

International Responsibility and Terrorism: with Special Emphasis on State Responsibility in International Law

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Abstract

Terror attacks such as those executed in the United States, Bali, Istanbul and India in recent years render beyond doubt the challenge facing the international community to address effectively the scourge of international terrorism. They also present countless challenges for international scholars and practitioners. These include: ensuring the centrality of law, and the uncompromising governance of the principle of legality, in the highly charged debate on countering the terrorist threat; advancing an understanding of the law as sufficiently clear and accessible to provide a meaningful framework for action; demonstrating that the law enables, and indeed obliges, states to take effective measures against terrorism, and is inherently responsive to the security challenges posed by international terrorism; where the law is unsettled or unclear, or mechanisms and procedures ineffective or inadequate, promoting normative clarification or reform; monitoring, and seeking accountability in respect of, violations of international law. This article hopes to make a modest contribution to these enormous challenges. It seeks principally to address the question whether there is an identifiable framework of international law capable of addressing issues related to these grave violations.

Keywords: Terrorism; International Law; State Responsibility.

Introduction

The atrocities committed on 11 September 2001 ('September 11' or '9/11'), like others since then, highlight the critical importance of the international rule of law and the terrible consequences of its disregard. Ultimately, however, the impact of such attacks on the international system of law depends on the responses to them and in turn on the reaction to those responses. To the extent that lawlessness is met with unlawfulness, unlawfulness with impunity, the long-term implications for the rule of law, and the peace, stability and justice it serves, will be grave. Undermining the authority of law can only lay

the foundation for future violations, whether by terrorists or by states committing abuses in the name of counter-terrorism [1].

A proliferation of legal measures ensued, with broad-reaching political and legal effect, including Security Council resolutions that imposed a wide range of obligations on states to prevent and suppress terrorism. These include ensuring that 'terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts' [2].

Definition

The search for an accepted definition of terrorism

in international law has been described as 'resembling the Quest for the Holy Grail'. Various diplomatic attempts, some of which are on-going, to draft a global terrorism convention have failed as consensus around a single definition of international terrorism has proved elusive [3].

The current informal definition of terrorism for the purposes of the Draft Comprehensive Convention (Article 2), prepared by the Coordinator for negotiating purposes, defines terrorism as unlawfully and intentionally causing (a) death or serious bodily injury to any person; (b) serious damage to public and private property, including a State or government facility; or (c) other such damage where it is likely to result in major economic loss. The definition further requires that 'the purpose of the conduct, by its nature or context, is to intimidate a population or to compel a Government or an international organization to do or abstain from doing any act' [4].

International law also provides a definition of terrorism for the specific context of armed conflict. IHL prohibits 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population', in international and non-international armed conflict. Serious violations of this and other IHL prohibitions may also amount to a war crime for which individuals may be held to account, as recently affirmed by the ICTY. As such, terror inflicted on the civilian population in armed conflict is a special case, providing an exception to the rule that 'terrorism' as such is not defined in, and does not constitute a crime under, international treaty law [5].

The Arab Convention on the Suppression of Terrorism was adopted by the League of Arab States in 1998. Article 1(2) of the Convention defines terrorism as

Any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize national resources [6].

Responsibility of a State for Acts of Terrorism

The international responsibility of a state arises from the commission of an internationally wrongful act, consisting of conduct that (a) is attributable to a state under international law and (b) constitutes a

breach of an international obligation of the state. As regards acts commonly referred to as 'terrorist', committed by individuals or groups not *formally* linked to the state, it is the first part of the test that is critical [7].

The question of attribution is relatively straightforward where conduct occurs at the hand of state officials or organs of the state, or persons exercising elements of 'governmental authority' in accordance with national law. In respect of such persons, states are directly responsible for their conduct which amounts to an 'act of state'. This is so even if the official exceeded or acted outside his or her authority [8].

Somewhat more controversial is the questions of the standard for attribution where those directly responsible for conduct are private individuals or groups with no formal relationship with the state. As 'a transparent relationship between terrorist actors and the state is predictably uncommon', this is the critical question for assessing state responsibility for acts of 'terrorism'.

International jurisprudence and the work of the International Law Commission support the view that the acts of private individuals may be attributed to a state which exercises sufficient control over the conduct in question. According to the International Court of Justice in the *Nicaragua* case, the test is whether the state or states in question exercised 'effective control'. Although the Court found the US to have helped finance, organise, equip, and train the Nicaraguan Contras, this was not sufficient to render the Contras' activities attributable to the US. Such a level of support and assistance did not 'warrant the conclusion that these forces were subject to the United States to such an extent that any acts they have committed are imputable to that State [9].

Where the state does not exercise the necessary control at the time of the conduct in question, it may nonetheless assume responsibility for the wrong *ex post facto*, where it subsequently 'acknowledges or accepts' the conduct as its own. In the *Tehran Hostages* case, the ICJ held that while the 'direct' responsibility of Iran for the original takeover of the US Embassy in Tehran in 1979 was not proved, subsequent statements in the face of incidents involving hostage taking by students created liability on the part of the state. To the extent that the judgment indicates that the Iranian State was considered capable of putting a stop to an on-going situation and instead chose to endorse and to 'perpetuate' it, the Court's finding against Iran is consistent with the application of the 'effective control' test. But the judgment also makes clear that even if such a test were not met, the state

may become responsible through its subsequent 'approval' or 'endorsement' of wrongful acts [10].

The rejection of strict liability for a state on whose territory crimes are orchestrated has been long established, since before *Nicaragua*. As the ICJ noted in 1949 in the *Corfu Channel* case, it is impossible to conclude 'from the mere fact of the control exercised by a state over its territory and waters that that State necessarily knew or ought to have known of any unlawful act perpetrated therein nor that it should have known the authors' [11].

States have obligations to take a range of measures in respect of terrorism, which have been supplemented and strengthened since. The Security Council has obliged all states, *inter alia*, to 'refrain from providing support, active or passive', 'deny safe haven' to persons involved in terrorism, 'freeze without delay terrorist assets' and cooperate fully with other states in criminal matters, stressing that 'those responsible for aiding, supporting or harboring the perpetrators, organizers and sponsors of these acts will be held accountable. If it can be established that a state has 'harboured or supported' terrorist groups, this may represent a breach of the obligations of the state, for example the longstanding obligation not to allow international terrorist groups to operate on its territory. A critical distinction exists, however, between a state being responsible for failing to meet its obligations vis a vis terrorism on its territory, and the acts of terrorists being 'attributable' or 'imputable' to the state, such that the state itself becomes responsible for the terrorists' wrongs [12].

Legal consequences flow from state responsibility for an internationally wrongful act. The extent to which practical consequences also ensue depends, at least in considerable degree, on the question of enforcement, the Achilles heel of the international legal system. Upon the commission of an internationally wrongful act, certain 'secondary' obligations arise under international law [13]. If a state is responsible for an internationally wrongful act it is obliged to cease the act (if it is ongoing), offer assurances of non-repetition and make full reparation for material or moral injury suffered. If the state responsible for the internationally wrongful act denies cessation of the wrongful act or refuses to comply with its secondary obligation to make full reparation, the injured state for its part may take 'countermeasures' against the responsible state to induce it to comply with these obligations [14].

In practice, the breach of an international obligation by a state may trigger various responses. States will often resort to diplomacy to persuade states to desist from or cease internationally wrongful

conducts. In addition, they may take lawful but 'unfriendly' acts, which may include, for example the breaking of diplomatic relations, limitations on trade with the wrongdoing state or the withdrawal of voluntary aid programmes. Countermeasures are however subject to limits: they must, as far as possible, be reversible, they can only target the responsible state, they must not be disproportionate to the injury caused by the internationally wrongful act, and they cannot involve the violation of fundamental human rights, humanitarian law or peremptory norms of international law. Given these limits, the lawfulness of certain countermeasures commonly resorted to by states, such as economic sanctions, is controversial: while some would argue that economic sanctions constitute lawful countermeasures, others would question their compatibility with 'obligations for the protection of fundamental human rights'. Moreover, the ILC Articles make clear that if the internationally wrongful act amounts to a gross or systematic breach of obligations under peremptory norms such as serious violations of human rights or of basic rules of IHL or the unlawful use of force states are not only entitled, but may be obliged, to act together to end the breach [15].

Responsibility of Non State Actors under International Law

The primordial rule of international law is that it is made by states, for states. As a basic governing principle, while states are the subjects of international law, 'non-state actors' are governed instead by national law. In respect of 'terrorists' and 'terrorist organizations' which fall within the broad non-state actor category the principal source of applicable law is national law. International law for its part focuses on ensuring that the state meets its obligation to provide a national legal system that effectively represses acts of terrorism, within the framework of the rule of law. In general then, international obligations, emanating from various branches and sources of international law, are directed towards states. The sharpness of this dichotomy between states and non-state actors has however been eroded to a degree through developments in international law.

While individual criminal responsibility under international law is not a new phenomenon, in recent years a system of international justice, with national and international components, has crystallized from the experience of addressing atrocities on the domestic and international planes. The work of the *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda ('ICTY' and 'ICTR' or 'the

ad hoc tribunals'), the Special Court for Sierra Leone, the adoption of the International Criminal Court Statute and supplementary documents and innovations in domestic law and practice have been the principal contributors [16]. The experience of, among others, the *ad hoc* tribunals demonstrates the viability of prosecutions involving complex criminal networks, including against those in the highest echelons of power, and in respect of massive crimes.

Conclusion

Thus, it may be concluded by saying that, a state is responsible for an act of terrorism by private actors where it exercises effective control over the act, or subsequently endorses it as its own. States may also be responsible for other internationally wrongful acts related to acts of terrorism, such as failing to take reasonable measures to prevent their territories being used by terrorists. As a matter of law, state responsibility has serious implications for the wrong doing state and, potentially, for the rights and obligations of other states. Finally, it is recalled that state responsibility may result from wrongs committed through terrorism or counter-terrorism. The challenge to injured states and to others that, as the above framework reflects, share responsibility to act in the face of serious wrongs is to ensure that international law is upheld and enforced against states involved in 'terrorism', or in unlawful responses thereto.

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