Chapter 8

The “Unrule” of Law: Unintended Consequences of Applying the Responsibility to Prevent to Counterterrorism, A Case Study of Colombia’s Raid in Ecuador

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I. Introduction

In 2001 the U.N. Security Council issued Resolution 1373 which expanded the scope of state responsibility to address indirect situations, setting forth duties to “[r]efrain from providing any form of support, active or passive” to terrorists and to “[d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens.” It also called for states to “prevent those who finance, plan, support or commit terrorist acts from using their respective territories for those purposes against other states or their citizens.” There have been developments in theory and practice which indicate efforts to transform the normative content of this resolution into international customary law. This is pursued by seeking consensus as to its content, demonstrating legal applicability, and applying creative argumentation for effective implementation via traditional and new compliance mechanisms. Furthermore, it

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1 See also Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, GA Res 2625 (XXV), UN GAOR, 25th Sess., Supp. No. 28, UN Doc A/Res/25/2625 (1970) 122: "Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State. Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force."

appears that violation of 1373 itself is increasingly being characterized as constituting a threat to international peace and security.\(^3\)

It has been suggested that there are attempts to transfer the Responsibility to Protect Doctrine (R2P) (which originally conditioned the state's sovereign right to non-interference in domestic affairs to its own fulfilment of human rights duties) to the field of counterterrorism, becoming the Responsibility to Prevent Terrorism.\(^4\)

Under classic R2P, states have an \textit{erga omnes} duty to protect and to prevent violations of human rights (genocide, ethnic cleansing, or crimes against humanity) and war crimes. Failure to do so would flag the responsibility of the international community to respond. There are numerous efforts to expand R2P's application beyond these specific criteria, for example in order to respond to harm caused by natural disasters.\(^5\) Nevertheless, this has not yet been accepted by the UN Security Council. Similarly, as stated by Vincent Joel Proulx, one may evince efforts to support recognition of a state duty to prevent terrorism as another obligation \textit{erga omnes}. Tal Becker buttresses this view:

The duty of states to prevent, and abstain from any involvement in acts of terrorism is beyond question in international law. At a fundamental level, these obligations are a corollary of sovereignty and arise from the basic duty of the state to exercise due diligence in order to prevent harm to other states or their nationals emanating from its territory.\(^6\)

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\(^3\) Proulx asserts that the international community has moved toward a model of indirect responsibility, which has supplanted direct responsibility in the field of attribution. Vincent Joel Proulx, 'Babysitting Terrorists: Should States be Strictly Liable for Failing to Prevent Transborder Attacks' in \textit{Berkeley Journal of International Law} vol. 23 (2005) pp. 615,629,637.

\(^4\) On R2P see the UN General Assembly, 2005 World Summit Outcome, paras. 138–139: \langle http://www.responsibilitytoprotect.org/index.php/united_nations/398?theme=alt\rangle. The response is to first utilize peaceful means, then progressing to coercive measures, including the use of force, in the event of failure. The intervention must meet the criteria of just cause, right intention, last resort, proportional means, reasonable prospects and right authority (i.e., the UN Security Council). On the emergence of a duty to prevent, see Lee Feinstein and Anne-Marie Slaughter, 'A Duty to Prevent' in \textit{Foreign Affairs} (January/February 2005); see also Ivo H. Daalder & James B. Steinberg, \textit{Preventive War, A Useful Tool}, Brookings Institution (4 December 2005); see also Jose E. Alvarez, 'The Schizophrenias of R2P', Panel Presentation at the 2007 Hague Joint Conference on Contemporary Issues of International Law: Criminal Jurisdiction 100 Years After the 1907 Hague Peace Conference, The Hague, the Netherlands, (30 June 2007).
