

D'Amato, Anthony, International Law Aspects of the Mideast 'War'

Jurist, July 18, 2006, <http://jurist.law.pitt.edu/forumy/2006/07/international-law-aspects-of-mideast.php>

JURIST Guest Columnist Anthony D'Amato of Northwestern University School of Law says that while the legal status of the current Middle East conflict embroiling Israel and Lebanon is not easily characterized by traditional definitions of international armed conflict, it falls at least partially under a doctrine originating closer to home...

In the eyes of the media, the current Lebanon-Israeli conflict is a “war.” But the status of the conflict under international law is not as easily encapsulated.

The governing principle of international law does not use the term “war,” but rather uses the term “armed attack.” This principle is found in Article 2, paragraph 4, of the United Nations Charter:

Article 2(4). 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.

As all-encompassing as this principle seems on first reading, in fact it does not apply to the Lebanon-Israeli conflict.

Although it is true that both Lebanon and Israel are Member states of the United Nations, neither state regards the conflict as coming within the terms of Article 2(4). The Lebanese government has disavowed the strikes by Hezbollah. And Israel is taking pains to distinguish Lebanon from Hezbollah. Indeed, Israel’s primary condition for a cease-fire is that the Lebanese army occupy Lebanon’s southern border (displacing the Hezbollah forces deployed there). This is not a condition that Israel would insist upon if its target were the state of Lebanon.

In addition, neither Lebanon nor Israel is attempting to strike against the other’s territorial integrity or political independence.

It is true that the Security Council, if it wished to be seised of this situation, would not be constrained by the wording of Article 2(4). All that is needed is for the Security Council to determine is that there has been a threat to the peace, a breach of the peace, or an act of aggression (Article 39). This would be an easy determination to make. However at the present time neither China nor Russia are willing to make such a determination in the Security Council. Their veto power ensures that the Security Council’s hands are tied.

Thus we need a legal principle to characterize the Mideast conflict that is narrower than Article 2(4). The principle is the recently minted Bush Doctrine. In a National Security paper of September 2002, President Bush stated that the United States would target terrorists wherever they are found. He went on:

Our priority will be first to disrupt and destroy terrorist organizations of global reach and attack their leadership; command, control, and communications; material support; and finances.

The community of nations quickly reached consensus as to the validity of this strategy under international law. Hardly any nation has voiced an objection. We may safely say that the Bush Doctrine is Israel's legal justification for the bombardment it is inflicting upon Lebanon.

A second aspect of the Bush Doctrine is that the United States will hold accountable any nation that harbors terrorists. But it's a debatable question whether Lebanon is intentionally harboring Hezbollah; Lebanon would like to rid itself of this terrorist group. Unfortunately for the Lebanese government, Hezbollah is too strong: it assassinates Lebanese leaders who voice a position against it; and it is also an elected minority party within the government itself.

Although Israel could invoke this second (harboring) aspect of the Bush Doctrine, it does not at present wish to do so. Israel has some hope that the moderate Lebanese in nominal control of the government will join Israel's fight against Hezbollah in a kind of Lebanese civil war. More importantly perhaps is the consideration that an attack against an Arab state per se might provoke other Arab states in the region to give indirect aid to Hezbollah by giving direct aid to Lebanon. One of the more curious political aspects of this conflict is the present unwillingness of all other Arab states to condemn Israel's military campaign.

Israel is seeking the complete extermination of Hezbollah. Any cease fire would give Hezbollah the chance to regroup and secure new weapons. But in my opinion Israel's goal cannot be met. For Hezbollah is in possession of some 12,000 missiles (as Israel concedes), the most powerful of which are two-stage rockets. Israel also concedes that these rockets can reach downtown Tel Aviv. It is less well known, and not openly conceded, that some or many of these rockets carry chemical and biological payloads.

For Hezbollah to send WMDs into Tel Aviv or Haifa (Israel's 2nd and 3rd largest cities) would invite nuclear retaliation.

Yet the closer Israel gets to achieving its goal of destroying Hezbollah, the more likely the WMDs will be launched. Suppose Israel comes close to annihilating Hezbollah to the point when only a few fanatics are left. As they await their turn to die, what would they lose if they launched the WMD missiles? Nothing. What would they gain? The virginal delights of heaven.

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