

Article 9 and the Attribution of Armed Groups' Attacks to the Territorial State

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The ongoing conflicts between Israel, Hamas, and Hezbollah continue to raise complex questions of international law. Some of these involve issues of State responsibility, requiring an assessment of whether the conduct of the relevant armed groups can be attributed to a State. I addressed this issue in a [previous post](#), focusing on Iran's responsibility for the October 7th attacks. However, Iran is not the only State to which the attacks perpetrated by Hamas and Hezbollah could potentially be attributed. Legal scholars have additionally asserted that these attacks could be attributable to the respective States from which these groups operate, namely Palestine and Lebanon.

In this context, the scholars concerned rely on a relatively obscure basis of attribution that has been the subject of minimal academic scrutiny. This is the rule reflected in [Article 9](#) of the International Law Commission's (ILC) Articles on State Responsibility (ASR), which applies when a non-State actor exercises governmental functions in the absence or default of the official authorities.

In a post on *Articles of War* related to the Hezbollah pagers attack, for example, the authors argue that Article 9 attributes Hezbollah's acts of "resistance" against Israel to Lebanon, meaning that Israel has the right to use force in self-defense not only against Hezbollah but also against the Lebanese State. Similar arguments have been made regarding the attribution of Hamas's attacks against Israel to Palestine. Legal commentators have relied on Article 9 ASR to contend that proceedings related to these attacks could be brought against the State of Palestine in the International Court of Justice.

As an initial observation, it is noteworthy that the customary status of the rule reflected in Article 9 ASR is far from certain. While the ILC considered that there was "some authority in favour of the principle" (p. 44, para. 217), the ASR commentary to the rule is very brief and refers to minimal State practice or other authority in its support. Nevertheless, for the purposes of analysis, this post proceeds on the basis that Article 9 reflects a rule of customary international law. It begins by reviewing the rule's object and purpose and the criteria that must be satisfied for it to apply. The post concludes that although considerable ambiguity surrounds the rule's application, it is not an appropriate basis on which to attribute to the conduct of either Hezbollah or Hamas to the States from which they operate.

Article 9's Object and Purpose

Attacks perpetrated by armed groups are normally attributable to a State only if the group concerned is acting on the State's behalf at the time of the attack. For instance, Article 8 ASR provides for the attribution to a State of conduct committed under its instructions, direction or control. In addition to rules related to agency-type situations, however, the ASR include certain exceptional bases of attribution. These may apply even if there are no links between the State and the relevant non-State actor at the time the latter acts in potential violation of international law. One of these exceptional rules is reflected in Article 9 ASR.

Article 9 provides:

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 exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

When formulating this rule of attribution, the ILC observed that in situations of revolution, conflict, or foreign occupation, private persons might assume governmental functions to ensure the continuation of essential services after the local administrations had disappeared. The ILC additionally referred in this context to private persons' assumption of military functions in the absence of the State's armed forces, as in a *levée en masse* (p. 262-64). In circumstances such as these, Special Rapporteur Roberto Ago considered that "The State,

as a subject of international law, should ... bear responsibility for the acts of these various classes of person where they relate to one of the functions, tasks or missions mentioned above and have resulted in a breach of an international obligation of the State” (p. 264).

In essence, the ILC intended that the rule should capture situations in which individuals perform public functions of their own initiative either to protect the interests of the territorial State (as in the *levée en masse* example) or to maintain the provision of services that are essential to the local population. Accordingly, the ILC commentary refers to the notion of “agency of necessity” and “the idea that some exercise of governmental functions was called for” in the circumstances (art. 9, commentary paras. 2, 6).

Nevertheless, the rule’s object and purpose is not immediately apparent. Recall that Article 9 can apply in cases where State officials have not authorized the relevant individuals to act on the State’s behalf and they might have no awareness of their conduct. Why should private acts be attributable to a State in these circumstances? The rule seems particularly illogical when considering the consequences that flow from a State’s responsibility. For instance, how can a State comply with its duty to cease an internationally wrongful act (ASR, art. 30) if its officials were not involved in the act’s commission, and they have no influence over the non-State actor concerned?

The answer seems to lie in the public character of the acts and the fact that their performance, in the exceptional circumstances of conflict, occupation, or revolution, advances the interests of the State and its population. Thus, the rule should apply only to conduct that fulfils a clear public need that the State’s own officials are unable to satisfy. This is apparent from the three criteria outlined in Article 9 that govern the rule’s application. These operate as limiting factors, both in terms of the factual situations to which the rule applies and the nature of the acts performed, meaning that it is only if all three conditions are satisfied that attribution is appropriate.

The three conditions relevant to Article 9’s application are: first, that the conduct is governmental in character; second, that it is performed in the absence or default of the official authorities; and third, that it is “called for” in the circumstances. With regard to the first criterion, requiring an exercise of public functions, this is not always straightforward to ascertain (p. 61-77). However, the attacks perpetrated by Hamas and Hezbollah were clearly public in character because they involved a use of military force against an external State. The application of the second and third criteria is less clear in this context. These are addressed in turn below.

The Absence or Default of the Official Authorities

Article 9 ASR applies only if the non-State actor performs the relevant public functions in the absence or default of the official authorities. The ILC commentary to the rule indicates that such circumstances may arise “during revolution, armed conflict or foreign occupation, where

the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative” (para. 1).

In an earlier draft of the rule now reflected in Article 9, the ILC provided only for its application “in the absence of the official authorities ...” (p. 283, draft art. 8(b)). When the ILC reviewed the draft article prior to the ASR’s adoption, it broadened the wording so that the rule would apply not only when the official authorities are “absent” but also when they are “in default” (p. 289, para. 80). The commentary clarifies that this wording “is intended to cover both the situation of a total collapse of the State apparatus as well as cases where the official authorities are not exercising their functions in some specific respect, for instance, in the case of a partial collapse of the State or its loss of control over a certain locality” (para. 5). Whether or not such circumstances exist is a question of fact.

These circumstances might become apparent in two distinct scenarios. First, it is clear from the ILC’s reference to a State’s “loss of control over a certain locality” that a State’s absence or default can be geographical in character. This criterion therefore appears to be satisfied in Gaza, where Hamas has governed the territory since 2007 in the complete absence of officials from the Palestinian Authority.

Second, the official authorities’ absence or default can be functional in character. In other words, although the official authorities are physically present throughout the State’s territory, or in the region where the non-State actor undertakes the relevant public tasks, they are unable to perform one or more governmental functions.

This second category is potentially relevant when considering Hezbollah’s activities in Lebanon. Professor Tom Ruys considered the application of Article 9 ASR to Hezbollah’s conduct in southern Lebanon in 2006 (p. 287-89). Professor Ruys noted that at that time, the official Lebanese authorities were present throughout the country, including in the south, albeit that the Lebanese police and military forces kept a low profile in that area. There was, accordingly, no absence of the official authorities from a geographical perspective.

In regions with a large Shi’a majority, however, Professor Ruys observed that “Hezbollah exercised a range of functions traditionally exercised by the government,” including policing functions (p. 288-289). Ruys concluded that in view of the overall context, “the group was performing public tasks in the default of the official authorities within the meaning of Article 9” (p. 289).

Professor Ruys’s conclusion in this respect appears to be sound, given the Lebanese authorities’ inability to perform policing and military functions in these areas of southern Lebanon. Whether the same conclusion is appropriate regarding Hezbollah’s more recent attacks against Israel turns upon the facts. If it is correct that Hezbollah perpetrates military

acts against Israel from areas of Lebanon where the State's security services do not perform their normal policing and military functions, it seems likely that the official authorities are "in default" for the purposes of Article 9.

Circumstances Such as to Call for the Exercise of Governmental Authority

The preceding analysis indicates that the first two conditions relevant to Article 9's application can be satisfied in the case of Hamas and Hezbollah's attacks against Israel. But why should Palestine or Lebanon bear international responsibility for these potential violations of international law, with which their officials were not involved? This question highlights the "normative element" of the rule reflected in Article 9, namely the requirement that the non-State actor's conduct must be "called for" in the circumstances (ASR, art. 9, commentary para. 6).

The ILC formulated the "called for" language shortly before the ASR's adoption in 2001. Previously, the draft article referred to non-State actors acting "in circumstances which justified the exercise of those elements of authority" (p. 283, draft art. 8(b)). The reason for the change was a concern that wrongful conduct, in violation of international law, cannot have been "justified" (p. 44, para. 217). Thus, the fact that there is a necessity to act does not automatically mean that the actions taken in response are either justified or lawful. For instance, private citizens' participation in a *levée en masse* could be "called for" in the circumstances, to protect the State in the face of an invasion, even if the individuals involved violate the law of armed conflict in the process.

The ILC provided few illustrations of the types of conduct that might be "called for" for the purposes of Article 9. One example the Commission gave was of a group of private individuals that takes over the running of an airport and assumes responsibility for immigration during or in the immediate aftermath of a revolution (p. 93-94, para. 30). This, and the *levée en masse* scenario, confirm the rationale for attribution as "a form of agency of necessity" (ASR, art. 9, commentary para. 2). However, there is a dearth of scholarship, State practice, or jurisprudence to clarify the precise parameters of the "called for" requirement.

Certain conclusions can nevertheless be drawn from the ASR commentary and the ILC's prior discussions. The first and most important of these is that the non-State actor's actions must be necessary to protect the interests of the State or to satisfy the essential needs of the community. Moreover, the circumstances surrounding the non-State actor's exercise of public functions "must have justified the attempt to exercise police or other functions in the absence of the constituted authority" (ASR, art. 9, commentary para. 6). Thus, it is the exceptional situation that has arisen, such as an armed conflict or foreign occupation, that generates the necessity to act.

It is evident from the examples outlined above that the ILC principally intended the rule reflected in Article 9 to apply to the conduct of non-State actors that act in the interests of the territorial State and its *de jure* government. For example, the rule could attribute the conduct of local citizens to Ukraine, who performed policing functions to fill the security vacuum when the towns where they lived initially fell to Russian forces. It is possible that these individuals may have violated Ukraine's obligations under the law of armed conflict or international human rights law when seeking to maintain security and prevent looting. If they did, the rule reflected in Article 9 might attribute their conduct in violation of international law to Ukraine.

Yet, armed groups that act against the interests of the State also potentially fall within the rule's scope. The ASR commentary indicates that the rule reflected in Article 9 can apply to the conduct of insurrectional movements that seek to overthrow the government provided the "special circumstances" envisaged by the rule can be satisfied (art. 10, commentary para. 2). One of these "special circumstances" is that the conduct in question is "called for" in the circumstances.

When considering the conduct of rebel groups, it is questionable whether their conduct could ever be "called for" for the purposes of Article 9. If it can, it seems that the relevant circumstances would be extremely limited. For instance, the rule could potentially apply to acts of governance on the part of rebels that control territory, provided these are performed for the benefit of the local population rather than to further the rebels' own interests (see Fortin).

Regarding groups such as Hamas and Hezbollah, which act against an external State, it is difficult to envisage any basis on which to conclude that their conduct in attacking Israel was "called for" for the purposes of Article 9. Returning to the rule's object and purpose, the ILC's intent was that the rule should attribute conduct to a State only when this fulfils a clear public need that the State's own officials are unable to satisfy. In other words, the non-State actor's conduct must be necessary either to protect the interests of the State or to meet the essential needs of the community. In the case of the attacks perpetrated by Hamas and Hezbollah, it seems that these could satisfy the "called for" requirement only if it is possible to conclude that the respective groups' conduct was objectively necessary in the circumstances to protect the interests of either Palestine or Lebanon.

In this context, it is helpful to consider the *levée en masse* example raised by the ILC during the rule's drafting process. It could be argued that the attacks perpetrated by Hamas and Hezbollah were "called for" in a similar manner to the acts of citizens who use force to defend their homeland against an aggressor. However, there is a clear difference between private individuals acting defensively to protect their State against a foreign invasion and the conduct of armed groups that instigate attacks against an external State. In the case of the *levée en masse*, it is far more evident that the participants are acting in the interests of the State, to defend it against an external aggressor.

It is much harder to reach this conclusion regarding the actions of Hamas and Hezbollah. In both cases, it seems that the groups' attacks promoted their own aims and objectives, and perhaps those of their sponsor Iran, rather than the interests of Palestine, Lebanon, or those States' respective populations. As such, it would defeat the object and purpose of the rule reflected in Article 9 for this to attribute the groups' attacks to the territorial States from which they operate.

Concluding Thoughts

Article 9 ASR represents a highly unusual rule of attribution, with an uncertain status in customary international law. Unlike the better-known rules, such as that reflected in Article 8, the rule reflected in Article 9 could attribute conduct to a State when the State's officials have no knowledge of, or links to, the non-State actor concerned. Moreover, attribution does not derive from any dereliction of duty on the part of the State. Although the rule applies only if the official authorities are "absent or in default," the reasons for this might be entirely beyond the State's control, as in the case of a foreign invasion. In contrast with the other rules of attribution reflected in the ASR, therefore, Article 9 might apply regardless of the State's own conduct.

The exceptional character of Article 9 points towards a narrow scope of application. The rule should attribute conduct to a State only if the performance of the relevant public functions was objectively necessary, to promote the essential interests of the State or its population, given the absence or default of the official authorities.

This narrow scope of application is particularly compelling when considering the attacks that Hezbollah and Hamas have perpetrated against Israel. If Article 9 applied to attribute such attacks to Lebanon or Palestine, this would entitle Israel to respond in self-defense not only against the armed groups but also against the States themselves, thereby causing harm to those States and their respective populations. Such an interpretation of Article 9 does not accord with the rule's object and purpose and is likely to be wholly unacceptable to States.

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