

REBELS, NEGLIGENT SUPPORT, AND STATE ACCOUNTABILITY: HOLDING STATES ACCOUNTABLE FOR THE HUMAN RIGHTS VIOLATIONS OF NON-STATE ACTORS

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This Note discusses a crucial problem in the law of state accountability for human rights abuses. Specifically, it analyzes the difficulty of attaching liability when a state “negligently supports” a group that it should reasonably expect to commit human rights abuses. This note shows that the current legal framework governing attribution stems from a myopic focus on non-state actors “acting” like arms of the state. Indeed, the current tests require that the state have an extraordinarily high level of control over the non-state actors before liability can attach. This requirement not only creates perverse incentives for states to acquire less control over the non-state groups they fund, but it also makes the goal of state responsibility illusory.

INTRODUCTION

State support of anti-government rebels has become a pressing concern for world governance. With the advent of new weapons and technology, rebel groups have become increasingly lethal and strategically effective. As rebels become more effective at overthrowing regimes, they also become more attractive investments for states that want to see regime change. While this transnational support frequently violates the U.N. Charter’s prohibition on interference, it also has profound human rights implications. Rebel groups lack the discipline and control often characteristic of traditional state-run militaries.¹ Without this discipline, individual rebels or rebel units are far more likely to commit human rights abuses against their

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1. See ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 517 (2006) (discussing the role of discipline with respect to human rights abuses); see also Hadeel al-Shalchi, *Libyan Rebels Hurt by Lack of Discipline, Training*, THE GUARDIAN (June 17, 2011), <http://www.guardian.co.uk/world/feedarticle/9699944> (discussing the NTC’s inability to control their rebels).

former oppressors, be they soldiers or civilians, than their state-run counterparts.² Thus, by arming or funding an armed rebel group, a state creates a nontrivial risk that the rebels will use this support to engage in human rights violations.

Yet, while state accountability for supporting groups that specifically aim to commit human rights violations, such as terrorists and death squads, receives robust consideration in academic circles,³ scholars have devoted considerably less attention to what this Note calls “negligent support.” Negligent support refers to state support⁴ of a rebel group that the state should reasonably expect will commit human rights violations, but the state does not actually intend for these violations to occur. The chief difference between negligent support of rebel groups and the clearly illegal support of terrorist groups or death squads is that the supporting state does not want human rights violations to occur. In fact, the state might support the rebel group with a view to preventing civilian deaths. While negligent support is better intentioned than supporting groups with the explicit aim to commit human rights violations, the effect of this support is often just as harmful. Indeed, when a state provides weapons, training, or logistical support to these groups but does not impose sufficient levels of control or discipline, it puts the rebels in a position to more efficiently commit these violations.⁵

France’s involvement in Libya is a paradigm example of good intentions producing human rights violations. In 2011, the National Transition Council (NTC), supported by France⁶ in its fight against the oppressive and violent Gaddafi regime, allegedly committed torture, extrajudicial killings, and killings of civilians.⁷ While it is certainly clear

2. See generally AMNESTY INT’L, *SIERRA LEONE: HUMAN RIGHTS ABUSES IN A WAR AGAINST CIVILIANS* (1995) (discussing the human rights abuses committed by the undisciplined RUF forces in Sierra Leone in 1994).

3. See, e.g., CHARLES DOYLE, CONG. RESEARCH SERV., *MATERIAL SUPPORT OF TERRORISTS AND FOREIGN TERRORIST ORGANIZATIONS: SUNSET AMENDMENTS* (2006) (reviewing the large body of literature on material support for terrorism).

4. What “support” means in this context is a subject of considerable debate. See *infra* Legal Standards of State Responsibility for a discussion.

5. Domestic American law recognizes concepts like negligent support in other contexts. In the Title IX context, for instance, courts recognize that an educational institution’s indifference to reports of sexual assault amounts to a violation of the law’s prohibition on sex discrimination because they support that student with educational services. Matthew Triplett, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 *Duke L. J.* 487, 496 (2012).

6. See, e.g., CLAPHAM, *supra* note 1, at 16 (listing France as a provider of weapons and training to Libyan rebels); Michael Birnbaum, *France Sent Arms to Libyan Rebels*, *WASH. POST* (June 30, 2011, 6:12 AM EST), http://www.washingtonpost.com/world/france-sent-arms-to-libyan-rebels/2011/06/29/AGcBxkqH_story.html.

7. See, e.g., *Evidence of Mass Murder After Gaddafi’s Death*, *AL JAZEERA* (Oct. 17, 2012, 14:34

that France had no intentions for the rebels to violate human rights norms, it is equally clear that French support put the rebels in a better position to commit these crimes. However, under the current law on state accountability, France will not be held accountable for the actions of the NTC even though it received warnings that abuses might occur.

This Note argues that the current legal framework governing state accountability entirely misses the problem of negligent support. It begins with a survey of the current legal standards governing state responsibility: the effective control test advanced by the ICJ, the test advanced by Article 8 of the ILC Articles on State Responsibility, and the overall control test from the ICTY. Next, it applies these three standards to France's actions in Libya, finding that France is liable under none of them. Following this determination, this Note evaluates, from a practical, legal, and normative perspective, the current legal standards' ability to hold states accountable for endangering human rights. In light of these failures, this Note will conclude with an analysis of the prospects of changing the current legal regime.

I. BACKGROUND

France was far from the first state to arm non-state actors against a common opponent. In fact, during the Cold War both the United States and the Soviet Union armed, funded, and supported several rebel groups against the other's ally.⁸ These conflicts were dubbed "proxy wars" because each superpower was essentially fighting the war by supplying, arming, and training forces, even though it was not using its own troops.⁹ When deciding which group to support, the superpowers seemingly only cared about one distinction: communist or non-communist. Thus, both sides armed groups about whom they knew very little. As the massive influx of arms into conflict zones increased the level and scale of violence, many of these untested rebel groups, lacking a formal command structure and effective way for their funders to control them, engaged in massive human

GMT), <http://www.aljazeera.com/news/africa/2012/10/2012101764217822832.html> (detailing the brutal beatings and killings of Gaddafi and his convoy); Tracey Shelton, *U.N.: Qaddafi, Rebels Both Guilty of War Crimes*, CBS NEWS (Mar. 5, 2012, 4:28 PM EST), http://www.cbsnews.com/8301-503543_162-57390947-503543/u.n.-qaddafi-rebels-both-guilty-of-war-crimes/ (citing a U.N. report that recounts war crimes by revolutionary forces).

8. See, e.g., Ted Galen Carpenter, *U.S. Aid to Anti-Communist Rebels: The "Reagan Doctrine" and Its Pitfalls*, 74 CATO POL'Y ANALYSIS I (1986), available at <http://www.cato.org/pubs/pas/pa074.html> (evaluating American assistance of rebellions in Afghanistan, Nicaragua, Cambodia, Mozambique, and Angola as a response to Soviet support for "insurgencies designed to spread communist dictatorships").

9. *Id.*

rights violations.¹⁰

Even after the Cold War, states continued to fund and arm rebel groups. After all, supplying arms to rebels is often cheaper and gives the funding state a certain level of deniability and distance from the rebels' actions.¹¹ Since these rebel or militia forces were not considered a *de jure* arm of the state, states attempted to escape liability by claiming that they could not completely control the rebels. Indeed, since the actions of non-state forces were very difficult to trace back or impute to states, militia and rebel forces became an attractive option through which states could effectively "farm out" their human rights violations when they wished.¹² For example, in the Sudan, armed Arab militiamen known as the *Janjaweed* have raped, terrorized, and murdered non-Arabs throughout Darfur.¹³ While the Arab leaders of Sudan ostentatiously criticized the *Janjaweed's* actions against their opponents, it is now clear that the Sudanese government supported and armed this militia force and intended for these violations to occur.¹⁴ This tragedy shows that a regime can try to use non-state actors to create a certain distance between it and violations of international law.

Based on the public condemnation of Sudan and the ICC arrest warrant for Bashir, however, it is clear that the actions of the *Janjaweed* can be imputed to the state.¹⁵ Indeed, cases like Sudan where the militia force lives in the supporter's state and receives weapons, money, training, and orders from the state are not difficult calls. Similarly, there was relatively little debate over whether or not the Taliban could be punished for al-Qaeda's actions.¹⁶ In many other cases, however, state accountability for human rights violations is much less clear. France's support of the

10. See, e.g., AMNESTY INT'L, *supra* note 2.

11. See, e.g., *Sudan Denies Directing Janjaweed*, BBC NEWS (Oct. 18, 2006, 15:15 GMT), <http://news.bbc.co.uk/2/hi/6062766.stm> (quoting both a former *Janjaweed* member's claims that the Sudanese government aided the rebels and the Sudanese government's denial of such assistance).

12. See, e.g., *U.S. Says Janjaweed Militia is Supported by Sudan's Government*, MAILONLINE.COM (Apr. 16, 2007, 11:15), <http://www.dailymail.co.uk/news/article-448866/U-S-says-janjaweed-militia-supported-Sudans-government.html>.

13. Oliver Read, *Sudan's Janjaweed Militia*, PBS NEWS HOUR (Apr. 7, 2006), http://www.pbs.org/newshour/indepth_coverage/africa/darfur/militia.html.

14. See *Sudan "Backs" Janjaweed Fighters*, BBC NEWS (Oct. 18, 2006, 00:31 GMT), <http://news.bbc.co.uk/2/hi/africa/6060976.stm> (discussing claims of the rebels and the Sudanese government).

15. See *Darfur Warrant for Sudan's Bashir: ICC Adds Genocide*, BBC NEWS (July 12, 2010, 17:41 ET), <http://www.bbc.co.uk/news/10603559>.

16. See Saijan Gohel, *The Al-Qaeda-Taliban Nexus*, COUNCIL ON FOREIGN RELATIONS (Nov. 25, 2009), <http://www.cfr.org/pakistan/al-qaeda-taliban-nexus/p20838> ("Al-Qaeda was deemed as a guest in Afghanistan.").

Libyan rebels is one such case.

On February 15, 2011, Libyans launched a major protest campaign against their leader, Muammar Gaddafi.¹⁷ By October 20, 2011, mostly due to the overwhelming air power and support of NATO members France and the United States, the rebels gained control of the country.¹⁸ By the end of the rebellion, however, it had come to light that the coalition of French-backed rebels had tortured and summarily executed former leader Muammar Gaddafi,¹⁹ brutally tortured suspected Gaddafi loyalists, and recklessly killed many civilians.²⁰ In short, the rebels, whom the French armed and supported in order to protect the human rights of civilians, were using their newfound power to engage in violations of their own.²¹

A. Legal Standards of State Responsibility

Before examining France's potential liability, it is important to understand the current legal framework governing state accountability. In this field, there are three major tests: the ICJ's effective control test, the overall control test espoused by the ICTY, and ILC's test.

B. Effective Control: International Court of Justice

In the 1986 opinion *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), the International Court of Justice addressed the question of whether the United States could be held accountable for the human rights violations of the *Contras*.²² The *Contras* allegedly committed several war crimes throughout the conflict, including launching indiscriminate attacks, mistreating prisoners, and killing non-combatants.²³ In order to hold the United States accountable for these violations of humanitarian law, the Court found it

17. *Timeline: Libya's Civil War*, THE GUARDIAN (Nov. 19, 2011, 9:36 EST), <http://www.guardian.co.uk/world/2011/nov/19/timeline-libya-civil-war?INTCMP=SRCH>.

18. *Id.* See also Ujala Sehgal & Connor Simpson, *Qaddafi is Missing as Rebels Gain Control of Most of Tripoli*, ATLANTIC WIRE (Aug. 21, 2011), <http://www.theatlanticwire.com/global/2011/08/qaddafis-last-stand/41530/>.

19. See CHAPHAM, *supra* note 1, at 28-29; *Muammar Gaddafi Killed, Captured in Sirte*, THE HUFFINGTON POST (Oct. 20, 2011, 5:12 AM EST), http://www.huffingtonpost.com/2011/10/20/muammar-gaddafi-killed_n_1021462.html.

20. *Libya: Deaths of Detainees Amid Widespread Torture*, AMNESTY INT'L (Jan. 26, 2012), <http://www.amnesty.org/en/news/libya-deaths-detainees-amid-widespread-torture-2012-01-26>.

21. See *id.* (giving accounts of detentions and torture).

22. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 105-15 (June 27) (holding also that the United States violated Nicaragua's territorial integrity by mining its harbors and supporting the *Contras*).

23. *Id.* ¶ 20.

must “determine [that] the relationship of the *Contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *Contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.”²⁴

The Court first drew a distinction between two types of actors who, while not *de jure* organs of the state, can still be considered as acting on the state’s behalf. The first group includes those who are completely dependent on the state for money, equipment, guidance, and direction.²⁵ The actions of these groups are clearly attributable to the supporting state because the state exercises nearly complete control.²⁶ The second class comprises individuals who receive material support from the state but maintain a substantial amount of autonomy.²⁷ According to the Court, state support for this second group is always attributed to the supporting state for purposes of an Article 2(4) inquiry.²⁸ However, in the humanitarian law context, the Court must undertake a different examination.²⁹

Here, the *Contras* fell under the second category of non-state actors.³⁰ Thus, in order to hold the United States accountable for the actions of the semi-autonomous *Contras*, it had to be proven that the “State had effective control of the operations in the course of which the violations were committed.”³¹ In other words, the United States must have “directed or enforced the perpetration of the acts contrary to human rights and humanitarian law.”³² This was a high bar indeed. Despite the significant amount of control exercised by the United States, the Court stated that it would only hold the United States accountable if American forces either issued directions that explicitly ordered the *Contras* to commit human rights violations or forced them to carry out the violations.³³ In fact, even if the United States knew to an absolute certainty that the *Contras* planned to commit these violations, yet armed the rebels anyway, it could escape

24. *Id.* ¶ 109.

25. *See id.* ¶ 110.

26. *See id.* (relating the *Contras* dependence on the United States to the United States’ control over the *Contras*).

27. *See id.* ¶¶ 113-14.

28. *See id.* ¶¶ 241-42.

29. *See id.* ¶ 115 (stating that for conduct to give rise to legal responsibility, it would have to be proven that a “state had effective control of the military and paramilitary operations in the course of which the alleged violations were committed”).

30. *See id.*

31. *Id.*

32. *Id.*

33. *Id.* ¶ 116.

liability.³⁴

In this case, the Court found that the United States did not enjoy “effective control” over the *Contras*.³⁵ Instead, it could only infer “partial dependency” from the fact that the United States picked the *Contras*’ leaders and organized, trained, and equipped their forces.³⁶ Since the Court could not ascertain whether the United States had ordered or forced the rebels to carry out the specific human rights violations, it found that the actions of the *Contras* were not attributable to the United States.³⁷

The rule espoused in *Nicaragua* effectively insulated states from attribution as long as the armed forces maintained some degree of autonomy and were not explicitly ordered by the supporting state to engage in the actual violations.³⁸ Thus, a state could provide robust support to a rebel group that it knows has committed or intends to commit gross and widespread human rights violations. In fact, since this test completely ignores the state’s intent, this test would not even attribute liability to a state that taught al-Qaeda operatives how to fly a plane or rig an explosive, so long as that state did not control the terrorist group.³⁹

C. Overall Control and the ICTY

In *Prosecutor v. Tadic*, the ICTY proposed a different test for state attribution. While the point at issue in *Tadic* was not state attribution of human rights violations,⁴⁰ the Court still had to determine whether Bosnian Serb paramilitary forces were acting on behalf of the Federal Republic of Serbia to determine jurisdiction.⁴¹ If the paramilitary forces were acting on behalf of Bosnia, then *Tadic* could be tried under Article 2 of the ICTY Statute for breaching the Fourth Geneva Convention.⁴² Thus, even though the Court sought to decide a different issue, it also had to enunciate an attribution test.

The Court began by stating that if armed rebels are to be considered as

34. *See id.*

35. *See id.* ¶ 115.

36. *Id.* ¶¶ 106-12 (describing the United States’ “logistic support, the supply of information on the location and movements of the Sandinista troops, the use of sophisticated methods of communication the deployment of field broadcasting networks, radar coverage, etc.”).

37. *See id.* ¶¶ 116, 119, 122.

38. *See id.* ¶ 114.

39. Of course, the state would violate many other laws that specifically relate to terrorism.

40. The true question was whether *Tadic* could be tried under ICTY Article 2, which is limited to actions during international armed conflict.

41. *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶ 80 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

42. *Id.* ¶ 78.

“belong[ing]” to another state, that state must possess a “degree of authority or control” over these forces.⁴³ In order to ascertain when a group in fact “belongs” to a state, the Court turned to the law on state responsibility.⁴⁴ It reasoned that state responsibility is designed to ensure that actions committed by private actors can still be attributed to states when they are acting as *de facto* organs of the state.⁴⁵ Quite simply, “States are not allowed on the one hand to act *de facto* through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law.”⁴⁶

The Court articulated two types of tests for state responsibility depending on the type of actor.⁴⁷ The first test concerns acts performed by individuals that are not part of the government but are ordered to commit illegal acts on its behalf.⁴⁸ For these actors and actions, the Court required specific orders to violate human rights, a standard similar to the “effective control” test from *Nicaragua*.⁴⁹ However, *Tadic* concerned the second type of actors: an organized and structured group.⁵⁰ When judging these cases, the Court used a test that required “overall control.”⁵¹ This “overall control” test was considerably less demanding than the “effective control” test in *Nicaragua* but still required something more than material support.⁵² In the *Tadic* case, the court required “overall control beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations.”⁵³ Thus, when organized groups are operating with the support of the state, the attribution test is much less demanding but still a high bar.

However, the ICTY did not require an explicit link with regard to the specific human rights violations. Instead, the Court reasoned that when states work closely with better-organized and disciplined groups, it should be assumed that the group acts under the authority of the state.⁵⁴ If a group “systematically” acts under the authority of the supporting state, it stands to reason that these illegal acts should also be attributed to the state even if the

43. *Id.* ¶ 117.

44. *Id.*

45. *Id.* ¶ 137.

46. *Id.* ¶ 117.

47. *Id.* ¶¶ 118-21.

48. *Id.* ¶ 118.

49. *See id.* ¶ 119.

50. *Id.* ¶ 120.

51. *Id.* ¶ 121.

52. *See id.* ¶ 145.

53. *Id.*

54. *Id.* ¶ 121.

acts were not explicitly ordered by the state.⁵⁵ Thus, under the ICTY's test, the actions of organized and hierarchical groups that receive state support are much more readily attributable to the state than unstructured groups or individuals.⁵⁶ However, since the group must still exercise considerable control over the group and the group must "systematically" act under the state's directions, the ICTY test still requires that the group is essentially an arm of the state.

D. ILC: State Responsibility for Internationally Wrongful Acts

The International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts sets out three different tests for state attribution.⁵⁷ According to Article 8 of the ILC's report, "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 acting on the instructions of, or under the direction or control of, that state in carrying out the conduct."⁵⁸ Thus, under the ILC Articles, a state is responsible for a group's actions when (1) the group is acting under the state's instructions (2) "directed" by the state or (3) the state exercises control over the group.⁵⁹ An important limiting principle is that this control and direction must apply to the specific illegal action.⁶⁰

The first prong of state attribution, acting under the state's instructions, clearly applies to situations where state officials, organs, or representatives specifically order the group to commit a crime. Similarly, the requirement that the actions are "directed" by the state clearly only applies to situations wherein a state actor directs the group or individual to do something that violates international law.⁶¹ Thus, the first two prongs are very similar to the demanding requirements set forth in *Nicaragua* and the first category of actors in *Tadic*.⁶² The state has to specifically act with respect to the human rights violations.⁶³

The third option, that the state exercises "control" over the group "in

55. *See id.*

56. *See id.* ¶ 119.

57. *See generally* Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Int'l Law Comm'n, 53d Sess., Dec. 12, 2001, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 at 43 (2001), available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf.

58. *Id.* art. 8.

59. *Id.*

60. *Id.*

61. *See id.*

62. *See id.*

63. *Id.*

carrying out the conduct,” seems to include actions in addition to direction and issuing orders.⁶⁴ However, the control must still relate to the specific crime.⁶⁵ Thus, while the text of the article is unclear on the exact scope of this last prong, it is clear that the ILC did not intend to move beyond the state attribution test espoused in *Nicaragua*.⁶⁶ In fact, even though the ILC does not use the term “effective control,” it seems that the state has to exercise a considerable amount of control over the rebel group in order to “direct” or “control” it.⁶⁷

Based on this survey of the international law on state attribution, it seems that two of the tests for state accountability are very demanding, requiring the supporting state to act specifically with respect to the specific violations. On the other hand, the test advanced in *Tadic* is somewhat less demanding, since attribution can occur when a state systematically supports and generally controls a rebel group.⁶⁸ Yet, all three require a very high degree of control, control that is almost always lacking in the negligent support context. In order to see how these distinctions work in practice, it is helpful to apply them to a specific set of facts. France’s support of the National Transitional Council provides a useful paradigm.

II. APPLICATIONS

A. Libya

1. State Support

Following years of government repression, protestors in Benghazi mounted a large-scale protest against Muammar Gaddafi’s regime. As the protests grew in size and effectiveness, the Gaddafi regime cracked down with violent and repressive tactics. In fact, “[s]nipers shot protesters, artillery and helicopter gunships were used against crowds of demonstrators, and thugs armed with hammers and swords attacked families in their homes.”⁶⁹ On March 17, the United Nations Security Council responded to the situation by passing Resolution 1973, which

64. *Id.*

65. *See id.*

66. *See id.*

67. *See id.*

68. *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶ 121 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

69. Nick Meo, *Libya Protests: 140 ‘massacred’ as Gaddafi Sends in Snipers to Crush Dissent*, THE TELEGRAPH (Feb. 20, 2011, 7:50 AM), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8335934/Libya-protests-140-massacred-as-Gaddafi-sends-in-snipers-to-crush-dissent.html>.

authorized member states to “take all measures to protect civilians.”⁷⁰ The resolution also demanded an immediate ceasefire and authorized member states to establish a no-fly zone over Libya.⁷¹ However, it specifically “exclud[ed] a foreign occupation force of any form on any part of Libyan territory.”⁷²

Acting pursuant to this resolution, French, British, and American jet fighters began flying sorties over Libya. According to General Carter Ham, the rules of engagement for all NATO air forces limited force to the protection of civilians. Thus, the air strikes were designed to protect civilians and prevent any advances by the Gaddafi regime against civilian-populated areas. Notably, General Ham stated that the NATO forces “do not provide close air support for the opposition forces.”⁷³

However, this prohibition on supporting opposition forces soon became unworkable in practice. First, it was very difficult to tell exactly who was an armed rebel versus who was a protestor or civilian. Moreover, many civilians fled to or lived in rebel-held strongholds. Thus, NATO’s goal of protecting civilians could easily have coincided with protecting the rebels. Eventually the work of NATO and the NTC began to look more and more coordinated, with rebels waiting for NATO airstrikes to soften military targets before they attacked the compounds on foot.⁷⁴ This relationship became so intertwined that when the NTC attacked Tripoli, they “planned th[e] operation with NATO.”⁷⁵ Furthermore, prior to the assault, France and the U.K. deployed special forces to train the rebels.⁷⁶ In addition to this training, French planes also dropped “weapons,

70. S.C. Res. 1973, ¶ 3, U.N. Doc. S/RES/6496 (Mar. 17, 2011) [hereinafter “Resolution 1973”].

71. *Id.* ¶ 2.

72. *Id.* ¶ 3.

73. Josh Rogin, *Rules of Engagement Are Murky in Libya Air War*, FOREIGN POLICY (Mar. 21, 2011, 2:01 PM), http://thecable.foreignpolicy.com/posts/2011/03/21/rules_of_engagement_are_murky_in_libya_air_war.

74. Chris Stephen, *Libya Conflict: British and French Soldiers Help Rebels Prepare Sirte Attack*, THE GUARDIAN (Aug. 25, 2011, 2:28 PM), <http://www.guardian.co.uk/world/2011/aug/25/libya-conflict-british-french-soldiers-rebels-sirte>.

75. See Dario Lopez, *Libyan Rebels, NATO Coordinate Attack on Tripoli*, SAN FRANCISCO CHRON. (Aug. 21, 2011, 4:00 PM), http://articles.sfgate.com/2011-08-21/news/29911034_1_zawiyah-libyan-rebels-mustafa-abdel-jalil (quoting Mustafa Abdel-Jalil, the head of the rebel leadership council, “We [the rebels] planned this operation with NATO.”).

76. Eric Schmitt, *Surveillance and Coordination with NATO Aided Rebels*, N.Y. TIMES, Aug. 21, 2011, <http://www.nytimes.com/2011/08/22/world/africa/22nato.html> (quoting two unnamed sources); Richard Norton-Taylor, *SAS Troopers Help Co-ordinate Rebel Attacks in Libya*, THE GUARDIAN, Aug. 23, 2011, <http://www.guardian.co.uk/world/2011/aug/23/sas-troopers-help-coordinate-rebels>; see also *Italy, France Sending Troops to Advise Libyan Rebels*, CNN (Apr. 20, 2011), http://articles.cnn.com/2011-04-20/world/libya.war_1_french-troops-rebel-stronghold-military-officers?s=PM:WORLD.

munitions and food to Libyan rebels.”⁷⁷ This material assistance included guns and rocket-propelled grenades.⁷⁸

2. State Control

While it is clear that France provided the rebels with training, advice, weapons, and supplies,⁷⁹ there is no evidence that the French ordered or compelled the rebels to engage in any sort of actions. Indeed, there is no record of French commands, orders, or directions being issued to the NTC rebels. However, several sources have stated that France did help the rebels to plan attacks and provided logistical as well as occasional aerial support.⁸⁰ During this coordination, the French advisors may have instructed the rebels to engage in a certain action. Yet, there is no proof of these orders and any instructions given by the French could easily have just been suggestions for coordination that the rebels were free to dismiss. Without more information, it is very difficult to call this admittedly close coordination “control.”

3. Human Rights Violations and the NTC

Prior to French or NATO involvement, Amnesty International warned states of the risks that the NTC would also commit retaliatory human rights violations.⁸¹ According to the latest reports from Amnesty International and several other NGO’s and international news sources, “both sides” in the conflict committed significant human rights violations.⁸² In fact, the accusations against the National Transition Council and other rebels are considerable. The NTC’s “reprisals”⁸³ include abductions, arbitrary detentions, torture, and killing of “former members of the security forces,

77. Elizabeth Pineau & John Irish, *France Provided Weapons, Food to Libyan Rebels*, REUTERS (June 29, 2011, 10:08 AM), <http://www.reuters.com/article/2011/06/29/us-libya-france-weapons-idUSTRE75S22P20110629>; *Libya Conflict France Air-Dropped Arms to Rebels*, BBC (June 29, 2011, 11:37 AM), <http://www.bbc.co.uk/news/world-africa-13955751>; *French Military Air-Dropped Arms to Libya Rebels*, FRANCE 24 NEWS (June 29, 2011), <http://www.france24.com/en/20110629-french-military-confirms-airdropping-arms-libya-kadhafi-rebel#>.

78. Michael Birnbaum, *France Sent Arms to Libyan Rebels*, WASH. POST, June 29, 2011, http://www.washingtonpost.com/world/france-sent-arms-to-libyan-rebels/2011/06/29/AGcBxkqH_story.html.

79. *France Armed Rebels Besieged by Qaddafi Forces*, CBS NEWS, (June 29, 2011), <http://www.cbsnews.com/stories/2011/06/29/501364/main20075394.shtml>; Stephen, *supra* note 74.

80. *See, e.g.*, Schmitt, *supra* note 76; Norton-Taylor, *supra* note 76; Stephen, *supra* note 74.

81. *Libya: New Report Details Gaddafi Forces Abuses But Warns NTC Over Reprisals*, AMNESTY INT’L, (Sept. 13, 2011), http://www.amnesty.org.uk/news_details.asp?NewsID=19684.

82. David Smith, *Murder and Torture ‘Carried Out By Both Sides’ of Uprising Against Libyan Regime*, THE GUARDIAN, Sept. 12, 2011, <http://www.guardian.co.uk/world/2011/sep/12/murder-torture-both-sides-libyan-regime>.

83. *Id.*

suspected Gaddafi loyalists, captured soldiers and foreign nationals wrongly suspected of being mercenaries fighting on behalf of Gaddafi forces.”⁸⁴ NTC militias also “terroriz[ed] residents of ‘loyalist’ town[s].”⁸⁵ Militiamen from the town of Misrata beat and killed residents of Tawergha, a city from which Gaddafi forces launched attacks against the NTC.⁸⁶ Investigators with Human Rights Watch discovered a pit filled with 53 bodies of suspected Gaddafi loyalists who had been executed with their hands tied behind their backs.⁸⁷ Human Rights Watch has called on the new Libyan regime to investigate the killings.⁸⁸ However, “[n]o independent or credible investigations are known to have been carried out by the NTC, nor effective measures taken to hold to account those responsible for these abuses.”⁸⁹

4. Complicating Factors

Before analyzing the possibility of attribution to France, it is important to discuss several complicating factors that arise with attribution in this context. The first factor relates to the Security Council’s authorization to use force in Libya. Resolution 1973 clearly authorized member states to “take all necessary measures to protect civilians.”⁹⁰ Arguably the “all necessary measures” language could include supporting rebel groups in

84. AMNESTY INT’L, LIBYA: THE BATTLE FOR LIBYA: KILLINGS, DISAPPEARANCES AND TORTURE, 70 (2011), available at <http://www.amnesty.org/en/library/info/MDE19/025/2011/en>; Katerina Nikolas, *Human Rights Watch Reports Libya Rebels Torturing Detainees*, DIGITAL J., Oct. 2, 2011, <http://digitaljournal.com/article/312235> (detailing the conditions of the prisons where Gaddafi loyalists are being arbitrarily detained. None of the detainees has seen a judge or lawyer).

85. *Libya: Militias Terrorizing Residents of ‘Loyalist’ Town*, HUMAN RIGHTS WATCH, (Oct. 30, 2011), <http://www.hrw.org/news/2011/10/30/libya-militias-terrorizing-residents-loyalist-town>; *Libya: Militias Terrorizing Residents of ‘Loyalist’ Town – Beatings, Shootings, Deaths in Detention of Tawerghans*, ALL AFRICA (Oct. 30, 2011), <http://allafrica.com/stories/201110300004.html> (summarizing the Human Rights Watch report).

86. *NTC Will Investigate Allegations of Crimes Against Pro-Gadhafi Forces, Official Says*, CNN (Oct. 30, 2011), <http://www.cnn.com/2011/10/30/world/africa/libya-militias/index.html>.

87. *Libya: Human Rights Watch Calls on NTC to Probe Mass ‘Executions’ as 53 Bodies Are Found*, THE TELEGRAPH, Oct. 24, 2011, <http://www.telegraph.co.uk/news/worldnews/africaandindian-ocean/libya/8845636/Libya-Human-Rights-Watch-calls-on-NTC-to-probe-mass-executions-as-53-bodies-are-found.html>.

88. *Id.*; *Libya: Apparent Execution of 53 Gaddafi Supporters*, HUMAN RIGHTS WATCH (Oct. 24, 2011), <http://www.hrw.org/news/2011/10/24/libya-apparent-execution-53-gaddafi-supporters>; *Libya’s NTC Orders Probe Into Gaddafi Killing*, ALJAZEERA (Oct. 24, 2011), <http://www.aljazeera.com/news/africa/2011/10/2011102413358850809.html>.

89. *Libya: NTC Must Take Control to Prevent Spiral of Abuses*, AMNESTY INTERNATIONAL (Sept. 13, 2011), <http://www.amnesty.org/en/news-and-updates/report/libya-ntc-must-take-control-prevent-spiral-abuses-2011-09-12>.

90. Resolution 1973, *supra* note 70, ¶ 3.

their effort to protect civilians.⁹¹ However, Resolution 1973 also contained several limiting factors, including a prohibition against an occupying force.⁹² Moreover, it only *authorized* force and did not compel the members to support or arm the rebel groups.⁹³ Finally, given the fact that NATO and NATO members were not insulated from liability for collateral damage during bombing campaigns pursuant to the same authorization of force,⁹⁴ France cannot escape accountability by merely pointing to Resolution 1973.

The next complicating factor concerns the unorganized nature of the rebel forces. The NTC is the largest and most well organized rebel group in Libya; however, many rebel forces in the country are not part of the NTC.⁹⁵ Given that there are several other active militia forces, it might be difficult to attribute the specific human rights violations to a specific rebel group, much less trace the violations back to French support.⁹⁶ While tracing specific violations is an extremely important issue with state attribution, this Note will only tangentially engage with this problem as this implicates more of a factual inquiry than a legal one.⁹⁷ For the purposes of this paper, I will assume that it is possible to trace the human rights violations to a specific group and examine the legal implications if that group is part and parcel of the NTC.

Attribution is also problematic because France was operating, in large part, as a member of both NATO and the United Nations. Many of its acts of support were carried out in tandem with American and British forces.⁹⁸ For instance, French assistance during the assault on Tripoli was also

91. *See id.*

92. *Id.* ¶ 4.

93. *See id.*

94. This case also implicates a question of international organization[?] responsibility for attacks. However, it seems pretty clear that both NATO and the accused states are jointly and severally liable for any criminal act. For this reason, I will not discuss NATO's liability, just France's. For a discussion of NATO's responsibility, see generally Kristen E. Boon, *New Direction in Responsibility: Assessing the International Law Commission's Draft Articles on the Responsibility of International Organizations*, 37 YALE J. INT'L L. 1 (2011), available at <http://www.yjil.org/online/volume-37-spring-2011/new-directions-in-responsibility-assessing-the-international-law-commissions-draft-articles-on-the-responsibility-of-international-organizations>.

95. *See* Steven Sotloff, *Libya's Long Endgame: Which Rebels Are Exactly Gaining on Gaddafi in Tripoli?*, TIME, Aug. 21, 2011, <http://www.time.com/time/world/article/0,8599,2089680,00.html>. (discussing the independent rebel forces and the NTC attempts to gain control over its field units).

96. *See id.*

97. A major point of this Note is that the legal regime is so ill-suited to respond to negligent support that the specific violations are irrelevant.

98. *See* Maria Golovnina, *France Says NATO Must Do More in Libya*, REUTERS (Apr. 12, 2011), <http://www.reuters.com/article/2011/04/12/us-libya-idUSTRE7270JP20110412> ("NATO took over air operations from a coalition of the United States, Britain and France.").

supplemented by American and British tactical air support and planning.⁹⁹ Thus, most instances of actual military support from France were part of a coordinated effort including several other states.¹⁰⁰ Again, the exact level of French involvement in the military strikes will be a factual question, separate from the legal inquiry regarding state attribution. For the purposes of applying the legal tests to French attribution, I will try to mitigate this problem in three major ways. First, I will focus on the actions of arming, training, and planning attacks more than the act of providing air support, as they are more relevant to the question of “control.” Second, I will assume that in any strike where French planes were involved that they indeed participated in the attacks and helped achieve NATO’s intended result. Finally, where the level of involvement is questionable, I will err on the side of attributing more rather than less involvement.¹⁰¹

III. FRENCH LIABILITY

A. Effective Control Test

The effective control test begins with an initial demarcation between two distinct types of non-state actors that receive state support. The first group completely depends on the state for money, equipment, and support, while the second group maintains a substantial amount of autonomy. Based on the available information, it seems that the NTC and other rebel groups received support from France in the form of weapons, munitions, and food.¹⁰² The rebels, however, were not completely dependent on France for materials or air support; the rebels were able to acquire weapons and arms from other sources.

It appears much more likely that the NTC-France relationship would fall under the second category set forth in *Nicaragua*. While the rebels received significant French support, they seemed to have a substantial amount of autonomy.¹⁰³ France helped plan missions,¹⁰⁴ but they did not order the rebels to engage in them. Thus, in order to attribute the NTC’s

99. See e.g., Lopez, *supra* note 75 (stating that NATO aircrafts did heavy bombing).

100. See *id.* (stating that NATO coordinated its efforts with the rebels in the attack on Tripoli).

101. Again, this Note contends that the exact depth of support is not relevant to the current legal inquiry.

102. Pineau, *supra* note 77.

103. While the ICJ in *Nicaragua* found that actions of this second group were always attributable to the state when examining a violation of Article 2(4) of the U.N. Charter, in the present case Resolution 1973 clearly authorized the violation of Libya’s sovereignty. Therefore, the Article 2(4) inquiry is irrelevant.

104. See Stephen, *supra* note 74 (discussing the role of French and British troops in helping rebels plan assaults).

actions to France under the *Nicaragua* test, the trier of fact must find that France had “effective control of the military or paramilitary operation *in the course of which* the alleged violations were committed.”¹⁰⁵ First, it must be shown that France had “effective control” over the NTC. Based on the current intelligence, it seems that France did provide small arms and rocket-propelled grenades, in addition to providing military training and advice. As we learned from *Nicaragua*, however, neither picking a group’s leaders nor training and equipping the forces are enough to meet this requirement. Yet France also used its own military weapons in support of the rebels, which would point toward a greater degree of support than that in *Nicaragua*.

Assuming that the NTC-France relationship was more than the “partial dependency” found in *Nicaragua*, the court would still have to find that France had “effective control” with regard to the specific human rights violations.¹⁰⁶ To prove this control, it must be shown that France “directed or enforced the preparation of the acts contrary to human rights and humanitarian law.”¹⁰⁷ France needs to have exercised its control over the NTC with respect to the specific unlawful conduct.¹⁰⁸ Thus, to attribute the NTC’s actions to France, we must examine the specific human rights violations and determine whether France ordered or directed the action.

The alleged human rights violations can be demarcated into three major categories: heat of combat crimes, “targeting,” and crimes committed while acting in a custodial capacity. For the first category of crimes, France would have to exercise control over the rebel forces in the course of which the human rights violations were committed during combat.¹⁰⁹ France would exercise this control if it issued orders or directed the rebels to engage in the attacks.¹¹⁰ There is considerable evidence that France helped train the rebels and may have helped them in planning the attacks against Gaddafi’s forces.¹¹¹ However, this coordination and assistance only rises to the same level found factually insignificant in *Nicaragua*.¹¹² Still, France

105. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J.14, at 115 (June 27) (emphasis added).

106. *Id.*

107. *Id.* See also Amanda Tarzwell, *In Search of Accountability: Attributing the Conduct of Private Security Contractors to the United States Under the Doctrine of State Responsibility*, 11 OREGON L. REV. 179, 194-96 (2009).

108. See Tarzwell, *supra* note 107, at 194-96.

109. See *id.* at 196.

110. See *Nicar. v. U.S.*, 1986 I.C.J. at 115 (discussing the appropriate degree of control required in the U.S.-Nicaragua case).

111. See, e.g., Schmitt, *supra* note 76.

112. See *Nicar. v. U.S.*, 1986 I.C.J. at 116 (determining that the assistance given by the U.S. was

also provided air support and softened military targets for the rebels prior to attacks.¹¹³ This support is much closer than that in *Nicaragua*. France's coordination and planning, coupled with its ability to provide air support, probably rises to a much higher level of control and dependence. Yet, based on the available evidence, there is no proof that France issued orders to the rebels or directed them to act during the raids.¹¹⁴ Since the *Nicaragua* test requires a higher degree of control and coordination between the state and rebels,¹¹⁵ the actions of the NTC would not attach to France.

The second set of actions, what I term as "targeting," refers to the act of seeking out suspected or actual Gaddafi supporters and abducting, torturing, and murdering them. For these crimes, there is no evidence of direct French support, planning, or assistance. French soldiers and observers may have been negligent in not curbing or preventing these attacks, but there is no evidence that they directed or issued orders to commit these crimes. Similarly, there is no evidence that France authorized or ordered any torture or violence against prisoners captured by the rebel forces. Thus, the second and third sets of actions cannot be attributed to France either.

France's significant air support, supply of arms, and logistical assistance do not rise to the level required under the "effective control" test.¹¹⁶ While there is a much stronger argument for attribution in the "heat of battle" crimes, the *Nicaragua* test requires such a high level of specificity with respect to the violations that France will not be held accountable.

B. Overall Control

The first inquiry under the effective control test is whether the person or group of persons that committed the actual violation were part of an organized, hierarchal structure or merely private individuals ordered to commit illegal acts on the government's behalf.¹¹⁷ This question matters a great deal. If the violators were found to be individuals and not truly part of an organized force, then the test would be very similar to the "effective

not of such a degree that the *Contras* were subject to the U.S., such that their acts would be attributable to the U.S.).

113. Stephen, *supra* note 74.

114. Indeed, no article mentions any level of control above that of "assistance" by France.

115. See *Nicar. v. U.S.*, 1986 I.C.J. at 115 ("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.").

116. See *id.*

117. *Id.*

control” test.¹¹⁸ However, in this case, it is clear that several of the alleged violations were purportedly committed by the NTC.¹¹⁹

The next question under this test turns to whether France enjoyed “overall control” over the NTC. Unlike the previous test, it must only be proven that France generally had control over the NTC’s operations.¹²⁰ This test, while less demanding than “effective control”, still requires more than “mere financing,” “equipping,” and “supervision of military operations.”¹²¹ Here, there is an argument that France’s air support and assistance is greater than the other, less-involved acts of financing and planning. However, the term “overall control” suggests that France was in some way able to order or instruct the rebels to behave in a certain way. While the supporting state need not have ordered the rebels to engage in the specific bad act, a state in control of a group should be able to compel the actors to behave in a certain way from time to time.¹²² However, there is no evidence that French troops or soldiers issued orders or commands to the rebels, much less that they followed them. Without more evidence, it appears that the NTC’s actions would not attach to France even under this much more expansive notion of state accountability.

C. ILC Article 8

Finally, for Article 8 of the ILC to attach responsibility to France, it must be shown that the NTC rebels (1) acted under the state’s instructions, (2) France directed the rebels to act or (3) France exercised control over the NTC.¹²³ As discussed above, these three components are very similar to “effective control” and require the state direction, orders, and control relate to the specific violations. Just as attribution would not attach under the “effective control test,” the ILC requirements are clearly not satisfied here.

Looking at the three major tests of state accountability, it is clear that under the current legal framework France will not be held accountable for the NTC’s action. Even though France gave the rebels guns, munitions, supplies, training, and air support, it will not face any legal repercussions for putting the rebels in a situation to commit these violations. In fact, it

118. *See id.*

119. While it might be the case that every human rights violations was committed by individuals acting alone in Libya, most of the intelligence points to members of the organized NTC.

120. *See Nicar. v. U.S.*, 1986 I.C.J. at 115.

121. *See id.*

122. *See, e.g.*, Kjetil Larsen, *Attribution of Conduct in Peace Operations: The ‘Ultimate Authority and Control’ Test*, 19 EUR. J. INT’L L. 509, 522 (2008) (discussing varying levels of state control).

123. *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, *supra* note 57, art. 8.

seems that unless France had specifically ordered the human rights violations or at least was able to order the rebels in other scenarios, the scope and magnitude of support as well as the group's reputation for human rights violations is irrelevant.

IV. ARGUMENTS FOR AND AGAINST GREATER ACCOUNTABILITY

The current legal framework's inability to hold France accountable implicates several normative questions regarding the level of state accountability. Arming rebel groups can lengthen the duration or even worsen the severity of conflict. Moreover, the current framework allows a state to fund, arm, and train rebel groups that have terrible human rights records. In fact, whether a state knows or should know that a rebel group will or intends to commit human rights violations is irrelevant under these standards. It seems that a state can give weapons to a group that openly vows to commit mass human rights violations and escape liability so long as it does not "control" or direct these specific violations. Thus, even though a state helps rebel groups commit human rights violations, the state is completely insulated from punishment.

Given these problems of accountability, should state attribution be expanded to apply to circumstances where the state knew or should have known that the group would commit human rights violations? After all, Amnesty International warned that the NTC rebels might commit such violations and France knew the risks of support. Should France be punished for ignoring or dismissing this warning when that risk is realized? Supporting a group prone to commit human rights violations is functionally very similar to funding and then asking a group to go and commit these same violations. Moreover, in the criminal law context we assume that a person intends the natural consequences of their actions. However, in this context, the state must not only intend, but also actively direct this violation to occur.

In the context of negligent support, the framework is a woefully inadequate tool for holding states accountable. However, before condemning the current system, it is important to recognize that arguments for increasing accountability to cover "negligent support" have their own normative, legal, and pragmatic values and costs. Furthermore, there are significant political hurdles to implementation, which could block any meaningful alteration to the current legal framework.

A. Is More Accountability "Good" or "Bad"?

Clearly, attaching state liability for "negligent support" would more

readily allow courts to hold states accountable when they support violators of human rights. As the Court said in the *Tadic* case, state attribution exists to “prevent States from escaping responsibility by having private individuals carry out tasks that may not or should not be performed by State officials.”¹²⁴ Allowing states to hide behind such high bars as “effective” or “overall” control frustrates this goal considerably. A less demanding standard would lower these bars and hold states accountable when their support produces foreseeable harms.

Moreover, a different standard might encourage states that are supporting rebel groups to acquire greater control over these groups, which would limit human rights violations. The current legal framework creates a strong disincentive against control, since the only time attribution attaches is when a state actually has control. Thus, states are encouraged not to exert control even if acquiring control meant that they could curb violations. Removing the “control” requirement would provide the opposite incentive. Since states now know that they are going to be held accountable for the actions of their rebels, they have a strong incentive to prevent any and all criminal actions.

Finally, a greater level of accountability would prevent some states from supporting rebel groups in the first place. Currently, rebel groups are attractive to states because they are cheaper than conventional forces and carry a lower risk of attribution. Partially for these reasons, states have supported rebel groups and carried out proxy wars. This incentive to support, however, not only leads to greater instability but could also prolong the conflict. A new rule of accountability would make supporting a rebel group a much less attractive option.

Despite the significant benefits of a less demanding standard for attribution, there are several non-trivial costs as well. First, while curbing support of non-state actors might help protect human rights by limiting the ability of rebels to harm civilians, it might also dampen efforts at human rights protection. In fact, increased risks of attribution could have a chilling effect on humanitarian aid. If states are to be held accountable for the actions of the groups that they support, they might be hesitant to support any non-state actor, even those that provide food and medicine to civilians. Since it seems that any new model of accountability would take into account the difference between supporting armed groups and groups that provide aid, it is unlikely that states would be overly concerned with the liability that comes from supporting organizations that only supply aid. However, a problem arises when groups do both. Some armed groups also

124. *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, 117 (July 15, 1999).

provide aid or even defend civilians against the state. This was the case in Libya. While the rebels in Libya may have violated international law, they also toppled a violent dictator and may have defended civilians from further government repression. Is this something the law should support or discourage?

A broader level of state responsibility would reduce the likelihood that armed rebels receive state support in the future. If this rule had been in place in 2011, it is possible that France would not have armed the NTC at all, especially given the warnings that rebels in Libya might commit human rights violations. Instead, the NATO forces might just have stuck to an air campaign designed to protect civilians. However, it is unclear whether NATO would still have been successful without the benefit of well-armed and trained rebels acting on the ground. Still, given the significant number of human rights violations committed by the rebels and the resulting instability in the country, it is hard to say that, even in this extraordinary situation, supporting rebel groups against a violent state has more benefits than harms from a human rights perspective. The possibility that states will be hesitant to fund aid groups that also have an armed wing cuts, at least in theory, against greater attribution.

B. Is More Accountability Politically Feasible?

While the normative question of whether a different standard for state accountability is an important one, increased state liability might be politically infeasible. Indeed, a tremendous problem with expanding accountability is that it would be highly contentious and would have significant difficulties in becoming law. First, states are hesitant to increase their own level of accountability and would not want to take on the extra liability for negligent support without some strong countervailing incentive. On top of this reason, many politically powerful states support non-state actors to advance their interests around the world. It seems unlikely that states would want to make themselves even more accountable for this support. Also, attributing state responsibility for the actions of non-state actors would implicate questions of sovereign immunity that could frustrate any real benefit from increased attribution.¹²⁵

The situation in Syria illustrates another example of why states would not want to increase state attribution. At the time of writing, it is quite clear that there is a human rights crisis in Syria; al-Bashar is brutally cracking

125. For a discussion of the problems posed by sovereign immunity in international law, see Ronald J. Bettauer, *Germany Sues Italy at the International Court of Justice on Foreign Sovereign Immunity Act*, AM. SOC. OF INT'L L., Nov. 19, 2009, at 3-4.

down on dissidents and killing civilians. However, it is also clear that Russia and China will block any Security Council authorization and, even if they did not, the presence of Iran would significantly limit the possibility of conventional military intervention.¹²⁶ Thus, one of the most practical routes for states that want to stop human rights abuses might be to arm the rebels.¹²⁷ Yet, the situation in Syria becomes more complicated when one considers the fact that relatively little is known about the rebels and that there are even accusations that al-Qaeda operatives are fighting alongside them.¹²⁸ Therefore, a state that wants to protect civilians in Syria by supporting the rebels would face a serious risk of legal liability despite its best efforts to prevent human rights violations. Similar to the situation in Libya, the state's actions would be, at least nominally, designed to protect civilians and prevent human rights violations. Given that this new standard of state attribution could possibly lead to legal liability for a state whose sole intention is to help civilians, even states that are more concerned about protecting human rights would not be completely behind this principle.

The problem of attaching state liability in the humanitarian intervention context is a considerable one, both normatively and legally. The international response to the NATO intervention in Kosovo illuminates one possible route to mitigating this problem. During the breakup of the Former Yugoslavia, NATO intervened in Kosovo without prior authorization from the Security Council, which violated international law.¹²⁹ The Security Council, nonetheless, did not punish NATO in recognition of the serious threat to civilians and need for action.¹³⁰ This case suggests that some actions that violate the letter of the law should nonetheless not be punished. Specifically, we should not punish acts that are "legitimate" because they are necessary to prevent greater harm.

A similar exception could be imposed in the state support context. Indeed, there are times when arming untested, unorganized rebels might be a necessary risk to put down an overwhelmingly strong threat to civilian lives. As mentioned above, even though there are serious humanitarian

126. See Walter Russell Mead, *The Wilsonian World Order Has Once Again Been Postponed*, THE AMERICAN INTEREST (Oct. 5, 2011), <http://blogs.the-american-interest.com/wrm/2011/10/05/the-wilsonian-world-order-has-once-again-been-postponed/>.

127. Putting Article 2(4) inquiries aside.

128. See, e.g., JONATHAN MASTERS, COUNCIL ON FOREIGN RELATIONS, AL-QAEDA IN IRAQ (2012) ("[T]op U.S. intelligence officials have also brought attention to a flow of AQI fighters over the border into Syria where they will likely take up arms against the regime of President Bashar al-Assad"), <http://www.cfr.org/iraq/al-qaeda-iraq/p14811>.

129. See generally Daniel Joyner, *The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm*, 7 EUR. J. INT'L L. 597 (2002).

130. See *id.*

risks to arming rebels in Syria, it seems that the risk of not arming rebels could be even greater. While this “illegal but legitimate” route is attractive in that it would allow more intervention, there is a risk that it would politicize the state support issue even more. After all, this exception would not be based on law but on something outside of the law.

C. Are There Other Routes to Accountability?

Since most states would not increase their liability, those seeking to hold states accountable could turn directly to the courts, hoping they could innovatively construe the law on state attribution. This judicial “activism” creates a considerable legitimacy problem. As seen in the *Ferrini* case, judicial outliers often can advance a doctrinal position through groundbreaking rulings.¹³¹ The considerable pushback against this ruling, however, makes clear that actions against states are not legitimate unless that state has consented.¹³² Indeed, courts that attempt to push the law beyond the point agreed upon by states will face an uphill battle. After all, states are sovereign entities and should be treated as such unless they have consented to a court’s authority. Moreover, the ICJ is generally conservative and unlikely to attempt to impose a new rule of accountability. Indeed, any new way of establishing accountability will experience a significant amount of resistance. Finally, courts and tribunals are usually made up of appointed and unelected judges, which would implicate problems of democratic accountability since these actors would have a considerable control over important foreign policy considerations.¹³³

Since relying on judicial outliers to push the doctrine in a new way is not politically feasible, concerned states might be able to hold violators accountable by imposing foreign policy costs on them. Initially, these punishments would probably be based on ad hoc conceptions of what each state believes the law on state accountability should be and would also be influenced heavily by exogenous considerations such as economic relations and military alliances. Thus, the imposition of these punishments would probably be far from uniform. Over time, however, a pattern of condemnation might emerge that could then point to a new functional framework of state accountability. This route to accountability would rely heavily on individual and groups of states being willing to impose some form of sanctions or punishments against the violating states. It would also,

131. See MIKE CORDER, *World Court Upholds Germany Immunity in Nazi Cases*, YAHOO! (Feb. 3, 2012), <http://news.yahoo.com/world-court-upholds-german-immunity-nazi-cases-102040610.html>.

132. See *id.*

133. See Curtis Bradley, *The Costs of Human Rights Litigation*, 2 CHI. J. INT’L L. 464, 465 (2001) (discussing the legitimacy problems posed by judges in international human rights litigation).

at least partially, require the punishing states to put aside their short-term self-interest in many scenarios by forcing them to suffer the reciprocal costs of sanctions. Nonetheless, this route might be the best option because of the considerable obstacles to all other routes to change

CONCLUSION

France's support of the NTC highlights a gaping problem in the current legal framework regarding state accountability. The international system was designed based on the notion that states are the basic and most important actors in the system. Thus, most models of accountability and punishment are either at the state level or the individual level, they do not contemplate the interplay of both state and non-state actors. However, non-state actors, especially armed rebels, have become increasingly important players on the world stage. While they are not *de jure* arms of the state, states have been using them for some time as important tools for affecting foreign policy. The current difficulties associated with state attribution for supporting rebel groups reflect this myopic focus on non-state actors "acting" like arms of the state. Indeed, the three legal tests all required some level of control analogous to the control that a state has over its agents.

While this inability to respond to new developments means that state support of human rights violators will often go unpunished, there are few prospects for change over the short term. States are extremely hesitant to take on increased levels of liability and courts suffer from a profound lack of legitimacy and accountability when they attempt to impose new standards on states. Perhaps the best route for achieving a greater level of state accountability is still politics and diplomacy.