

Third Party Liability for Hezbollah Attacks against Israel

By *Stefan Kirchner**

A. Introduction

After an Israeli soldier was abducted in the south of the country in late June, Israeli Defense Forces (IDF) began Operation "Summer Rain" in Gaza in order to secure the safe return of the soldier. On 12 July 2006, Hezbollah forces captured two Israeli soldiers in Northern Israel and killed three more, triggering Operation "Just Reward", which ended with the fragile cease-fire agreed upon under the terms outlined in U.N. Security Council Resolution 1701.¹ The conflict between Israel and the Hezbollah had the potential of plunging the whole region in a wider war; as a matter of fact, it seems that Iran and Syria were fighting a proxy war against Israel. Hezbollah alone does not have the technological capabilities of hitting Haifa or Nazareth with their own Katjusha-type missiles, which essentially are not much more than slightly modified World War II weapons, yet Hezbollah struck deep inside Israel. On the last day of the war alone, with the cease-fire already in sight, 246 rockets were fired into Israel.² Moreover, it appears that Israel was not hit only by Katjushot but also by other missiles with a longer range. Given their arsenal and longstanding support for Hezbollah, the assumption that Iran and Syria have actually delivered missiles or missile technology to Hezbollah is anything but far-fetched. News reports during the conflict indicated that Hezbollah used Syrian 220mm-missiles against Israel and that weapons have been delivered to the Hezbollah from Iran, often *via* Syria.³ Hezbollah's arsenal includes Iranian-made

* Associate Lecturer (*Lehrbeauftragter*), Law Faculty, Justus-Liebig-University, Giessen, Germany; *Rechtsreferendar*, Regional Court of Appeals (*Oberlandesgericht*) Frankfurt am Main / Regional Court (*Landgericht*) Giessen, currently on assignment to the Office of the Prosecutor (*Staatsanwaltschaft*) in Giessen. This article only reflects the author's private opinion. Email: kirchnerlaw@yahoo.com .

¹ S.C. Res. 1701, U.N. Doc. S/RES/1701 (August 11, 2006).

² *Nasrallah wins the war*, THE ECONOMIST, August 19-25, 2006, at p. 9.

³ See a report broadcast by Deutschlandfunk Radio on 17 July 2006 at 6:12 a.m. Central European Summer Time.

Zilzal-2 missiles with a range of 210 km, Russian-designed AT-5 anti-tank weapons which were produced in Iran, as well as Russian-made Kornet-E laser-guided weapons and Metis-M anti-armor weapons, both supplied by Syria.⁴ Most notorious was the use of Iranian Fajr-3 missiles against Israeli cities. Thousands of these missiles had already been provided to Hezbollah before the fighting began.⁵ The rockets that hit the town of Afula, south of Haifa, on 28 July 2006, and which was referred to by Hezbollah as Khaibar-1, likely were the first Iranian-made Fajr-5 missiles ever used by Hezbollah.⁶ Despite the destruction of the infrastructure in Lebanon during Operation "Just Reward", Hezbollah continued to receive weapons.⁷ But Syrian and Iranian influence goes back a long time. Today's Hezbollah is the result of an Iranian-nurtured program that lasted for two decades and transformed a local guerilla group into a full-fledged army.⁸ Today, Hezbollah's military wing is no longer a group of partisans but an army comprising between 6,000 and 8,000 regular members, not counting reserves, divided into battalions of 250 men,⁹ as well as special forces. Not only was it the late Ayatollah Khomeini who provided the initiative for the foundation of Hezbollah, Iran continues to train Hezbollah fighters and supports Hezbollah's army with weapons, such as the C-802 land-to-sea-missile that was used against the Israeli Naval Ship "Hanit" during the recent conflict.¹⁰

At the same time, Iran is thought to continue to exercise such a degree of control over Hezbollah that the country is considered to have been calling the shots in this conflict - in the most literal sense: it is thought that the use of longer-range missiles

Amos Harel and Avi Issacharoff, *The Rocket Menace That no One Wanted to Acknowledge*, HAARETZ - ONLINE EDITION, 17 July 2006, available at <http://www.haaretz.com/hasen/spages/739067.html>.

⁴ David A. Fulghum and Robert Wall, *Lebanon Intermission; Israel Starts Examining the Military's Roles, Missions and Technology During Lull in Lebanon Fighting*, 165 AVIATION WEEK & SPACE TECHNOLOGY 32 (No. 8, August 21, 2006).

⁵ *Id.*

⁶ Hussein Dakroub, *Hezbollah Says it Fired New Rocket in Strike on Israeli City South of Haifa*, ASSOCIATED PRESS WORLDSTREAM, July 28, 2006, 4:46 PM GMT.

⁷ See Anatoly Tsyganok, *A No-contact War Against Partisans Didn't Work Out - Why Hezbollah Gunmen Believe They Defeated the Israeli Army*, 94 DEFENSE AND SECURITY (August 25, 2006) (also: 32 VOENNO-PROMYSHLENNY KURIER 2 (August 2006)).

⁸ Carol Rosenberg, *Hezbollah Army Is a Powerful Blueprint, How 2-decade Program Turned Guerillas Into a Force of Depth, Might*, CHARLOTTE OBSERVER, August 19, 2006, at p. 1 A.

⁹ See *supra* note 7.

¹⁰ See *supra* note 8.

by Hezbollah would have required, not only approval from Teheran,¹¹ but in the case of the Fajr-3 and Fajr-5 missiles, the troops on the ground are likely to have needed "direct Iranian help in the field to fire" the rockets.¹²

In this comment I will examine the legal responsibility of Lebanon, Iran and Syria under international law for the armed attacks by Hezbollah against Israel. Active support of terrorists, or sheltering them, like the Taleban did until 2001 with Al Qaeda, is only the tip of the iceberg when it comes to international responsibility for acts of private groups and individuals. Holding states responsible for acts by private parties, however, is not a new phenomenon.

As a general rule states are not responsible for activities of private persons, be they groups, companies or individuals.¹³ In this comment I will examine how this limitation can be overcome and how states can be held liable under international law for private conduct. In this context, it is noteworthy that liability and responsibility are not the same thing. Liability requires, *inter alia*, the presence of damage and causality and that the state in question is responsible under international law for the damaging act. Responsibility therefore is only one of several elements for establishing liability.

Although, in principle, states cannot be held liable for private activities, states are not only responsible for what their official organs do (or fail to do), but also for the factual exercise of jurisdiction, of the power of the state, if you will, by natural or legal persons, provided that the state itself directs or controls said persons.¹⁴

B. State Responsibility for Hezbollah Missile Attacks against Israel

Under international law, liability includes two major categories: liability for injurious consequences arising from acts not prohibited under international law and (classical) state responsibility.¹⁵ It is only the latter category with which I am

¹¹ Youval A. Zoulay et al., *Rockets Strike Afula, Jezreel Valley for First Time; Hezbollah: We Can Hit Anywhere*, HAARETZ - ONLINE EDITION, 17 July 2006, available at <http://www.haaretz.com/hasen/spages/738747.html>.

¹² See *supra* note 6.

¹³ Joachim Wolf, *Zurechnungsfragen bei Handlungen von Privatpersonen*, 45 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (ZaöRV) 232 (1985).

¹⁴ See *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3, 35 (May 24).

¹⁵ XUE HANGIN, *TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW* 1 (2003). Hangin considers international environmental law claims to form a third, distinct, category. See Thomas Gehring and Markus Jachtenfuchs, *Liability for Transboundary Environmental Damage - Towards a General Liability Regime*, 4 EUROPEAN JOURNAL OF INTERNATIONAL LAW 92, 107 (1993) (Arguing that environmental law

dealing here. State responsibility is the responsibility of one subject of international law towards another in the case of a violation of international law by an action or omission of the first subject.¹⁶ As noted above, a difference exists between liability and responsibility:¹⁷ liability requires responsibility and therefore a violation of international law. The armed attacks on the state of Israel in general, and the use of force against civilians, be it against individual civilians or the civilian population as such directly¹⁸ or "merely" in an indiscriminate manner affecting,¹⁹ constitute violations of international law.

But liability also requires that the damaging conduct is attributable to the defendant state. It was not Syrian, nor Iranian nor Lebanese forces – but Hezbollah forces – that were attacking Israel. The question, therefore, is whether the conduct of Hezbollah's armed forces can be attributed to said states.

I. Sheltering Hezbollah - Lebanese State Responsibility for Hezbollah Attacks on Israel

For many years Hezbollah forces have been able to operate freely in Lebanon, in particular in Southern Lebanon and even more so since the Israeli withdrawal. This went so far that, by autumn 2002, Lebanon's border with Israel was not guarded by Lebanese forces but by Hezbollah.²⁰ In fact, it was not the Cedar Flag flying on the border across from Israel's blue star of David, but Hezbollah's yellow flag.²¹ Hezbollah is no longer merely a political movement within Lebanese society but has become part of the Lebanese *state* structure,²² rather than of the political system.

claims can fit into the first category of liability for injurious consequences arising from acts not prohibited under international law). Apart from this category, there is only a single general regime of state responsibility. See Daniel Bodanksy and John R. Crook, *Symposium: The ILC's State Responsibility Articles – Introduction and Overview*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 773, 781 (2002).

¹⁶ ALFRED VERDROSS AND BRUNO SIMMA, *UNIVERSELLES VÖLKERRECHT* § 1262 (1984).

¹⁷ Particularly instructive are the IUCN Draft International Covenant on Environment and Development, which contains a difference between *liability* (Art. 48) and *responsibility* (Art. 47), as well as Art. 139 (1) (*responsibility*) and (2) (*liability*) of the 1984 Law of the Sea Convention (LOSC).

¹⁸ Art. 51 (2) First Protocol Additional to the Geneva Conventions. See G.A. Res. 2444 (XXIII), U.N. Doc. A/7433 (December 19, 1968); Institute de droit international, Art. 4 of the Resolution on September 9, 1969, AIDI 53 II (1969), at p. 375.

¹⁹ Art. 51 (4) First Protocol Additional to the Geneva Conventions.

²⁰ PETER SCHOLL-LATOUR, *KAMPF DEM TERROR - KAMPF DEM ISLAM?* 261 (2003).

²¹ *Id.*

²² *Supra* note 7.

With U.N. Security Council Resolution 1559,²³ the Security Council called upon Lebanon to enforce the removal of Hezbollah forces from the region, yet the Lebanese government so far has failed to take the necessary action. Lebanon, therefore, might very well be held responsible for giving Hezbollah free reign in this respect. Attribution can be based on the fact that state organs²⁴ have permitted the attacks against Israel but also might be based on the mere control of the state territory. This would require a rule of customary international law to this effect. However, it appears doubtful that customary international law recognizes such a wide rule of attribution.²⁵ The existence of such a rule of customary international law requires relevant practice by states and corresponding *opinio iuris*.²⁶ Keeping in mind the decision of the International Court of Justice (ICJ) in *Corfu Channel*,²⁷ it is necessary to determine whether harmful activities of non-state entities emanating from the territory of a state give rise to automatic attribution.²⁸ In Resolution 1373 the Security Council of the United Nations accepted that states could be held responsible for failing to prevent the use of their territory as a starting point for transboundary terrorist activities.²⁹ Every state is under an obligation *erga omnes* to fight international terrorism.³⁰ Tolerating the use of a state's territory for transboundary terrorist activities, therefore, constitutes a violation of a primary duty of international law.³¹ This is not a secondary³² aspect of attribution; the duty

²³ S.C. Res. 1559, U.N. Doc. S/RES/1559 (September 2, 2004).

²⁴ On the liability for actions of a state's organs, see Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 62, 87 (April 29); Francisco Mallén (United Mexican States) v. United States, 4 R.I.A.A. 173, 174 (1927).

²⁵ See GABY BORNHEIM, HAFTUNG FÜR GRENZÜBERSCHREITENDE UMWELTBEEINTRÄCHTIGUNGEN IM VÖLKERRECHT UND IM INTERNATIONALEN PRIVATRECHT 276 (1995); Juraj Andrassy, *Les relations internationales de voisinage*, 79 RECUEIL DES COURS 79 (1951 II).

²⁶ North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark / Federal Republic of Germany v. The Netherlands), 1969 I.C.J. 3, 77 (February 20).

²⁷ *Corfu Channel* (United Kingdom v. Albania), 1948 I.C.J. 4 (March 25).

²⁸ ANTONIO CASSESE, INTERNATIONAL LAW 390-91 (2001).

²⁹ S.C. Res. 1373, U.N. Doc. S/RES/1373 (September 28, 2001).

³⁰ *Id.* at ¶ 1; S.C. Res. 1368, ¶ 4, U.N. Doc. S/RES/1368 (September 12, 2001).

³¹ S.C. Res. 1373, ¶ 2, U.N. Doc. S/RES/1373 (September 28, 2001).

³² While state liability requires a violation of primary duties under international law, the liability rules themselves contain secondary rules. See IUCN *Commentary on the Draft International Covenant on Environment and Development, Launched at the United Nations Congress on Public International Law held at New York, NY on 13 March 1995, Revised Text presented to the Member States of the United Nations on the Occasion of the Closing of the UN Decade of International Law, 54th Session of the UN General Assembly, 17 November 1999*, Environmental Policy and Law Paper No. 31 Rev., p. 135, there fn. 447. See also Mark A.

to deny safe havens for terrorists on one's territory is a primary obligation.³³ Pursuant to this analysis, Lebanon has violated international law by harboring Hezbollah terrorists.

The terrorist activities of Hezbollah can, furthermore, be attributed to Lebanon due to the fact that state functions have been allowed to fall into the hands of Hezbollah.³⁴ If a state has transferred³⁵ the exercise of state functions to private entities, state responsibility is based on the fact that only the state as such can be held responsible.³⁶ The illegality under international law of any action taken on behalf of the state falls back on the state.

II. Arming and Controlling Hezbollah - Attribution of Hezbollah activities to Syria and Iran

Both Syria and Iran have been providing Hezbollah with weapons³⁷ and both exert a high degree of control over Hezbollah's military activities.³⁸ In *Tadić* the International Criminal Tribunal for the former Yugoslavia (ICTY) deviated from the ICJ's *Nicaragua* judgment³⁹ and acknowledged that, along with activities of state organs, activities deriving from general control or based on official orders also can be attributed to a state.⁴⁰ The ICTY went so far as to conclude that public toleration

Drumbl, *Trail Smelter and the International Law Commission's Work on State Responsibility for Internationally Wrongful Acts and State Liability*, in *TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION* 85 (Rebecca M Bratspies and Russell A. Miller eds., 2006). On the line separating primary from secondary duties, see Daniel Bodansky and John R. Crook, *Symposium: The ILC's State Responsibility Articles - Introduction and Overview*, 96 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 773, 781 (2002).

³³ See S.C. Res. 1373, ¶ 2(c), U.N. Doc. S/RES/1373 (September 28, 2001).

³⁴ *Supra* note 20.

³⁵ Since domestic (e.g. constitutional) rules are irrelevant for the legal situation under international law, this is so, regardless of whether this transfer of factual authority has occurred based on an active behavior or on an act of the regular organs of the state.

³⁶ See Cristina Hoss and Pierre-Marie Dupuy, *Trail Smelter and Terrorism: International Mechanisms to Combat Transboundary Harm*, in *TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL-SMELTER-ARBITRATION* 225, 236 (Rebecca M. Bratspies and Russell A. Miller eds., 2006).

³⁷ See *supra* notes 3, 4, 6, 7 and 10.

³⁸ See *supra* notes 6 and 11.

³⁹ *Military and Paramilitary Activities (Nicaragua v. U.S.)*, 1986 I.C.J. 15, 63 (June 27).

⁴⁰ *Prosecutor v. Tadić*, Case No. IT-94-1, Appeals Chamber, Judgment (Merits), ¶ 137 (July 15, 1999).

of the damaging conduct by private citizens can be sufficient to justify attribution.⁴¹ But the ICTY's conclusions cannot be easily transferred from International Criminal Law to the law of state responsibility: the criminal responsibility of individual defendants has to be seen as separate from the responsibility of the state under general international law, although the individual's criminal law responsibility can entail state responsibility in the case where a state official acted in his or her official capacity when committing a crime under international law. While not being completely disconnected from the law of state responsibility, International Criminal Law forms a special, self-contained regime of international law, separate from the more general law of state responsibility. Consequently the *Tadić*-rule does not replace the *Nicaragua*-formula in the law of state responsibility but is only applicable within the more specialized regime of International Criminal Law. In the *Nicaragua* case,⁴² the ICJ considered state financing of private activities to be insufficient for attribution. In order for a damaging act to become attributable, the ICJ required: (1) that the state control⁴³ the private actor that caused the damage; and (2) that the private actor is dependent upon the state.⁴⁴ The state has to be able to influence the activities in question,⁴⁵ e.g. the government has to be in a position to give orders to the actors on the ground.⁴⁶ In *Nicaragua*, the ICJ attributed to the United States activities of the so called "Unilaterally Controlled Latino Assets" (UCLAs) as well as of the Contras, due to a factual influence by the U.S. on the activities of the UCLAs and the Contras, respectively.⁴⁷ Control therefore requires a degree of dependency and a lack of autonomy on the part of the private actor being controlled, in particular regarding the damaging activity. In *United States Diplomatic and Consular Staff in Tehran* the ICJ even went so far as assuming that, through official government approval, private acts become acts of the state in question,⁴⁸ which significantly closes the gap between the ICJ and ICTY.

Although it is unrealistic to assume that every decision regarding Hezbollah's military activities is being made in Teheran, the Mullah regime appears to have the

⁴¹ *Id.*

⁴² *Military and Paramilitary Activities (Nicaragua v. U.S.)*, 1986 I.C.J. 15 (June 27).

⁴³ Reflecting existing customary international law, a control requirement is also found in Art. 139 LOSC.

⁴⁴ *Military and Paramilitary Activities (Nicaragua v. U.S.)*, 1986 I.C.J. 15, 63 (June 27).

⁴⁵ *See Schering Corp. v. Islamic Republic of Iran*, 5 Iran-U.S. Claims Tribunal 361, 370 (1984).

⁴⁶ *Id.* On the requirement that the government issue orders, *see Flexi-Van Leasing Inc. v. Islamic Republic of Iran*, 12 Iran-U.S. Claims Tribunal 335, 349 (1986).

⁴⁷ *Military and Paramilitary Activities (Nicaragua v. U.S.)*, 1986 I.C.J. 15, 63 (June 27).

⁴⁸ *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3, 34 (May 24).

final say on the grander lines of Hezbollah's armed attacks against Israel, in particular the use of advanced missile weaponry against civilian population centers in Israel proper. If, as it appears, Syria and Iran are making the attacks against Israel possible by delivering missiles to Hezbollah terrorists, Hezbollah's activities are attributable to both Syria and Iran, especially considering the high degree of control Teheran exercises over Hezbollah.

C. Outlook

At the time of writing it remains to be seen if the truce will hold and how much the envisaged UN-forces will be able to achieve, but with regard to international law, the implications of this conflict go beyond the borders of the Cedar state. Although taking renewed action against Lebanon or even striking against Syria and Iran could be interpreted as an escalation of the conflict by Israel,⁴⁹ the hostile attitude by the leadership of all three states towards Israel can no longer be dismissed as political rhetoric: Terrorist activities can be attributed to states supporting the terrorists in question and Hezbollah's attacks against Israel are attributable to Lebanon, Iran and Syria. Attribution leads to liability under international law. Iran, Syria and Lebanon, are liable under international law for the attacks perpetrated by their proxy fighters in Hezbollah's armed forces against the state of Israel and will be liable for any future attacks by Hezbollah, unless they refrain from supporting the terrorists in the way they do today.

⁴⁹ See Daniel Jonah Goldhagen, *Israel's Fight for Life in the name of the West*, WEEKEND AUSTRALIAN, August 19, 2006, at 27.