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State Responsibility for the Acts of Private Armed Groups

Derek Jinks*

Under what circumstances should international law impute to states the acts of private armed groups? Although states as a general rule are not liable for the conduct of nonstate actors, it is now well settled that the acts of de facto state agents are attributable to the state. That is, the conduct of ostensibly private actors may be sufficiently connected with the exercise of public power that otherwise “private acts” may be deemed state action. Of course, the question remains how best to distinguish de facto state action from purely private conduct. The attacks of September 11, and the international political firestorm that followed, underscore the importance of this issue. Indeed, the legal justification for Operation Enduring Freedom was predicated on the claim that the Taliban regime in Afghanistan was, as a formal matter, responsible for the acts of al Qaeda. The legal response to the terrorist attacks (and other recent developments) strongly suggests that the scope of state liability for private conduct has expanded. Moreover, this expansion of liability was achieved not by refashioning any “primary rules” defining the content of state obligations, but rather by relaxing the “secondary rules” defining state responsibility for breaches of any such obligation.¹

This type of strategy, though not uncommon in international law, is potentially problematic. In this Article, I argue that (1) the response to the September 11 attacks may signal an important shift in the law of state

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¹ The primary rules of international law define the content of the legal obligations—that is, primary rules establish particular standards of conduct (for example, do not take property without adequate compensation). In contrast, the secondary rules of state responsibility define the general conditions under which states are to be considered responsible for internationally wrongful actions or omissions. As the International Law Commission has noted, “[I]t is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation.” Roberto Ago, *Second Report on State Responsibility*, [1970] 2 YB Intl L Commn 271, 306, UN Doc No A/CN.4/SER.A/1970/Add.1 (1970).

responsibility; and that (2) this shift is likely to prove ineffective and counterproductive. The thrust of my policy argument is that the revision of trans-substantive secondary rules is a clumsy, and typically ineffective, device for vindicating specific policy objectives. Through an analysis of the role of state responsibility in global antiterrorism efforts, I illustrate several perverse collateral consequences of amending the secondary rules of attribution. My claim is that the formal characterization of terrorist acts as a specie of “state action” risks overapplication and underapplication of the relevant primary rules. The most effective strategy to restrain and deter state support for, or toleration of, terrorism is to define more clearly the primary obligations of states and the consequences for noncompliance with those obligations.

I. STATE RESPONSIBILITY AND THE GLOBAL RESPONSE TO TERRORISM

In the aftermath of the September 11 terrorist attacks, the United States formally invoked its right to use force in self-defense against another sovereign state. The US self-defense claim was predicated on two related propositions. First, the United States characterized the September 11 attacks as an “armed attack” within the meaning of the United Nations (“UN”) Charter.² Second, the United States maintained that international law permitted military action against the Taliban regime in Afghanistan because this “armed attack” was

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. Despite every effort by the United States and the international community, the Taliban regime has refused to change its policy. From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad.³

That is, the United States sought to justify military action against Afghanistan on the grounds that the hostile acts of al Qaeda should be attributed to the Taliban regime. In an important address following the initiation of air strikes in Afghanistan, President George W. Bush directly implicated the Afghan government in the September 11 attacks, maintaining that the Taliban regime had itself committed murder by supporting and harboring the terrorists.⁴ The US

² See Jonathan Charney, *The Use of Force Against Terrorism and International Law*, 95 Am J Intl L 835 (2001).

³ UN Security Council, *Letter Dated 7 October 2001 From the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council*, UN Doc No S/2001/946 (2001). See also Christopher S. Wren, *U.S. Advises U.N. Council More Strikes Could Come*, NY Times B5 (Oct 9, 2001).

⁴ See *Bush's Remarks on U.S. Military Strikes in Afghanistan*, NY Times B6 (Oct 8, 2001). Bush also adopted this position in his remarks to the UN General Assembly on November 10,

Congress subsequently authorized the President to use force against those responsible for the September 11 attacks, including any states aiding or harboring the primary perpetrators.⁵ In short, it was made clear that the United States, in its antiterrorism campaign, would equate terrorists with those who support or harbor them.

Moreover, several important international organizations—including the UN Security Council, North Atlantic Treaty Organisation (“NATO”), and the Organization of American States (“OAS”)—endorsed the US approach. The Security Council, for example, endorsed both prongs of the US position. First, the Council implicitly suggested that the events of September 11 constituted an “armed attack.” The Security Council determined that the attacks constituted a threat to international peace and security triggering its Chapter VII powers and recognized the right of the United States to act in self-defense consistent with Article 51 of the UN Charter.⁶ Because the Charter requires an “armed attack” as the factual predicate for the lawful exercise of self-defense, the Security Council’s invocation of Article 51 necessarily implies that it classified the September 11 attacks as such.⁷ This approach represented an important shift in Council practice concerning terrorist attacks for two reasons.⁸ First, the Security Council had made no such finding in the aftermath of the 1998 attacks on US

2001. See Press Release, Office of the Press Secretary, *President Bush Speaks to United Nations* (Nov 10, 2001), available online at <<http://www.whitehouse.gov/news/releases/2001/11/20011110-3.html>> (visited Mar 8, 2003) (“The allies of terror are equally guilty of murder and equally accountable to justice. The Taliban are now learning this lesson—that regime and the terrorists who support it are now virtually indistinguishable.”).

⁵ See *Authorization for Use of Military Force*, Pub L No 107-40, 115 Stat 224 (2001) (“[T]he President is authorized 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.”).

⁶ See Security Council Res No 1373, UN Doc No S/RES/1373 (2001). See also Security Council Res No 1368, UN Doc No S/RES/1368 (2001).

⁷ See, for example, Charney, 95 Am J Intl L at 836–37 (cited in note 2); Thomas Franck, *Terrorism and the Right of Self-Defense*, 95 Am J Intl L 839, 842 (2001).

⁸ The Security Council did not explicitly characterize the September 11 attacks as an “armed attack” (as required by Article 51), describing the events instead as a “terrorist attack.” Security Council Res No 1368 (cited in note 6); Security Council Res No 1373 (cited in note 6). This ambiguity is arguably important in that the Council typically links its invocations of Article 51 with an express finding of an “armed attack.” See, for example, Security Council Res No 661, UN Doc No S/RES/661 (1990) (affirming “the inherent right of individual or collective self-defence, in response to the *armed attack* by Iraq against Kuwait, in accordance with Article 51 of the Charter”) (emphasis added). This textual ambiguity suggests that the Security Council was unsure how best to classify the September 11 attacks, but nevertheless held the view that they arguably came within the ambit of Article 51.

embassies in Africa,⁹ even though the United States officially invoked Article 51 as the legal justification for missile strikes against Sudan and Afghanistan.¹⁰ Second, the Security Council impliedly endorsed, without expressly authorizing, the use of force against Afghanistan. Although the Council had initially refrained from attributing the terrorist attacks to any state,¹¹ it would, in the days following the initiation of Operation Enduring Freedom, expressly condemn the Taliban regime “for allowing Afghanistan to be used as a base for the export of terrorism by the Al-Qaida network ... and for providing safe haven to Usama Bin Laden, Al-Qaida and others associated with them.”¹² Although the Security Council did not expressly authorize the use of force against Afghanistan,¹³ Article 51 requires no such authorization for states to act in self-defense.¹⁴ Moreover, the reactions of states¹⁵ and the UN Secretary-General¹⁶ to Operation

⁹ See Security Council Res No 1189, UN Doc No S/RES/1189 (1998) (condemning the “indiscriminate and outrageous acts of international terrorism that took place on 7 August 1998 in Nairobi, Kenya and Dar-es-Salaam, Tanzania,” but limiting its statement to the reaffirmation that “every [] State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territories directed towards the commission of such acts”).

¹⁰ In a letter dated 20 August 1998, the United States notified the Security Council that the attacks on Afghanistan and Sudan were carried out “pursuant to the right to self-defence confirmed by Article 51 of the Charter of the United Nations.” See UN Security Council, *Letter Dated 20 August 1998 From the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council*, UN Doc No S/1998/780 (1998). See also W. Michael Reisman, *International Legal Responses to International Terrorism*, 22 *Houston J Intl L* 3, 47 (1999). On the US attacks, see Ruth Wedgwood, *Responding to Terrorism: The Strikes Against Bin Laden*, 24 *Yale J Intl L* 559 (1999).

¹¹ See Security Council Res No 1373 (cited in note 6); Security Council Res No 1368 (cited in note 6).

¹² See Security Council Res No 1378, UN Doc No S/RES/1378 (2001). The Security Council, explicitly invoking its authority under Chapter VII of the United Nations Charter, had in a previous resolution emphasized the need to combat by “all means” terrorist acts threatening international peace and security; required states to take steps to block terrorist finances and end any state support for terrorism; and called on states to increase cooperative intelligence-gathering and law enforcement efforts. See Security Council Res No 1373 (cited in note 6).

¹³ Charney, 95 *Am J Intl L* at 835 (cited in note 2).

¹⁴ See, for example, Thomas M. Franck, *When, if Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, 5 *Wash U J L & Poly* 51 (2001).

¹⁵ See, for example, Siobhan Roth, *A United Front?*, 24 *Legal Times* (Oct 15, 2001) (quoting Pakistani President Pervez Musharraf as stating that “[t]his is a resolution for war against terrorism”); Suzanne Daley, *European Leaders Voice Support*, *NY Times* B10 (Oct 8, 2001) (reporting on European leaders’ support for military operations in Afghanistan).

¹⁶ See Press Release, UN Info Serv, *The Secretary-General’s Statement on Afghanistan* (Oct 8, 2001), available online at <<http://www.escwa.org.lb/information/press/un/2001/8oct.html>> (visited Mar 8, 2003) (stating that the US and the UK “have set their current military action in Afghanistan in th[e] context [of Security Council Resolutions]”).

Enduring Freedom strongly suggest that the resolutions impliedly authorized, or at least condoned, the use of force against the Taliban regime in Afghanistan.¹⁷

Similar findings by other international bodies triggered collective security commitments. NATO formally interpreted the September 11 attacks as “armed attacks” directed against the United States. Upon determining that the attacks were directed from “abroad,” NATO invoked the collective self-defense provision of the alliance’s founding treaty.¹⁸ Specifically, NATO determined that (1) al Qaeda carried out the attacks and (2) the Taliban regime in Afghanistan worked in concert with al Qaeda by providing protection to Osama bin Laden and his “key lieutenants.”¹⁹ Similarly, the OAS implicitly interpreted the attacks as “armed attacks,” recognized the inherent right of the United States to act in self-defense, and invoked the collective self-defense provision of the Inter-American Treaty of Reciprocal Assistance.²⁰

Finally, several commentators have noted that the US case for armed invasion of Afghanistan turned, in substantial part, on whether the terrorist attacks could be attributed to the Taliban regime.²¹ Examples abound, but consider the exemplary comments of Professor Michael Byers:

In late September 2001, the US found itself in something of a legal dilemma, though not an entirely unhelpful one. In order to maintain the coalition against terrorism, its military response had to be

¹⁷ See, for example, Jordan J. Paust, *Comment: Security Council Authorization to Combat Terrorism in Afghanistan*, ASIL Insights (Oct 23, 2001), available online at <<http://www.asil.org/insights/insigh77.htm#comment4>> (visited Mar 8, 2003).

¹⁸ See Press Release, North Atlantic Treaty Organization, *Statement by the North Atlantic Council* (Sept 12, 2001), available online at <<http://www.nato.int/docu/pr/2001/p01-124e.htm>> (visited Mar 8, 2003); North Atlantic Treaty Organization, *Invocation of Article 5 Confirmed* (Oct 2, 2001), available online at <<http://www.nato.int/docu/update/2001/1001/e1002a.htm>> (visited Mar 8, 2003).

¹⁹ See North Atlantic Treaty Organization, *Statement by NATO Secretary General, Lord Robertson of 2 October 2001*, available online at <<http://www.nato.int/docu/speech/2001/s011002a.htm>> (visited Mar 8, 2003).

²⁰ See *Resolution of the Twenty-Fourth Meeting of Consultation of Ministers of Foreign Affairs: Terrorist Threat to the Americas*, OAS Doc No RC24/Res1/01 (Sept 21, 2001), available online at <<http://www.oas.org/OASpage/crisis/RC.24e.htm>> (visited Feb 25, 2003). The special session of OAS foreign ministers invoked the collective security provision of the Rio Treaty, which is triggered by an “armed attack” against an American state. See *Inter-American Treaty of Reciprocal Assistance*, art 3, 62 Stat 1681 (1947).

²¹ See, for example, Anne-Marie Slaughter and William Burke-White, *An International Constitutional Moment*, 43 Harv Intl L J 1, 19–21 (2002); Michael Byers, *Terrorism, the Use of Force, and International Law After 11 September*, 51 Intl & Comp L Q 401, 405–10 (2002); Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 NC L Rev 1, 34–35 (2002); Marco Sassòli, *State Responsibility for Violations of International Humanitarian Law*, 84 Intl Rev Red Cross 401, 406–09 (2002); Mary Ellen O’Connell, *Evidence of Terror*, 7 J Conflict & Sec L 19, 28–32 (2002); Helen Duffy, *Responding to September 11: The Framework of International Law, Parts I–IV* 20–23 (Interights 2001), available online at <<http://www.interights.org/about/Sept11,%20Section%201.pdf>> (visited Apr 17, 2003).

necessary and proportionate. This meant that the strikes had to be carefully targeted against those believed responsible for the atrocities in New York and Washington. But if the US singled out Bin Laden and Al-Qaeda as its targets, it would have run up against the widely held view that terrorist attacks, in and of themselves, do not constitute ‘armed attacks’ justifying military responses against sovereign States.²²

Because the US position (regarding the use of force in Afghanistan) has enjoyed broad, general support in the international community (at least in intergovernmental bodies), substantial evidence suggests that the international legal response to the terror attacks signaled a subtle, but important shift in the law of state responsibility.

II. STATE RESPONSIBILITY FOR DE FACTO AGENTS: FROM “EFFECTIVE CONTROL” TO “HARBORING”

Sustained reflection reinforces the view that an important shift in the law of state responsibility—at least in the domain of antiterrorism—is indeed underway. The traditional rule is that the conduct of private persons or entities is not attributable to the state under international law.²³ State liability attaches only if the wrongful actor was either a formal or de facto agent or organ of the state. The International Law Commission’s (“ILC”) Draft Articles on Responsibility of States for Internationally Wrongful Acts suggest that attribution is appropriate only if the nonstate actor was “in fact acting on the instructions of, or under the direction or control of, that State in carrying out the [wrongful] conduct.”²⁴ Prior to the events of September 11, disputes about the contours of this rule centered on the degree of control states must exercise over private actors to trigger an imputation of responsibility. In its classic formulation, the rule requires that states exercise “effective control” over the wrongdoer. In the *Nicaragua* case, the International Court of Justice (“ICJ”) held that the *contra* rebels were not de facto agents of the United States because the latter’s:

participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of ... targets, and the planning of the whole of its operation, is still insufficient in itself ... for the purpose of attributing to the

²² Byers, 51 *Intl & Comp L Q* at 408 (cited in note 21).

²³ Robert Jennings and Arthur Watts, eds, 1 *Oppenheim’s International Law* 502–03 (Pearson 9th ed 1996).

²⁴ See United Nations, *Report of the International Law Commission*, UN Doc No A/56/10 at 45, ¶ 76 (2001). The Articles are also annexed to General Assembly Res No 56/83, UN Doc No A/RES/56/83 at ¶ 3 (2001). The final Articles, commentaries, prior drafts, tables showing the derivation of each provision, bibliography, and an informative introduction by the last special rapporteur on state responsibility, all appear in James Crawford, ed, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge 2002).

United States the acts committed by the contras For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.²⁵

This rigid formulation of the rule was softened somewhat by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) in the *Tadic* case.²⁶ In *Tadic*, the Appeals Chamber held that the trial court erred in relying on the ICJ’s “effective control” test, reasoning that the test was contrary to the very logic of “state responsibility,” and that it was inconsistent with state and judicial practice. The ICTY concluded that states need only exercise “overall control” over private armed groups to attribute to the state responsibility for any unlawful acts of the group.²⁷

Although the “overall control” test applied in *Tadic* did indeed lower the threshold for imputing private acts to states when compared to the ICJ rule, the touchstone of both approaches is that states must direct or control—rather than simply support, encourage, or even condone—the private actor. It is important to recall that these tests are, after all, designed to define the circumstances in which private actors are de facto agents or instrumentalities of the state. The issue is, therefore, whether the private acts in question are, as a formal matter, attributable to the state, and not whether the state is simply complicit in some unlawful conduct. That is, the traditional approach—common to the ILC Draft Article 8, the ICJ’s “effective control” test, and the ICTY’s “overall control” test—imputes to states only those unlawful acts committed on behalf of the state.

As previously discussed, aspects of the collective response to the September 11 attacks strongly suggest that the threshold for attribution has been lowered substantially. Recall that the United States argued that the attacks constituted an “armed attack” within the meaning of the self-defense provision of the UN Charter. In addition, the US asserted the right to act in self-defense against Afghanistan because the Taliban regime had supported and harbored leaders of the al Qaeda terrorist network. In short, the US sought to attribute to Afghanistan the hostile acts of a nonstate actor—namely, al Qaeda. The US, however, did not attempt to establish that al Qaeda acted on behalf of the Taliban, or that the Taliban played any direct role in, or had any direct knowledge of, the planning or execution of the attacks. Instead, the US arguably sought to impute al Qaeda’s conduct to Afghanistan simply because the Taliban had harbored and supported the group, irrespective of whether the state

²⁵ *Military and Paramilitary Activities (Nicar v US)*, 1986 ICJ 14, ¶ 115 (June 27).

²⁶ *Prosecutor v Tadic*, Case No IT-94-1-A (ICTY 1999), available online at <<http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf>> (visited Mar 8, 2003).

²⁷ Id at ¶¶ 116–44.

exercised “effective control” (or “overall control”) over the group. Although this line of argument is not new for the United States, the claim enjoyed much broader international support in the wake of September 11. As discussed more fully in Part I, the UN Security Council, NATO, and the OAS expressly or tacitly endorsed the US position. Moreover, many distinguished commentators have expressed some measure of support for this type of claim.²⁸

The emergent “harboring” or “supporting” rule represents a substantial relaxation of the traditional attribution regime—one that may signal a shift in the very nature of “state action.” The fundamental character of this shift is made clear when the new rule is compared with other aspects of the law of state responsibility. Consider the ILC Draft Rules concerning “complicity” as a basis for state responsibility. Under Article 16 of the Draft Rules, a state is made responsible for providing aid or assistance to *another state* in the commission of an internationally wrongful act, provided that the aiding or assisting state acts with knowledge of the circumstances surrounding the specific wrongful act, and that the act would have been unlawful if committed by it directly. A state is therefore made responsible for the unlawful acts of another state if it: (1) knowingly aids or assists in the commission of the unlawful act (Article 16) or (2) knowingly directs or controls the unlawful conduct of the other state (Article 17—the interstate analogue to Article 8). Conversely, as previously discussed, the Draft Rules render states responsible for ostensibly private conduct only if the state directs or controls the unlawful conduct of the “private” actors. The question arises why “complicity” establishes responsibility for the acts of another state, but not the acts of private entities. The structure of the rules suggests that the lower threshold suffices for imputing the conduct of another state because the public character of any such acts is clear—that is, other states clearly have international legal personality. Attribution of the private acts, on this view, is appropriate only if the nexus between the state and the ostensibly private actor confers a public character on the conduct in question—recasts the private acts as “state action.” In this sense, the emergent rule arguably reconfigures the distinction between public and private conduct.

²⁸ See, for example, Slaughter and Burke-White, 43 *Harv Intl L J* at 20 (cited in note 21) (“The traditional ‘effective control’ test for attributing an act to a state seems insufficient to address the threats posed by global criminals and the states that harbor them.”); Reisman, 22 *Houston J Intl L* at 39 (cited in note 10) (“State-sponsored terrorism is the most noxious and dangerous of its species, yet its authors and architects evade all deterrence and prospect of punishment if the fiction is that states are not involved and only their agents are deemed responsible for the terrorism.”). See also Luigi Condorelli, *The Imputability to States of Acts of International Terrorism*, 19 *Israel YB Hum Rts* 233 (1989); Yoram Dinstein, *War, Aggression and Self-Defence* 182–83 (Cambridge 3d ed 2001) (“[A]n armed attack is not extenuated by the subterfuge of indirect aggression or by reliance on a surrogate. There is no real difference between the activation of a country’s regular armed forces and a military operation carried out at one remove, pulling the strings of a terrorist organization (not formally associated with the governmental apparatus).”).

III. ASSESSING THE RELAXED STANDARD: A POLICY PERSPECTIVE

To be sure, this development is not without some merit. The events of September 11 discredit many of the conventional assumptions about “national security” and “law enforcement.”²⁹ Although traditionally addressed as a law enforcement problem, it is now clear that international terrorism will often necessitate some sort of military response. The attacks, after all, illustrate starkly that private armed groups now have the organizational capacity and the political will to project catastrophic force globally. Because this “globalization of informal violence” will often overwhelm the capabilities of civilian order-maintenance institutions, the “war on terrorism” will often involve formal military action.³⁰ As a consequence, many traditional institutional cleavages will inevitably erode, fundamentally restructuring civil-military relations at home and abroad. Indeed, it is already evident that the lines between war and peace, military and police, and combatant and criminal have blurred.

States that support, tolerate, or harbor terrorist organizations (and “networks”) have obstructed and will continue to obstruct efforts to suppress international terrorism. Such states frustrate transnational law enforcement efforts by shielding terrorist leaders from investigation, extradition, and prosecution. In addition, international rules governing the use of force will often preclude antiterrorism military campaigns when targets are located on the territory of uncooperative states. Perhaps the most salient example of this problem is, of course, the recalcitrance and noncooperation of the Taliban regime in Afghanistan following the September 11 terrorist attacks on the United States. Any effective antiterrorism regime must therefore necessarily include an effective strategy to deter and to prevent state support for terrorist groups. With respect to the “war on terror,” the central question is when states should be held accountable for the acts of private armed groups. And because military campaigns will often occur on the territory of noncooperative (but nevertheless sovereign) states, the answer to this question is crucial to the determination of when and if military force can be used to suppress international terrorism.

In this Part, I argue that manipulation of secondary rules of state responsibility is an ineffective and potentially counterproductive means to achieve these policy objectives. Through an analysis of several potential

²⁹ See Derek Jinks, *September 11 and the Laws of War*, 28 Yale J Intl L 1 (2003) (arguing that the terrorist attacks initiated or confirmed the existence of an “armed conflict” and that the attacks constitute “war crimes”).

³⁰ Robert O. Keohane, *The Globalization of Informal Violence, Theories of World Politics, and the “Liberalism of Fear,”* Dialogue Intl Org 29 (April 2002), available online at <http://mitpress.mit.edu/journals/INOR/Dialogue_IO/keohane.pdf> (visited Mar 8, 2003).

collateral consequences of the “harbor or support” rule (“HSR”), I explore whether this rule would be a useful feature of the global antiterrorism regime. The question that animates the analysis in this Part is whether it is advisable to characterize terrorist groups as de facto state agents or instrumentalities. My argument is organized around two themes. First, HSR risks overapplication of various primary rules of international law in ways that could materially impair antiterrorism efforts. Second, HSR risks underapplication of the primary rules directly regulating terrorist activity by conferring privileges and immunities ordinarily reserved to states and their instrumentalities on terrorist groups.

A. OVERAPPLICATION

HSR risks overapplication of various primary rules of international law in ways that could compromise antiterrorism efforts. Several examples illustrate the point. First, HSR increases the costs of effecting regime change in rogue states. That is, HSR would render states less likely to support opposition groups in rogue states for fear that the conduct of any such groups could be imputed to the supporting state. Indeed, this potential implication would disproportionately affect powerful states, like the United States, that actively support regime change in illiberal states. Recall that it was US support for the *contra* rebels at issue in the *Nicaragua* case before the ICJ. Under HSR, the US would have been responsible for war crimes and other atrocities committed by the *contras*. In addition, the US provided extensive material and tactical support to Northern Alliance troops in Afghanistan. Substantial evidence suggests that these fighters committed numerous atrocities during the course of the conflict.³¹ Although the US may be accountable for these acts, this accountability would issue from the “primary rules” of the Geneva Conventions that require states “to ensure respect” for its substantive provisions.³² Two important points follow from these observations: (1) states may be hesitant to support any opposition movements over whom they exercise little or no control (such as the African National Congress in South Africa in the 80s and early 90s); and (2) a decline in such support may frustrate global democracy promotion and antiterrorism efforts.

Second, HSR might complicate coalition building and constructive engagement in the “war on terror” by attributing radical illegality to too many states. Indeed, HSR arguably imputes the acts of al Qaeda alone to several states—including Yemen, Saudi Arabia, Pakistan, Sudan, and the Philippines. Proponents of HSR might suggest that this is a great strength of the rule—that

³¹ Robert Cryer, *The Fine Art of Friendship: Jus in Bello in Afghanistan*, 7 J Conflict & Sec L 37 (2002).

³² See, for example, Geneva Convention, art 1, 6 UST 3114, 3217, 3316, 3516 (1956) (The contracting parties agree “to respect and to ensure respect for the [] Convention in all circumstances.”).

is, its fluid character and broad applicability arguably provide global actors with flexibility to determine the appropriate response in each case. Irrespective of the merits of this claim, the general character of the rule does not allow for the principled calibration of any international response, rendering it difficult to fashion a stable, broad-based antiterror coalition.

Third, HSR could increase the costs of routine counterterrorist activities by triggering the application of the Geneva Conventions. That is, HSR could redefine a broad range of international terrorist activity as “acts of war” attributable to another state and thereby activate international humanitarian rules formally applicable only in international armed conflicts. Overapplication of these rules could, in turn, frustrate routine law enforcement activities. My claim is not that the application of humanitarian law is inconsistent with effective law enforcement (although the US government has made such a claim in connection with the captured fighters detained at Guantanamo Bay, Cuba). Rather, I am suggesting only that HSR might establish a “hair trigger” for the laws of war that could, in turn, limit the ability of states to employ nonmilitary tactics effectively. Along similar lines, HSR, because of this “hair trigger” effect, might too readily trigger collective security commitments. Recall that in the aftermath of September 11, both NATO and the OAS issued formal findings that triggered their respective collective security obligations.

B. UNDERAPPLICATION

HSR also risks underapplication of various primary rules that directly regulate terrorist activity by conferring on terrorist groups privileges and immunities ordinarily reserved to state actors. Consider the following examples. First, HSR might confer on terrorist groups privileges and immunities established in the laws of war.³³ Under the Geneva Convention for the Protection of Prisoners of War (“GPW”), militias and volunteer corps *servng as part of the armed forces* are entitled to specific privileges as prisoners of war (“POWs”).³⁴ In addition, members of other volunteer corps, militias, and organized resistance forces *belonging to a party to the conflict* are entitled to POW status provided that the organization meets the four criteria in Article 4(A)(2) of the GPW.³⁵ Although many of these fighters may well qualify for POW status depending on the circumstances surrounding their capture (and, conversely, many of these fighters may well fail to qualify depending on the circumstances), it is important to note that HSR might artificially strengthen the case of fighters

³³ See, for example, David J. Scheffer, *Reality Check on Military Commissions*, Christian Sci Monitor 11 (Dec 10, 2001).

³⁴ Geneva Convention Relative to the Protection of Prisoners of War, art 4(A)(1), 6 UST 3316 (1956).

³⁵ Id at art 4(A)(2).

who would not otherwise qualify for POW status. The point is that classification of terrorist groups as de facto agents of the state may confer on some terrorists POW status in that it would support a finding that the terrorists are “part of the armed forces of the state” or that they “belong[]” to a state party to the conflict. This is a critical point because POWs as “lawful combatants” are immune from criminal prosecution for their hostile acts that otherwise comply with the laws of war. Along the same lines, HSR might immunize terrorist groups from prosecution for proportional attacks directed against military targets.³⁶

Second, HSR might symbolically aggrandize terrorist groups by ascribing to them the status of an “army” or state-sponsored fighting force.³⁷ States have historically resisted any attempt to classify insurgents or other rebel groups as “belligerents.”³⁸ Indeed, states routinely deny the existence of an “armed conflict” within their borders by classifying antigovernment forces as “terrorists,” “bandits,” or simply “criminals.”³⁹

Third, HSR potentially elevates terrorist groups to the status of state agent or instrumentality, which might in turn confer on these groups, and their members, foreign sovereign immunity from civil suit.⁴⁰ In US law, for example, states and their instrumentalities enjoy broad immunity from suit even with respect to acts contrary to *jus cogens* norms such as the prohibition on genocide.⁴¹ And although sovereign immunity does not extend to acts of states formally designated as “state sponsors of terrorism,” this list of states is remarkably short (and does not to date include Afghanistan).⁴²

IV. CONCLUSION: REGULATING STATE SUPPORT FOR TERRORISM THROUGH PRIMARY RULES

The events of September 11 make it clear that international cooperation is an essential ingredient of any effective antiterrorism regime. In this environment,

³⁶ See, for example, Scheffer, *Reality Check*, Christian Sci Monitor at 11 (cited in note 33).

³⁷ See *id.*

³⁸ See, for example, Geoffrey Best, *War and Law Since 1945* (Clarendon 1994); James E. Bond, *The Rules of Riot: Internal Conflict and the Law of War* 80–137 (Princeton 1974).

³⁹ See, for example, Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge 2002).

⁴⁰ For a summary of US sovereign immunity law and its effect on potential suits involving international terrorism, see Jack L. Goldsmith and Ryan Goodman, *U.S. Civil Litigation and International Terrorism*, in John Norton Moore, ed, *Civil Litigation Against Terrorism* (Carolina Academic Press, forthcoming 2003).

⁴¹ See, for example, *Prinz v Germany*, 26 F3d 1166 (DC Cir 1994).

⁴² Under the Foreign Sovereign Immunity Act (“FSIA”), US courts may exercise personal jurisdiction over foreign states when they are sued for personal injury caused by actions that include torture, extrajudicial killing, aircraft sabotage, or hostage taking. 28 USC § 1605(a)(7) (2000). The FSIA only permits such suits against a foreign state that has been “designated as a state sponsor of terrorism.” *Id.* at § 1605(a)(7)(A). At present, terrorist countries include Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria. See 48 CFR § 252.209-7001 (2001).

states that assist, support, or harbor terrorist groups present an important challenge to global security. Indeed, although international terrorist organizations are typically private armed groups, in that they do not act on behalf of any state, the most effective and lethal groups enjoy some measure of state support. As a consequence, there can be no doubt that any comprehensive antiterrorism regime will involve measures to increase the accountability of states sponsoring or otherwise supporting terrorism. As mentioned at the outset of this essay, the question is how best to define these international legal obligations. In this Article, I argue that (1) the response to the September 11 attacks may portend an important shift in the secondary rules governing state responsibility; and that (2) this shift is unnecessary, ineffective, and counterproductive. Regarding the second point, I point out that the emergent HSR might trigger several perverse, collateral consequences. In short, I maintain that the formal characterization of terrorist acts as de facto “state action” risks overapplication and underapplication of the relevant primary rules.

A better approach, I submit, is to address state support for terror as a breach of primary legal obligations. Of course, the viability of this approach is unclear because states cannot, it seems, agree on a workable definition of “terrorism.” In view of this difficulty, states have two basic choices. States could either fabricate an antiterror regime by indirection through the amendment of secondary rules, along the lines reflected in the US response to September 11. Alternatively, states could work to build a durable even if thin consensus, and in the process, fashion an antiterror regime that encompasses only the core of conduct that may be fairly described as “terrorist.” I believe that the first approach is unsound, because it risks a range of perverse, trans-substantive implications that could undermine the struggle against terrorism.

The second approach avoids the collateral consequences outlined in this Article by focusing the discussion on the most important impediment to international cooperation—disagreement on the propriety and scope of a “freedom fighters” exception in the definition of terrorism. That is, the HSR approach fails to address the central problem: the absence of international agreement on the definition of “terrorism.” In fact, the HSR approach not only finesses this problem, it also impedes progress by raising the stakes of an overinclusive definition. The virtue of the second approach is that it addresses these fundamental political disputes directly without unnecessarily politicizing debates about the substance and application of antiterrorism rules.



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