On the evening of September 11, 2001, President George W. Bush announced that in reacting to the calamities of that day, the United States would “make no distinction between the terrorists who committed the attacks and those who harbor them.” In so declaring, the President voiced the first (and less well known) component of the “Bush Doctrine.”

A rethink of the rules of international law, the Bush Doctrine is better known for advancing a theory of “preemptive” use of military force against feared – as opposed to actual – adversaries. The implications of that strategy continue to play out in the streets of Iraq. However, in equating support for terrorists with terrorism itself on September 11, Bush presented an equally radical and perhaps even more far-reaching challenge to conventional international law. The immediate consequence of Bush’s announcement was the invasion of Afghanistan, a country at the time governed by the Al-Qaeda-harbouring Taliban. Its more distant progeny, however, may well be the recent conflict in Lebanon.

While he certainly does not make the latter claim, Tal Becker’s review and analysis in his magisterial book supports this possibility. Becker’s work focuses on “state responsibility,” which refers, loosely speaking, to the general remedy principles in international law. His project can be summarized, simply, as an inquiry into the circumstances in which the actions of non-state terrorist actors engage the responsibility of states for the wrongs done by those terrorists. This is no minor question. As Becker observes, in the pre-9/11 era, terrorism was largely a product of state sponsorship, with terrorists often serving as proxies for states in various geopolitical machinations. Tying the acts of terrorists to their state patrons was a relevant and – at least legally speaking – relatively simple task. The rules of state responsibility easily accommodate principles of agency, and thus link terrorists to those states for whom they act.
The post-9/11 era is different. Al-Qaeda found shelter in the Taliban’s Afghanistan, but as Becker notes, they were not the Taliban’s proxies: “[T]he United States and its allies never expressly advanced the argument that the Taliban regime directed or controlled the actions of Al-Qaeda or adopted Al-Qaeda conduct as its own, thus satisfying standard agency criteria for attribution of private acts” to states under the rules of state responsibility.² It therefore contorts law and fact to view Al-Qaeda as Afghani agents in the attacks of 9/11. Yet the international community moved swiftly in supporting massive military action against Afghanistan, culminating in the displacement of the Taliban from government.

From this latter fact, Becker deduces a shift in the law of state responsibility, at least in the area of terrorism. This new state practice is, however, uncertain, and the exact circumstances in which terrorists will be conflated with the states who harbour them unclear. State inadequacies in the area of anti-terrorism are not all equal. On one end of the spectrum are classic state sponsors – Iran’s relationship with Hezbollah, for example. On the other are failed states on whose territory terrorists thrive, but whose capacity to forestall this presence is nonexistent. Somalia, for instance, is in no position to regulate the actions of terrorists on its territory. Are both these sorts of states equally remiss? The Bush Doctrine as explicated to date is silent on this question.

Becker’s main task, therefore, is to layer onto state practice post-9/11 a proposed new legal paradigm for assessing state responsibility for the violence committed by private actors. The model he chooses is a negligence-like theory of causation – that is, attribution of responsibility to a state where the terrorist action would not have occurred “but for” the state’s action or inaction.

Becker urges that a causal approach to attributing terrorist actions to states provides a more sensible explanation of the post-9/11 response than conventional agency analyses:

[T]he Taliban’s persistent violations of its legal [anti-terrorism] duties created the environment in which the planning and execution of Al-Qaeda’s terrorist activity became possible. … The Taliban represented the proverbial firefighter who is obligated to extinguish the blaze, but chooses instead to join forces with the arsonist, both watching as he ignites the blaze and helping ensure that it is safe for him to do so.³

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² Ibid. at 217.
³ Ibid. at 349.
As already suggested, the reaction to the Taliban’s delinquency – and the Al-Qaeda attacks that followed – was Operation Enduring Freedom, the armed assault against the Taliban still unfolding in Afghanistan to this day. It is in this fact – delinquency constituting a justification for war on the de facto government of a state – that Becker’s otherwise elegant theory is most alarming. To be certain, Becker proposes tempering with policy considerations his approach to attribution founded on “but for” causation. Not least, he is careful to note that the remedy enforceable against a responsible state must correspond to other rules of international law. Chief among these are the rules specifying circumstances in which armed force may be used against another state. Put simply, other than when authorized by the UN Security Council, force may only be deployed in self-defence as specified in the Charter of the United Nations – that is, in response to an “armed attack.” International law is also clear that the act of self-defence must be necessary and proportional.

Becker rightly observes that these use of force rules are a lex specialis, to be addressed independently of any question of state responsibility (as derived from his causation model, or otherwise). But critically, in that lex specialis, self-defence has never before been justified simply because a state’s delinquency lies somewhere along a causal chain leading to an armed attack. In the words of the International Court of Justice, “[A]n armed attack must be understood as including not merely action by regular armed forces across an international border, but also the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to (inter alia) an actual armed attack conducted by regular forces, or its substantial involvement therein.” The point should be underscored: an “armed attack” attributable to the state requires the actual sending by or on behalf of the state, not simply delinquency in policing what goes on within a state’s territory.

Meanwhile, the most authoritative rendition of the law of state responsibility – the 2001 draft articles on state responsibility prepared by the UN International Law Commission – rejects use of force as a legitimate countermeasure that may be employed by one state in response to the plain vanilla breach of international law by another. Put another way, a state that simply fails to meet its counter-terrorism

6 Reproduced in Official Records of the General Assembly, Fifty-sixth Session,
obligations under international law (and nothing more) cannot, as a consequence of that failure, be attacked by another state in self-defence. And yet, it was exactly this sort of failure that lies at the beginning of the chain of causation that, under Becker’s theory, produced Operation Enduring Freedom.

In deploying his causation approach to explain the Afghan war, Becker therefore conflates the existence of a causal link between the state and the act of terrorism with a pretext for war in the international law of armed conflict. His causality theory renders easier coercive responses to terrorism undertaken in the name of terrorism and directed at states themselves. It gives legal nuance to the Bush Doctrine, at the risk of giving armed force against terrorist-hosting states a legitimacy in anti-terrorism responses.

Becker may be right in suggesting that conventional rules regarding the use of force are inadequate in an era of contemporary terrorism. After all, Al-Qaeda operates on a scale and with a level of violence very different from, say, the hijackers at Entebbe. It is exactly for this reason that the atrocities of 9/11, although perpetrated by a private actor, are widely regarded as an “armed attack.” As such, use of force in self-defence against Al-Qaeda itself should be uncontroversial, so long as the requirements of proportionality and necessity are observed. That exercise of self-defence may require military responses mounted within the territory of another state, for instance Afghanistan. Unless the terrorist act is attributable to the state itself, however, those attacks should be limited to the terrorist organization and not extended to the institutions of the host state. That is a vision shared by many scholars canvassed by Becker, at least in the pre-9/11 era. It should remain firm doctrine.

Afghanistan is the easy case. Few mourn the passing from power of the Taliban and most are anxious about its recent resurgence. Imagine, however, the application of the new doctrines of self-defence, infused by the causality standard, to Lebanon. Hezbollah forces in southern Lebanon attack Israel on a scale plausibly labeled an “armed attack”, triggering an Israeli right to self-defence. Conventional international law would imagine a proportional response directed against Hezbollah assets. However, the Lebanese government has clearly failed to meet its obligations to suppress terrorism in the south of the country. Much of this failure stems from the fragility of the Lebanese state. But it is also true that Hezbollah enjoys political representation and influence in the government. It possibly operates with more impunity than would be the

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7 Supra note 1 at 163 et seq.
case under a more determined government. Under a strict “but for” causality analysis, Hezbollah’s attacks against Israel may, therefore, be attributable to Lebanon. If this causality approach is incorporated into the understanding of armed attack, the state of Lebanon itself becomes a legitimate target in the exercise of self-defence. The net result is to legalize a wider war, including (possibly) regime change.

Expanding the circumstances in which armed force may be deployed is not what international law has tried to do over the last 60 years. It would be disastrous if the struggle against terrorism were to become the thin edge of the wedge in the unraveling of vital constraints on the exercise of state violence. While the threat of catastrophic terrorism looms large in the twenty-first century, the lessons of the twentieth century should not be lost: the body-count attributable to wars between states dwarfs that associated with violence by non-state actors.

Becker’s book is, therefore, a tour de force in the literature on state responsibility. His scholarship is impeccable. How his proposed doctrine would be applied in the real world remains, however, a troubling question.