
JURIST Guest Columnist Anthony D’Amato of Northwestern University School of Law says that the Israeli air strike on Qana that killed over 60 Lebanese civilians has set the stage not only for possible war crimes prosecutions but also for a potentially-robust UN Security Council resolution imposing a UN peacekeeping force on the parties in an effort to stop the violence...

Secretary of State Condoleezza Rice was meeting with Israeli Defense Minister Amir Peretz in Jerusalem on Sunday morning July 30th when news came in of a two-missile strike on a house in Qana, Lebanon. So far, over 60 bodies of civilians have been recovered, the majority of them children. A father of five who managed to escape lost his wife, sister, aunt, and all his children, including a two-year-old. The pinpoint accuracy of the Israeli missiles is not disputed.

As in the missile attack five days earlier on the United Nations Interim Peacekeeping Force in southern Lebanon, the government of Israel again stated that the attack was not deliberate and that it would be investigated. Unfortunately Israel’s disclaimers, no matter how sincere, have no truth-value. They are like a judge entering a plea of “not guilty” on behalf of a silent criminal defendant. Lawyers for Israel’s government undoubtedly advised the officials that unless they said affirmatively that the attacks were not deliberate, they could severely impair their defense to a later war-crimes prosecution.

It is worth pausing a moment to falsify the oft-stated claim that Israel’s leaders need not worry about war crimes because there is no international court that has the jurisdiction to prosecute them. First, a strong argument can be made that the International Criminal Court itself has jurisdiction over the attack on the U.N. peacekeepers even though neither Israel nor Lebanon are parties to the Court. For although the Statute of the Court says nothing about crimes committed against the United Nations or its personnel, the International Court of Justice (an organ of the United Nations) issued an advisory opinion on April 11, 1949 known as the “Reparation for Injuries” case. The ICJ recognized an “international personality” in the United Nations. If one were to make a constructivist interpretation of the ICC’s statute (an endeavor perhaps less familiar to Continental than common-law attorneys), the ICC might well find that it has jurisdiction over states that attack UN personnel. Second, European nations are beginning to assert jurisdiction over war crimes committed abroad even if their own citizens are not involved. Last year a former Israeli military chief cancelled his trip to London upon being warned that he could be prosecuted for war crimes that he had allegedly committed in Gaza. The concept of “universal jurisdiction” for war crimes and crimes against humanity is catching on in country after country. Third, although the Israeli Prime Minister and Defense Minister are immune from war-crimes prosecution anywhere while they are in office (under a recent ruling by the ICJ), they lose their immunity when their term of office expires. Fourth, they would have no immunity at all from prosecution in Israel. This is extremely unlikely, of course, but the country could later turn against them the way that Chile has
decided to prosecute its former ruler Augusto Pinochet for crimes against humanity committed during his dictatorship.

In my view, the Israeli government did not receive creative legal advice following the strike upon the UN peacekeepers. It should have immediately arrested the crew of the F-16 that fired the missile and released their detention photographs to the public. It should have said that the crew members were being interrogated, and that court-martial charges against them were possible. Instead, Israel suffered major public-relations damage throughout the world by simply saying that the incident would be investigated. If Israel had acted forthrightly and arrested the crew members, the second missile attack in Qana might have been deterred.

Of course, it is possible that Israel did get such advice from its lawyers but felt itself politically hamstrung by the military. The Israeli Air Force (IAF) is technically an arm of the Israeli Defense Force (IDF) but, as is true of most countries, feels that it is in competition with the ground troops. One can infer from recent events that the pilots of the IAF believe they can win the war all by themselves. After taking out the obvious infrastructure targets, they apparently are beginning to drop bombs and missiles indiscriminately. Their constant excuse is that the Hezbollah has insinuated itself among the civilians and hence it is impossible to bomb Hezbollah targets while avoiding collateral damage. Yet it may also be true that the IAF believes that if they reduce the entire country to rubble, all the Hezbollah terrorists will be buried along with the rest of the Lebanese population: thus guaranteeing security for Israel.

It’s possible that if the civilian government of Olmert-Peretz does not have enough parliamentary clout to constrain the conduct of the IAF pilots, at least it does have the power to curtail or stop their sorties over Lebanon. It will be interesting to see if post-Qana Israel shifts its emphasis to ground forces and away from air strikes. In my JURIST editorial last week, I argued that the ineffectiveness of air strikes against the Hezbollah bunkers coupled with the increasing likelihood of war crimes should push Israel toward replacing its aerial bombardment with a massive ground campaign.

In any event, the Security Council will meet in the next few days to consider a resolution calling for a cease-fire and establishing a United Nations army to patrol the Lebanon-Israel borders. In the first week of the war (July 13-20) a UN peacekeeping force was envisaged along the model of the usual consensual force: that is, both Lebanon and Israel would have to approve of the force. My guess is that the world has rapidly become exasperated with Israeli attacks on the UN mission and on the civilian target in Qana. There’s a good chance that the UN will act if necessary in the teeth of complaints or protests from Lebanon or Israel. This means that Article 39 of the Charter will be invoked on the basis that there has been a breach of the peace in the Middle East conflict. Such a finding would then allow the Security Council to invoke its power to send in a United Nations army (made up from national military contributions). Inasmuch as Israel and Lebanon would have no choice in the matter, they might want to save face by consenting to the U.N. resolution. However, Israel continues to insist that no ceasefire is possible until Hezbollah is disarmed.
A peacekeeping force set up by the Security Council under its Chapter 7 powers would only be the second such force in UN history. The first, during the Gulf War, was correctly referred to as a “Chapter 6½” force, inasmuch as it was run by the contributing military powers (mainly the United States) and not by the Secretary-General (as would be the case with a pure Chapter 7 force). It will be interesting to see whether the Chapter 6½ model is used this time. If the bulk of the UN army is contributed by Turkey (as is currently rumored), the major powers might be unwilling to let Turkey call the shots. Chapter 6¾, anyone?

The big question is what Hezbollah will do. The representatives of Hezbollah who are part of the Lebanese government have expressed their approval of a cease-fire and a U.N. peacekeeping force so long as there are a few minor concessions. But those governmental representatives might not be speaking for Hassan Nasrallah, the Hezbollah leader.

While it is possible that Nasrallah might “quit while we’re even,” thus enhancing Hezbollah’s burgeoning reputation as the first Arab entity ever to stand up to Israel’s vaunted IDF, I think there is a more important consideration that is rarely mentioned. Lebanon has a dozen good ports on the Mediterranean that could receive shipments of rockets, missiles, and launchers from countries such as Iran, Russia, and Syria, as well as from private “merchants of death” who operate on a global scale. Even submarines could be used to transport these weapons into Lebanon. If the Security Council resolution provides for a peacekeeping blockade of these ports, or if it leaves open to Israel the policing by air and navy of Lebanon’s ports, then I doubt that Nasrallah would agree to a cease-fire. On the other hand, if access to Lebanon by sea is not realistically interdicted by the UN resolution, then Israel may break with the UN. The Middle East crisis is more dire than is generally appreciated.

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