

CAN NATIONS “PURSUE” NON-STATE ACTORS ACROSS BORDERS?

By Lionel Beehner

This past fall 2010, tensions between Pakistan and the United States reached a climax after the latter carried out counterterrorism attacks in “hot pursuit” of Taliban militants. To protest such cross-border incursions and the accidental killing of three of its border guards, Pakistan temporarily closed an important supply border crossing and even secured an apology from Washington. The Pakistani government claims these attacks are a violation of its state sovereignty. “Our policy is very clear,” a Pakistani Foreign Office spokesman told reporters. “We will never allow any foreign boots on our soil. This is one of our red lines and the international community including the U.S. knows about it.”

Yet U.S. infringement on Pakistan’s territory is hardly a new trend, much less a red line in the sand of any sort. In fact, these kinds of cross-border attacks stretch back to 2003, during the early stages of the Afghan war. After a shootout between a Pakistani border scout and a U.S. soldier in January of that year, F-16 warplanes dropped a 500-pound bomb on an abandoned *madrassa*, where the border guard had reportedly fled. Pakistan, of course, was similarly outraged then, but it is widely known that cross-border incursions by U.S. forces largely have the Pakistani government’s tacit approval. Besides, such “hot pursuit” raids have emerged as a norm in the international arena and the laws of armed conflict. Indeed, the phrase’s use in international affairs is growing, given the borderless nature of today’s enemies, from terrorists to drug traffickers, not to mention states’ growing inability – and sometimes unwillingness – to control these combatants.

The phrase, as interpreted in its modern incarnation, provides legal wiggle-room for states to cross into other states to pursue non-state actors. These actors – be they terrorists, rebels, pirates, warlords, or drug barons – have committed a crime on the territory of the pursuing state and have then fled to another for safety. Some

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governments interpret the phrase more broadly to justify larger cross-border incursions or even limited air strikes.

Turkey, for instance, has invoked the phrase repeatedly to justify its cross-border incursions against Kurdistan Workers Party (PKK) camps in northern Iraq. Colombia used the phrase to provide legal cover for its February 2008 raid against FARC rebels holed up in Ecuador. During the early phases of the war in Iraq, a few officials in Washington suggested that U.S. forces carry out raids or launch air strikes against Islamic militants holed up across the border in Syria.

Indeed, military honchos say "hot pursuit" is becoming just another component of the U.S. rules of engagement, which spell out when, where, and how force can be applied. As Army Lt. Gen. Douglas Lute (former President George W. Bush's "war czar") told the Senate Armed Services Committee in March 2007, U.S. forces do not need the approval of the Pakistani government "to pursue, either with fires or on the ground, across the border." According to a classified 2005 memo released a few years ago by Wikileaks, U.S. forces were also apparently authorized to enter Iran and Syria to "pursue" insurgents. This policy was further substantiated by a declaration by President Bush in January 2007, which called for terrorist networks within those Middle Eastern countries to be actively sought out and destroyed. The use of "hot pursuit" was clearly gaining traction as a legitimate counterterrorism tactic.

Of course, such cross-border attacks are nothing new in international relations. Throughout history, states have routinely violated the sovereignty of other nations with impunity, from when U.S. forces pursued Vietcong guerrillas in Cambodia to attacks by Rwanda's Tutsi-led military on Hutu militants across the border in Congo. Stretching further back, the U.S. military didn't think twice about crossing into Mexico to chase down Pancho Villa in 1916, in response to his raid of New Mexico.

But the growing use of this principle raises touchy issues concerning territorial sovereignty and may open a dangerous legal can of worms. Some legal scholars say it is a bastardization of an old law of the sea, which allows ships on the high seas to pursue and overtake other ships if a crime is committed on the former ship's sovereign waters. They remain unconvinced that the principle carries any legitimacy on land. Any armed incursion that violates another state's territorial borders and is not in self-defense or sanctioned by the UN Security Council constitutes an act of war, clear and simple.

As an extension of this, some argue that rather than limiting the size of conflicts, "hot pursuit" may be misinterpreted by governments as a provocation that could spark wider wars or lend greater legitimacy to nations that launch preemptive strikes under the legal mantle of "anticipatory self-defense." Another concern is that the doctrine, if implemented on a more formal or wider scale, might fully supplant other legal channels, such as the extradition process. After all, there are already indications that this is happening. What is the incentive to wait around for Iraqi Kurds to arrest and extradite PKK rebels to Turkey or for Venezuela to extradite FARC rebels to Colombia if a more expedient alternative already exists?

Given these uncertainties, it seems international law may need some amending to reflect modern realities – to incorporate "hot pursuit," but within formal guidelines. Indeed, the

high seas may be an apt metaphor to describe the rugged hills of northwest Pakistan or Iraqi Kurdistan – lawless frontiers where armed rebels can safely carry out cross-border attacks against civilian populations with impunity. Under certain circumstances, “hot pursuit” can be a necessary and legitimate response to violent non-state actors, provided the response is immediate, proportional, and a means of last resort. Yet the principle should complement, not replace, other legal channels. The United Nations should spell out specific ground rules, including where, when, and under what circumstances “hot pursuit” is allowed, to prevent countries from invading their neighbors willy-nilly.

At the same time, terrorists or armed rebels, much like ships at sea, should not be allowed to cross state boundaries to escape justice. Likewise, governments have a legal obligation to prevent their territories from becoming terrorist safe havens. Prior to 9/11, only a government that exhibited “effective control” of a group within its borders was found liable for the group’s crimes. That explains why the International Court of Justice found that Nicaragua was not responsible for funneling arms to El Salvador-based guerrillas in the 1980s. Yet with the U.S.-led overthrow of the Taliban in 2001, the “effective control” principle was, in effect, tossed out the window. UN Security Council Resolution 1373, passed shortly after 9/11, required that states “deny safe haven to those who finance, plan, support, or commit terrorist acts.” And now, the threat of “hot pursuit” could help give the resolution some teeth.

States should not have to sit by idly while terrorists enjoy sanctuary in neighboring states. Sovereignty, after all, confers rights as well as responsibilities. Among the latter is preventing violent groups from setting up shop within one’s sovereign borders. Just as Iraqi Kurdistan and Ecuador are liable for the actions of the PKK and FARC respectively, Pakistan is responsible for the actions of terrorist networks operating from its territory. Until its regions are no longer feeding grounds for violent extremists, the U.S. military will – and should – take the fight to the enemy there. And it has every legal right to do so. ■