israeli response in self-defence – which will be examined in Chapter 4 – Israel could claim a necessity to act, since the host state Syria does not.

The Israeli operations against Hezbollah in Syria are quite similar to the US-led coalition's operations against ISIL. Both are targeting alleged terrorists, and the main goal seems to be preventing future attacks. Furthermore, like states participating in Operation Inherent Resolve, Israel has claimed that its operations are directed at the non-state actor, and not at the Syrian state. Even though several states participating in Operation Inherent Resolve pointed to UN Security Council Resolution 2249 (2015) in their justifications, the operations had been going on for over a year before that resolution was adopted. All the four states using the language of unwilling or unable in their justifications, did so before the adoption of the resolution.

The main goal of the Israeli operations is to prevent Hezbollah from acquiring advanced weapons. As mentioned earlier\textsuperscript{160}, Security Council Resolution 1701 (2006) called for the disarmament of all armed groups in Lebanon, and decided that all states should take the necessary measures to prevent the supply of arms to any entity in Lebanon, unless authorized by the Government or UNIFIL. Although the position of Lebanon and Hezbollah is that Hezbollah is a legitimate resistance movement opposing Israeli occupation, and should therefore be allowed to keep its weapons\textsuperscript{161}, this seems impossible to reconcile with the language of the resolution. Even if one considers Hezbollah's opposition to Israeli occupation as legitimate, it is still an "armed group". It therefore seems obvious that the supply of arms to Hezbollah would be a violation of the resolution, and this was also the view of the UN Secretary General in his latest report on the implementation of the resolution.\textsuperscript{162} By not preventing the supply of weapons to Hezbollah from or via Syria, Syria is violating paragraph 15 of this resolution, either due to unwillingness or inability. This would of course not in itself be a ground for Israel to use force in Syria, but it could be a factor when determining whether action in self-defence is necessary under the "unable or unwilling" doctrine. Israel claims that these weapons are meant for future use against it, and could argue that since Syria is unwilling to act, Israel has to do so to prevent a future threat. (Whether prevention of a future threat may be a justification for self-defence, will be examined in Chapter 4.)

\textsuperscript{160} See Chapter 1.3.1.
\textsuperscript{161} Gray, 103; Norton 148 and 161.
\textsuperscript{162} See Chapter 1.3.1.
It appears that according to the "unwilling or unable" doctrine, Israel would be allowed to conduct operations against Hezbollah in Syria, presupposing that Hezbollah's operations are grounds for lawful self-defence. The legal status of this doctrine, however, is controversial. As mentioned earlier, 10-13 states have endorsed it, while only 4 have rejected it. The majority of states have not offered any clear opinion. Among scholars, opinion on the doctrine's legal status is divided. Henderson writes that the doctrine is a "fairly well settled part of the US government's legal position, and also appears to be creeping into the justificatory discourse and general rhetoric of other states"\textsuperscript{163}, however "(e)ven academic proponents of it struggle to argue that it exists as an established legal doctrine"\textsuperscript{164}. Trapp writes that "the precise parameters of the right to respond to an armed attack by NSAs with a use of force in foreign territory are still being worked out in practice"\textsuperscript{165}.

It therefore seems that international law in this area is unsettled. States and scholars are divided on whether and how a state can lawfully respond to armed attacks by non-state actors unless the host state exercises "effective control" (unless the host state consents to the response, or it is authorized by the UN Security Council). With this uncertainty, Israel can at least make the argument that international law allows them to use force against Hezbollah inside Syria.

Israel would however need to be careful when choosing targets for their strikes. The "unable or unwilling" doctrine may only allow for the use of force against objects belonging to Hezbollah, and not Syrian objects. However, some states have argued that it may also be legal to target the host state even when the "effective control" standard has not been met, as seen in the operations against the Taliban in Afghanistan. Bethlehem's Principle 8 states that "(i)n the case of a colluding or a harboring state, the extent of the responsibility of that state for aiding or assisting the nonstate actor in its armed activities may be relevant to considerations of the necessity to act in self-defense and the proportionality of such action, including against the colluding or harboring state."\textsuperscript{166} It may therefore be that Israel may also strike Syrian targets, but only insofar as it is necessary to prevent the threat posed by Hezbollah's operations. And it seems Israel is careful when choosing targets. Although Syrian objects have been hit during the Israeli operations, this seems to be when the targets can be linked Hezbollah, like when Syrian bases are being used by Hezbollah.\textsuperscript{167} The CSIS report found that more than two-third

\begin{footnotes}
\footnotetext{163}{Henderson, 326.}
\footnotetext{164}{Henderson, 332.}
\footnotetext{165}{Trapp (2015), 696.}
\footnotetext{166}{Bethlehem, 776 (emphasis added).}
\footnotetext{167}{See Chapter 1.3.2.}
\end{footnotes}
of the strikes were against missile-related targets, so it appears that at least for the most part, the Israeli force is directed at preventing the transfer of arms to Hezbollah.
4  Are the Israeli Operations Lawful Self-Defence?

The severity of the Israeli strikes against Hezbollah, and the fact that they are taking place on Syrian territory, means that they violate the prohibition of the use of force.\textsuperscript{168} To be considered lawful, they therefore have to be justified by one of the exceptions to the prohibition. Since there is no Security Council authorization, and no consent from the Syrian government, the only potential exception is the right to self-defence provided by Article 51 of the UN Charter and customary international law.

Article 51 establishes that self-defence is available "if an armed attack occurs". The Israeli operations are, however, not a response to an occurring armed attack. The purpose of the Israeli operations is to prevent Hezbollah from acquiring weapons and bases that Israel claims are meant to be used in a future attack against Israel.\textsuperscript{169} But whether forcible self-defence may be used to prevent future attacks – and if so, under what conditions – is a contentious issue.

It is an increasingly accepted view that self-defence to prevent a future armed attack, may be lawful if the threatened armed attack is "imminent".\textsuperscript{170} The main points of contention are how to assess imminence when determining the threat of an armed attack, and when self-defensive measures may be considered necessary in light of contemporary foes, technology and threats.\textsuperscript{171} The concept of imminence is thus linked to the principle of necessity, and the Chatham House Principles state that "(n)ecessity is a threshold, and the criterion of imminence can be seen to be an aspect of it, inasmuch as it requires that there be no time to pursue non-forcible measures with a reasonable chance of averting or stopping the attack."\textsuperscript{172}

The concept of imminence is often traced back to the Caroline incident of 1837, when British forces destroyed the merchant ship Caroline, anchored in US territory. The British destroyed the ship to prevent it from being used by rebels fighting the British rule in Canada, for transportation of forces and supplies into Canada. US Secretary of State, Daniel Webster, then stated that for the British to use force in self-defence on US territory, there would have to be "a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation", and this was accepted by the British.\textsuperscript{173} This incident has little authority for determining current law as the use of force was not prohibited at the time, and

\textsuperscript{168} See Chapter 1.4 and Chapter 3.
\textsuperscript{169} See Chapter 2.1.
\textsuperscript{170} Henderson, 277.
\textsuperscript{171} Henderson, 275.
\textsuperscript{172} Wilmshurst, 967.
\textsuperscript{173} Henderson, 227.
the question was what actions the British could perform without starting a war with the US. Still, it is often cited as a classic example on how to assess whether preventive use of force is acceptable, as the formulation "instant, overwhelming, leaving no choice of means, and no moment for deliberation" reflects the concept of imminence."

A useful first distinction is that between anticipatory self-defence and pre-emptive self-defence. Anticipatory self-defence refers to defensive military action against an armed attack (or threat of attack) that is imminent (which traditionally means that it is close in time – temporally imminent). Pre-emptive self-defence refers to military action "taken to prevent more temporally remote threats of an armed attack from coming to fruition at some point in the future". However, the terms used to describe the right to use self-defensive force against future threats, are not terms with clearly defined meanings, and are used in different ways by different authors. When this thesis uses the term preventive self-defence, it refers to all military actions taken to prevent future attacks, thus covering both anticipatory and pre-emptive self-defence.

4.1 Preventive Self-Defence

Before the events of 9/11, states rarely invoked anticipatory self-defence as justification for uses of force, and when they did, their actions were condemned by other states. Both Israel and South Africa have launched military operations into neighbouring states, saying that their aim was to prevent future attacks, but these operations were widely condemned. While some states rejected the legality of preventive self-defence, most states condemned the actions on other grounds. When Israel in 1981 attacked the Osiraq nuclear reactor under construction in Iraq, it claimed to be acting in self-defence to prevent a future threat. It claimed that the reactor was to be used for the production of nuclear weapons, whose target would have been Israel, and that it had acted to remove a nuclear threat to its existence. The attack was widely condemned, and some states explicitly rejected the lawfulness of preventive self-defence. However, most states instead focused on lack of evidence that an Iraqi attack was imminent.

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174 Wilmshurst, 967.
175 Henderson, 281.
176 Gray, 250. As an example the High-Level Panel report "A More Secure World: Our Shared Responsibility" which is cited later in this chapter, uses pre-emptive to describe imminent threats, and preventive to describe non-imminent threats.
177 Gray, 173.
178 Gray, 145.
179 Gray, 173.
180 Gray, 173.
imminent or questioned the necessity of an Israeli response in self-defence.\textsuperscript{181} There were also instances where the prevention of future attacks was used as one argument in combination with others to justify actions as self-defence. For example, when the US responded to the embassy bombings in 1998, it claimed to be responding to past terrorist attacks and to prevent and deter their continuation.\textsuperscript{182}

In the Nicaragua case, the ICJ chose not to assess the lawfulness of preventive self-defence. The Court said that "reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised. Accordingly the Court expresses no view on that issue."\textsuperscript{183} Nevertheless, in his dissenting opinion, Judge Schwebel commented on the "question of whether a State may act in self-defence in the absence of armed attack", and made clear that he did not think Article 51 should be read as allowing for "the inherent right of self-defence (…) if, and only if, an armed attack occurs".\textsuperscript{184}

State practice and the ICJ's deliberate avoidance of the issue, shows that before 9/11 the legality of using force in preventive self-defence was controversial.\textsuperscript{185} States rarely relied on anticipatory self-defence as the only justification for uses of force, but instead would take a wide view of armed attack so that they could claim their actions was a response to one. This is natural, as states will usually try to provide a justification that they think others will support, and indicates that the lawfulness of anticipatory self-defence was doubtful.\textsuperscript{186}

4.1.1 The Impact of 9/11

The US response to the terror attacks of 9/11 and the international reactions raised questions of whether a broader right to act in self-defence to prevent future threats was emerging. Both the US operations and the justifications it provided, seemed to be accepted by almost the entire international community.\textsuperscript{187}

\textsuperscript{181} Henderson, 284.
\textsuperscript{182} Gray, 205.
\textsuperscript{183} Nicaragua, paragraph 194.
\textsuperscript{184} Nicaragua, Dissenting Opinion of Judge Schwebel, paragraph 173.
\textsuperscript{185} Gray, 174.
\textsuperscript{186} Gray, 170.
\textsuperscript{187} Henderson, 285; See Chapter 3.2 for the international reactions.
In its letter to the UN Security Council, the US spoke of an "ongoing threat", and stated that "(i)n response to these attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States."\textsuperscript{188}

It seemed that the US would not limit its actions to those responsible for the specific attacks of 9/11, but also claimed a right to expand its operations to a general "war on terror".\textsuperscript{189} The US thus wrote in its letter to the UN Security Council that "(w)e may find that our self-defence requires further actions with respect to other organizations and other States."\textsuperscript{190} Henderson notes that "with hindsight it is now clear that this part of the letter was also laying the groundwork for the Bush administration's subsequent attempts to expand the concept of 'imminence' beyond any reasonable definition so as to incorporate more temporally remote and uncertain threats of a future armed attack."\textsuperscript{191}

In its 2002 National Security Strategy, the US proclaimed that "(w)e must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries".\textsuperscript{192} The US claimed it "has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction— and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack." The US thereby put forth a new interpretation of imminence where proximity in time was no longer needed. This was a clear break with earlier state practice, where imminence was based almost exclusively on the temporal aspect.\textsuperscript{193}

This doctrine of pre-emptive self-defence (often referred to as the "Bush-doctrine"), was widely rejected by the international community. In 2004, the High Level Panel on Threats, Challenges and Change appointed by the UN Secretary General, presented its final report, \textit{A more secure world: our shared responsibility}. This report accepted the lawfulness of self-defence against imminent threats by saying that "a threatened State, according to long established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportionate."\textsuperscript{194} It continued by

\textsuperscript{188} UN doc S/2001/946.
\textsuperscript{189} Henderson, 285.
\textsuperscript{190} UN doc S/2001/946.
\textsuperscript{191} Henderson, 286.
\textsuperscript{192} U.S. Department of State (2002).
\textsuperscript{193} Henderson, 287.
\textsuperscript{194} UN doc A/59/565, paragraph 188.
distinguishing between on the one hand self-defence against an imminent or proximate threat (which are lawful), and on the other hand self-defence against a non-imminent or non-proximate threat (which are not).\textsuperscript{195} In the latter case, the situation should be referred to the Security Council, "which can authorize such action if it chooses to"\textsuperscript{196}. The panel argued that a right to unilateral pre-emptive action would be too big a risk to the global order.\textsuperscript{197} The Secretary-General took a similar position in his follow-up report \textit{In Larger Freedom}. Both reports consequently accepted anticipatory self-defence based on temporal imminence, something which UN bodies had so far been reluctant to do.\textsuperscript{198} But they rejected the wider claims put forth by the US of a right to act pre-emptively.

The assertion by the panel that long established international law allows for self-defence against imminent threats of attack, was not reflective of previous state practice, as this subject was highly controversial.\textsuperscript{199} This controversy was displayed in the UN debates about the reports, where states were split on this subject. Many states expressly accepted the panel's position that acknowledged the right to self-defence against imminent threats.\textsuperscript{200} But most states would not allow for self-defensive force to be used preventively.\textsuperscript{201}

Despite (or because of) the debate surrounding the legality of anticipatory self-defence after the response to 9/11, the ICJ in 2005 refrained from assessing the issue. In the Armed Activities case, the ICJ cited the Nicaragua case, and used the same reasoning to avoid taking a position on anticipatory self-defence. It noted that "Uganda has insisted in this case that operation 'Safe Haven' was not a use of force against an anticipated attack", and again decided to express no view on the issue.\textsuperscript{202}

In 2007, Israel again attacked and destroyed an unfinished nuclear reactor, this time in Syria. Though Israel did not acknowledge the strike until 2018, the US in 2008 released intelligence confirming that Israel had destroyed the reactor, as they considered Syrian nuclear capability to be an existential threat to the state of Israel.\textsuperscript{203} In marked contrast to the international reactions when Israel destroyed an Iraqi reactor in 1981, there was now almost no condemna-

\textsuperscript{195} Ibid, paragraph 189.
\textsuperscript{196} Ibid, paragraph 190.
\textsuperscript{197} Ibid, paragraph 191.
\textsuperscript{198} Henderson, 292.
\textsuperscript{199} Gray, 174.
\textsuperscript{200} Henderson, 293.
\textsuperscript{201} Gray, 251.
\textsuperscript{202} Armed Activites, paragraph 194.
\textsuperscript{203} Henderson, 290.
tion of the strike. This could indicate that states had become more tolerant to the use of preemptive force, and that – even though they do not want it to be part of international law – there are situations where they will allow it.

4.1.2 Syria

Operation Inherent Resolve against ISIL in Syria, seems to provide support to the existence of a right to use force in preventive self-defence. When the US in its letter to the UN at the start of Operation Inherent Resolve, referred to ISIL (and other terrorist groups in Syria) as "a threat not only to Iraq, but also to many other countries, including the United States and our partners"205, this can be seen as partially justifying their operations as preventive self-defence (although as seen in Chapter 3, it provided other justifications as well). Similarly, other states also referenced the threat of future attacks by ISIL in their letters. Canada said its actions were "aimed at further degrading ISIL’s ability to carry out attacks".206 Turkey claimed it was "under a clear and imminent threat of continuing attack" from ISIL.207 The UK said it had exercised self-defence when attacking "an ISIL vehicle in which a target known to be actively engaged in planning and directing imminent armed attacks against the United Kingdom was travelling."208 In these ways, they claimed preventive self-defence as part of their justifications for self-defence against ISIL.

The UN Security Council Resolution 2249 (2015) also apparently approves of the right to use preventive self-defence under some circumstances. It expressly called ISIL, as well as all entities associated with al-Qaeda "a threat to international peace and security", and called upon states to take "all necessary measures" against them. Furthermore, the Security Council, after condemning specific terrorist attacks, "notes (ISIL) has the capability and intention to carry out further attacks and regards all such acts of terrorism as a threat to peace and security". Marc Weller argues that this means that states no longer have to demonstrate imminence when invoking self-defence against ISIL, as "(t)he Council has considered ISIL’s recent track record of attacks and concluded that it is safe to assume that there will be further such attacks, both in terms of capacity and intent."209

204 Ibid.
205 UN doc S/2014/695.
206 UN doc S/2015/221.
207 UN doc S/2015/563.
208 UN doc S/2015/688.
4.1.3 Contextual Imminence

As already noted, the traditional interpretation of imminence focuses on the temporal aspect – there needs to be a presumption that an armed attack will soon occur if it is not prevented by forceful self-defence. This interpretation has in recent years been challenged by some states, most notably by the US, which has abandoned "the language of pre-emptive self-defence in favour of a very wide interpretation of 'imminence'". Instead of assessing imminence based almost exclusively on the temporal aspect, some contend that it should be assessed based on contextual factors regarding a perceived threat. They claim that even if it cannot be determined that an armed attack will be launched soon, there may be other factors that indicate that an armed attack will be launched at some point in the future unless it is prevented. There may therefore be a need to respond with forceful self-defence to prevent the attack, and so this new interpretation of imminence is tied to the necessity requirement of self-defence. The necessity criterion needs to be adapted to fit today's realities, as the adversaries of today are more capable (and maybe also more willing) than in the past of launching graver attacks. These arguments are seen as particularly relevant in the context of threats by non-state actors regarded as terrorists.

As for what contextual factors that may be taken into account when assessing whether an attack is imminent, The Chatham House Principles provides some clarification. The Chatham House Principles states that "(w)hether the attack is ‘imminent’ depends upon the nature of the threat and the possibility of dealing effectively with it at any given stage." It thus sets out that "(i)n assessing the imminence of the attack, reference may be made to the gravity of the attack, the capability of the attacker, and the nature of the threat, for example if the attack is likely to come without warning." Furthermore, "(o)ther factors may also be relevant, such as the geographical situation of the victim State, and the past record of attacks by the State concerned." In addition, "(f)orce may be used only when any further delay would result in an inability by the threatened State effectively to defend against or avert the attack against it." The Bethlehem Principles, which have been expressly endorsed by the US, the UK and Australia, put forth similar factors to be considered:

210 Gray, 248.
211 Henderson, 338.
212 Henderson, 338.
213 Henderson, 297.
214 Wilmshurst, 967-968.
215 Wilmshurst, 967-968.
"Whether an armed attack may be regarded as “imminent” will fall to be assessed by reference to all relevant circumstances, including (a) the nature and immediacy of the threat, (b) the probability of an attack, (c) whether the anticipated attack is part of a concerted pattern of continuing armed activity, (d) the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action, and (e) the likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss, or damage."  

US Legal Adviser Bryan Egan in a speech in April 2016 cited these factors when clarifying how the US assessed whether an armed attack is imminent for purposes of the use of force against non-state actors.  

So did the UK Attorney General Jeremy Wright in January 2017. He continued by stating that the UK Government's view is that "these are the right factors to consider in asking whether or not an armed attack by non-state actors is imminent and the UK Government follows and endorses that approach.

When asked by the Joint Committee on Human Rights about its understanding of "imminence", the UK Government in 2016 responded that "imminence must be interpreted in the light of the circumstances and threats that are faced. As new forms of attack and new means of delivery of such attacks develop, so must our ability to take lawful action to defend ourselves." When combatting modern enemies using modern technologies "it will be a rare case in which the Government will know in advance with precision exactly where, when and how an attack will take place. An effective concept of imminence cannot therefore be limited to be assessed solely on temporal factors. The Government must take a view on a broader range of indicators of the likelihood of an attack."

The temporal aspect is still a factor when assessing whether an attack is imminent in regard to the concept of contextual imminence, but it is just one of several factors to consider. When considering if an armed attack is contextually imminent, the factors need to be assessed and weighed based on the specific facts in each case. Moreover, it is not necessary that there has been a previous attack, as that is just one of several factors to consider. It may therefore appear that the concept of contextual imminence is quite similar to the Bush doctrine of pre-

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216 Bethlehem (2012), principle 8, 775-776.
217 U.S. Department of State (April 1, 2016).
220 Henderson, 300.
221 Henderson, 338.
emptive self-defence. However, the concept of contextual imminence seems to be more
developed, as the factors to take into consideration provide at least some level of objectivity
to the assessment. It nevertheless gives states a large amount of discretion, as it is for the
acting state to evaluate and weigh the relevant factors and determine if an armed attack is
imminent.\textsuperscript{222}

It is clear that the Bush-doctrine of pre-emptive self-defence was so widely rejected that it
does not represent international law. It is also clear that there is still not by far enough
acceptance of the concept of contextual imminence, for that to be considered as part of
international law, and action taken under it would appear to be unlawful.\textsuperscript{223} Yet, since it
seems an increasing number of states (though still only a handful) – and an increasing number
of scholars – are arguing that imminence should not be assessed solely or even primarily on
the temporal factor, this may be a sector of international law that is in a process of evolving.

4.2 Are the Israeli Operations against Hezbollah Lawful Anticipatory Self-Defence?

As shown in this Chapter, situations where states invoke anticipatory self-defence have
increased in recent years, and especially since the events of 9/11. However, anticipatory self-
defence is still a controversial issue, but its acceptance among states and scholars has risen,
particularly where force is used in self-defence against non-state actors that are considered as
terrorists.\textsuperscript{224} Today it is probably fair to say that "the majority of international law experts and
most States agree that the standard of imminency (...) represents customary international
law"\textsuperscript{225}. But even those who accept anticipatory self-defence disagree on the interpretation of
imminence, so precisely how it should be assessed is unclear.

It seems clear that the Israeli operations are not meant to prevent a temporally imminent
armed attack by Hezbollah. Israel says its operations are aimed at preventing Hezbollah from
acquiring weapons which will be used against Israel, and from establishing bases from which
Hezbollah will launch attacks against Israel, without indicating when an attack might take
place. Israel has made no claims that there is evidence or information indicating that
Hezbollah plans to launch any specific attack against Israel, or even that it will launch any
attack in the near future. The Israeli actions are meant to prevent more temporally remote

\textsuperscript{222} Henderson, 410.
\textsuperscript{223} Henderson, 306.
\textsuperscript{224} Henderson, 306.
\textsuperscript{225} Arimatsu and Schmitt (2014), 16.
threats of an armed attack from coming to fruition at some point in the future, which would make the Israeli actions pre-emptive rather than anticipatory. Therefore, Israel's operations against Hezbollah cannot be justified as anticipatory self-defence when imminence is considered solely on the temporal factor.

However, in recent years an increasing number of states and scholars have argued for a wider interpretation of imminence. Israel could therefore join them, and argue that the concept of imminence should be interpreted based on contextual factors, and for that reason this thesis will examine the Israeli operations in accordance with the concept of contextual imminence.

One factor that is considered as necessary when assessing contextual imminence, is that the potential attacker has an intent to launch an attack, as intent is what may change a potential threat into a potent one.\(^{226}\) Evaluating intent may be difficult in practice, though, at least if there has been no previous attack. Previous attacks would make clear that the attacker has demonstrated an intent to attack, and while the Chatham House Principles refers to "the past record of attacks"\(^{227}\) when assessing imminence, the Bethlehem Principles refers to "a concerted pattern of continuing armed activity"\(^{228}\). Israel and Hezbollah have a long history of attacks and counter-attacks, and it was accepted by many states that the 2006 war was started by a Hezbollah cross-border attack.\(^{229}\) This could suggest that future attacks by Hezbollah are probable (Bethlehem's Principle 8 (b)).

How probable is harder to gauge. The situation on the Lebanese-Israeli border has been relatively quiet in recent years, which would suggest that the probability of attacks in the near future is slim. However, one reason for the quiet could be that Hezbollah has been busy aiding Assad in Syria, and has therefore not been interested in also engaging Israel. As the situation in Syria is stabilizing, Hezbollah might focus more on Israel again, going forward.

Both the 1985 letter and the 2009 manifesto contain hostile rhetoric aimed at Israel, though the latter does not make clear whether Hezbollah sees itself as a defender of Lebanese territory, or whether it endorses offensive operations against Israel.\(^{230}\) Henderson notes that general animosity and rhetoric is in itself far from enough to indicate an intent to attack. But if that is combined with a developing ability to launch potentially serious attacks, it may make

\(^{226}\) Henderson, 302.
\(^{227}\) Wilmshurst, 968.
\(^{228}\) Bethlehem (2012), principle 8, 775.
\(^{229}\) Gray, 213.
\(^{230}\) See Chapter 1.2.2.
It is clear that Hezbollah has a hostile attitude towards Israel, and the acquisition of more – and more advanced – weapons, means that its ability to launch grave attacks has increased in recent years. It will also increase further if the transfer of weapons is not prevented.

The nature and gravity of the threat are also factors to consider according to both the Chatham and Bethlehem principles. When Israel invaded Lebanon in 2006, it argued that its actions should be seen as part of the war on terror: "the Axis of Terror: Hezbollah and the terrorist States of Iran and Syria (…) have today opened another chapter in their war of terror." It furthermore argued that the aim of Hezbollah was to destroy Israel, and that it therefore faced an existential threat. Nothing indicates that Israel sees Hezbollah in a more positive light today, and it has in letters to the UN expressed concern over Hezbollah's growing arsenal of weapons. Whether Hezbollah in reality represents an existential threat to Israel, is a matter of opinion. It should however be noted that the Israeli claim is that Hezbollah does not operate alone, but in cooperation with Syria and Iran. Furthermore, Israel also has other hostile elements near its borders, such as Hamas and Islamic Jihad in Gaza. The threat of a potential coordinated future attack against Israel, with Hezbollah as one of its attackers, would therefore seem grave.

Bethlehem's Principle 8 (d) refers to "the likely scale of the attack and the injury, loss, or damage likely to result therefrom" as a factor in assessing imminence. According to Israeli letters to the UN, Hezbollah has threatened Israel with attacks that would lead to massive damage and civilian injuries. They referred to statements made in speeches in 2016 and 2017 by Hezbollah leader Hassan Nasrallah, where he stated that rockets aimed at ammonia storage tanks in Haifa could "lead to the death of tens of thousands of residents and 800,000 Israelis would be affected", and he compared this to the effect of nuclear weapons. It should however be noted that Nasrallah made these statements when speaking of Hezbollah's capacity to deter Israel from attacking Lebanon, and regarded these potential rocket attacks as self-defensive measures on Hezbollah's part. He made no indication that Hezbollah would attack Israel. On the contrary, he said that Hezbollah did not seek a war, and that Hezbollah's deterrence capabilities made it unlikely that Israel would attack Lebanon.

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231 Henderson, 302-303.
232 UN doc S/2006/515.
233 Gray, 228.
234 UN doc S/2017/356.
235 UN doc S/2016/153; UN doc S/2017/148; AlahedNews (undated, 2016);
While the traditional concept of imminence requires a threatened attack to be considered close in time, contextual imminence focuses on whether there is a necessity to act now, or whether action can be taken later. This is reflected in Bethlehem's Principle 8 (e), which lists as a factor "the likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss, or damage."\(^{236}\) As for the transfer of weapons to Hezbollah, it has been argued that it is necessary to stop them before they reach their destinations in Lebanon.\(^{237}\) The argument is that Hezbollah stores its weapons in civilian-populated areas, and therefore Israeli actions there will probably lead to more civilian casualties. It could therefore be that if the Israeli strikes were delayed, there would be no other opportunity to destroy the weapons, at least not without causing more harm.

The temporal factor is still a factor to consider. Bethlehem refers in Principle 8 (a) to the "immediacy" of the threat. As mentioned, the Israeli operations against Hezbollah seem to be aimed at a threat that is rather remote, temporally. The concept of contextual imminence does not exclude temporally remote threats, but in the context of the Israeli operations, it is a factor that in itself militate against regarding the threat as imminent. Besides, the further removed in time a potential attack is, the more time is available to pursue other means of addressing the threat.

For the Israeli operations against Hezbollah to be lawful, they must be considered as necessary to prevent the threat posed by Hezbollah. This means that if there are non-forceful measures available to prevent the transfer of weapons and establishment of bases, these must be pursued before Israel may turn to the use of force. As for diplomatic means, it seems evident that neither Syria, Iran, Lebanon nor Hezbollah would be willing to prevent Hezbollah's activities in Lebanon or Syria at the moment, and they are actually supporting the armament of Hezbollah. It is also hard to see the UN taking a more active role in the disarmament of Hezbollah, as it has not been willing to do so thus far. But Israel is actually pursuing other diplomatic channels trying to prevent Hezbollah's armament and establishment of bases. It has approached both Russia and the US, and has received at least some support. Russia has said it expects all foreign forces, including Hezbollah, to withdraw from Syria.\(^{238}\) As Russia has been a major factor in Assad's regaining of control in Syria, it presumably has some influence on Syrian policies going forward. Russia, the US and Jordan have also established a temporary de-escalation zone in southern Syria in 2017, to prevent Hezbollah

\(^{236}\) Bethlehem (2012), 775-776.
\(^{237}\) Dunlap (May 8, 2017).
\(^{238}\) Jones and Markusen, 9.
and other militias from entrenching there. \(^{239}\) Israel could push for this arrangement to last longer. Still, these measures have not prevented Hezbollah from acquiring weapons and establishing bases, though they may have limited its efforts to some degree.

However, stockpiling weapons and building bases does not in itself justify use of self-defensive force, as these actions do not necessarily mean that an armed attack will be launched. \(^{240}\) And Israel has provided no proof or information that Hezbollah is planning a future attack against Israel. The Chatham House Principles distinguishes lawful anticipatory self-defence from "a right to respond to threats which have not yet crystallized but which might materialize at some time in the future", as such a right "has no basis in international law". \(^{241}\) Likewise, the UK Attorney General, when endorsing the concept of contextual imminence, made it clear that the UK did not support "any notion of a doctrine of pre-emptive strikes against threats that are more remote". "It is absolutely not the position of the UK Government that armed force may be used to prevent a threat from materialising in the first place." \(^{242}\) And this seems to be what Israel is doing: by trying to prevent Hezbollah from acquiring weapons and establishing bases, it is trying to prevent a threat from materializing.

Besides, it is far from evident that the Israeli operations are actually diminishing the probability of a future attack. It could be argued that Israel is in fact escalating tensions by its strikes, thereby making a future attack by Hezbollah more probable. Neither is it clear that the operations are effective. Hezbollah's stockpile of weapons has grown rapidly in recent years, and it now has a missile arsenal many times larger than in 2006. \(^{243}\) If the Israeli strikes are not effective, they cannot be considered necessary.

Even though some factors militate in favour of regarding the threat posed by Hezbollah as contextually imminent, others do not. The assessment mainly turns on the principle of necessity – as forceful self-defence does not seem to be necessary to oppose the potential threat. It therefore seems that even according to the wide right of self-defence provided by the contextual interpretation of imminence, it is hard to see the Israeli operations against Hezbollah in Syria as lawful. Furthermore, contextual imminence is – at least not yet – part of international law. When assessing the Israeli operations under the more accepted view of temporal imminence, it is clear that they do not meet the requirements of anticipatory self-defence. The Israeli operations are therefore not lawful.

\(^{239}\) Ibid.
\(^{240}\) Heller (May 8, 2017).
\(^{241}\) Wilmshurst, 968.
\(^{243}\) Norton, 255.
Conclusion

The Israeli strikes against Hezbollah in Syria are not lawful according to international law. Their justification would have to rely on the "unable or unwilling" doctrine. This doctrine is controversial, although its acceptance among states seems to be increasing, so it may be considered an emerging part of international law. On this point, the law is not settled. What makes it clear that the strikes are unlawful, is their pre-emptive nature. They cannot even be justified based on the wide concept of contextual imminence, which in itself controversial. Pre-emptive operations meant to prevent temporally remote threats from materializing into actual armed attacks at some unspecified point in the future, are clearly not tolerated in international law. And it appears that this is how the Israeli operations should be characterized.

It is therefore noteworthy that the international response to the operations has mostly been silence. Although the Non-Aligned Movement condemned a couple of the early strikes, since then hardly any states have expressed disapproval of the strikes, except for Syria, Lebanon and Iran, and to some degree Russia. This lack of condemnation could be for a variety of reasons – political, strategic or sympathetic. In today's international political climate, neither Hezbollah nor its state supporters have many friends among other states, and this might account for a disininterest in opposing operations against them. The fact that Israel has not acknowledged responsibility for specific strikes, has probably led to others being unwilling to comment. But since Israel has acknowledged general responsibility for operations against Hezbollah in Syria, there should be room for states to express concern if they wanted to. On the other hand, there has been even fewer statements of support for the Israeli operations. This could indicate that while states don't want pre-emptive strikes to be lawful under international law, there are situations where they will accept such operations. The Israeli 2007 attack against a nuclear reactor in Syria is another example of states choosing silence as a response to what seems to be an unlawful pre-emptive use of force.

Those who argue for a wide right of self-defence based on the "unwilling or unable" doctrine, or on a contextual interpretation of imminence, ground their argument in the defending state's necessity to act. While the criterion of necessity is traditionally used as a limitation on when force can be used in self-defence, in these arguments necessity is instead used to expand the room for use of force. This wide right of self-defence leaves a lot of discretion on the part of the acting state. The criteria for assessing contextual imminence, as well as the criteria for assessing whether a state is unable or unwilling, are not very specific. In addition, it is also

244 Henderson, 291.
not clear how the criteria should be weighed against each other. This would mean that an acceptance of these doctrines would allow for more unilateral assessment of whether forceful self-defence can be used in specific situations. It could therefore lead to abuse of the right of self-defence by states acting with ulterior motives.

On the other hand, for international law to be effective, it is also necessary that it makes states able to respond to changing realities. As attacks by non-state actors are now more common than attacks by states on other states, the evolvement of international law may be desirable. Striking a balance so that the law allows states to effectively respond to new threats, while not leaving the law open to abuse, may be difficult. This might explain why states in some situations seem to allow practice that is not in accordance with international law, such as the Israeli strikes against Hezbollah in Syria.
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