TERRORISM AND THE STATE

Today's terrorists possess unprecedented power, but the State still plays a crucial role in the success or failure of their plans. Terrorists count on governmental inaction, toleration or support. And citizens look to the State to protect them from the dangers that these terrorists pose. But the rules of international law that regulate State responsibility for preventing terrorism were crafted for a different age. They are open to abuse and poorly suited to hold States accountable for sponsoring or tolerating contemporary terrorist activity. It is time that these rules were reconceived.

Tal Becker's incisive and ground-breaking book analyses the law of State responsibility for non-State violence and examines its relevance in a world coming to terms with the threat of catastrophic terrorism. The book sets out the legal duties of States to prevent, and abstain from supporting, terrorist activity and explores how to maximise State compliance with these obligations.

Drawing on a wealth of precedents and legal sources, the book offers an innovative approach to regulating State responsibility for terrorism, inspired by the principles and philosophy of causation. In so doing, it presents a new conceptual and legal framework for dealing with the complex interactions between State and non-State actors that make terrorism possible, and offers a way to harness international law to enhance human security in a post-9/11 world.

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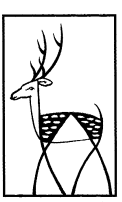
Terrorism and the State

Rethinking the Rules of State Responsibility

TAL BECKER



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To Palti,
who taught a young man about responsibility

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Tal Becker,
November, 2005

Contents

1

Introduction

1.1 TERRORISM AND THE STATE

Today's terrorists operate beneath the radar of the international system that they threaten. They can engage in State-like violence without bearing the burden of State-like responsibility.

The immediate perpetrators of these terrorist acts are not identifiable government officials but obscure non-State actors that are often indistinguishable from the civilian population within which they operate. They are private individuals, acting in the shadows, but they undermine human security across borders and cultures like never before.

Unlike the terrorists of previous decades, many of today's terrorists can operate transnationally without direct State sponsorship. They can function as diffuse networks rather than hierarchical organizations. They can engage in large-scale, indiscriminate and recurring violence with undeterrable conviction. Civilians feel deeply threatened, but they cannot easily identify the source of that threat. It has no fixed address. It offers no easy target for a response.

In some respects, this form of terrorism presents a new kind of problem for international law. For much of its history, international law has been preoccupied with State abuse of its sovereign privilege, rather than with the threats posed by large-scale private violence. The rules regulating the use of force have traditionally sought to restrict the threat posed by one State against the territorial integrity of another. The international human rights regime has primarily sought to protect citizens from maltreatment and exploitation at the hands of their own government.

These were, and remain, weighty challenges. But in each case the law has had the benefit of knowing in which direction to point the blame. It has been able to promote rules against fixed sovereign actors within a system grounded in some measure of reciprocity and with the benefit of some degree of deterrence.

Contemporary private terrorism constitutes a new kind of threat. It demands new kinds of thinking. In part, counter-terrorism strategies must be devoted to improving the ability to detect these private actors and hold them accountable. These strategies must involve recognizing that today's terrorists are players on the international stage and need to be treated as such. A broad range of measures need to be adopted to diminish, if not eliminate, the dangers they pose and counter the elements that attract new recruits to their cause.

But these strategies alone are not enough. Success in the confrontation against private terrorism requires enhancing the accountability not just of the terrorists that perpetrate these atrocities but also of the States that are charged to protect individual citizens against them.

In an international system of sovereign States, citizens will continue to look to their governments to serve as 'the frontline responders to today's threats'.[1] When terrorists attack, their victims may not know where to find them, but there is an address for their grievances and their fears. It is the State.

States are afforded unequaled power and legitimacy in the international legal order. They alone are entitled to regulate private conduct. And they enjoy unrivalled monopoly over the legitimate use of force. But these privileges come with obligations. Citizens have bequeathed their personal security to the State and, in return, the State is expected to exercise its prerogatives to their benefit. No State can claim the rights of sovereignty without accepting the responsibilities it imposes to ensure that conduct on its territory conforms with the law and does not endanger the fair realization of rights in the territory of others.

When private actors are able to terrorize communities and perpetrate international violence without international responsibility, individual citizens no longer benefit from the monopoly over the use of force bestowed upon the State. If the State can abdicate responsibility for terrorism by claiming that its perpetrators were private actors, not government officials, what use are the State's sovereign prerogatives to individual human security.

Private terrorist actors may possess an unprecedented degree of power, but States still play a crucial, and sometimes indispensable, role in the success or failure of private terrorist activity. As the attacks of September 11th cruelly demonstrated, while contemporary terrorist groups may no longer need extensive State sponsorship to endanger international peace and security, they still thrive on State inaction, on governmental toleration or acquiescence in their activities, and on weak counter-terrorist infrastructures.

To protect the foundations of the international system in the face of this growing threat it is necessary to hold the State accountable for its part in making this kind of private violence possible. It is necessary to see in State toleration of terrorist activity, or its failure to prevent it, a fundamental violation of the covenants made both between States and within them.

To achieve this objective, international law has an important role to play. For centuries the rules of State responsibility have regulated the extent of government accountability for privately inflicted harm. To address the role of international law in the field of State responsibility for private acts of terrorism it is thus important to understand the origins of these rules and appreciate their conceptual foundations. But it is equally important to understand that the dangers posed by today's private terrorist violence differ, in orders of magnitude,

[1] Report of the High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, UN Doc A/59/565 (2004) 22.

from the kind of non-State activity that preoccupied international lawyers of bygone eras. The legal landscape needs to be considered within the context in which it was created and against the background of contemporary challenges.

This kind of inquiry requires a careful examination of the rules that govern State responsibility for private conduct. It must identify their nature, their scope and their authority. And it must ask whether, as a matter of policy, these rules can be usefully harnessed to meet today's challenges or need to be re-evaluated in light of the threat posed by private actors in a post-September 11th world. That is the subject of this study.

1.2 THE LAW OF STATE RESPONSIBILITY FOR PRIVATE ACTS

The term 'responsibility' is occasionally used interchangeably with the notion of 'obligation'. In the field of international law, however, it has a more precise meaning. When a State is held 'responsible' for an unlawful act or omission, it bears the legal consequences that flow from this breach of its legal duties.[2] The State becomes the appropriate address for whatever remedial action is legally permissible in the circumstances.

The laws of State responsibility for private actions have gradually developed to hold a State answerable for its own wrongdoing in relation to private violence. Where the State is subject to a duty to prevent private harm or to abstain from any support for it, its responsibility will be engaged when it violates these obligations. In these cases, most international jurists have been at pains to point out that the State is responsible not for the private act itself, but for its own unlawful conduct in relation to that act. To engage direct State responsibility for the private act, it is considered necessary for the private actors to operate as *de facto* State agents, thus enabling the law to treat the State as the author of the private wrong.

This view of State responsibility is grounded in conceptions of agency. It justifies and delimits the scope of State responsibility by reference to those acts that can themselves be said to have been perpetrated by the State. If applied to private acts of terrorism, this agency-based analysis produces clear results. Unless the private terrorist operatives function on behalf of the State, the State can be answerable only for violating its distinct duties to prevent, and abstain from supporting, terrorist activities. It is not answerable in law for the terrorist act itself.

[2] B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London, Stevens, 1953) 163 ('responsibility means that a person is the author of an act and should, therefore, bear its consequences'); see also H Kelsen, 'Collective and Individual Responsibility for Acts of State under International Law' (1948) 1 *Jewish YB Intl L* 226 (distinguishing between legal obligation and legal responsibility and referring to responsibility as defining the person against whom a legal sanction may be directed).

As this study will elaborate, there is a significant difference between treating the State as directly responsible for a terrorist act and treating it as responsible only for violating its duty to prevent or abstain from supporting that act. At the level of principle, when the State's responsibility is restricted to a violation of the duty to prevent or abstain, attention is focussed away from the State and towards the private perpetrators. This kind of limitation on the scope of a State's responsibility promotes a discourse that 'privatizes' the problem of terrorism—encouraging solutions which are directed primarily against the private terrorists, while casting the State in a more minor, supporting role.

In practical terms, this distinction influences the range and intensity of the responses that may be legally available against the wrongdoing State. As discussed in Chapter 5, when the State is treated as the author of a private terrorist attack it can become a more central focus of the remedial action taken to redress the harm caused by such an attack. In some cases, it may even become the direct target of forcible action in self-defense.

Clearly, a finding of State responsibility in relation to a private act of terrorism is not an automatic license to engage in any form of retaliatory response. Even in those situations where a terrorist attack may give rise to a right of self-defense, the specific conditions that attach to that right must be independently satisfied for any coercive response to be considered lawful. At the same time, when the State is regarded as bearing direct responsibility for a private terrorist attack, it can join the terrorist perpetrators as a principal, rather than an incidental, address for those measures that the law may permit in the circumstances.

Given the significance of the distinction between direct State responsibility for a private terrorist act and responsibility for wrongdoing in relation to that act, it becomes critical to determine how these assessments of responsibility are made. Any responsibility strategy that is applied to these situations must be based on sound legal foundations and be responsive to the reality of modern-day State involvement in private terrorist activity. It must be an effective tool in promoting accountability and enhancing compliance with counter-terrorism obligations. It must also safeguard against abusive counter-terrorist activity and avoid offering an easy pretext for unjustified State interference.

The agency criteria that have dictated international legal scholarship in this field offer one analytical model for regulating State responsibility for private terrorist acts. However, as this study reveals, recent terrorist attacks and the looming threat of catastrophic terrorism have raised questions as to whether this model is the only, or the most desirable, alternative.

1.3 THE CHALLENGE OF SEPTEMBER 11TH

The events of September 11th have unsettled agency-based assumptions about State responsibility for private action. When President Bush declared, on the evening of September 11th, that the United States would 'make no distinction between the terrorists who committed the attacks and those who harbor them'[3] he made no claim that State responsibility was grounded in an agency relationship. The Taliban was held directly responsible for the September 11th attacks because it "allowed" Al-Qaeda to operate not because it directed or controlled their activities.[4] And yet, the overwhelming number of nations that appeared to endorse this policy, and to support the targeting of both the Taliban regime and Al-Qaeda, seemed remarkably unconcerned by this departure from agency standards.

In the wake of these events, and the growing threat posed by private terrorist actors, some international lawyers have begun to reconsider the legal foundations of the rules of State responsibility for terrorism. It is a discourse that is long overdue.

Most jurists have tried to analyze this question through the conventional agency prism of State responsibility. On this basis, they have either doubted the legitimacy of direct Taliban responsibility, or forced the Taliban-Al-Qaeda association into the box of a principal-agent relationship. Some scholars have argued that the events of September 11th demonstrate the emergence of a new rule of international law by which the threshold for agency has been lowered in terrorism cases. But few have questioned the authority of the agency paradigm and none have offered a detailed conceptual framework for examining State responsibility for terrorism in this new age.

The present study seeks to push the conversation about State responsibility for terrorism in a more ambitious direction. In light of the contemporary terrorist threat and the potential consequences associated with a finding of direct State responsibility for private terrorist acts, it argues for a deeper and more nuanced understanding of the legal principles that regulate State responsibility for terrorism. It pursues this objective without necessarily taking a specific position regarding the legal consequences that may flow from a finding of State responsibility in any particular case. Its purpose, instead, is to step back from the automatic acceptance of agency criteria or the more recent claim that harboring and perpetration are indistinguishable in order to question the validity of the assumptions that have generated these kinds of assertions.

In this context, the study attempts to escape the confines of the agency paradigm and examine whether the principles of causation that animate the

[3] Presidential Address to the Nation, (11 September 2001), available at http://www.whitehouse gov/news/releases/2001/09/20010911-16.html.

[4] See below section 6.1. The term Al-Qaeda is spelled in various forms in the literature. This study uses the spelling Al-Qaeda, which appears to be the most common, except when quoting from sources that use an alternative spelling.

assessment of responsibility for the acts of another in both legal and ordinary thought offer a more effective and more attractive framework for regulating State responsibility for private acts of terrorism.

By engaging in this analysis, this study seeks to do more than contribute to the appreciation of the legal and policy dynamics that are, or should be, at play in determining State responsibility for terrorism. The broader objective is to begin a discussion about the place of causation in the regime of State responsibility and, in so doing, to test the reach and the limits of State accountability in a multi-actor world.

1.4 OVERVIEW OF RESEARCH

Against this background, the study divides the examination of State responsibility for terrorism into three parts.

Part I charts the evolution and development of legal norms in the field of State responsibility for private acts. Chapters 2 and 3, undertake an analysis of agency-based State responsibility, its origins in legal theory, and its application in legal practice.

Part II considers whether traditional agency approaches to State responsibility for private conduct have been, or should be, applied to private acts of terrorism. Chapter 4 begins by presenting a working definition of terrorism, and examining the content of counter-terrorism obligations, as well as the standards by which compliance with these obligations can be measured. Chapters 5 and 6 examine the way jurists have proposed to assess State responsibility issues in terrorism cases when these counter-terrorism obligations have been violated. These theories are tested against State practice, with particular emphasis on the response to the September 11th attacks, and the targeting of the Taliban in 'Operation Enduring Freedom'.

The examination undertaken in chapters 5 and 6 demonstrates a striking inconsistency between prevailing academic approaches to State responsibility for private conduct and State practice in terrorism cases, especially with respect to the events of September 11th. Chapter 7, the concluding chapter of Part II, turns to consider the legal, conceptual and policy inadequacies of existing approaches to State responsibility for terrorism so as to better understand this dissonance between theory and practice, and better craft a responsibility regime that is attuned to the subtle interactions between the State and the non-State actor that makes contemporary terrorism possible.

In light of the problems faced by conventional perspectives, Part III contemplates an alternative conceptual framework for assessing questions of State responsibility for private acts of terrorism that is grounded in the theory of causation. Chapter 8 presents the core causal principles that operate to establish responsibility for the acts of another and looks for echoes of causal-based analysis in international law. The chapter then examines whether this causal

approach can be reconciled with existing international jurisprudence on State responsibility for private action.

Chapter 9 turns to consider how a causation-based approach to State responsibility for terrorism might be formulated in practice. It examines whether this theory offers not only a better explanation for the treatment of the Taliban regime after September 11th, but also a more useful legal tool for responding to the practical and policy challenges posed by contemporary terrorist activity. The chapter lays out a causal model of responsibility for terrorism that could operate to determine whether a State may be held directly responsible for a private act of terrorism, and addresses the problem of satisfying the evidentiary burden in such cases.

Finally, chapter 10 offers some concluding observations about the broader implications of a causation-based approach to State responsibility for terrorism, reflecting on the changing relationship between State and non-State actors and the role of the international law of State responsibility in responding to that change.

PART I

State Responsibility for Private Acts: Theory and Practice

2

State Responsibility for Private Acts: The Evolution of a Doctrine

2.1 INTRODUCTION

For much of its history, State responsibility for the acts of private individuals has been conceptually intertwined with the field of injury to aliens. Beginning with the earliest writers in international law, attempts have been made to determine the responsibility of the State for the wrongful conduct of its subjects directed against non-nationals or foreign sovereigns. To trace the development of these principles is to trace a web of arbitral awards, codification efforts and academic projects that span several centuries.

These numerous, and at times conflicting, efforts culminated in the adoption by the UN General Assembly, in 2001, of resolution 56/83 on the Responsibility of States for Internationally Wrongful Acts, in accordance with the recommendation of the International Law Commission (ILC).[1] Since 1949, succeeding generations of leading scholars of the ILC had labored over this project, seeking to formulate a set of draft articles to regulate State responsibility for the violation of international legal obligations. The Draft Articles adopted by the Commission, and acknowledged by the General Assembly, represent the most significant effort to date to codify the rules of State responsibility. They constitute the basic touchstone for any appreciation and critical analysis of the field.[2]

This chapter maps out the conceptual and practical evolution of the principles of State responsibility in relation to private acts, leading to their embodiment in

[1] GA Res 56/83, UN GAOR, 56th Sess, Supp No 49, UN Doc A/RES/56/83 (2001) 499 [hereinafter ILC Draft Articles]. The resolution takes note of the Draft Articles and commends them to the attention of Governments, while deferring the question of their future adoption in the form of a convention. This action was taken on the recommendation of the ILC, see Report of the International Law Commission to the General Assembly, UN GAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) 41; see also GA Res 59/35, UN GAOR, 59th Sess, UN Doc A/RES/59/35 (2004) (deferring consideration of the future form of the Draft Articles to the 62nd session of the General Assembly in 2007).

[2] While not a direct source of international law, at least in the formal sense, the Draft Articles represent the most extensive and detailed scholarship of the practice and principles of State responsibility. Because their preparation involved consultation with governments, and the contributions of leading scholars over several decades, they are widely viewed, and spoken of, as authoritative and reflecting a broad consensus, see R Higgins, *Problems and Process: International Law and How We Use it* (Oxford, OUP, 1994) 146–48. For further discussion of the legal status of the Draft, see below section 7.3.2.

the ILC Draft Articles. By identifying the cluster of norms that have developed in the field, and understanding their origins, it will be possible to critically consider whether their application to State responsibility for private acts of terrorism is justified.

2.2 THE ORIGIN OF STATE RESPONSIBILITY AND THE GENERAL PRINCIPLE OF NON-ATTRIBUTION OF PRIVATE ACTS

It is now well established that a State is responsible for an internationally wrongful act only if conduct 'constituting an act or omission is attributable to the State under international law and constitutes a breach of an international obligation of the State'. This cardinal principle, which is clearly enunciated in Article 2 of the ILC Draft Articles, has been repeatedly affirmed by the Permanent Court of International Justice,[3] the International Court of Justice,[4] and in the leading scholarly works on State responsibility.[5]

The legal responsibility of the State is thus engaged by an unlawful act *of* the State, operating through its official organs and agents. Indeed, according to the conventional perspective, the direct responsibility of the State for the acts of private individuals is engaged only when, for one reason or another, the individual is treated as acting on the State's behalf. In this way, the principles of attribution and responsibility, embodied in the ILC Draft Articles, are commonly viewed as intimately related to conceptions of agency.[6]

If the State is only legally responsible for its own wrongful acts, it follows that the conduct of a private individual, wholly unrelated to the State, cannot trigger that State's responsibility. This is the general principle of non-attribution of private acts. This principle embodies a conception of the State, as distinct from its

[3] See, eg, *Phosphates in Morocco*, Preliminary Objections 1938, PCIJ (ser A/B) No 74, 10, (14 June) 28.

[4] See, eg, *United States Diplomatic and Consular Staff in Tehran* (US v Iran) [1980] ICJ Rep 3 (24 May) 29; *Military and Paramilitary Activities in and against Nicaragua* (Nicar v US) [1986] ICJ Rep 14 (27 June) 117–18; *Case Concerning the Gabçikovo–Nagymaros Project* (Hungary v Slovakia) [1997] ICJ 7 (25 September) 54.

[5] See, eg, C Eagleton, *The Responsibility of States in International Law* (New York, NY, NYU Press, 1928) 6–7; I Brownlie, *System of the Law of Nations: State Responsibility Part I* (Oxford, Clarendon Press, 1983) 23; J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge, CUP, 2002) 4.

[6] The principles of attribution embodied in Art 4 (conduct of organs of a State); Art 5 (conduct of persons or entities exercising elements of governmental authority); Art 6 (conduct of organs placed at the disposal of a State by another State); and Art 7 (excess of authority or contravention of instructions), of the current Draft Articles are all examples of attribution based on the idea that the actors are agents of the State. In addition, as will be discussed below section 3.3, Art 8 (conduct directed or controlled by a State); Art 11 (conduct acknowledged and adopted by a State as its own); and, to a lesser extent, Art 9 (conduct carried out in the absence or default of the official authorities) and Art 10 (conduct of an insurrectional or other movement); can all be generally regarded as exceptions to the principle of non-attribution of private acts to the State because in these cases the private actor is seen as acting as the State's agent or representative, see ILC Draft Articles, above, n 1.

citizens, which has highly significant implications for the international legal system. It advances a strict division between the public and private domain. And it derives from a perception of States, operating through their officials and agents, as the primary bearers of rights and obligations on the international plane, while encouraging a State system that avoids undue regulation and control over the private sphere.

The philosophical and policy implications of this agency-based approach to responsibility will be considered in greater detail later.[7] For now, it is sufficient to note that this model of the State and its responsibility for the acts of its subjects was not always the prevailing one.

2.3 THE DOCTRINE OF COLLECTIVE RESPONSIBILITY

In the Middle Ages, the accepted view was based on feudal notions of collective responsibility that had their origins in the Roman *jus gentium*.[8] A group was automatically responsible for the acts committed by its members.[9] In its formative stages, international legal practice recognized a doctrine of reprisals that allowed for retaliation against a foreign entity for the unfriendly act of one of its subjects. Under this approach, the act of the foreign subject was deemed automatically to be an act of the collective entity, justifying countermeasures against it.[10]

Later writers attenuated this approach by arguing that while, in principle, the State was responsible for all privately inflicted harm it could discharge that responsibility by providing for an effective remedy against the private wrong. Adopting what was essentially a theory of strict responsibility, jurists such as William Hall maintained that 'prima facie a state is of course responsible for all acts and omissions taking place within its territory', but it could escape such responsibility by demonstrating the absence of wrongdoing on its part.[11] Clyde Eagleton too argued that the State 'should be responsible for the individual's act from the moment of its occurrence', while conceding that local remedies would serve as 'a means of discharging this responsibility'.[12]

[7] See below section 7.6.

[8] JA Hessbruegge, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law' (2004) 36 *NYU J Intl L & P* 265, 276–79.

[9] EJ de Aréchaga, 'International Responsibility' in M Sørensen, (ed), *Manual of Public International Law* (New York, NY, St Martin's Press, 1968) 531, 558; see also Eagleton, above n 5, p 76.

[10] H Lauterpacht, 'Revolutionary Activities by Private Persons against Foreign States' in E Lauterpacht, (ed), *The Collected Papers of Hersch Lauterpacht*, vol 3 (Cambridge, CUP, 1970) 251. 258; see also FV García Amador, 'Fifth Report on State Responsibility' (1960) 2 *YB Intl L Comm'n* 41, UN Doc A/CN.4/125, p 61

[11] WE Hall, *A Treatise on International Law*, 2nd edn, (Oxford, Clarendon Press, 1884) 193.

[12] C Eagleton, 'Measure of Damages in International Law' (1929–30) 39 *Yale L J* 52, 56; see also Hessbruegge, above n 8, pp 280–81; see also RE Curtis, 'The Law of Hostile Expeditions as Applied by the United States' (1914) 8 *Am J Intl L* 1, 35.

The shift away from a doctrine of collective responsibility—which predated the system of sovereign States—and towards the principle of non-attribution of private acts, has been gradual but unmistakable. This principle of non-attribution draws inspiration from concepts that were famously articulated in the international sphere by Hugo Grotius, according to which legal responsibility was predicated on culpability. The collective, like the individual, could not be held responsible without first establishing its own distinct wrongdoing.

In more recent times, a theory of absolute or strict State liability[13] to compensate for private harm has surfaced in international law and practice in a way that is somewhat reminiscent of earlier collective responsibility doctrines. In a select variety of spheres, ranging from activities in outerspace, to nuclear testing and the environment, scholars and States have advocated, or accepted, a doctrine of liability that is not dependent on evidence of wrongdoing on the part of the State.

However, these applications are the exceptions, not the rule. Like their counterpart in domestic law, absolute or strict liability is advocated primarily in order to ensure monetary compensation for ultra-hazardous activities, generally for reasons of economic policy and 'risk allocation'.[14] More importantly, even in these cases, the prevailing view is that the State is not usually held legally responsible for the private harm but is required nevertheless to compensate for it.[15] The concept of absolute or strict liability does not, therefore, displace the general principle of non-attribution of private acts that has achieved near universal acceptance in contemporary international law.

2.4 THE THEORY OF COMPLICITY

As noted, Grotius was among the first to formulate a theory of State responsibility for private acts that was not derived from principles of collective or absolute responsibility. Essentially, he asserted that the State would not normally be responsible for the wrongful conduct of its subjects. However, such responsibility would arise if the State was 'complicit' in the private act through the notions of *patientia* or *receptus*.[16]

A State, aware of private wrongdoing, yet failing to take appropriate measures to prevent it (*patientia*) or offering the offender protection, after the fact, by refusing to extradite or punish him (*receptus*), revealed its approval of the

[13] Though the terminology is somewhat contested, absolute liability refers to a duty to compensate for harm without any possibility of exculpation. Strict liability, on the other hand, creates a *prima facie* duty to compensate that involves a shift in the burden of proof, but it may still be possible in certain circumstances to avoid or mitigate payment, see Brownlie, above n 5, p 44.

[14] See, eg, H Lauterpacht, 'Delictual Relationships between States: State Responsibility' reprinted in E Lauterpacht, (ed), *The Collected Papers of Hersch Lauterpacht*, vol 1 (Cambridge, Grotius, 1970) 251, 399.

[15] See below section 3.2.4.

[16] H Grotius, JB Scott, (tr), *2 De Jure Belli Ac Pacis* (1646) 523–26.

wrongful act and thus became an equal party to it. The responsibility of the State was thus born not from the act of the individual alone, but from the implied complicity of the State in that act, through its failure to prevent or punish.

Emerich de Vattel, writing in 1758, echoed the Grotian tradition. Rejecting absolute State responsibility for the acts of private citizens, Vattel asserted that such acts could be attributed to the State only if it approved or ratified the act, thus becoming 'the *real author* of the affront'.[17] Vattel, adopting the notions of *patientia* and *receptus*, argued that:

> . . . if a sovereign who has the power to see that his subjects act in a just and peaceable manner permits them to injure a foreign nation . . . he does no less a wrong to that nation than if he injured it himself . . . . A sovereign who refuses to repair the evil done by one of his subjects, or to punish the criminal or, finally, to deliver him up, makes himself in a way an accessory to the deed, and becomes responsible for it . . . .[18]

A few years later, William Blackstone stressed that a sovereign that fails to punish private offenders becomes 'an accomplice or abettor of his subject's crime'.[19] In rationalizing this doctrine, Blackstone seemed preoccupied by the fact that privately inflicted insults could become a pretext for going to war.[20] As a result of the connection between private wrongs and the taking up of arms under the international law of the time, it was important to encourage the sovereign to punish private offenses against foreign subjects, lest he draw 'upon his community the calamities of foreign war'.[21]

Though the terminology used regularly failed to distinguish between the criminal nature of the private offense and the civil damages awarded against the State, a general theory of State complicity was identifiable and popular throughout the 19th and early 20th century and was reflected in many of the academic works of the period.[22]

[17] E De Vattel, CG Fenwick (tr), 2 *The Law of Nations or, the Principles of Natural Law: Applied to the Conduct and to the Affairs of Nations and Sovereigns* (New York, NY, Legal Classics Library, 1916) 72 (emphasis added).

[18] *Ibid*, pp 71, 75.

[19] W Blackstone, W Morrison, (ed), *4 Commentaries on the Laws of England (1765–69)* (London, Cavendish, 2001) 68.

[20] I am indebted to Professor George Fletcher for this insight. Indeed, the fact that forcible self-help by States to redress the claims of their nationals was a legally permissible option has contributed to the charge, later advanced by developing States, that the rules of State responsibility for injuries to aliens served merely as a pretext for imperial ambitions, see RB Lillich, 'The Current Status of the Law of State Responsibility for Injuries to Aliens' in RB Lillich, (ed), *International Law of State Responsibility for Injuries to Aliens* (Charlottesville, VA, University of Virginia Press, 1983) 1, 3.

[21] Blackstone, above n 19, p 68.

[22] See, eg, P Pradiér–Fodéré, 1 *Traite De Droit International Public Européen and Américain: Suivant Les Progrès De La Science Et De La Pratique Contemporaines* (Paris, G Pedone-Lauriel, 1885) 336:

> En somme les actes privé des nationaux n'engagent pas en principe las responsibilté de l'Etat auquel ces nationaux appartiennent, mais l'Etat don't le government approuve et ratife les actes

A considerable number of early arbitral awards also seemed to invoke the complicity theory in order to explain State responsibility in relation to private malfeasance. The majority of these cases involved determinations of State responsibility for 'denial of justice', where the State failed to prosecute or unjustly pardoned the private offender.[23] For instance, the *Cotesworth and Powell Case*,[24] considered by a Mixed Commission established between Great Britain and Colombia in 1872, concerned a claim for damages arising out of the illegal acts of private individuals who were granted immunity by Colombia. In this context, the Commission noted that:

> One nation is not responsible to another for the acts of its individual citizens, except when it approves or ratifies them. It then becomes a public concern, and the injured party may consider the nation itself the real author of the injury. And this approval, it is apprehended, need not be in express terms, but may fairly be inferred from a refusal to provide means of reparation when such means are possible; or from its pardon of the offender when such pardon necessarily deprives the injured party of all redress.[25]

The *Montijo Case*, in 1874, also concerned the grant of amnesty to persons who had seized a US vessel bound for Panama as part of revolutionary activities in that country. The United States-Colombia Commission, in explaining its decision against Panama in that case, argued that 'even in the absence of an express stipulation to that effect, the grantor of an amnesty assumes as his own the liabilities previously incurred by the objects of his pardon'.[26]

In the *Poglioli Case*,[27] before the Italian-Venezuelan Commission of 1903, Umpire Ralston considered the legal responsibility of Venezuela for failing to apprehend and punish four persons who had attempted to murder the claimants. Ralston, after favorably reviewing the authorities advocating the complicity theory, found 'complicity on the part of the officials and denial of justice . . . .

> de sese ressortissants, ou qui refuse de réparer le dommage cause par un de ses sujets, de chattier lui-mêle coupable, de le livrer pour êpuni, deviant en quelque sorte l'auteur de l'injure commise, se ren comme complice de l'offense . . .

See also T Twiss, *The Law of Nations Considered as Independent Political Communities* (Oxford, Clarendon Press, 1875) 20; F De Martens, *1 Traité De Droit International* (Paris, Chevalier-Marescq, 1883) 563.

[23] Though the term 'denial of justice' has a variety of meanings, it is connected primarily to what is referred to today as the right to a remedy, see D Shelton, *Remedies in International Human Rights Law*, 2nd edn, (Oxford, OUP, 2005) 59-60.

[24] *Case of Cotesworth & Powell* (*Great Britain v Colombia*) (1875), reprinted in JB Moore, 2 *History and Digest of International Arbitrations to which the United States has been a Party* (1898) 2050.

[25] *Ibid,* p 2082

[26] *The Montijo* (*US v Colombia*) (1875), reprinted in JB Moore, 2 *History and Digest of International Arbitrations to which the United States has been a Party* (1898) 1421, 1438.

[27] *Poglioli Case (Italy v Venezuela)* (1903) 10 R Intl Arb Awards 669, 689.

Venezuela has, through the fault of Los Andes, rendered itself in some measure an accomplice to the injury and has become responsible for it'.[28]

Similarly in the *de Hammer Case*, Commissioner Findlay asserted Venezuelan responsibility by arguing that 'a State, however, is liable for wrongs inflicted upon the citizens of another state in any case where the offender is permitted to go at large without being called to account or punished for his offense . . .'.[29]

Advocates of the complicity theory presented a system of State responsibility more plausible for their age. As the fundamental separation between the sovereign State and the individual private citizen became entrenched in the international order, notions of automatic responsibility for the conduct of non-State actors increasingly rang hollow.[30] Complicity theory accepted the general principle of non-attribution and its theoretical underpinning in the notion that there could be no State responsibility without State culpability. At the same time, it sought to establish State responsibility for private acts by deeming the State a party to the act itself by reason of its wrongful failure to prevent the offense or to hold the private offender accountable.

2.5 THE JANES CASE

The *Janes Case*, heard in 1925 before the Mexico-United States General Claims Commission,[31] represented a watershed in the development of the law of State responsibility for private conduct.[32] The case involved a claim brought by the United States on behalf of the Janes family for the killing of Byron Everett Janes, a US national. Janes had been killed in public view by his former employee at a Mexican mining company. The US argued that Mexico should be held responsible for the death in view of the failure of Mexican authorities to exercise due diligence in apprehending and punishing the culprit.

After reviewing the facts of the case, the majority of the Commission proceeded to take note of the tendency in international awards to base State responsibility in such cases on 'some kind of complicity with the perpetrator himself and rendering the State responsible for the very consequences of the individual's misdemeanor'. Here, the Commission made a crucial distinction:

[28] *Ibid*. It should be noted that Roberto Ago, in his fourth report to the ILC on State Responsibility questioned whether *Poglioli* could be brought in support of the complicity theory since there was evidence that State officials had themselves participated in the offences committed against the Poglioli brothers; see R Ago, 'Fourth Report on State Responsibility' (1972) 2 *YB Intl L Comm'n* 71, UN Doc A/CN.4/264 and Add 1, 102–3 [hereinafter Ago, Fourth Report]. However, it would seem that Umpire Ralston based his award primarily on the denial of justice and it is in this context that he cited the complicity theory with approval.

[29] *Narcisa de Hammer (United States) v Venezuela* (1885) reprinted in in JB Moore, 3 *History and Digest of International Arbitrations to which the United States has been a Party* (1898) 2969.

[30] Hessbruegge, above n 8, pp 286–87.

[31] For background on the General Claims Commission see Note, (1951) 4 R Intl Arb Awards 3.

[32] *Laura MB Janes (USA) v United Mexican States* (1925) 4 R Intl Arb Awards 82 [hereinafter *Janes Case*].

> A reasoning based on presumed complicity may have some sound foundation in cases of non-prevention where a Government knows of an intended injurious crime, might have averted it, but for some reason constituting its liability did not do so. The present case is different: it is one of non-repression . . . . The international delinquency in this case is one of its own specific type, separate from the private delinquency of the culprit. The culprit is liable for having killed or murdered an American national; the Government is liable for not having measured up to its duty of diligently prosecuting and properly punishing the offender . . . . Even if non-punishment were conceived as some kind of approval—which in the Commission's view is doubtful—still approving of a crime has never been deemed identical with being an accomplice to that crime.[33]

The Commission thus found Mexico responsible for a separate delinquency of denial of justice without asserting any complicity in the private act. When it came to assessing the measure of damages, the Commission argued that as the delinquency of the State and of the individual offender were different in their 'origin, character and effect', it followed that the damages could not be computed merely by assessing the harm caused by the private act.[34] After reviewing the checkered history of reparations in such cases, the Commission argued that the damage owed by Mexico was for individual grief suffered by the claimants by reason of the failure to punish, and 'for the mistrust and lack of safety, resulting from the Government's attitude'.[35]

It is important to note that while the *Janes Case* criticized the theory of complicity it did not reject it altogether.[36] It not only acknowledged the validity of the theory in relation to non-prevention, but also noted that 'if the non-prosecution and non-punishment of crimes . . . occurs with regularity such non-repression may even assume the character of non-prevention and be treated as such'.[37]

Nevertheless, the reasoning in the *Janes Case* paved the way for arbitral tribunals and jurists to go beyond the cautious analysis of the Commission and challenge the authority of the complicity theory as a whole. By asserting that the State's wrongdoing and resulting damage was fundamentally distinct from the private act, the *Janes Case* exposed the artificial character of complicity theory.[38]

The complicity theory ultimately proved unsustainable in the eyes of jurists because it did not go far enough in respecting the distinctions between the public and private realm. Those that invoked the criminal language of complicity implied that the State, through its omission, had somehow intentionally created

[33] *Ibid,* p 87.
[34] *Ibid,* p 89.
[35] *Ibid*.
[36] *Cf* de Aréchaga, above n 9, p 559.
[37] *Janes Case*, above n 32, pp 89–90.
[38] See, eg, Eagleton, above n 12, p 56 (noting that the idea that if a State failed to prevent or punish it was an accomplice to the private act 'is stretching logic rather too far'); AV Freeman, *The International Responsibility of States for Denial of Justice* (Liége, H. Vaillant-Carmanne, 1938) 20 (referring to the 'utterly fictitious theory of implied State complicity').

the circumstances to facilitate the commission of the offense and thus should be held liable for it. And yet, the cases in which the issue was addressed concerned civil damages and made no effort to prove such an intention on the part of the State. Complicity was implied by legal fiction, not evidence. As scholars became increasingly convinced that State responsibility should be grounded in 'objective' violations of international obligations, rather than any kind of fault or malicious intent,[39] the concept of State complicity became untenable.

Indeed, the very presumption that the sovereign State could act jointly with the private criminal offender in the perpetration of the offense was difficult to sustain when, according to the prevailing views of the time, the two were not only subject to different legal obligations but inhabited distinct legal worlds. As Roberto Ago, the second special rapporteur of the ILC on State responsibility was to argue: 'since a private individual cannot violate an international obligation, complicity between the individual and the State for the purpose of such a violation is inconceivable'.[40] An international legal order that emphasized the sovereignty of the State and its strict division from the private conduct of its subjects could not embrace a State responsibility doctrine inspired by notions of complicity and it is not surprising that the theory drifted out of favor in the early decades of the 20th century.

2.6 THE CONDONATION THEORY AND THE CALCULATION OF DAMAGE

Around the time of the award in the *Janes Case*, several authors engaged in a kind of rearguard action designed ostensibly to defend the complicity theory, albeit in a somewhat modified form. These authors were clearly affected by the criticism directed against the complicity theory as artificial. They suggested instead that States became responsible for private acts not through complicity as such, but because their failure to prevent or punish the wrongdoing amounted to a ratification or 'condonation' of the act thus making it their own. While advocates of the complicity theory had occasionally used the notion of complicity and condonation interchangeably, these concepts were now presented as legally distinct.

Some of those who adopted this approach drew support from the separate opinion of the American Commissioner in the *Janes Case*, Fred Nielsen. In a spirited defense of the condonation theory, Nielsen maintained that:

[39] See discussion of objective responsibility below section 4.4.3.

[40] See Ago, Fourth Report, above n 28, p 96. This analysis is also consistent with the ILC's ultimate rejection of the notion of State crimes, such that implicating the State in the private criminal offense was regarded as implausible, see below section 5.2.3. For a discussion of contemporary views on the inter-penetration of the public and private sphere, see below section 7.6.

> . . . the theory repeatedly advanced that a nation must be held liable for failure to take appropriate steps to punish persons who inflict wrongs upon aliens because by such failure the nation condones the wrong and becomes responsible for it is not illogical or arbitrary. Certainly there is no violence to logic and no distortion of the proper meaning of the word condone in saying that a nation condones a wrong committed by individuals when it fails to take action to punish the wrongdoing. It seems to be equally clear that . . . a nation may logically be charged with responsibility for crime when it is shown that proper punitive measures have been neglected.[41]

Writing in 1928, the American jurist Charles Hyde found evidence in support of the condonation theory from the fact that many international arbitral tribunals assessed damages by reference to the pecuniary loss caused by the original private offender. This, he suggested, indicated that the State was being held directly responsible for the private wrong. In explaining this ground of State responsibility for private conduct, Hyde relied on Nielsen's reasoning to distinguish between complicity and condonation:

> . . . when the State neglects to prosecute it is to be deemed to approve of or condone the wrongful acts of those who did the violence to the claimant, and to assume responsibility therefor . . . . The condonation theory affords a more satisfactory explanation than that which imputes complicity in the commission of acts of violence where none is apparent. A State may by its neglect condone conduct without becoming an accomplice of the actor.[42]

James Brierly also argued against the conclusion of the majority in the *Janes Case* by asserting that:

> . . . we introduce no fiction if we regard the state's omission as in some sense making it a party to the original act, and if 'implied complicity' is too strong a term, 'condonation' which is the word used by Mr Nielsen will serve . . . . It may not be a logical necessity that a state which has 'condoned' the wrongful act of an individual should be held responsible for the damage that that act may have caused, but at least it does not violate the sense of justice, and it avoids the artificiality of attempting to give different foundations, in regard to the measure of damages . . . .[43]

The common feature of these positions was the assumption that private conduct could somehow be transformed into an act of the State as a result of the State's wrongdoing. The condonation theory allowed this transformation to be essentially implied from the failure of the State to prevent the act or properly

[41] *Janes Case*, above n 32, p 92.

[42] C Hyde, 'Concerning Damages Arising From Neglect to Prosecute' (1928) 22 *Am J Intl L* 140, 141–42; see also E Borchard, *The Diplomatic Protection of Citizens Abroad* (New York, NY, Banks Law Publishing, 1915) 217 (arguing that a State would be responsible for a private injury 'either by directly ratifying or approving it, or by an implied, tacit or constructive approval in the negligent failure to prevent the injury or to investigate the case').

[43] J Brierly, 'The Theory of Implied State Complicity in International Claims' (1928) 9 *Brit YB Intl L* 42, 49.

prosecute the private offender. The equation made by this proposition was that the State's inaction in connection to a private act was tantamount to an official acknowledgement that the act could be treated as its own.[44]

But the very notion that the State could render a private act its own merely by indirectly condoning it, suggested that the act itself was not altogether private. In contrast to the principle of non-attribution of private acts, the boundary between the public and private domain under the condonation theory was fluid, not fixed in stone. It was for the State to demonstrate that it considered the act private through the exercise of due diligence in holding the private actor accountable. Failure to do so was evidence that the act was not wholly private in nature, and could be attributed to the State.

This latent presumption seems to indicate that the condonation theory challenged the very foundations of the principle of non-attribution of private acts. In its underlying rationale, the condonation theory was closer to a doctrine of strict responsibility since it justified direct responsibility for private action unless the State discharged its duties.[45] When the theory is understood in this way, its failure to attract wider support in an international system that affirmed the distinction between the State and its subjects can be more easily appreciated.

It is interesting to note that those that expressed support for the condonation theory seemed to be motivated largely by a desire to facilitate the computation of damages for the State's wrongdoing.[46] Advocates of this theory were encouraged by the fact that, in contrast to the award in the *Janes Case*, arbitral tribunals often measured the amount owed by the State by calculating the loss caused by the private act.

As Clyde Eagleton argued, if the State was responsible only for its own act then damages 'should be measured by the act or omission of the State itself'.[47] But in practice compensation was measured 'by the loss suffered from the original act', producing what he termed 'a striking inconsistency between theory and practice'.[48] Those who questioned the validity of the complicity or condonation theories, insisting instead that the State was only ever liable for its own misconduct, were thus challenged to explain this anomaly.

Three possibilities present themselves. In cases of non-punishment, it could be argued that while the State is responsible only for its own omission, that omission prevented recovery from the primary offender thus making the State liable to compensate for the original injury. Secondly, it could be suggested that due to the difficulty in assessing the damage caused by the State's wrongdoing, the original harm can be used, albeit somewhat artificially, as one of the factors to

[44] In this sense, it is a rejection of the assertion in the *Janes Case* that 'approving of a crime has never been deemed identical with being an accomplice to that crime', see *Janes Case*, above n 32, p 87.

[45] See above section 2.3.

[46] Ago, Fourth Report, above n 28, p 122.

[47] Eagleton, above n 12, p 54.

[48] *Ibid*, pp 54–55; see also Shelton, above n 23, p 62.

consider in determining the amount owed in compensation.[49] In other words, policy considerations dictate using the privately caused harm as a yardstick since otherwise the claimant might only be entitled to a negligible sum. Finally, it could be asserted that compensation commensurate with the private harm is imposed on the State as a punitive measure, without necessarily suggesting that the State is legally responsible for anything other than its own delinquency.[50]

Interestingly, Edwin Borchard who had previously voiced some support for the condonation theory[51] seemed to be influenced by the *Janes* decision to rethink his position, especially as it related to the question of damage assessment. In 1927, he noted that the 'Commission's theory of separating the individual crime from the government's delinquency is, in principle, to be commended'.[52] He continued to maintain, not inconsistently with *Janes*, that where there is proven 'governmental complicity, deducible from an unqualified or notorious refusal to punish, there is no reason why the Government should not be held responsible for the original act, as if they had commanded it'.[53] However, Borchard argued that:

> Possibly the complete mental separation of the private and the public offense, in measuring the damages is more fancied than real, more theoretical than actual. The alleged grounds on which damages in such cases are based are often metaphysical, and awarding the amount of the supposed loss occasioned by the original crime has the advantage of simplicity and is supported by considerable authority. The Commission's theory is useful, however, because it is analytically correct and because it recognizes various degrees of governmental delinquency . . . . The difficulty will always remain of measuring or computing such degrees of delinquency . . . . That must, in any event be arbitrary. But the inarticulate purpose of such damages, which may or may not be actually compensatory, must involve the theory that by such penalty the delinquent government will be induced to improve the administration of justice.[54]

In this passage, Borchard seemed to be suggesting that the process of assigning an amount to governmental wrongdoing was flexible and somewhat arbitrary. Measuring damages in relation to the original injury could be explained in some cases as State responsibility for the private act, especially where the failure

[49] This is somewhat analogous to the approach adopted, in a different context, by the Permanent Court of International Justice in the *Chorzow Factory Case* when it concluded that: 'the damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due to the State', *Case Concerning the Factory at Chorzow (Germany v Poland)* 1928 PCIJ (ser A) No 17 (13 September) 28.

[50] But see S Wittich, 'Awe of the Gods and Fear of the Priests: Punitive Damages and the Law of State Responsibility' (1998) 3 *Austrian Rev Intl & Eur L* 101 (demonstrating paucity of support for punitive damages against the State in international jurisprudence).

[51] See above n 42.

[52] E Borchard, 'Important Decisions of the Mixed Claims Commission United States and Mexico' (1927) 21 *Am J Int'l L* 516, 517.

[53] *Ibid*, p 518.

[54] *Ibid*.

was 'continuous and notorious'. But it could equally be the result of other considerations unrelated to the legal responsibility of the State, which remained associated only with its own unlawful conduct and not with any private wrongdoing.

Subsequent writers affirmed that no evidence in favor of State complicity or condonation could be deduced from the measure of damages occasionally awarded by arbitral tribunals. Roberto Ago, in his fourth report to the ILC on State responsibility, maintained that:

> . . . writers have erred in allowing themselves to be influenced by the fact that, in certain cases, the amount of reparation that the State has had to pay has been calculated on the basis of the damage actually caused by the action of the individual . . . . The fact that certain criteria rather than others are used as the basis for fixing the amount of reparation, once responsibility is established, does not necessarily mean that the principle of the conclusion in question [separate responsibility of the State] can be reconsidered.[55]

In these words, Ago was echoing the sentiments of his predecessor García Amador who had noted, in 1956, that strictly speaking the only applicable criterion for assessing the amount of reparation owed by the State was that which corresponded to the State's own wrongful act or omission.[56]

By this time, of course, the complicity and condonation theories had fallen into disrepute. As shall be seen in the following section, by the early decades of the 20th century the strict distinction between the State's responsibility for its own wrongdoing, on the one hand, and responsibility for the private act itself, on the other, was already winning increasing support. It followed that awards of reparation measured against the original private harm could only be understood as being motivated by exogenous factors, without any effect on the integrity of what had become a virtually uncontested doctrine.

[55] Ago, Fourth Report, above n 28, pp 97–98; see also Comments of the Chairman of the ILC at the 30th Session of the Sixth (Legal) Committee of the General Assembly, UN GAOR, 30th Sess, 6th Comm, 1550th mtg, UN Doc A/C.6/SR.1550 (1975) 130.

[56] FV García Amador, 'First Report on State Responsibility' (1956) 2 *YB Intl L Comm'n* 173, 213, UN Doc A/CN.4/96. García Amador did admit, however, of the possibility that punitive damages could be calculated in relation to the damage caused by the private actor, see FV García Amador, 'Sixth Report on State Responsibility' (1961) 2 *YB Intl L Comm'n* 1, UN Doc A/CN.4/134 and Add.1; FV García Amador, 'State Responsibility—Some New Problems' (1958) 94(2) *Hague Recueil des Cours* 382, 483–87.

2.7 THE SEPARATE DELICT THEORY

2.7.1 Introduction

While the complicity and condonation theories have always had some adherents,[57] the discourse on State responsibility for private acts has long been dominated by the principle of non-attribution, and a resulting distinction that has been made between harmful private conduct and State wrongdoing in relation to that conduct.

If the State could only be legally responsible for the unlawful conduct of its own organs and agents, there had to be an alternative explanation for State responsibility in the event of injuries to non-national and foreign sovereigns occasioned by private acts. The theory that has gradually emerged is often cited in international law today, but its evolution and historical context have been somewhat forgotten.

This theory rejects the notion that State responsibility can arise in relation to wholly private conduct because the conduct itself is directly (through collective responsibility) or indirectly (through complicity or condonation) attributable to the State. Rather, State responsibility is engaged solely for the State's *own* violation of a separate and distinct duty to exercise due diligence in preventing and punishing the private offense.

The advocates of this theory have stressed that State responsibility always derives from the State's own wrongdoing. They have also suggested, either implicitly or expressly, that unless the private act is attributable to the State, the State can never be regarded as responsible for the private act itself, only for its wrongdoing in relation to that act. Following the dictum in the *Janes Case*, this theory thus views the private act merely as an external event, while State responsibility is both justified and circumscribed by the State's own illicit conduct.

Evidence of support for what shall be termed the 'separate delict theory' appears, with varying degrees of clarity, in a broad range of international legal sources. The following sections note some representative samples from the jurisprudence of the earlier decades of the 20th century that are cited as illustrations of the increasing pervasiveness of the doctrine and highlight its salient features.

2.7.2 Arbitral Awards

The general authority of the principle of non-attribution and the separate delict theory has been acknowledged repeatedly by arbitral tribunals since the turn of

[57] See below section 5.2.2. See also Shelton, above n 23, p 62 (relying on early theorists such as Eagleton to support a strict responsibility approach whereby the State is responsible for all privately inflicted harm but may discharge that responsibility through effective local remedies).

the 20th century.[58] These cases usually concerned the alleged failure of the State to prevent or prosecute privately inflicted injuries to aliens and asserted, directly or indirectly, that State responsibility was engaged in such instances only for the State's own delinquency.

Not all of these sources express fidelity to the separate delict theory in clear terms. In numerous cases, the tribunals were content to affirm that a State would not be held responsible for injuries to aliens sustained by private conduct without articulating the legal rationale for this conclusion. Still, the cases generally embraced a rigid distinction between the State's wrongdoing and the private act that occasioned it and, in so doing, contributed to the crystallization of the separate delict theory in international legal doctrine.

Early arbitral awards placed considerable emphasis on the principle of non-attribution. The *Lovett Case*, for example, concerned the murder by rebels in Chile of the governor of the local garrison. In that case, the US-Chile Claims Commission of 1892 stated, quite confidently, that 'all the authorities on international law are a unit as regards the principle that injury done by one of the subjects of a nation is not to be considered as done by the nation itself'.[59] In the *Sambiaggo Case* of 1903, the umpire expressed what he considered an axiomatic principle that 'a government, like an individual, is only to be held responsible for the acts of its agents or for acts the responsibility for which is expressly assumed by it. To apply another doctrine . . . would be unnatural and illogical'.[60] The principle had been similarly enunciated in other early cases such as *Underhill* in 1903[61] and the *Home Frontier and Foreign Missionary Society* of 1920.[62]

The well-known decision of Max Huber in the *British Property in Spanish Morocco Case* of 1925 complemented the *Janes Case* in its support for the separate delict theory.[63] In general terms, Huber explained:

> . . . the State is not responsible for the revolutionary events themselves, [but] it may nevertheless be responsible for what the authorities do or do not do to mitigate the consequences as far as possible. Responsibility for the action or inaction of the public authorities is quite different from responsibility for acts that may be imputed to persons outside the control of the authorities or openly hostile to them.[64]

[58] It is worth noting, however, that most of these awards were made by bilateral bodies, and were sometimes influenced by the specific nature of the relations between the two States concerned.

[59] *Frederick H Lovett* (*United States v Chile*) (1892), reprinted in JB Moore, 3 *History and Digest of International Arbitrations to which the United States has been a Party* (1898) 2991.

[60] *Sambiaggo Case (Italy v Venezuela)* (1903) 10 R Intl Arb Awards 499, 512 (he went on to suggest that one reason that Venezuela could not be held responsible for the acts of revolutionists was that they 'are not the agents of government').

[61] *Underhill Cases* (*United Kingdom v Venezuela*) (1903) 9 R Intl Arb Awards 155, 159.

[62] *Home Frontier and Foreign Missionary Society of the United Brethren in Christ* (*United States v United Kingdom*) (1920) 6 R Intl Arb Awards 44.

[63] *Spanish Zone of Morocco Case* (*United Kingdom v Spain*) (1923) 2 R Intl Arb Awards 615.

[64] *Ibid*, pp 641–42.

In the specific examination of the Menebhi incident, Huber was called upon to consider Spanish responsibility for cross-border thefts committed by inhabitants of the Spanish zone in the international zone of Morocco. In the circumstances, Huber found no State responsibility for failure to prevent the thefts, and proceeded to consider Spain's responsibility in respect of its duties to prosecute the offenders. Here, the arbitrator found that Spain had 'done nothing to induce the offenders to return the money or to punish them . . . . It is justifiable to regard this inaction as a breach of an international obligation'.[65] However, he continued:

> It would . . . in no circumstances be justifiable to attribute responsibility for the entire damage to a Government which, although perhaps negligent in that respect, was certainly not responsible for the events which were the immediate cause of the damage. . . . Spain's responsibility is based only on the conditions of judicial assistance and not on the circumstances of the actual event which caused the damage.[66]

This decision by Huber clarified the position that State responsibility for failure to prevent or punish private wrongdoing was not an exception to the general principle of non-attribution. Even in these cases, the State's liability was only for its own unlawful omissions in relation to the private conduct, and certainly not for complicity in, or condonation of, the conduct itself.

Similar conclusions can be drawn from the *Noyes Case* in 1933, where the United States brought a claim on behalf of its national for injuries he sustained at the hands of a drunken mob in Panama. The Commission affirmed that no State responsibility could arise from the private conduct. Panama could only be held responsible for its authorities own 'behavior in connection with the particular occurrence, or a general failure to comply with their duty to maintain order, to prevent crimes or to prosecute and punish criminals'.[67] On the facts of the case, such wrongdoing on the part of Panama had not been specifically established.

Analogous decisions affirming, or at least alluding to, State responsibility for violation of its own international obligations and without responsibility for the

[65] *Spanish Zone of Morocco Case* (*United Kingdom v Spain*) (1923) 2 R Intl Arb Awards 615, p 709.

[66] *Ibid*, pp 709–10.

[67] *Walter A Noyes (United States) v Panama* (1933) 6 R Intl Arb Awards 308, 311. Interestingly, this case implied that responsibility could arise either as a result of State malfeasance in connection to a specific incident or a more general failure to maintain order. For a discussion of these two different types of obligation see below section 4.4.4.

private act itself are also found, *inter alia*, in the following cases: *Venable*,[68] *Kennedy*,[69] *Kidd*,[70] *Denham*,[71] and *Finnish Shipowners*.[72]

2.7.3 Codification Efforts

In the decades preceding the establishment of the ILC, numerous attempts were made to codify rules on State responsibility for injuries caused to aliens. These successive efforts, undertaken by international and regional organizations, as well as by independent academic institutions, demonstrate a preference for the separate delict theory with respect to State responsibility for purely private conduct, though they were often affected by ambiguity.

It is worth emphasizing that until 1963 virtually all efforts to codify State responsibility rules were restricted to the field of injury to aliens, and were primarily concerned with instances in which reparations were owed by one State to another as a result of such injury. In 1963, a sub-committee of the ILC, chaired by Roberto Ago, recommended separating the treatment of State responsibility from any substantive field of international law.[73] The terms 'primary' and 'secondary' rules were adopted to characterize specific rules of substantive international law, on the one hand, and the general infrastructure of State responsibility, on the other, which regulated the consequences of State wrongdoing regardless of the 'primary' rule in question.[74]

Prior to this development, most codification efforts, including the ILC's own work, suffered from a considerable degree of confusion. The persistent intermingling of general principles of State responsibility with the rules governing the narrow field of injury to aliens impeded the emergence of a clear body of law

[68] *HG Venable (USA) v United Mexican States* (1927) 4 R Intl Arb Awards 219, 229 (denying 'direct responsibility' for the destruction of four locomotives retained by court order in a railway yard since the locomotives were neither in the custody of Mexican officials or other persons 'acting for' Mexico).

[69] *George Adams Kennedy (USA) v United Mexican States* (1927) 4 R Intl Arb Awards 194, 199 (claim could only be grounded on a denial of justice and thus reparations were owed only for that wrongdoing on the part of the State).

[70] *Annie Bella Graham Kidd (Great Britain) v United Mexican States* (1931) 5 R Intl Arb Awards 142, 144 (Mexican authorities could only be responsible for their own wrongdoing, but reasonable measures were in fact taken).

[71] *Lettie Charlotte Denham and Frank Parlin Denham (United States) v Panama* (1933) 6 R Intl Arb Awards 312, 313 (Panama held liable for inadequate punishment only, not for private act).

[72] *Claim of Finnish Shipowners against Great Britain in Respect of the Use of Certain Finnish Vessels during the War* (*Finland v Great Britain*) (1934) 3 R Intl Arb Awards 1480, 1501 (finding that the respondent government had 'no direct responsibility under international law for the acts of private individuals').

[73] See below section 2.8.

[74] Ago's own expression of this distinction appears in R Ago, 'Second Report on State Responsibility' (1970) 2 *YB Intl L Comm'n* 177, UN Doc A/CN.4/SER.A/1970/Add.1, p 306. Naturally the notion that State responsibility rules were of general application was without prejudice to the principle, reflected in Draft Art 55, that special legal regimes might have their own unique rules regulating responsibility, see Art 55, ILC Draft Articles, above n 1.

relating to State responsibility as a whole.[75] Nevertheless, codification efforts addressing injury to aliens, while often ambiguous in their wording, made a significant contribution to later endeavors of the ILC to distil a broad set of secondary rules of State responsibility, including with respect to State responsibility for private acts.

The Hague Codification Conference

The most significant codification effort undertaken in the pre-World War II period was undoubtedly the 1930 Hague Codification Conference. In 1925, following a request of the Assembly of the League of Nations to pursue the codification of international law, a Committee of Experts began to consider the circumstances in which a State could be liable as a result of injury caused to foreigners or their property.[76] The Committee's own conclusions, which were circulated to governments for comment in 1926, included the assertion that 'losses occasioned to foreigners by private individuals, whether they be national or strangers, do not involve the responsibility of the State' and that State responsibility in such cases arose only if the State 'has itself violated a duty'.[77]

This position was clearly supported in the responses of governments to the proposals prepared by the Committee. Germany, for example, responded by saying that 'the responsibility of a State can only ever be involved by the acts or omissions of its officials and never by the action of private persons . . . responsibility does not originate in the action of the private persons'.[78] Japan stipulated that 'the State should not in principle be held responsible for the acts of private persons.[79] Similarly, Poland commented that 'the State can never be held responsible . . . for the acts of private individuals'.[80] The United States argued that 'the State is not responsible for the wrongful acts of private individuals directed against aliens . . . . A delinquency on the part of the state, independent of the act of the private citizen, is essential to raise responsibility'.[81]

[75] It should be noted, however, that a number of academics had previously attempted to codify these secondary rules. See Draft Convention prepared by Strupp in 1927, and Roth in 1932, reprinted in R Ago, 'First Report on State Responsibility' (1969) 2 *YB Intl L Comm'n* 125, UN Doc A/CN.4/217 and Add.1, pp 151–53 [hereinafter, Ago, First Report].

[76] This included sending out questionnaires to governments. See, eg, League of Nations Committee of Experts for the Progressive Development of International Law, Questionnaire no 4, on *Responsibility of States for Damage Done in their Territories to the Person or Property of Foreigners* (1926), League of Nations publication, V Legal, 1926.V3 (document C.46.M.23.1926.V), reprinted in FV García Amador, 'First Report on State Responsibility' (1956) 2 *YB Intl L Comm'n* 173, 221, UN Doc A/CN.4/96 [hereinafter, García Amador, First Report].

[77] *Ibid*.

[78] Preparatory Committee of the Conference for the Codification of International Law, Bases of Discussion (1929), League of Nations publication, V Legal, 1929.V3 (document C.75.M.69.1929.V), reprinted in S Rosenne, (ed), *2 League of Nations Conference For The Codification Of International Law* (Dobbs Ferry, NY, Oceana Publications, 1975) 540–42 [hereinafter Rosenne, *Codification Conference*].

[79] *Ibid*, p 635.

[80] *Ibid*, p 655.

[81] *Ibid,* p 694.

Czechoslovakia also stated that 'the punishable acts of private individuals therefore do not, strictly speaking, constitute a ground for the international liability of the State; they merely furnish the occasion for it'.[82] Finally, Switzerland, formulated its position most clearly: 'We cannot, however, share the views of certain publicists who hold that a State which has not exercised all proper diligence becomes, so to speak, the accomplice of the offenders. In reality, the State is responsible internationally, not for the acts of any particular individual, but for its own omission.'[83]

It is important to note, however, that several formulations discussed at the Hague Codification Conference implied—in contrast to the finding in the *Janes Case*—that once State responsibility was engaged by the State's own wrongdoing, the State was generally liable for the damage caused by the private act itself. Thus, for example, the Preparatory Committee for the Conference concluded that '[t]he ground on which a State may be responsible for damage caused by a private person to a foreigner is not to be found in the act itself but in the conduct of the State, ie, in its failure to discharge its duty to maintain order'.[84] Similarly, some of the bases for discussion that were prepared for the Conference spoke of 'State responsibility for damage caused by a private individual'.[85]

It is unclear the extent to which this consideration of damages reflected a specific view about the scope of the State's responsibility. To the extent that these texts were discussed, they were a matter of considerable contention.[86] Roberto Ago argued that the reference to liability for damages corresponding to the private harm merely provided a convenient way of calculating the reparations owed in respect of the State's illicit conduct.[87] But it is at least conceivable that some of the delegates that supported the reference to 'responsibility for damage' did so on the basis of the presumption that the State could be held responsible *for* the privately inflicted harm once its responsibility was engaged as a result of its own wrongdoing.[88]

Article 10 of the Draft Articles adopted at the Conference on first reading did not help to clear up this confusion. It stipulated that: 'As regards damage caused to foreigners or their property by private persons, the State is only responsible

[82] *Ibid*, p 671.
[83] *Ibid*, p 663.
[84] *Ibid*, p 518.
[85] See Basis of Discussion No 22 (stating that in principle a State is 'not responsible for damage caused to the person or property of a foreigner by persons taking part in an insurrection or riot or mob violence'); Bases of Discussion No 17 and 18 (referring to 'State responsibility for damage caused by a private individual' in circumstances where the State failed to show the necessary due diligence in protecting the foreigner or in punishing the offender), *ibid*, pp 518–20; Basis of Discussion No 20 (proposing that in cases of amnesty the state would be responsible for damage 'to the extent to which the author of the damage was responsible'), *ibid*, p 525; Basis of Discussion No 29 (clarifying that 'Where the State's responsibility arises solely from failure to take proper measures after the act causing the damage has occurred, it is only bound to make good the damage due to its having failed, totally or partially to take such measures'), *ibid*, pp 573–74.
[86] Ago, Fourth Report, above n 28, pp 109–10.
[87] *Ibid*, p 110; see also above section 2.6.
[88] For additional discussion see below sections 8.4.2 (regarding codification efforts).

where the damage sustained by the foreigners results from the fact that the State has failed to take such measures . . . to prevent, redress or inflict punishment for the acts causing the damage.'[89]

When Article 10 is read in isolation it is unclear what precisely the State is responsible for? Is its responsibility limited to its own delict or does it encompass the act of the private offender? The participating States had clarified that private conduct was not in principle attributable to the State[90] but the references to responsibility for the damage caused did not make for a tight and lucid legal text and raise some questions about the exact scope of a State's responsibility in relation to privately inflicted harm.

In the end, the Conference never completed its work on State responsibility.[91] Owing to a lack of time and the complexity of the subject matter, delegates were unable to further clarify and elaborate upon the draft articles. Much of the controversy surrounded the substantive rules relating to the standard of protection to which foreigners were entitled.[92] As the ILC was to observe several decades later, had the broader issue of State responsibility been divorced from the primary rules of injury to aliens both fields of study may have benefited from a lesser degree of confusion.

Other Codification Efforts

Other codification efforts from this period appeared to support the separate delict theory, but they too were not immune from ambiguity. As Roberto Ago noted in 1972:

> The codification drafts . . . —whether the work of academic associations or private authors or prepared under the auspices and on behalf of official bodies—generally seem to be unanimous in stating, or at least implying, that the conduct of the individual as such is not attributable to the State as a source of international responsibility. . . . Yet these drafts are often unclear on essential points . . . . Most of them envisage only responsibility for damage caused to foreign individuals so that the aim of defin-

[89] See Art 10, Text of Articles Adopted in First Reading by the Third Committee of the Conference for the Codification of International Law, League of Nations publications V. Legal 1930.V.17 (document C.351(c)M.145(c).1930.V), reprinted in García Amador, First Report, above n 76, pp 225–26.

[90] This position was clearly supported by the six States that referred to the issue (Austria, Denmark, Finland, Germany, Japan and Switzerland), with one state (The Netherlands) expressly positing that pecuniary damage could be imposed commensurate with the original damage caused. The United States originally maintained the position it had held in the *Janes Case*, see Rosenne, *Codification Conference* above n 78, p 702. However, at the Conference itself, the US argued that the issue was too controversial and should be omitted from the final text see Ago, Fourth Report, above n 28, p 110.

[91] For a more general overview of the Hague Conference see S Rosenne, *The International Law Commission's Draft Articles on State Responsibility* (Dordrecht, Nijhoff, 1991) 2–17.

[92] Art 10, for example, was adopted on first reading by a majority of 21 against 17, with 2 abstentions. This result had little to do with the wording from a State responsibility perspective, and was generated primarily by the dispute between developed and developing countries over the standard of care owed to aliens, see Ago, Fourth Report, above n 28, p 109.

> ing, even indirectly, the 'primary' obligation incumbent on the State with regard to the treatment of aliens sometimes prevails over the aim of accurately formulating the rule governing responsibility as such.[93]

As with the documents considered during the Hague Codification Conference, vague and unqualified references to responsibility, sometimes obscured what the State was being held responsible for. This ambiguity was evident to varying degrees in texts prepared by the Second International Conference of American States in 1902,[94] by the International Law Association of Japan in 1926[95] and of Germany in 1930,[96] and by Harvard Law School in 1929.[97] The draft articles prepared by García Amador, the first special rapporteur of the ILC, tied as they were to the sphere of injury to aliens and drawing inspiration from the texts of the Hague Conference, also bore these shortcomings.[98]

It should nevertheless be noted that even before the ILC came to address this issue under its second rapporteur, there were some important documents in which the separate delict theory did not suffer from obfuscation. These were texts of more recent vintage, which focused on the secondary rules of State responsibility, without the added dimension of treating the specialized field regulating the protection of aliens. The Inter-American Juridical Committee, for instance, provided in 1965 that:

> The State is not responsible for the acts of private individuals since international responsibility of the State must be attributable to an official or agency of the

[93] *Ibid*, pp 124–25. Ago's observation was repeated by the ILC itself in 1975, see Report of the International Law Commission to the General Assembly (1975) 2 *YB Intl L Comm'n* 114, 126, UN Doc A/CN.4/SER.A/1975/Add.1.

[94] Second International Conference of American States, Convention Relative to the Rights of Aliens, Art 2 (1902), reprinted in García Amador, First Report, above n 76, p 226; see also Inter–American Juridical Committee, 'Principles of International Law that Govern the Responsibility of the State, Reflecting the Latin American View', Art V (1961), reprinted in García Amador, First Report, above n 76, p 361 (providing that 'injuries caused to aliens by acts of private parties create no responsibility of the State, except in the case of the fault of duly constituted authorities').

[95] K Gakkawi, 'Rules Concerning the Responsibility of a State in Relation to the Life, Person and Property of Aliens' (1926) reprinted in *Report of the Thirty–Fourth Conference* (International Law Association, 1927) 382–83.

[96] Deutsche Gesellschaft für Völkerecht, Draft Convention on the Responsibility of States for Injuries Caused in their Territory to the Person or Property of Aliens, Art 1 (1930), reprinted in R Ago, 'First Report on State Responsibility' (1969) 2 *YB Intl L Comm'n* 125, p 149.

[97] Harvard Law School, Draft Convention on 'Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners', Art 11 (1929), reprinted in (1929) 23 *Am J Intl L* 133. The Commentary to this Article is equally unclear. On the one hand, it seems to support the 'usual rule that a state is responsible only for some fault or delinquency of its own' and notes that reparations for the original harm are due to 'political considerations'. On the other hand, the Commentary seems to refer with approval to complicity and condonation theories, see *Ibid*, p 187–90.

[98] FV García Amador, 'Second Report on State Responsibility' (1957) 2 *YB Intl L Comm'n* 104, UN Doc A/CN.4/106 [hereinafter, García Amador, Second Report]. García Amador revised this provision in a later draft in 1961, but without rectifying the ambiguity, see FV García Amador, 'Sixth Report on State Responsibility' (1961) 2 *YB Intl L Comm'n* 1, 47, UN Doc A/CN.4/134 and Add.1.

> government. The State, however, is responsible for (a) A failure to exercise due diligence to protect the life and property of foreigners. (b) A failure to exercise due diligence to apprehend and punish private individuals who injure foreigners.[99]

This trend was also evident in the Restatement of the Law prepared by the American Law Institute in that same year.[100]

In the final analysis, attempts at codification revealed a measure of agreement that wrongful private conduct was not attributable to the State, and that State responsibility arose only for the State's own acts or omissions in relation to such conduct, rather than for the private act itself. However, several texts were ambiguous as to the precise scope of the State's responsibility.[101] By concentrating on the circumstances in which the State was an appropriate address for reparation in the case of injuries to aliens, these documents were inclined to relegate the precise nature of the State's responsibility to the subtext of their provisions. It was not until the ILC confronted the issue in the early 1970's, that the theory was more clearly articulated in codified form.

2.7.4 State Practice

While occasionally suffering from the same ambiguity present in the codification projects considered above, preference for the separate delict theory also emerged from diplomatic incidents of the period. Evidence of State practice is available with respect to only a handful of States, but it provides some useful indications of the prevailing views regarding State responsibility for private conduct as early as the beginning of the 1920s.

The present section considers some of the leading incidents that are cited in support of the principle of non-attribution and the separate delict theory as customary legal norms. Subsequent chapters will consider State practice in the years following the adoption of Part I of the ILC Draft Articles on State responsibility, especially as they relate to terrorism.[102]

The Janina incident of 1923, represents one of the most celebrated cases involving State responsibility for private conduct from this period. On 7 August of that year, unknown individuals operating in Janina, in Greek territory, assassinated the Italian members of an international commission established by the Conference of Ambassadors to delimit the Greek-Albanian frontier.[103] The

[99] Inter–American Juridical Committee, Principles of International Law that Govern the Responsibility of the State in the Opinion of The United States of America, Art V, (1965), reprinted in Ago, First Report, above n 75, p 154.

[100] American Law Institute, *Second Restatement of the Law*, 2 Foreign Relations Law of the United States, Section 183 (1965).

[101] For an attempt to address this ambiguity, see below sections 8.4.2. and 8.4.3.

[102] See below sections 3.1 and 5.4.

[103] See generally J Barros, *The Corfu Incident of 1923: Mussolini and the League of Nations* (Princeton, NJ, Princeton University Press, 1965).

initial position taken by the Italian government was to assert Greek responsibility for the assassination solely by reason of its occurrence on Greek territory, without making any effort to allege actual wrongdoing on the part of Greece in relation to the offence.[104] When the Greek Government—though agreeing to some of the claims for satisfaction—rejected Italy's reasoning and denied any responsibility for the incident,[105] Italy moved to occupy the island of Corfu so as to force Greek compliance with all of its demands.

The occupation of Corfu in turn led to consideration of the dispute by the League of Nations. By this time, the initial position of Italy had been indirectly supported by a telegram concerning the incident sent to the Council of League of Nations by the Conference of Ambassadors. The telegram affirmed that 'it is a principle of international law that States are responsible for the political crimes and outrages committed in their territory'.[106]

These positions purported to invoke a doctrine of absolute responsibility which, as the representative of France to the Council noted, were 'quite contrary to the opinions held by jurists'.[107] Accordingly, while the incident itself was settled quickly following an agreement between the two countries,[108] the Council decided to refer certain questions of international law arising out of the affair to a special Committee of Jurists.[109] In responses to these questions the Committee of Jurists reaffirmed the principle that: 'The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State had neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal.'[110]

The members of the Council of the League of Nations, including Italy itself, unanimously approved the reply of the Committee of Jurists in 1924.[111] This reply was then transmitted for comment to all the Members of the League. Of the 21 comments received in response, not one questioned the position taken by the Commission of Jurists with respect to the responsibility for prevention, and several members expressly endorsed this aspect of the Committee's reply.[112]

[104] See 4 League of Nations OJ No 11, p 1413 (1923).

[105] *Ibid*, pp 1413–14.

[106] *Ibid*, p 1294.

[107] *Ibid*, p 1297 (Statement of M Hanotaux). The French representative cited the example of the attempted assassination of Emperor Alexander II in 1862 to assert that the legal issue in question was not responsibility for the crime but 'responsibility for the repression of the crime'.

[108] The settlement was reached in Paris on 13 September 1923 when the Conference of Ambassadors adopted a resolution taking note of Greece's undertaking to apologize and offering a sum as indemnity should the perpetrators not be apprehended. Italy, in return, was to vacate Corfu, *ibid*, p 1305–6.

[109] *Ibid*, p 1351.

[110] 5 League of Nations OJ No 4, p 524 (1924).

[111] *Ibid*, p 525.

[112] See Observations of the Governments of the States Members of the League of Nations, League of Nations Doc C.212.M.72 (1926) (see especially comments by Cuba, Hungary, Poland and Switzerland).

In the same year as the Janina incident, the Soviet Envoy to the Lausanne Peace Conference, Worowski, was killed by a Swiss national of Russian origin. While Swiss authorities were quick to arrest the culprit, the Soviet Union accused Switzerland of failing to afford their representatives adequate protection. In a telegram issued by the People's Commissioner for Foreign Affairs, the Soviet Union stated that:

> The last communications from Worowski have proved beyond any doubt that the Swiss authorities completely neglected to take the most elementary precautionary measures to protect the Russian delegate and his colleagues . . . the attitude . . . of the Swiss authorities must be clearly designated as tolerance of one of the most serious crimes.[113]

The telegram proceeded to demand the dismissal and prosecution of all officials guilty of misconduct. Switzerland objected forcefully to the Soviet accusations, arguing no wrongdoing on its part and insisting that it 'owes nobody any satisfaction other than that prescribed by the duty to guarantee the impartial enforcement of the laws in force in the country'.[114]

The exchanges between the two countries continued to be heated. At one point, the Swiss refusal to meet Soviet demands prompted a charge of 'moral complicity' in the crime and a boycott against Switzerland.[115] Tensions were also heightened when the alleged offender was acquitted by a Swiss court, but the issue was eventually settled by a joint declaration issued in 1927.[116]

Throughout the incident, the essential dispute between the two States related to the facts and to the degree of protection owed to foreign delegates rather than to questions of attribution. The charge of 'moral complicity', which appeared in one of the later Soviet telegrams, seemed to be motivated by political indignation rather than legal conviction. Both sides seemed to accept that what was at issue was Switzerland's compliance with its own obligations to prevent and prosecute the private offense, rather than its responsibility for the private act itself.

A significant number of incidents involving riots and cross-border raids have also adopted these principles. When the property of a US national, Marshall Cutler, sustained damage as a result of riots in Florence in 1925, the State Department instructed its Embassy to seek compensation unless appropriate steps had been taken by the authorities. In a note verbale replying to the US request, the Italian Minister for Foreign Affairs stipulated as follows:

[113] K Furgler, *Grundprobleme Der Völkerrechtlichen Verantwortlichkeit Der Staaten, Unter Besonderer Berücksichtigung Der Haager Kodifikationskonferenz, Sowie Der Praxis Der Vereinigten Staaten Und Der Schweiz* (Zurich, Polygraphischer Verlag, 1948) (translation from German). See also Ago, Fourth Report, above n 28, p 116.

[114] Furgler, above n 113, pp 59–60.

[115] *Ibid*, p 60.

[116] Switzerland agreed to grant Mr Worowksi's daughter material assistance on an *ex gratia* basis.

> The Royal Italian Government does not in any way intend to reject the international principle concerning a State's responsibility in the case of losses sustained by foreigners . . . the Royal Government holds itself obligated, not absolutely to prevent certain occurrences from taking place, but to exercise in order to obviate them ordinary vigilance . . . the question of the juridical responsibility of a State may be raised only when: (1) the damage has been caused by the State itself; (2) it is the consequence of an illicit act by the State; (3) it is imputable to the State. Now, none of the foregoing conditions is applicable to the case of Mr Marshall Cutler . . . the private acts of nationals do not involve the State's responsibility.[117]

The response of the State Department affirmed that there was no disagreement regarding the issue of attribution, though there may have been differences regarding the measure of reparations owed in the event of wrongful omissions on the part of the Italian authorities.[118] The State Department issued similar instructions to its embassies regarding the non-attribution of private acts following disturbances in Cuba in 1933,[119] and in Libya in 1956.[120]

Several other cases can be briefly mentioned. In 1933, a group of German citizens abducted three Saar nationals and returned with them to Germany. In a note to the Secretary-General of the League of Nations, the German government indicated that it would institute criminal proceedings against the abductors, but denied any responsibility for the act itself, asserting that it 'can accept no responsibility for the spontaneous acts of individuals'.[121] An analogous statement was made by France in response to a parliamentary question raised following the killing of French nationals in Morocco. The French Minister for Foreign Affairs explained that: 'On each occasion, we have insisted on the responsibility of the Government, not so much because of any direct complicity on its part as because of the elementary duty incumbent upon any independent Government to maintain order in its territory.'[122]

It may be assumed that sovereign governments would generally want to limit the circumstances in which private acts were attributable to the State. States may often be more concerned with protecting themselves from direct accountability for private offenses, than with ensuring that they are able to hold other States liable for the harm occasioned to their own nationals. It is thus not altogether

[117] (1943) 5 *Hackworth Digest* 659.

[118] *Ibid,* pp 660–61. The US seemed to be demanding compensation commensurate with the original harm caused, rather than a sum corresponding to any malfeasance on the part of Italy.

[119] *Ibid*, p 658.

[120] (1967) 8 *Whiteman Digest* 831–32. In a subsequent incident in Iraq in 1958, the US did seek compensation for the killing of 3 of its nationals by a mob while they were in Iraqi police custody. In this case it would seem that the US based its claim on the failure by the Iraqi authorities to prevent the killing. Iraq, paid compensation on an *ex gratia* basis affirming the principle of non-attribution and denying wrongdoing on its part, see *ibid,* pp 832–33.

[121] 14 League of Nations OJ, No 8, (1933) 1050.

[122] ACH Kiss, 3 *Répetoire De La Pratique Française En Matiére De Droit International Public* (Paris, Éditions du Centre National de la Recherche Scientifique, 1965) 636.

surprising that the diplomatic incidents surveyed above offer some support for the principle of non-attribution and the separate delict theory.

Upon reflection, however, the picture may be more textured than the tendency noted above seems to indicate. For one thing, most of the incidents are preoccupied with rejecting any notion of automatic responsibility for private wrongs. They stipulate that responsibility originates in the distinct violation of the State, but they have not always clarified whether that responsibility, once engaged, may encompass the damage caused by the private action.[123]

It should also be observed that most of the diplomatic episodes considered thus far involved sporadic incidents against foreign nationals residing within the territory of another State. Indeed, the arbitral decisions and codification projects of the period were largely, if not exclusively, preoccupied with these kinds of events. It may not necessarily follow that States would take the same view with respect to acts of a more nefarious nature, involving a sustained failure on the part of a State to prevent or punish repeated cross-border acts of terrorism perpetrated by private actors.[124]

State practice leading up to the codification of Draft Articles on State Responsibility by the ILC does evidence a preference for divorcing State responsibility from private responsibility, and for insisting that the State can only be held accountable as a result of its own wrongdoing. However, the repertoire of diplomatic practice available from this period concerns only a select group of States, and focuses primarily on the award of damages for injury to aliens within a State's territory. It remains to be seen whether this trend is evident in more recent State practice, particularly in relation to the activities of terrorist organizations.

2.7.5 Publicists

The opinions of those jurists who advocated the complicity or condonation theories to explain State responsibility for private conduct have already been examined.[125] There is little doubt, however, that while prevalent at the turn of the 20th century, the views of these commentators have since been overwhelmed by scholarly works that adopt, in express or implied terms, the separate delict theory.

Early views on the subject were framed as reactions to theories of complicity or collective responsibility. The German jurist Heinrich Triepel stated in 1899 that 'the State does not become, as is always said, responsible for the act [of the individual] just because of its passivity, it was and remains responsible if it neglects to do what it is obliged to do by reason of that act'.[126] Clyde Eagleton also

[123] See below section 8.4.3.
[124] See below section 7.3.2
[125] See above sections 2.4 and 2.6.
[126] H Triepel, *Völkerrecht und Landsrecht* (Leipzig, CL Hirschfeld, 1899) 333–34 (translation from German).

regarded this as accepted doctrine, stipulating that 'the state is never responsible for the act of an individual as such: the act of the individual merely occasions the responsibility of the state'.[127] Similar positions were formulated in the early decades of the 20th century by writers such as Anzilotti,[128] Arias,[129] Freeman,[130] and Starke.[131]

Following the Second World War, the separate delict theory came to be accepted as the principal doctrine explaining the responsibility of States in relation to private conduct. It received the support of leading scholars of international law such as Rousseau,[132] Guggenheim,[133] Kelsen,[134] Cheng[135] and Schwarzenberger.[136] Eduardo Jiménez de Aréchaga, for example, writing in 1968, stated as follows:

> In the modern view the basis of state responsibility for acts of private individuals is not complicity with the perpetrator but solely failure of the state to perform its international duty of preventing the unlawful act, or failing that, to arrest the offender and bring him to justice . . . . There is no reason then to speak of state complicity . . . since the state is internationally responsible not for the acts of any private individual, but for its own omission . . . . The deliquency of the private individuals is no longer taken as a basis of state responsibility but as merely the occasion for calling into operation certain duties of the state.[137]

[127] Eagleton, above n 5, p 77. Though, as noted above section 2.3, Eagleton argued for something akin to a strict responsibility approach, he recognized that the separate delict theory was the prevailing view; see also Eagleton, above n 12, p 54 ('the State is responsible only for its own acts . . . [individual acts] are not acts of the state, they cannot engage the responsibility of the state').

[128] D Anzilotti, 'La Responsabilité Internationale des Etats à Raison des Dommages Soufferts par de Estrangers' (1906) 13 *RGDIP* 5, 298–99.

[129] H Arias, 'The Non-liability of States for Damages Suffered by Foreigners in the Course of a Riot, an Insurrection or a Civil War' (1913) 7 *Am J Intl L* 724, 747.

[130] Freeman, above n 38, pp 367–69 (1938) ('No doctrine based on "complicity" or "approbation" can prove acceptable to those unwilling to receive a fictional interpretation of this particular phenomenon of responsibility . . . International responsibility in these cases is born of the sole fact that in some way the processes of administering criminal justice have fallen so far short of that required . . .'. He notes, however, that a doctrine of complicity could be defensible in the case of a knowing failure to prevent).

[131] JG Starke, 'Imputability in International Deliquencies' (1938) 19 *BritY B Intl L* 104, 112 (stating that 'What happens is that international law imputes to the state not the acts of the private individuals, but the breach by state agencies of international obligations in regard to the damage or injury which is the consequence of those acts'.)

[132] C Rousseau, *Droit International Public* (Paris, Sirey, 1953) 376–77.

[133] P Guggenheim, 2 *Traité De Droit International Public*, *Avec Mention de la Pratique Internationale et Suisse* (Geneva, Georg, 1954) 5.

[134] H Kelsen, *Principles of International Law* (New York, NY, Rinehart, 1952) 121 ('in all the cases of so-called indirect or vicarious responsibility, the state is responsible only for its own conduct').

[135] B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London, Stevens, 1953) 176.

[136] G Schwarzenberger, 1 *International Law as Applied by International Courts and Tribunals*, 3rd edn, (London, Stevens & Sons, 1937) 615.

[137] de Aréchaga, above n 9, p 560; see also EJ de Aréchaga, 'International Law in the Past Third of a Century' (1978) 159(1) *Hague Recueil des Cours* 1, 283 ('. . . the notion of implied State complicity does not provide an adequate explanation . . . the basis of State responsibility in these cases is not complicity with the perpetrator but failure to perform its own international duty . . . There is

After Robert Ago advocated this approach in his fourth report to the ILC in 1972,[138] the separate delict theory attracted even wider support. The writers who have since endorsed this approach are too numerous to mention, but some may be cited as representative samples.

The British international lawyer, Ian Brownlie, put the proposition in these terms: 'responsibility can only be based upon some ultimate default by the organs of the state the activities of private persons merely constituting the objective standards which give rise to a breach . . . on the part of the state'.[139] Similarly, Michael Akehurst argued succinctly that 'a State is never liable for the acts of private individuals. But the acts of private individuals may be accompanied by some act or omission on the part of the state, for which the state is liable'.[140] Finally, the most recent edition of Oppenheim's International Law provides that the failure of a State in relation to the illicit act of a private person 'although itself wrongful, does not amount to condonation or ratification of his acts by the state so as to make his acts attributable to the state: the failure is a distinct matter, for which the state may be held responsible . . .'.[141]

2.8 THE PRESENTATION OF THE SEPARATE DELICT THEORY TO THE ILC

From Injury to Aliens to State Responsibility as a Whole

At its first session in 1949, the International Law Commission selected both the treatment of aliens and State responsibility as among the topics considered suitable for codification.[142] With other issues being given higher priority, it was

no reason to speak of State complicity or of "vicarious" or "indirect" responsibility.'); CF Amerasinghe, 'Imputability in the Law of State Responsibility for Injuries to Aliens' (1966) 22 *Revue Egyptienne de Droit International* 91, 96.

[138] See below section 2.8.

[139] Brownlie, above n 5, p 159. (Noting also that this principle was consolidated between 1900 and 1930).

[140] M Akehurst, *A Modern Introduction to International Law*, 5th edn, (London, Routledge, 1984) 88–89.

[141] R Jennings and A Watts, (eds), *Oppenheim's International Law*, 9th edn, (Harlow, Longman, 1992) vol 1, 549; see also Higgins, above n 2, p 153; Rüdiger Wolfrum, 'State Responsibility for Private Actors: An Old Problem of Renewed Relevance' in M Ragazzi, (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Leiden, Brill, 2005) 423, 425 ('a State, in fact, is not held directly responsible for the private conduct but for the State action or rather lack thereof in response to the conduct of private persons. The private conduct only constitutes the trigger for the international responsibility but it is the conduct of State officials or the lack of conduct which counts').

[142] Report of the International Law Commission, UN GAOR, 4th Sess, Supp No 10, UN Doc A/925 (1949). The ILC was basing its decision in large part on a memorandum prepared for the Secretary General by Sir Hersch Lauterpacht in which, with considerable foresight, he had argued that the question of responsibility 'transcends' the field of injury to aliens, see Survey of International Law in relation to the Work of Codification of the International Law Commission, UN Doc A/CN.4/1/Rev.1 (1948) para 98.

not until 1953 that the General Assembly requested the ILC to undertake 'the codification of the principles of international law of State responsibility'[143] and not until 1955 that the Commission appointed FV García Amador of Cuba as special rapporteur for the topic.

Between 1956 and 1961 García Amador presented the Commission with six reports. While including some novel and broad inquiries into State responsibility as a whole, García Amador's reports continued in the line of previous codification projects by concentrating on the responsibility of the State for injuries to aliens.

In those areas where García Amador was willing to advance innovative ideas he found his fellow Commission members less than receptive.[144] In those areas where he tried to codify specific principles related to the field of injury to aliens, the Commission stumbled into the same debates that had impeded progress at the Hague Codification Conference of 1930.[145]

As it happened, the ILC was preoccupied with codification in other fields and gave García Amador's reports scant attention. They were briefly discussed at the 8th, 9th, 11th and 12th sessions of the Commission, without ever adopting any of the draft articles that the special rapporteur had proposed.

García Amador followed a long line of jurists in supporting the principle of non-attribution. On this point, at least, his fellow Commission members raised no objections. In his first report, García Amador argued that State responsibility with respect to private acts 'does not originate in the act itself but rather in the conduct of the State in relation to the act'.[146] The sentiment was repeated in his second report, which noted that 'what is in essence imputed to the State is not really the [private] act or deed which causes the injury, but rather the non-performance of an international duty'.[147] As discussed above, while García Amador's position was clear in principle, the draft articles he prepared retained a measure of ambiguity in so far as the general question of State responsibility for private acts was concerned because of the focus on the field of protection of aliens.

When García Amador's membership in the ILC ended in 1961, the work on State responsibility had advanced little, and remained at an impasse. The following year, the Commission established a subcommittee, under the stewardship of the Italian jurist Roberto Ago to consider the future of the topic.

As noted above, the report of the sub-committee recommended the separation of the rules of State responsibility for the violation of legal obligations, from the

[143] GA Res 799 (VIII), UN GAOR, 8th Sess, Supp No 17, UN Doc A/799 (1953).

[144] For example, in suggesting the notion of State crimes or in positing that the individual was a subject of international law who could bring an international claim in his own capacity, see García Amador, First Report, above n 76. From his second report until his last, García Amador narrowed his treatment to traditional concepts related to injuries to aliens, see García Amador, Second Report, above n 98, p 105.

[145] See, eg, Report of the 413th and 415th Meeting of the International Law Commission, (1957) 1 *YB Intl L Comm'n* 154–65, UN Doc A/CN.4/96; see also Crawford, above n 5, pp 1–2.

[146] García Amador, First Report, above n 76, p 182. See also *ibid*, p 187.

[147] García Amador, Second Report, above n 98, p 121.

substantive or 'primary' rules of international law.[148] The report proceeded to outline the main points which needed to be considered as part of the study—an outline which effectively guided the work of the Commission on this topic until its conclusion in 2001. The outline included the question of attribution, including 'State responsibility in respects of acts of private persons' and the 'question of the real origin of international responsibility in such cases'.

The report of the sub-committee and its subsequent endorsement by the General Assembly,[149] represented a defining moment in the progress towards the codification of the topic of State responsibility. At one level, the idea of codifying general rules at a high level of abstraction 'created a politically safe space' for the ILC to conduct its work without getting embroiled in controversial debates about substantive rules.[150] More fundamentally, the General Assembly accepted the ILC's presumption that international law was sufficiently cohesive to enable the articulation of trans-substantive principles of State responsibility.

Though the terms had not yet been invoked, the distinction drawn between the 'secondary' rules of State responsibility and 'primary' rules of international law enabled the Commission to free itself of the preoccupation with the field of injury to aliens, and concentrate on codifying the broader field of State responsibility as a whole. In so far as questions of attribution were concerned, this meant that whatever rules the ILC would formulate with respect to private conduct would presumably, and in the absence of exceptions, apply across the entire range of international legal obligations.[151]

Ago's Presentation of the Separate Delict Theory

Roberto Ago, who had been appointed as the Commission's second special rapporteur for the topic, submitted eight reports between 1969 and 1980. His third and fourth reports focused on the issue of attribution, and the determination of an 'act of State' under international law. His fourth report, issued in 1972, dealt extensively with the question of State responsibility in relation to private conduct. Unburdened by considerations of the primary rules on injury to aliens, Ago was able to present a clear analysis of the applicable legal principles. His report remains, to this day, the most comprehensive and forceful exposition of the separate delict theory.

In his introductory consideration of the issue, Ago conceded that from a theoretical standpoint, there was nothing to prevent the conduct of private persons,

[148] Report of the Sub-Committee on State Responsibility, (1963) 2 *YB Intl L Comm'n* 227, UN Doc A/CN.4/152.

[149] GA Res 1902 (XVIII), UN GAOR, 18th Sess, Supp No 15, UN Doc A/1902 (1963) 69.

[150] D Bodansky and JR Crook, 'Symposium: The ILC's State Responsibility Articles' (2002) 96 *Am J Intl L* 773, 780.

[151] See below section 3.1, for a discussion of the scope of the ILC Draft Articles; see also below section 7.3.2.

as such, from being considered an act of State.[152] However, in practice he observed that only the acts of persons who form part of the State's 'organization' is so attributed.[153]

In assessing the relevant legal sources, Ago was adamant that it is the State's 'delinquency for which reparation is made and not the damage which may result therefrom'.[154] He asserted that the 'State assumes responsibility not for the action of the individual, but for the conduct, usually omissive, of some of its organs in connexion with the action of the individual',[155] and he referred to the 'fundamental principle of non-responsibility of the State for damage caused in its territory' by private actors.[156] In this context, Ago explained the separate delict theory in the following terms:

> Actions and omissions by individuals who are and remain individuals are not attributed to the State under international law and do not become 'acts of the State' which, as such, may involve its responsibility towards other States . . . the State is internationally responsible only for the action, and more often for the omission, of its organs. . . . It is responsible for having violated not the international obligation with which the individual's action might be in contradiction, but the general or specific obligation imposing on its organs a duty to provide protection.[157]

After a detailed review of the relevant international legal sources, Ago presented the following conclusion to the Commission:

> We have seen that, according to the principles currently applied in international judicial decisions and State practice, acts of private individuals are not attributed to the State . . . the strictly negative finding regarding the attribution to the State of the acts of private individuals in no way signifies that the State cannot otherwise incur international responsibility with regard to such actions. But the rule must spell out that this responsibility can derive only from an act by State organs, which by their passive attitude towards the action of individuals, have failed to fulfill an international obligation of the State . . . [T]he action of the individual may assume [importance] as an external event, constituting the catalyst of the wrongfulness of the State's conduct.[158]

Ago's fourth report encapsulated a century of international legal debate during which the principle of non-attribution and the separate delict theory had

[152] R Ago, 'Third Report on State Responsibility' (1971) 2 *YB Intl L Comm'n* 199, 233 UN Doc A/CN.4/226 and Add, 1–3.

[153] *Ibid*.

[154] Ago, Fourth Report, above n 28, p 99.

[155] *Ibid*.

[156] *Ibid*, p 106; see also *ibid*, p 124 ('the State is answerable only for the wrongful attitude adopted by its organs in relation to private acts').

[157] *Ibid*, p 123.

[158] *Ibid*, p 126; see also Ago's presentation to the Commission at its 1308th meeting, Summary Records of the Twenty Seventh Session of the International Law Commission, (1975) 1 *YB Intl L Comm'n* 23, UN Doc A/CN.4/SER.A/1975.

become consolidated as legal norms. In submitting his conclusions to the members of the Commission, Ago helped pave the way for the crystallization of a principle regulating State responsibility for private acts in codified form that, as discussed in chapter 3, has since been widely relied upon.

2.9 CONCLUSION

The long history of jurisprudence, and Ago's own conclusions, provide general support for the proposition that the separate delict theory represents a broadly accepted legal doctrine. Under this approach, the State is responsible for its own acts, not for the acts of private individuals, acting in that capacity. In essence, State responsibility depends on an agency-type relationship between the actor engaged in the illicit conduct and the State itself. From this perspective, acts of the State's own officials and organs would be attributable to the State, while the conduct of purely private actors could neither be attributed to the State nor define its responsibility. The legal responsibility of the State is thus seen as a function of agency, and the principles of attribution with respect to private conduct flow naturally from this conception.

It is important to bear in mind, however, that the legal foundations of this theory are less sound than is often assumed. Most of the cases in which this issue arose, and upon which the special rapporteur had relied in preparing his report, concerned the protection of aliens[159] and were not devoid of ambiguity.[160] Many sources emphasized that wrongful State action was the basis for State responsibility without necessarily ruling out the possibility that such responsibility, once engaged, could encompass the private conduct itself. In numerous cases, the separate delict theory was advanced with a view to deflecting competing doctrines that were prevalent at the time, rather than examining its full import and scope as a legal principle of general application.

While the principle has since been widely applied, its historical origins cannot be ignored, and they will be revisited when its possible application to private terrorist activity is considered. Before doing so, however, it is first necessary to address the Commission's formulation of this principle, its exceptions, and its more recent applications in State practice.

[159] See comment of Šahović, *ibid*, p.32; see also below section 7.3.2.
[160] See below section 8.4.3.

3

The Agency Paradigm: The Principle of Non-Attribution and its Exceptions

3.1 THE PRINCIPLE OF NON-ATTRIBUTION OF PRIVATE ACTS AND THE SEPARATE DELICT THEORY: THE ILC TEXT AND THE CLAIM OF UNIVERSAL APPLICATION

The principles that Roberto Ago had advocated were reflected without objection in Part I of the ILC Draft Articles in 1975. In the course of the debate within the Commission,[1] and later in the Sixth (Legal) Committee of the General Assembly,[2] experts and States were unanimous in their praise for the special rapporteur's exhaustive commentary, and offered support for the international legal rule he had articulated.

Though differing in drafting style from the language originally proposed by Ago,[3] the provision eventually recommended by the Commission has generally been understood as affirming that a State could only ever be held responsible for its own conduct in relation to the acts of private persons, operating purely in that capacity, and never for the private acts themselves.

The idea that legal responsibility depended on the illicit conduct of an individual that was in a relationship of agency to the State became an implicit part of the Draft Articles in two ways. First, in the general list of principles of attribution that affirmed that only the conduct of those regarded as acting on behalf of the State was to be equated with the conduct of the State itself for which it could be held responsible.[4] Secondly, in the affirmation that private

[1] The discussion of Ago's report by the Commission took place at the 1308th to 1311th meetings, the 1345th meeting and the 1359th meeting, see Summary Records of the Twenty Seventh Session of the International Law Commission, (1975) 1 *YB Intl L Comm'n* 23–41, 214–15, 294–95, UN Doc A/CN.4/SER.A/1975.

[2] See Summary Records of the Sixth Committee, UN GAOR, 6th Comm, 30th Sess, UN Doc A/C.6/SR. 1522–82; UN Doc A/C.6/SR.1535 (Finland); UN Doc A/C.6/SR.1538 (Brazil); UN Doc A/C.6/SR.1539 (FDR); *ibid*, p 65 §7 (Austria); UN Doc A/C.6/SR.1540, 69 §11 (Argentina); UN Doc A/C.6/SR.1543, 85 §32 (Netherlands); UN Doc A/C.6/SR.1546 (Denmark); *ibid*, p 101 §41 (Oman); UN Doc A/C.6/SR.1547 (Uruguay); UN Doc A/C.6/SR.1547 (Iran); *ibid*, p 113 §15 (Indonesia); UN Doc A/C.6/SR.1549 (Ghana); *ibid*, p 125 §56 (Uganda).

[3] R Ago, 'Fourth Report on State Responsibility' (1972) 2 *YB Intl L Comm'n* 71, UN Doc A/CN.4/264 and Add 1, p 126.

[4] See ILC Draft Arts 4–11, reprinted in GA Res 56/83, UN GAOR, 56th Sess, Supp No 49, UN Doc A/RES/56/83 (2001) 499 [hereinafter, ILC Draft Articles]; see also below section 3.3; above section 2.1, n 6.

conduct lacking that relationship of agency would not be so attributable and could not, by implication, give rise to direct State responsibility. Draft Article 11 of the ILC text, as adopted on first reading, read as follows:

1. The conduct of a person or group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.
2. Paragraph 1 is without prejudice to the attribution to the State of any other conduct which is related to that of the person or group of persons referred to in that paragraph and which is to be considered an act of the State by virtue of articles 5 to 10.[5]

According to the ILC Commentary, this rule not only reflected customary international law, it was of universal application. The last paragraphs of the Commentary pronounced that the rule was 'in accordance with criteria which have gradually been affirmed in international legal relations' and was 'valid irrespective of the circumstances in which the private person acts and of the interests affected by his conduct'.[6] The Commission went on to reject the introduction of exceptions to the rule, arguing that it 'fully meets the needs of contemporary international life and does not require to be altered'.[7]

Draft Article 11 was essentially left untouched by the Commission, until the fifth special rapporteur, James Crawford, revisited it in 1998, as part of his efforts to guide the ILC towards the completion of the State responsibility project. In his first report, Crawford did not question the continuing validity of the rule itself, but echoed sentiments made regarding its utility by a number of governments during debates in the Sixth Committee of the General Assembly that had followed its adoption.[8]

Crawford recognized that the provision recorded 'the outcome of an important evolution in general international law . . . towards a clear distinction in principle between the State and non-state domains'. On the other hand, he noted that the provision itself was a negative statement without independent operative content. It amounted essentially to a somewhat circular proposition, the inverse form of the ILC's other attribution articles, which affirmed that private conduct, which could not be regarded as an act of the State under ILC rules, was not attributable to the State.[9]

[5] The Draft Article itself was adopted in 1975, see (1975) 2 *YB Intl L Comm'n* 70, UN Doc A/CN.4/SER.A/1975/Add.1. Part I as a whole, as adopted on first reading, may be found in (1980) 2(2) *YB Intl L Comm'n* 30, UN Doc A/CN.4/SER.A/1980/Add.1.

[6] (1975) 2 *YB Intl L Comm'n* 70, p 82, UN Doc. A/CN.4/SER.A/1975/Add.1.

[7] *Ibid*.

[8] See, eg, Chile, (1980) 2 (1) *YB Intl L Comm'n* 97, UN Doc A/CN.4/SER.A/1980/Add.1; Germany, (1986) 2 (1) *YB Intl L Comm'n* 12, UN Doc, A/CN.4/SER.A/1986/Add.1; Comments and observations received from Governments, UN Doc A/CN.4/488, p 41 (1998) (United States); *ibid*, p 37 (Switzerland).

[9] J Crawford, 'First Report on State Responsibility' (1998) 31–32, UN Doc A/CN.4/490/Add.5. Several members of the Commission had also noted this in 1975 but had supported the inclusion of the Draft Article since it documented the result of a process of international legal development, see Summary Records of the Twenty Seventh Session of the International Law Commission, above n 1, p 30 (Tsuroka), p 31 (Reuter), p 37 (Bilge) and p 38 (Ustor).

Crawford's recommendation to delete Article 11 from the ILC's final draft on this basis was accepted by the Commission.[10] The final version of the ILC Draft Articles, as adopted by the General Assembly, thus contains no clear remnant of Ago's intensive labors on this point. But this omission can in no way be interpreted as casting doubt on the accepted authority of the rule. On the contrary, the deletion of Draft Article 11 emanated not from any perceived change in this rule, but from the sense that its content was so embedded in the fabric of the ILC's principles of attribution, that its explicit articulation was superfluous. The deletion of Draft Article 11 was thus, in a sense, testimony to the prominent status the rule had acquired.

As Crawford himself has noted, the ILC's principles of attribution: '. . . were cumulative but also limitative: in the absence of a specific undertaking, a State could not be held responsible for the conduct of persons or entities in any circumstances not covered by the positive attribution principles.'[11]

This view is reflected not only in the work of jurists,[12] but also in the ILC Commentary itself. Chapter II of the ILC Draft Articles that specifies the principles of attribution, and the conceptions of agency on which they are founded, are thus generally regarded as covering exhaustively the circumstances in which a State may be held responsible for an internationally wrongful act.

While Draft Article 55 of the ILC text acknowledges that the Articles do not apply to the extent that the responsibility of a State is governed by a *lex specialis*, they are clearly designed to have trans-substantive application in the absence of an explicit contrary rule.[13] In the simple words of the Commentary, 'a State is

[10] The subject was considered at the 2555th, 2556th, and 2558th meeting, and concluded at the 2562nd meeting, see Summary Records of the Fiftieth Session of the International Law Commission, (1998) 1 *YB Intl L Comm'n* 246, 249, 268 & 284, UN Doc A/CN.4/SER.A/1998.

[11] J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge, CUP, 2002) 5; see also J Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 *Am J Intl L* 874, 878–79:

> Whatever the range of state obligations in international law, the ways of identifying the state for the purposes of determining breach appear to be common . . . Rarely (and never, as far as I am aware, by implication) is the state taken to have guaranteed the conduct of its nationals or of other persons on its territory, even when it has entered into obligations in completely general terms. The rules of attribution are thus an implicit basis of all international obligations so far as the state is concerned.

[12] See, eg, L Condorelli, 'L'imputation à Létat d'un Fait Internationalement Illicite: Solutions Classique et Nouvelles Tendances' (1984) 189(4) *Hague Recueil Des Cours* 9. (ILC principles of attribution should be presumed to apply to every field of international law, unless the existence of a *lex specialis* can be demonstrated); GA Christenson, 'The Doctrine of Attribution in State Responsibility' in RB Lillich, (ed), *International Law of State Responsibility for Injuries to Aliens* (Charlottesville, VA, University of Virginia Press, 1983) 320, 327 ('these categories are universal; they do not apply only to aliens'); DD Caron, 'The Basis of Responsibility: Attribution and Other Trans-substantive Rules' in RB Lillich and DB Magraw, (eds), *The Iran–United States Claims Tribunal: Its Contribution to State Responsibility* (Irvington-on-Hudson, NY, Transnational Publishers, 1998) 109, 110 (referring to rules of attribution as 'trans-substantive' in that they apply 'regardless of the specific norm (primary rule) allegedly breached').

[13] See below section 7.3.2.

not responsible for the conduct of persons or entities in circumstances not covered by this chapter'.[14]

3.2 RECENT APPLICATIONS OF THE SEPARATE DELICT THEORY

International legal practice in the years following Ago's report, has largely served to confirm the authority of an agency-based approach to State responsibility for private conduct. Despite its origins in the field of injury to aliens, there is considerable evidence to support the assertion that the separate delict theory reflects an accepted principle of international law of broader application. Moreover, subsequent practice has suffered far less from the kind of ambiguous formulations that were evident in the early treatment of injury to alien cases. A survey of international jurisprudence in the period following the adoption of the ILC text, on its first reading, reveals a variety of fields where an agency paradigm of responsibility for private acts has been generally applied or advocated.

3.2.1 Injury to Aliens and the Iran-US Claims Tribunal

State responsibility for privately occasioned injury to aliens remains dominated by the principle of non-attribution of private acts and the separate delict theory. The most detailed consideration of this aspect of State responsibility has emerged in the context of wrongful expulsion, expropriation and breach of contract claims made by US nationals before the Iran-US Claims Tribunal. Though the decisions of the Tribunal's Chambers do not always present a coherent jurisprudence,[15] a trend with respect to issues of responsibility and attribution in relation to private acts can be clearly discerned.[16] In a series of influential cases, the Tribunal has shown itself reluctant, absent a clear agency relationship, to attribute to Iran direct responsibility for conduct of non-State actors, even where Iran plainly failed in its duty to protect foreigners or somehow influenced the private activity.[17]

In the important case of *Short v Iran*,[18] the claimant alleged that acts of harassment and intimidation by private individuals before and during the

[14] Report of the International Law Commission to the General Assembly, UN GAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) 83.

[15] See DD Caron, 'Attribution Amidst Revolution: The Experience of the Iran–United State Claims Tribunal' (1990) 84 *Am Soc Intl L Proc* 51, 65; see also below section 8.4.2.

[16] The Tribunal's jurisprudence with respect to constructive expulsion has recently been relied upon by the Eritrea–Ethiopia Claims Commission. In this context, the Commission concluded that the alleged expulsion of Ethiopians by Eritrea did not meet the 'high threshold' set by the Iran–US Tribunal, see Eritrea–Ethiopia Claims Commission, Civilians Claims, Ethiopia's Claim 5, 17 December 2004, available at http://www.pca-cpa.org/ENGLISH/RPC/EECC/ET%20Partial%20Award%20Dec%2004.pdf, p 27

[17] GA Christenson, 'Attributing Acts of Omission to the State' (1991) 12 *Mich J Intl L* 312, 341–46.

[18] *Short v Islamic Republic of Iran* (1987) 16 Iran–US Cl Trib Rep 76 [hereinafter *Short*].

Islamic revolution led to his departure from Iran, and accompanying property loss. He argued that these acts were attributable to Iran and amounted to unlawful constructive expulsion by the State itself.

The majority of the Chamber, after referring approvingly to ILC's principles of attribution, held that while the conduct of members of a revolutionary movement who became the new government of a State would be considered an act of State,[19] 'the acts of supporters of a revolution cannot be attributed to the government'.[20] As the claimant was unable to point to specific directives issued by the leaders of the Revolution, or to identify revolutionary agents who were themselves involved in the acts leading to his departure, Iran could not be held responsible for the harmful conduct.

In a vigorous dissent, Judge Brower questioned the majority's finding on several grounds. First, he argued that hostile anti-American statements by Ayatollah Khomenei were part of a deliberate policy to expel US nationals from Iran and that the acts of loosely organized adherents could be properly attributed to the new government.[21] He also reasoned that in such circumstances the Tribunal should have established a rebuttable presumption that the departure of US nationals was the result of a wrongful expulsion by Iran.[22] In explicit terms, Brower found that Khomenei's total failure to 'quell the expulsive fervor . . . should permit attribution to him of responsibility for the consequences. The fire brigade commander who studiously looks the other way while the arsonist is at work in his midst *is no less guilty of the wrong*'.[23]

Brower's dissent had limited resonance in other Tribunal decisions.[24] As a general rule, the Tribunal's awards have strictly relied on agency principles to restrict the scope of State responsibility and impose an exacting, if not impossible, standard of proof on claimants wishing to establish State responsibility in such cases. In the case of *Rankin v Iran*,[25] for example, decided several months after *Short*, the Tribunal affirmed that the claimant had to produce evidence that specific directives to Iranian revolutionary agents were the cause of his departure and property loss. The fact that there existed a general and widespread official policy to rid the country of foreigners was insufficient to show that Iran was directly responsible for Rankin's departure.

Even cases in which the Tribunal did find Iran responsible for constructive expulsion or property loss, have served to support the view that private acts cannot be a source of State responsibility without a clear and proven link of

[19] ILC Draft Art 10, *reprinted in* ILC Draft Articles, above n 4.
[20] *Short*, above n 18, p 85.
[21] *Ibid*, pp 93–95, 99.
[22] *Ibid*, p 101.
[23] *Ibid*, pp 94–95 (emphasis added).
[24] See below section 8.4.2.
[25] *Rankin v Islamic Republic of Iran* (1987) 17 Iran–US Cl Trib Rep 135; see also *Arthur Young & Co v Islamic Republic of Iran* (1987) 17 Iran–US Cl Trib Rep 245; *Hilt v Islamic Republic of Iran* (1988) 18 Iran–US Cl Trib Rep 154; *Leach v Islamic Republic of Iran* (1989) 17 Iran–US Cl Trib Rep 233.

agency. In *Yeager v Iran*,[26] the claimant was able to show that members of the Iranian Revolutionary Guards had caused his departure from Iran. Because the Guards were performing public functions and constituted a local militia identified by distinctive armbands, the Tribunal regarded them as *de facto* agents of the nascent Khomenei government. As a result, the Chamber found that 'Iran cannot, on the one hand, tolerate the exercise of governmental authority by revolutionary "Komitehs" or "Guards", and at the same time deny responsibility for wrongful acts committed by them'.[27] In the process, the Chamber confirmed that if the conduct had been private in nature Iran could not be responsible for it, despite having acknowledged a calculated governmental policy encouraging anti-American activity.[28]

Analogous findings were made by the Tribunal in cases concerning wrongful expropriation, with express or implicit reliance on the ILC Draft Articles.[29] Such cases have served to affirm that the State will not be held directly responsible for the expropriation of private property, even if it tolerates or encourages such conduct, unless it can be shown that the offenders themselves were acting specifically on the State's behalf. Thus, for example, in *Pereira v Iran*[30] and *Computer Sciences Corp. v Iran*,[31] the Tribunal held Iran responsible for the expropriation of some of the claimant's property because it regarded the Revolutionary Guards who conducted the confiscatory actions as effective agents of Iran. By contrast, in *Schott v Iran*,[32] the claimant's inability to prove that *de jure* or *de facto* State agents were responsible for the confiscation was fatal to the claim.

The Tribunal has relied on a related type of analysis to determine Iranian responsibility for breach of contract by State owned or controlled enterprises. In

[26] *Yeager v Islamic Republic of Iran* (1987) 17 Iran–US Cl Trib Rep 92. There is some dispute as to what this case is authority for, see AJJ de Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, The *Tadić* Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia' (2001) 72 *Brit Y B Intl L* 255, 271 (arguing that Yeager is really a case of attribution for a *de facto* organ exercising governmental authority pursuant to Art 4 of the ILC draft). The tribunal itself, however, considered it a case of *de facto* agency of private actors pursuant to Art 8 of the ILC Draft. By contrast, the present ILC Commentary has cited this case in the context of Art 9—agents of necessity, see below section 3.3.3.

[27] *Yeager v Islamic Republic of Iran* (1987) 17 Iran–US Cl Trib Rep 92, 105. Significantly, unlike other instances before the Tribunal, the Chamber found sufficient evidence to establish a presumption that the Revolutionary Guards were *de facto* State agents, thus shifting the burden of proof to the Respondent.

[28] But see G Townsend, 'State Responsibility for Acts of De Facto Agents' (1997) 14 *Ariz J Intl & Comp L* 635, 651.

[29] See generally, C Brower and JD Brueschke, *The Iran–United States Claims Tribunal* (The Hague, Nijhoff, 1998) 442–71; see also A Mouri, *The International Law Of Expropriation as Reflected in the Work of the Iran–US Claims Tribunal* (Dordrecht, Nijhoff, 1994) 177–91 (arguing that all three Chambers of the Tribunal seem to have unanimously approved the rules of international law on attributability).

[30] *William Pereira Associates v Islamic Republic of Iran* (1984) 5 Iran–US Cl Trib Rep 198.

[31] *Computer Sciences Corp v Islamic Republic of Iran* (1986) 10 Iran–US Cl Trib Rep 269; see also *Leonard and Mavis Daley v Islamic Republic of Iran* (1988) 18 Iran–US Cl Trib Rep 232.

[32] *Robert Schott v Islamic Republic of Iran* (1990) 24 Iran–US Cl Trib Rep 203; see also *Schering Corp v Islamic Republic of Iran* (1984) 5 Iran–US Cl Trib Rep 361.

one instance, involving alleged breaches by corporations effectively controlled by Iran, the Tribunal found that without clear evidence of governmental interference the corporate action should be regarded as private and commercial and could not be attributed to Iran.[33] In another case, a State owned bank was presumed to have been acting in its commercial capacity when it took control of and title to the claimant's property because there was no factual basis to show that the bank was exercising public authority.[34] By respecting the distinct corporate personality of the State owned enterprise, the Tribunal has thus avoided the attribution of the illicit conduct of such enterprises to the State itself.[35] In so doing, the principle of non-attribution has been upheld to deny State responsibility even in cases where the State was itself the author of the conduct, provided that the conduct occurred in the context of corporate commercial activity.[36]

In sum, while dealing with a unique set of circumstances involving State responsibility in cases of revolution,[37] broad acceptance for the agency paradigm can be clearly identified in the Tribunal's awards.[38] Despite the disorder inherent in a turbulent time of revolution, the Tribunal's tendency was to establish a strict standard, requiring direct authorization or control of the private conduct to justify engaging Iran's responsibility.[39]

It is somewhat disconcerting that the Tribunal generally failed to consider a subsidiary ground of responsibility, firmly recognized in international law, which derived not from the private conduct itself, but from Iran's failure to exercise due diligence to prevent it.[40] When coupled with the difficult burden of proof placed

[33] *Flexi–Van Leasing v Islamic Republic of Iran* (1986) 12 Iran–US Cl Trib Rep 335, 348–349; *cf Foremost Tehran Inc v Islamic Republic of Iran* (1984) 10 Iran–US Cl Trib Rep 228 (where specific governmental control and interference was found to be the decisive factor in the decision not to pay a large US shareholder its due dividends).

[34] *International Technical Products Corp v Islamic Republic of Iran* (1985) 9 Iran–US Cl Trib Rep 206, 238–39.

[35] Respect for the distinct corporate personality of a State-owned or operated enterprise applies to prevent direct State responsibility in other legal fields as well, see, eg, Art 31, United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3, (in force, 16 November 1994) [hereinafter Law of the Sea Convention]; Art 3(b), Chicago Convention on International Civil Aviation, 7 December 1944, 61 Stat 1180, (in force, 4 April 1947); see also *Barcelona Traction Case (Belgium v Spain)* [1970] ICJ Rep 3, 39 (5 February) (where the court affirmed that international law respects the separate status of the corporate entity, except where the 'corporate veil' is a device or vehicle for fraud or malfeasance).

[36] See generally, J Chalmers, 'State Responsibility for Acts of Parastatals Organized in Corporate Form' (1990) 84 *Am Soc Intl L Proc* 60 (criticizing the presumption in favor of the commercial and distinct nature of the State-owned enterprise).

[37] It should, of course, be remembered that decisions of the Tribunal were limited to the terms of the Algiers Accords and particularly the General Declaration and the Claims Settlement Declaration of 19 January 1981, see (1981) 1 Iran–US Cl Trib Rep 3. However, it is submitted that on the questions of attribution with which we are concerned the findings of the Tribunal have general significance as they are unaffected by the unique jurisdictional scope of the Tribunal, see Caron, above n 12, pp 111–19.

[38] See Caron, above n 15, p 71 ('majorities of the tribunal appear to have accepted the Draft Articles as dispositive'); see also RL Cove, 'State Responsibility for Constructive Wrongful Expulsion of Foreign Nationals' (1988) 11 *Fordham Intl L J* 802.

[39] Townsend, above n 28, p 659.

[40] Christenson, above n 17, p 343.

on the claimant, such a position meant that individuals injured through the actions of ostensibly private persons could not recover directly or indirectly against the State, even if the State through its own wrongful actions or omissions contributed to the atmosphere which engendered the harmful private conduct.[41]

3.2.2 Human Rights

The principle that the State will not be directly responsible for privately caused harm but can be responsible for its own wrongs in relation to such harm is now broadly accepted in the sphere of human rights law. Considerations of State responsibility for private acts that infringe upon individual rights have, by and large, steered clear of notions of complicity or condonation and relied on rationales grounded in the principle of non-attribution and the separate delict theory.[42]

Inter-American Court of Human Rights

It is particularly instructive to compare the awards of the Iran-US Claims Tribunal with the conclusions reached in three important wrongful disappearance cases considered by the Inter-American Court of Human Rights. These cases are interesting, firstly, because they represent instances in which ILC principles were applied beyond the protection of aliens to cover situations where non-State actors infringe the human rights of the territorial State's own nationals. Moreover, these cases demonstrate how, without deviating from an agency based approach to responsibility, evidentiary tools can be used to contend more effectively with the subtle and clandestine nature in which States and private actors can interact to produce harm.

The *Velásquez Rodriguez Case* of 1988,[43] concerned the disappearance of a student at the National Autonomous University in Honduras. The Court diverged from the jurisprudence of the Iran-US. Claims Tribunal by recognizing the difficulty of proving tacit approval or direction by the State and thus allowing more liberal reliance on presumptions and shifting burdens of proof to establish State responsibility.[44] Referring to the general 'public and notorious

[41] *Ibid*, p 346 ('The decisions thus confirm the general trend that claimants . . . must show a direct causal link to conduct of agents of the State, not merely inaction in the face of duty, before action will be attributed to the State'); see also Caron, above n 15, p 67, (who criticizes the standard of proof applied by the Tribunal as unworkable).

[42] See generally Condorelli, above n 12, pp 149–55; see also S Farrior, 'State Responsibility for Human Rights Abuses by Non-state Actors', in 'State Responsibility in a Multiactor World' (1998) 92 *Am Soc Intl L Proc* 299, 301 ('It is the omission on the part of the state—not the act by the private actor—for which the state may be responsible').

[43] *Velásquez Rodriguez Case* Inter–Am Ct HR Decisions and Judgments 91 (ser C) No 4 (1988) [hereinafter *Velásquez Rodriguez*].

[44] *Ibid*, p 134. The Court, having regard to attempts to suppress information and to the State's control over it, argued that if a general policy of support or toleration of disappearances could be

knowledge' of disappearances conducted or tolerated by Honduran authorities, and giving weight to the circumstantial evidence presented in the case, the Court effectively shifted the burden of proof to the Government to refute the allegations.[45] On this basis, and without determining the exact identity of the offenders, the Court held that the disappearance was carried out by Honduran agents or, at the least, that Honduras failed in its duty to prevent the wrongful conduct.[46]

In this regard, the Court adopted the principle that while Honduras could not be held responsible for the acts of private or unidentified persons themselves, such acts 'can lead to the international responsibility of the state, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond as required by the Convention'.[47]

In the *Godínez Cruz Case*,[48] involving the disappearance of a schoolteacher and trade union leader, the Court followed the approach to evidentiary questions applied in *Velásquez Rodriguez*. As a result, it found adequate proof that the disappearance was 'carried out by individuals who acted under the cover of public authority'.[49] In this case too, the Court affirmed that the failure to take reasonable steps to prevent the disappearances or punish those responsible was a distinct ground of State responsibility that could be relied upon even if there was no direct State involvement in the disappearance itself.[50]

By contrast, in the *Fairén Garbi and Soliś Coralles Case*[51] the Court, disagreed with the Inter-American Commission, and found insufficient evidence to show that the disappearance of Garbi and Coralles had been carried out by Honduran authorities or was otherwise imputable to the respondent State. Nevertheless, the judgment reiterated that the affirmative duties under the American Convention of Human Rights could render the State responsible for a failure to ensure that private actors did not undermine the rights guaranteed in the Convention.[52]

The significance of these cases lies in the affirmation of a distinct duty to prevent and punish infringements of human rights by non-State actors for which State responsibility can be engaged even if the private conduct itself is not directly attributable to the State on agency grounds. The Court drew this

shown, and the Velásquez disappearance could be linked to that policy either through circumstantial evidence, indirect evidence or logical inference, that would be sufficient to support the allegations.

[45] *Ibid*, pp 140–45.

[46] *Ibid*, p 158.

[47] *Ibid*, p 154.

[48] *Godínez Cruz Case* Inter–Am Ct HR Decisions and Judgments 85 (ser C) No 5 (1989) [hereinafter *Godínez Cruz*].

[49] *Ibid*, p 156; citing circumstantial evidence, the Court established a presumption that the disappearance was carried out within the framework of a government practice, *ibid*, p 140.

[50] *Ibid*; see also Townsend, above n 28, p 675.

[51] *Fairén Garbi and Soliś Coralles Case* (1989) Inter–Am Ct HR Decisions and Judgments 73 (ser C) No 6 [hereinafter *Fairén Garbi and Soliś Coralles*].

[52] *Ibid*, p 129.

conclusion on the basis of Article 1 of the Convention which requires State parties not just to respect the rights guaranteed therein, but also 'to ensure' their full and free exercise.[53] As a result, State responsibility could be engaged not only for human rights violations committed by its own organs or agents, but also on a separate basis that was grounded in the State's omissions in relation to private conduct which infringed upon the rights guaranteed under the Convention.[54] Some have referred to this as the *Drittwirkung*[55] of human rights, combining a duty imposed upon State authorities to respect the rights enshrined in a convention with an additional duty to ensure their respect by others.

According to the Court, the obligations under Article 1 required the State to adopt all the means at its disposal 'of a legal, political, administrative and cultural nature' to ensure and promote the protection of human rights and to punish those responsible for their violation.[56] Failure to do so would give rise to State responsibility not for the private act itself, but for the State's own failure to adequately prevent or respond to it. In this sense, the Court accepted the separate delict theory, by denying responsibility for the private act itself but accepting responsibility for the State's own distinct wrongdoing in relation to that act.

The otherwise lucid reasoning in the disappearance cases, is somewhat tainted by subtle invocations of notions akin to complicity to explain the State's responsibility in relation to private conduct. In both *Velásquez Rodriguez* and *Godínez Cruz*, the Court reasoned that in circumstances where violations by private actors are not seriously investigated by the authorities, the non-State actors are 'aided in a sense by the government, thereby making the State responsible on the international plane'.[57] This language jars with the general tenor of the judgments by implying that responsibility arises because of the assistance that is indirectly afforded to the private actor, rather than the distinct violation by the State of its own legal obligations.

[53] *Velásquez Rodriguez*, above n 43, pp 166–67; *Godínez Cruz Case,* above n 48, pp 149–50; *Fairén Garbi and Soliś Coralles*, above n 51, pp 135–36; see also *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism,* Advisory Opinion of OC–5/85 of 13 November 1985 Inter–Am Ct HR Judgments and Opinions (ser A) No 5, pp 110–11. In a more recent case, the Inter-American Court held Nicaragua responsible for failing to prevent a foreign firm from improperly exploiting land belonging to the native Awas Tingni community, see *Mayagna (Sumo) Awas Tingni Community v Nicaragua* Inter–Am Ct HR Judgments and Opinions (ser C) No 79 (2001).

[54] See generally, D Shelton, 'Private Violence, Public Wrongs and the Responsibility of States' (1990) 13 *Fordham Intl L J* 1, 13–14.

[55] The term, meaning 'third party effect', is somewhat confusing in this context as it was not originally meant to relate to the obligation of the State to protect individuals from privately inflicted wrongs. It originates in German constitutional law and generally refers to the possible application of the German Basic Law to cases where both parties are private, see A Clapham, 'The "Drittwirkung" of the Convention' in RJ Macdonald, F Matscher and H Petzold, (eds), *The European System for The Protection of Human Rights* (Dordrecht, Nijhoff, 1993) 163; see also Condorelli, above n 12, pp 15–51. Other senses in which the term is used are less relevant to this discussion, see P van Dijk and GJH van Hoof, *Theory and Practice of the European Convention on Human Rights* (The Hague, Kluwer Law International, 1998) 22–26.

[56] *Velásquez Rodriguez*, above n 43, p 155; *Godínez Cruz,* above n 48, p 153.

[57] *Velásquez Rodriguez*, above n 43, p 156; *Godínez Cruz,* above n 48, p 154.

This apparent inconsistency in reasoning might arguably indicate that the Court was not entirely satisfied with a strict reliance on the separate delict theory as the sole basis for State responsibility in these cases. While never expressly deviating from an agency-based approach, the Court in these passages seemed to be searching for an alternative legal formulation that expressed responsibility in terms of the State's contribution to the disappearances themselves.

On the whole, the disappearance cases illustrate a greater degree of sophistication and flexibility in approaching the problem of State responsibility for ostensibly private conduct, than that displayed by the Iran-US Claims Tribunal. In particular, the Court was sensitive to the complex and veiled ways in which a State could in fact use private actors as *de facto* agents, and was receptive to using evidentiary principles as instruments to contend with this difficulty.[58]

At the same time, it should be noted that in the human rights field there may not generally be a practical difference between holding the State responsible for the private conduct itself and holding it responsible only for its failure to prevent that conduct.[59] In both cases the State may be deemed liable to compensate for the harm, and will be duty bound to prosecute the offenders and pursue the cessation of the wrongful conduct. This may explain the ease with which the Court adopted an 'either-or' approach, without demanding a more detailed investigation of questions of attribution and State responsibility in relation to purely private acts.

Other Human Rights Instruments

The general approach adopted by the Inter-American Court with respect to State responsibility for private infringements of human rights has been employed in relation to comparable provisions in other human rights instruments. In this regard, the detailed jurisprudence of the Inter-American Court has effectively set the standard for State responsibility whenever human rights instruments imply a duty to regulate private conduct.

While the thrust of international human rights treaties remains the protection of individuals from violations by State actors, this protection can be expanded, depending on the language of the convention, to cover State responsibility for the failure to prevent or punish privately infringed rights. This approach has been applied both to specific provisions that require the repression of defined private conduct, and to more general obligations on States parties not only to respect the enumerated rights, but also to 'ensure' their respect by others.[60]

Thus, for example, the European Commission and Court of Human Rights have consistently found that State responsibility could be engaged by the wrongdoing of State officials in relation to privately occasioned harm.

[58] See below section 4.4.5 and 9.3, for a discussion of evidentiary issues in terrorism cases.

[59] This may be contrasted to the possible far reaching implications of this distinction in cases of terrorism, see discussion below section 5.1.

[60] See generally, M Forde, 'Non-governmenal Interferences with Human Rights' (1985) 56 *Brit Y B Intl L* 253.

Mirroring the Inter-American Court, these organs have interpreted Article 1 of the European Human Rights Convention,[61] which requires States parties to 'secure to everyone within their jurisdiction' the rights guaranteed therein, as providing for State responsibility for the failure to adequately prevent or punish private conduct inconsistent with the Convention.

Such an approach has been evident in a wide range of cases involving the private infringement of rights. These include cases concerning the right to assembly and association,[62] the right to respect for private and family life,[63] the right to freedom from cruel and degrading treatment,[64] and the right to life.[65] In all these instances, agency principles have effectively been affirmed since the State has been held responsible not for the private conduct itself, but for its own failure to exercise due diligence to prevent or punish that conduct where there exists a duty to do so.[66]

In a recent case the principle of non-attribution and the separate delict theory have been applied by the European Court not only in respect of the unorganized wrongful acts of private individuals, but also in relation to a State's failure to repress human rights infringements by domestic armed opposition groups which the State itself is confronting.[67] In the interesting decision in *Ergi v Turkey*,[68] for

[61] European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221 (in force, September 1953); see generally A Clapham, *Human Rights in the Private Sphere* (Oxford, Clarendon Press, 1993); G Sperduti, 'Responsibility of States for Activities of Private Law Persons' in R Bernhardt, (ed), *4 Encyclopedia of Public International Law*, 2nd edn, (Amsterdam, North-Holland, 2000) 216.

[62] See, eg, *Young, James and Webster Case* (1981) 44 Eur Ct HR (ser A) (citing Art 1 of the European Convention, the Court found State responsibility engaged by domestic legislation which allowed violation of Art 11 rights to form and join trade unions by non-State actors); *National Union of Belgian Police Case* (1976) 17 Eur Ct HR (ser B) 52 (Commission relied on ILO standards on labor-management relations to argue that Art 11 of the Convention covered State responsibility arising from interference against union activity by private employers).

[63] *X & Y v The Netherlands* (1985) 91 Eur Ct HR (ser A) 11 (case involving sexual abuse of child at privately run mentally handicapped facility. The Court found that Art 8 of the European Convention could require the State to adopt 'measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves'); see also below n 98 citing two European cases regarding violations of Article 8 by a State for failing to prevent environmental harm.

[64] *Costello–Roberts v United Kingdom* (1993) 19 Eur HR Rep 112, 119–20, 132 (concerning corporal punishment at private school. Commission and Court held, citing Art 1 of the Convention, that State responsibility could arise in principle from failure to ensure protection of pupils from private school conduct in violation of Art 3); see also *Z v United Kingdom* (2001) 34 Eur HR Rep 3; *DP and JC v United Kingdom* (2003) 36 Eur HR Rep 11.

[65] *Osman v United Kingdom* (1998) 29 Eur HR Rep 245, 277–78 (Court held State could be responsible under Art 2 for police failure to respond to private harassment leading to death, provided that it knew or should have known of the risk).

[66] But see MD Evans, 'State Responsibility and the European Convention on Human Rights: Role and Realm' in M Fitzmaurice and D Sarooshi, (eds), *Issues of State Responsibility before International Judicial Institutions* (Oxford, Hart Publishing, 2004) 139.

[67] See generally, L Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge, CUP, 2002) 164–219.

[68] *Ergi v Turkey* (2001) 32 Eur HR Rep 388. Evidence of such failure was inferred by the absence of proof presented by Turkey regarding the planning and conduct of the operation. State responsibility also arose by virtue of State's failure to conduct an investigation into the death. See also *Yasa v Turkey* (1999) 28 Eur HR Rep 408.

example, an ambush operation by Turkish security forces against the Workers' Party of Kurdistan (PKK) led to the death of the claimants' sister, though there was inconclusive evidence as to whether the deadly fire emanated from Turkish or PKK gunmen. The Court concluded that the duty to secure the rights guaranteed under the Convention meant that even if the PKK was directly responsible for the death, a separate ground of responsibility existed with respect to Turkey, if the Turkish forces failed to plan and execute the operation in a manner that would avoid or minimize the risk to civilians from counter-attack by the PKK.[69]

This approach has also been followed in relation to the African Charter on Human and Peoples' Rights.[70] While the Convention does not contain an explicit 'horizontal' provision, the African commission has read a distinct duty to regulate private conduct into the Charter.[71] In the recent 2001 case of *SERAC v Nigeria*, for example, the Commission held Nigeria responsible, among other things, for failing to control the conduct of oil companies that had severely harmed the local Ogoni community. In that context, the Commission held that the government had effectively 'given the green light to private actors', arguing that: '. . . governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties.'[72]

Clear parallels to these regional approaches can be found in the monitoring of international human rights conventions by human rights treaty bodies. With respect to the International Covenant on Civil and Political Rights,[73] the Human Rights Committee (HRC) has adopted this analysis in comments it has issued regarding a broad range of rights enshrined in the Convention, including the

[69] In this regard, the Court followed comparable comments made by the Inter-American Commission regarding the possibility that Colombia bore separate responsibility for failing to adequately prevent or punish wrongful acts by the FARC or the Army of National Liberation (ELN). Such a duty applied, according to the Commission, even where the threat to individual rights emerged from fighting between enemy groups that did not involve State forces, see Annual Report of the Inter–American Commission on Human Rights 1996, OEA/Ser.L/V/II95, 668–69; see also Annual Report of the Inter-American Commission on Human Rights 1975, reprinted in Inter-American Commission of Human Rights, *Ten Years of Activities 1971–1981* (1982) 333.

[70] The African Charter for Peoples' and Human Rights, 27 June 1981, 1520 UNTS 217 (in force, 28 December 1988).

[71] See, eg, *Commission Nationale des Droits de l'Homme et des Libertés v Chad*, African Commission Communication No 74/92 (1995). (Chad held responsible for failure to provide security and stability even though it could not be proved that violations themselves were committed by government agents).

[72] *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, African Commission, Communication No 155/96, paras 57–58 (2001).

[73] International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (in force, 23 March 1976). Art 2(1) provides that States Parties undertake to 'respect and ensure' the rights recognized in the Covenant. See generally, NJ Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge, CUP, 2002) 47; S Joseph, *et al*, *The International Covenant on Civil and Political Rights*, 2nd edn, (Oxford, OUP, 2004).

rights to life,[74] privacy[75] and freedom of movement.[76] Analogous views have been advocated regarding the International Covenant on Economic Social and Cultural Rights[77] and the International Convention on the Elimination of All Forms of Racial Discrimination.[78] In this latter context, the Committee on the Elimination of Racial Discrimination (CERD), established under the Convention, has held that the State can be responsible for failing to prevent private cases of discrimination, though not for the discrimination itself.[79]

This position has also been adopted under the Convention on the Elimination of All Forms of Discrimination against Women.[80] Similar questions regarding

[74] See, eg, General Comment No 6 (1982), reprinted in Compilation of General Comments and General Recommendations by Human Rights Treaty Bodies, 127–28 UN Doc HRI/GEN/1/Rev.6 (2003) [hereinafter Compilation of General Comments] (State duty, pursuant to Art 6, to prevent and punish deprivation of life caused by private criminal acts). This approach was applied in Communication 161/1983 involving the State's failure to prevent disappearance and subsequent killing, see *Herrera Rubio v Colombia* UN GAOR, 43rd Sess, Supp No 40, 190, UN Doc A/43/40 (1987). The HRC has also criticized certain States for ineffectively preventing violations of Arts 6 and 7 by private actors, see UN Doc CCPR/C/79/Add.48 (1995), §16 (criticizing lenient Paraguayan laws on infanticide); UN Doc CCPR/C/79/Add.106, §12 (criticizing tolerance of female genital mutilation by private groups in Lesotho); UN Doc CCPR/C/79/Add.50 (1995), §17 (criticizing easy availability of firearms in the US).

[75] See General Comment No 16 (1988), reprinted in Compilation of General Comments, above n 74, p 142 (requiring States to adopt measures to prevent unlawful interference with privacy rights under Art 17 'whether they emanate from State authorities or from natural or legal persons'); General Comment No 20 (1992), reprinted in Compilation of General Comments, above n 74, pp 151–53; (applying similar approach to prevent degrading treatment under Art 7 by persons acting in their private capacity).

[76] See General Comment No 27 (1999), reprinted in Compilation of General Comments, above n 74, pp 174–75 (affirming that right to free movement under Art 12 must be protected from private interference, especially in relation to women); see also General Comment No 28 (2000), reprinted in Compilation of General Comments, above n 74, pp 179–85 (citing duty to prevent discrimination against women in private sector). See also General Comment No 23 (1994), reprinted in Compilation of General Comments, above n 74, pp 158-161 (applying similar principles to the protection of minority rights under Article 27)

[77] International Covenant on Economic Social and Cultural Rights, 16 December 1966, 999 UNTS 3 (in force, 3 January 1976). The Committee on Economic Social and Cultural Rights has held that the Covenant imposes obligations on States to prevent violations by private actors, see generally DM Chirwa, 'The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights' (2004) 5 *Melb J Intl L* 1, 18–23.

[78] International Convention on the Elimination of all Forms of Racial Discrimination, 21 December 1965, 660 UNTS 195 (in force, 4 January 1969).

[79] For example, in a Communication issued in relation to the dismissal by a private employer on racist grounds, CERD found that the State was responsible for failing to ensure protection of the right to work enshrined in Art 5(e)(i), see Communication 1/1984, *Yilmaz–Dogan v The Netherlands*, UN GAOR 43rd Sess, Supp no 18, p 59, UN Doc A/43/18 (1988); see also General Recommendation XX (1996), reprinted in Compilation of General Comments, above n 74, pp 208–9; Condorelli, above n 12, p 155.

[80] Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, reprinted in (1980) 19 ILM 33 (in force, 3 September 1981). See, eg, General Recommendation No 19 (1992), reprinted in Compilation of General Comments, above n 74, pp 243–48 (adopted by the Committee on the Elimination of Discrimination against Women (CEDAW) and referring to responsibility for the failure 'to act with due diligence to prevent violations of rights or to investigate and punish acts of violence. . .'); see also Declaration on the Elimination of Violence Against Women, GA Res 48/104, UN GAOR, 48th Sess, Supp 49, UN Doc A/RES/48/104 (1993) 217; RJ Cook, 'Accountability in International Law for Violations of Women's Rights by Non-State Actors' in

State responsibility under the Genocide Convention[81] for the failure to prevent or punish private conduct may also soon be addressed by the International Court of Justice in the context of separate proceedings instituted respectively by Bosnia and Herzegovina and by Croatia against Yugoslavia (Serbia and Montenegro).[82]

The proposition that State responsibility may be engaged in relation to private acts in the human rights sphere, while initially contentious, is now well established. In this context, it appears that the principle of non-attribution and the separate delict theory have provided the explanation for State responsibility for privately occasioned infringements of fundamental human rights, when a duty to regulate private conduct can be read into the convention.[83] As a result of this approach, human rights bodies have not really considered whether the State could be responsible for the private action itself in the absence of an agency relationship, and have focussed instead on establishing a distinct ground of State responsibility for the failure to properly regulate the private conduct.[84]

3.2.3 International Environmental Law

The principles and practice of international environmental law have generated significant doctrinal and terminological confusion with respect to questions of State responsibility. The interplay between the notion of *responsibility* for wrongful conduct, on the one hand, and the *liability* of the State to compensate for environmental harm, on the other, remains contested. At least on some occasions involving ultra-hazardous activities, a principle of absolute liability is

DG Dallmeyer, (ed), *Reconceiving Reality: Women And International Law* (Washington DC, American Society of International Law, 1993).

[81] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277 (in force 12 January 1951). Bosnia and Herzegovina and Croatia, in separate applications, have requested the ICJ to declare that Yugoslavia violated the Convention, *inter alia,* by failing to prevent or punish acts of genocide during the Balkans conflict, as required by the Convention. While the applications principally concern alleged violations by Yugoslavian officials, issues relating to State responsibility for private conduct are likely to arise, see Application of the Republic of Bosnia and Herzegovina, 20 March 1993, available at www.icj-cij.org/icjwww/idocket/ibhy/ibhyframe.htm.; Application of the Republic of Croatia, 2 July 1999, available at www.icj-cij.org/icjwww/idocket/icry/icry_orders/icry_iapplication_19990702.pdf.

[82] The name Federal Republic of Yugoslavia was changed to Serbia and Montenegro on 4 February 2003, at the request of its government, see UN Doc A/57/728–S/2003/170 (2003).

[83] This may be contrasted, for example, with the Torture Convention which is read as being limited to acts inflicted by, at the instigation or with the consent or acquiescence of officials, see Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 10 December 1984, reprinted in (1984) 23 ILM 1027 (in force 26 June 1987); *but* see *Harjrizi Dzemajl v Yugoslavia* UN Doc CAT/C/29/D/161/2000 (2002) (involving police acquiescence in pogrom against the Roma community by private persons).

[84] Curiously, in the field of injury to aliens, the application of the principle of non-attribution and the separate delict theory has served to *limit* State responsibility, preventing the direct attribution of private acts that was initially advocated through notions of complicity and condonation. By contrast, human rights law has settled on this same standard after *expanding* the scope of State responsibility to cover the failure to adequately control private activity.

applied so as to require the State to compensate for trans-boundary harm caused by non-State actors, irrespective of any wrongdoing on its part.

Strictly speaking, however, cases of absolute liability do not represent an exception to ILC principles of responsibility. Even in these instances, the private act is not attributed to the State. Instead, the State is made liable to compensate for the ensuing harm, without regard to the question of whether it is legally responsible for it.[85] Though some have criticized it as misconceived,[86] this has been the approach adopted by the ILC in affording separate treatment to the topic of International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law.[87]

The attention paid to the liability to compensate in environmental law has tended to obscure questions of State responsibility and attribution in relation to privately inflicted environmental harm. However, the available evidence indicates that a State's failure to comply with the standard of care required to protect against private trans-boundary harm will engage State responsibility under traditional agency standards.[88] Practical and policy considerations may obligate the State to compensate for the harm caused,[89] but, absent an agency relationship, the State is said to be legally responsible not for the private act itself but only for its own failures in relation to that act.

[85] X Hanqin, *Transboundary Damage in International Law* (Cambridge, CUP, 2003) 80.

[86] For some jurists, these cases involve the responsibility of the State for violating an 'obligation of result', regardless of the precautions it may have taken. On this view, the language of State responsibility remains relevant because the trans-boundary harm itself constitutes the wrongful act, see, eg, AE Boyle, 'State Responsibility and International Liability for Injurious Consequences of Acts Not Prohibited by International Law: A Necessary Distinction?' (1990) 39 *Intl & Comp L Q* 1; see also R Pisillo–Mazzeschi, 'Forms of International Responsibility for Environmental Harm' in F Francioni and T Scovazzi, (eds), *International Responsibility for Environmental Harm* (London, Grahan & Trotman, 1991) 15, 27.

[87] See Report of the International Law Commission on the Work of its Thirtieth Session (1978) 2 *YB Intl L Comm'n* 149, UN Doc A/33/10. The ILC has divided its consideration of the topic into two stages. The first, which focuses on the duties of the State to prevent trans-boundary harm was completed in 2001 with the adoption of a set of 19 Draft Articles. The second, which addresses questions of remedial measures and liability, was taken up in 2002 and is still at a relatively preliminary stage. For an overview of this topic and the most recent progress see Report of the International Law Commission, UN GAOR, 59th Sess, Supp No 10, UN Doc A/59/10 (2004); see also S Sucharitkul, 'State Responsibility and International Liability under International Law' (1996) 18 *Loy LA Intl & Comp L J* 821.

[88] See, eg, Condorelli, above n 12, pp 134–37, (concluding that conventional obligations in the field of protection of the environment are generally subject to standard ILC principles of attribution for private conduct, though they may sometimes involve a higher standard of diligence).

[89] See, eg, Art XV, Convention on the Liability of Operators of Nuclear Ships, 25 May 1962, reprinted in (1963) 57 *Am J Intl L* 268 (imposing liability on licensing State for damage caused by nuclear ship if it has failed to ensure that the ship is properly licensed and insured); see also Arts 139 and 263, Law of the Sea Convention, above n 35 (imposing *responsibility* on the State only for its own violations of the Convention in respect of private activities in the Area and marine research, respectively, even though State *liability* for compensation in the event of failure covers the damage actually caused). These cases are analogous to injury to aliens cases where compensation paid by the State for privately caused harm need not imply the direct responsibility of the State for the private act itself, see above section 2.6.

This proposition has been most apparent when considering the obligation of States at customary law to prevent trans-boundary environmental harm. Thus, for example, Riccardo Pisillo-Mazzeschi argues that customary environmental law imposes 'an obligation of prevention limited by the due diligence standard . . . the wrongfulness is not to be attributed to the polluting activity, but to the conduct of the State with regard to such activity'.[90] Similarly, Eduardo Jiménez de Aréchaga has written that:

> According to customary rules a State's international responsibility for transfrontier pollution cannot be brought into play unless the State itself has caused the damage or, if it has been caused by private operators, the State can be shown to have fallen short of the diligent behavior which other States are entitled to expect of it.[91]

International practice provides some support for this conclusion.[92] In the *Trail Smelter Case*,[93] a tribunal considered responsibility for damage caused to the United States by the fumes of a private smelter company operating on Canadian soil. In examining the question of Canadian responsibility, the tribunal affirmed that 'no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another'.[94] This passage, and the award as a whole, has given rise to conflicting interpretations.[95] But it at least suggests that the State's legal responsibility in relation to private harm will arise from the wrongful conduct of the State in 'permitting' the hazardous use of its territory, not from the harm itself.

The *Lac Lanoux*[96] arbitration, involving the alleged diversion of water resources, expressed a similar view. On the facts of the case, the tribunal found that Spain had not suffered any reduction in the quantity of water it was able to extract from the lake. At the same time, the tribunal acknowledged that France's legal responsibility could only be engaged to the extent that it had failed to take

[90] Pisillo-Mazzeschi, above n 86, p 24; see also see also Hanqin, above n 85, pp 77–78; G Handl, 'State Liability for Accidental Transnational Environmental Damage by Private Persons' (1980) 74 *Am J Intl L* 525 (who also argues that, irrespective of the question of legal responsibility, the State should bear—as a matter of policy—subsidiary direct liability to pay compensation if the private polluter is unable to cover the costs).

[91] EJ de Aréchaga, 'International Law in the Past Third of a Century' (1978) 159(1) *Hague Recueil des Cours* 1, 272.

[92] See generally T Gehrig and M Jachtenfuchs, 'Liability for Transboundary Environmental Damage: Towards a General Liability Regime?' (1993) 4 *Eur J Intl L* 92 (arguing that practice does not reveal a trend of conflating liability and responsibility).

[93] *Trail Smelter Case (US v Canada)* (1941) 3 R Intl Arb Awards 1905. On the general duty to prevent harmful use of territory, see also *Corfu Channel Case (UK v Albania)* [1949] ICJ Rep 4 (9 April); below section 4.3.1.

[94] *Trail Smelter Case (US v Canada)* (1941) 3 R Intl Arb Awards 1905. In its reasoning the tribunal made reference to a case decided by the Federal court of Switzerland to support the notion that the State was required to take necessary precautions to prevent harm but was not responsible for absolutely removing all risk of harm, see *ibid*, p 1963.

[95] See generally BD Smith, *State Responsibility for the Marine Environment* (Oxford, Clarendon Press, 1988) 112–28.

[96] *Affaire du Lac Lanoux* (*Spain v France*) (1957) 12 R Intl Arb Awards 281.

the necessary measures to protect Spanish rights.[97] An analogous conclusion could be drawn from a 1986 dispute between Germany and Switzerland over the pollution caused to the Rhine River by a fire at a private chemical storage facility. In that instance, both governments agreed that Switzerland was responsible for the lack of due diligence in regulating the conduct of private pharmaceutical industries, rather than for the private conduct.[98]

What is perhaps of greater significance in this context is the absence of consistent evidence in State practice of a willingness to engage direct responsibility for harm sustained by private conduct. Indeed, even where a State has directly compensated for private harm it has often done so on an *ex gratia* basis or in circumstances where an admission of responsibility for the private conduct is, at best, uncertain.[99]

There is an opposing school of thought according to which current environmental law has rejected the due diligence standard in favor of a general customary rule imposing responsibility, not just liability, on the State for any environmental harm emanating from its territory.[100] Under this view, an obligation of result is effectively imposed on the State, and any significant transboundary harm will be deemed a breach of the State's international obligations, for which it is legally responsible. If this approach were accepted, customary environmental law would represent a *lex specialis* in the field of State responsibility for private conduct. As Alexander Kiss and Dinah Shelton have suggested:

> Although the International Law Commission draft articles on state responsibility provide that in general states are not responsible for private activities, this view does not appear to be accepted in environmental matters. The rule seems rather to be that the state whose territory serves to support the activities causing environmental damage elsewhere, or under whose control it occurs is responsible for the resulting harm.[101]

[97] *Ibid*, p 303; see also J Barron, 'After Chernobyl: Liability for Nuclear Accidents under International Law' (1987) 25 *Colum J Tranat'l L* 647, 658.

[98] Barron, above n 97, p 652. It should be noted that some cases of environmental harm by private actors have been dealt with in the context of human rights conventions, see, eg, *López Ostra v Spain* (1994) 20 Eur HR Rep 277. (Spain, despite not being 'directly responsible for the violation', was held responsible for failing to secure private and family life under Article 8 of the European Convention as a result of its failure to control effects of a waste treatment plant on a neighboring family); *Guerra v Italy* (1998) 26 Eur HR Rep 357. (Italy held responsible for failing to protect against infringement of private and family life caused by emissions and explosion at a fertilizer factory).

[99] See generally Survey of State Practice Relevant to International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law, UN Doc A/CN.4/384 (1984).

[100] See above n 86.

[101] A Kiss and D Shelton, *International Environmental Law* 3rd edn (Ardseley, NY, Transnational Publishers, 2004) 322; see also R Higgins, *Problems and Process: International Law and How We Use it* (Oxford, OUP, 1994) 164 (arguing that responsibility should attach for the 'result' of transboundary harm); J Schneider, *World Public Order of the Environment: Towards an International Ecological Law and Organization* (Toronto, University of Toronto Press, 1979) 163–67.

At first glance, Principle 21 of the 1972 Stockholm Declaration,[102] which has achieved universally recognized significance, supports this view. It provides that States are responsible to 'ensure' that activities under their jurisdiction or control do not cause trans-boundary damage to the environment. This could imply that the State must legally guarantee that no harm will emanate from its territory, and will thus be absolutely responsible for any such harm. Yet the evidence is hardly overwhelming. The *travaux preparatoires* to the Stockholm Conference indicate strong opposition to such an interpretation.[103] Subsequent declarations and documents adopted by international bodies lend weight to the contrary view that State responsibility, absent a more rigorous treaty obligation, remains limited to the duty to exercise due diligence to prevent environmental harm.[104] And, as has been noted, State practice provides little support for a doctrine of absolute responsibility for private conduct in the environmental sphere.[105]

In the same vein, the International Court of Justice, when referring to a State's environmental obligations under customary law made a slight, yet significant, modification to the language of Principle 21. In the *Nuclear Weapons Advisory Opinion*[106] and in the *Gabiçkovo-Nagymaros Case*[107] the Court stated that: 'The existence of the general obligation of States to ensure that activities within their jurisdiction *and* control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.'[108]

The stipulation that a State's obligations related to activities under its 'jurisdiction *and* control', rather than 'jurisdiction *or* control' as specified in Principle 21, suggests that the mere presence of harmful environmental conduct within a State's jurisdiction is insufficient to engage legal responsibility without State control over the activity. This would be consistent with the principle established in the *Corfu Channel Case*, according to which sovereignty of

[102] UN Declaration on the Human Environment, UN Doc A/CONF48/14 reprinted in (1972) 11 ILM 1416, 1420.

[103] See UN Doc A/CONF48/PC12, Annex II, p 15 ('The draft declaration should, therefore exclude any responsibility of the public authority based on risk and should emphasize that only negligence of a State, imputable either to inaction or to the failure to fulfill specific commitments, could engage its responsibility within the meaning of international law'); see also Pisillo-Mazzeschi, above n 86, p 32; Handl, above n 90, p 536.

[104] See instruments listed in Pisillo-Mazzeschi, above n 86, p 33. It should also be noted that Principle 7 of the Stockholm Declaration itself refers to the duty of States to prevent pollution of the seas, rather than imposing absolute responsibility for harm.

[105] See generally B Graefrath, 'Responsibility for Damages Caused: Relationship between Responsibility and Damages' (1984) 185(2) *Hague Recueil Des Cours* 13; DF McClatchey, 'Chernobyl and Sandoz One Decade Later: The Evolution of State Responsibility for International Disasters 1986–1996' (1996) 25 *Ga J Intl & Comp L* 659, 676–78.

[106] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* [1996] ICJ 66 (Advisory Opinion of 8 July).

[107] *Case Concerning the Gabçikovo–Nagymaros Project (Hungary v Slovakia)* [1997] ICJ 7, 41 (25 September).

[108] Emphasis added.

territory alone does not admit of the conclusion that the State 'knew, or ought to have known, of any unlawful act perpetrated therein'.[109]

The Court thus seems to be suggesting that the State must also have a capacity to prevent or control the harmful conduct, so as to trigger its legal responsibility. In other words, there will be no legal responsibility without wrongdoing on the part of the State. The private actor may operate as an agent of the state, in which case the private harm will be equated with harm caused by the State. But absent such a relationship, customary environmental law apparently imposes legal responsibility, as opposed to liability, for privately occasioned trans-boundary harm only for the State's own failure to properly control the private activity.

It appears therefore that the weight of authority supports the conclusion that the principle of non-attribution and the separate delict theory operate to regulate State responsibility for private trans-boundary harm at customary law. In conventional environmental law, it may be assumed that the same standard will apply whenever the treaty is silent on this question. Even where a higher standard of *liability* is imposed, those environmental conventions which call on States parties to adopt 'all appropriate measures' or take 'necessary steps'[110] to prevent environmental harm, can be read consistently with agency principles so as to engage *responsibility* only for the State's failure to take the required steps, and not for the private acts resulting in the harm.

At the same time, it should be recognized that in the field of environmental law whether the State's wrongdoing justifies the imposition of responsibility for the ensuing private act or is limited to responsibility for the State's own conduct may be a distinction without a difference. Once the State's violation is established, it may be required to compensate for the privately inflicted harm in either case. Because of this, a careful inquiry into the scope of State responsibility that is engaged as a result of a State's wrongful act and omission has perhaps not been considered necessary.

3.2.4 Other Legal Obligations to Regulate Non-State Conduct

Reference should finally be made to a broader range of international obligations that call for the regulation of private conduct in a manner that seems to attract the application of an agency-based approach to State responsibility for non-State acts.

A leading example concerns State responsibility for a failure to protect diplomatic and consular officials from private harm, as famously illustrated in

[109] *Corfu Channel Case (UK v Albania)* [1949] ICJ Rep 4, 22 (9 April).

[110] Examples of this kind of environmental obligations could include, *inter alia*, Art 194 of the 1982 Law of the Sea Convention, above n 35; and Art 1 of the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, 29 December 1972, 26 UST 2403, (in force, 30 August 1975).

the *Tehran Hostages Case*.[111] This case may, of course, be seen as an extension of the general and well-established category of injury to aliens. However, the Court's reliance on the obligations imposed by the Vienna Conventions on Diplomatic Relations[112] and Consular Relations[113] may provide a basic model for the treatment of other cases of State responsibility arising out of a conventional duty to control private conduct.

The case arose following the seizure of the US Embassy in Tehran, as well as attacks on the US Consulates in Tabriz and Shiraz, and the taking of hostages by student militants. It was the first International Court of Justice decision to examine questions of attribution and responsibility in significant detail.[114] The most noteworthy part of the Court's judgment, which will be considered below,[115] concerned the 'second phase' of the seizure where the Court directly attributed the ongoing conduct of the militants to Iran by reason of its subsequent ratification of their acts. Yet the Court's treatment of the 'first phase', addressing the initial seizure of the Embassy and the inaction of State authorities, directly tackled the question of State responsibility in the face of wrongful conduct that was treated as purely private in nature.

The Court rejected the American argument that exhortations by Khomenei to attack US targets constituted specific authorization to seize the embassy, transforming the student militants into *de facto* State agents. Indeed, the Court found that even the subsequent endorsement by the Revolutionary Government did not alter the independent and private nature of the initial seizure of the embassy.[116] Instead, the conduct of the students was regarded, until the ratification by Iran, as private and unattributable.

At the same time, the Court held that while the seizure of United States Embassy and Consulates could not be imputed to Iran that 'does not mean that Iran is, in consequence, free of any responsibility in regard to those attacks; for its own conduct was in conflict with its international obligations'.[117] During the 'first phase', Iran was thus held responsible, in the Court's view, not for the seizure itself, but for its total failure to protect the Embassy and its staff or to intervene to end the seizure once it was initiated.[118] The Court concluded that Iran was aware of its obligations and of the appeals for help on the part of the

[111] *Case Concerning United States Diplomatic and Consular Staff in Tehran* (*US v Iran*) [1980] ICJ Rep 3 (24 May) [hereinafter *Tehran Hostages Case*].

[112] Vienna Convention on Diplomatic Relations, 18 April 1961, 500 UNTS 95, (in force, 24 April 1964).

[113] Vienna Convention on Consular Relations, 24 April 1963, 596 UNTS 261, (in force, 19 March 1967).

[114] Issues of State responsibility and attribution had been touched upon indirectly in the Court's Advisory Opinion in the *Reparations Case*, see *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 ICJ 174 (Advisory Opinion of 11 April). In that context, the Court noted that State responsibility could arise for the State's failure to protect UN officials in the performance of their duties, *ibid*, p 177.

[115] See below section 3.3.2.

[116] *Tehran Hostages Case*, above n 111, p 36.

[117] *Ibid*, p 31.

[118] *Ibid*, p 32–33.

United States, had the means at its disposal to perform its obligations and yet had 'completely failed to comply with these obligations'.[119]

In adopting this approach, the Court relied on the affirmative duties of prevention and protection under the Vienna Conventions on Diplomatic and Consular Relations to assert State responsibility for Iran's omissions, while denying direct State responsibility for the acts of the student militants themselves. The Court thus accepted the validity of the agency paradigm in limiting the scope of State responsibility, even in circumstances where the wrongful inaction on the part of State authorities seemed to be accompanied by a policy which fostered hostile private conduct, and may well have been designed to facilitate the seizure of the US compound.[120]

It may be reasonable to assume that the principle of non-attribution and the separate delict theory would be applied in an analogous fashion in relation to any other international legal instruments that impose an affirmative duty to prevent, regulate or punish private conduct. Some examples might include conventions relating to slavery[121] and the traffic in persons,[122] conventions on the illicit trafficking of narcotic drugs,[123] international trade law,[124] as well as resolutions adopted by the Security Council under Chapter VII of the Charter calling on States to prevent the transfer of funds or weapons to non-State entities subjected to sanctions.[125]

To the extent that obligations under international humanitarian law entail a duty to prevent purely private conduct similar principles have been advocated.[126]

[119] *Tehran Hostages Case*, above n 111, p 32.

[120] For instance, Khomenei had declared on 1 November 1979, just four days prior to the attack, that it was 'up to the dear pupils, students and theological students to expand with all their might their attacks against the United States and Israel', see *ibid*, p 30. It is not difficult to see how the Court's conclusion in this regard helped set the stage for the denial of direct State responsibility in the jurisprudence of the Iran–US Claims Tribunal, see above section 3.2.1.

[121] See, eg, Art 2, Slavery Convention, 25 September 1926, 60 LNTS 253 (in force, 9 March 1927).

[122] See, eg, Art 9, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transitional Organized Crime, UN Doc A/55/383 of 15 November 2000 (in force, 25 December 2003).

[123] See, eg, United Nations Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 20 December 1988, reprinted in (1989) 28 ILM 493 (in force, 11 November 1990).

[124] For example, the European Court of Justice has been required to examine questions of State responsibility for the failure to prevent obstructions to free trade resulting from the conduct of private actors. In one case, concerning the obstruction by French farmers of the free movement of agricultural goods, the Court held that States were under an obligation 'not merely themselves to abstain from adopting measures or engaging in conduct liable to constitute an obstacle to trade but also, when read with Art 5 of the Treaty, to take all necessary and appropriate measures that that fundamental freedom is respected on their territory', see Case C–265/95 *Commission of the European Communities v France* [1997] ECR 12 I–6959, I–6999.

[125] See, eg, SC Res 1343, UN SCOR, 56th Sess, 4287th mtg, UN Doc S/RES/2001/1343 (2001) (concerning Liberia). For a discussion of Security Council measures in terrorism cases see below section 4.3.2.

[126] In the framework of international humanitarian law, there has been a greater degree of caution in asserting a general legal obligation on States to regulate non-State abuses during armed hostilities. Still, when a specific obligation of this kind has been held to exist it has generally been interpreted in a manner consistent with the separate delict theory and the principle of

Recent applications of the separate delict theory in the context of armed hostilities are thus evident, for example, in the latest decisions of the ICJ and of the Eritrea-Ethiopia Claims Commission,[127] and in reactions towards the failure of coalition forces to prevent acts of vandalism and the looting of cultural property by Iraqi civilians in the immediate aftermath of the Iraq war.[128] In all these cases, State responsibility was invoked not for the private damage itself, but only for the State's failure to prevent it.

On the whole, cases involving State responsibility for private conduct in this broader range of legal fields remain relatively untested before independent monitoring bodies or judicial authorities. Nevertheless, the general acceptance of the principle of non-attribution and the separate delict theory, when read together with express obligations to prevent private conduct, recommends a likely outcome. One could be forgiven for drawing a general conclusion that in any of these circumstances, and absent an agency relationship, wrongful private conduct will not itself attract a State's direct responsibility, but can occasion the distinct responsibility of the State should it violate its own duties to prevent, punish or otherwise regulate the private activity.

3.2.5 Observations

In general terms, the above cases offer considerable support for an agency paradigm of State responsibility for private acts. They suggest that, excluding

non-attribution, see, eg, F Kalshoven, 'The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit' (1999) 2 *YB Intl Hum'n L* 3; M Sassòli, 'State Responsibility for Violations of International Humanitarian Law' (2002) 84 *Intl Rev Red Cross* 401, 412; see also J Pictet, (ed), *Commentary on the Geneva Conventions of 12 August 1949: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva, ICRC, 1958) 213 (stipulating, in reference to Art 29 of the Fourth Geneva Convention, that the

> principles of international law . . . remain fully valid side by side with the Articles under discussion. According to those general principles a State is not automatically responsible for the private actions of its nationals. It is responsible, however, if it has failed to give proof of the requisite diligence and attention in preventing the acts contrary to the Convention and in tracking down, arresting and trying the guilty party.

[127] *Case Concerning Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*) (19 December 2005) available at http://www.icj-cij.org/icjwww/idocket/ico/ico_judgments/ico_judgment_20051219.pdf [hereinafter, *DRC v Uganda Case*] (finding Uganda responsible, *inter alia*, for failing to prevent violations of international humanitarian law by non-State actors in the Ituri district); Eritrea Ethiopia Claims Commission, Civilians Claims, Ethiopia's Claim No 5, 17 December 2004, p 11, available at http://www.pcacpa.org/ENGLISH/ RPC/EECC/ET%20Partial%20Award %20Dec%2004.pdf (concluding that Eritrea was responsible for failing to ensure that Ethiopian civilians were protected during hostilities from private violence).

[128] In this context, it has been argued that coalition forces while not themselves responsible for private acts of vandalism against cultural property, nevertheless failed to meet their obligation to protect against such private action, see A Kahn, *The Obligation of the Coalition Provisional Authority to Protect Iraq's Cultural Heritage* (2003), available at http://www.asil.org/insights/insigh113.htm; see also Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 216 (in force, 7 August 1956) (particularly Arts 4(3) and 5 that impose a specific duty to prohibit, prevent and cease this activity in situations of armed conflict and belligerent occupation); Second Protocol to the Hague Convention of 1954, 26 March 1999, reprinted in (1999) 38 ILM 769 (in force, 9 March 2004).

special legal regimes, the principle of non-attribution for purely private acts and the separate delict theory can be applied beyond the narrow scope of sporadic and local incidents of injury to aliens upon which Ago had primarily relied.

The prevailing perception, then, turns on the idea that the State is directly responsible only for the acts of those persons with whom it is in a relationship of agency. For this reason, the State will be responsible for the conduct of its own organs or officials, but not for the conduct of non-State actors that is wholly private in nature. The State can, however, be held responsible for its own violations of a separate duty to regulate the private conduct.

At the same time, the strength of this conclusion should not be overstated. States and tribunals have not always needed to be precise in their description of the scope of responsibility that is triggered by the State's wrongdoing since there has not always been a material difference between responsibility for the private act and responsibility for State failure in relation to that act. Moreover, the category of cases in which an agency approach to responsibility for private conduct has been expressly applied remains limited in both number and kind. Whether ongoing acts of terrorism by non-State actors, which involve the prospect of forcible responses by the victim State, are covered by similar principles will be the focus of attention in subsequent chapters.

3.3 THE EXCEPTIONS

3.3.1 Attribution of Conduct of *De Facto* State Agents

It will be readily apparent that many of the cases considered thus far serve as authority not only for the principle of non-attribution of purely private acts, but for the inverse proposition that private actions undertaken in fact on behalf of the State may be directly attributed to it and engage its direct responsibility. This is the principal exception to the strict division made by the ILC between the public and private domains, and numerous cases cited above could just as well have been included in this section to illustrate the point.

It would, of course, be imprudent to deny State responsibility for private conduct in circumstances where it is clear that the State is using the private actors as its *de facto* agents. To deny State responsibility merely on the grounds that an actor is a private individual when it is clear that he or she acts on the instructions of the State, would be to encourage State use of private agents to violate legal obligations.

The *de facto* agency exception to the principle of non-attribution of private acts has long been recognized in judicial and diplomatic practice[129] and was

[129] See above sections 2.7 and 3.2. In addition to the examples already cited, mention may be made of State responsibility for unlawful extra-territorial abductions by bounty hunters. While some have invoked notions of complicity or connivance, most jurists analyze State responsibility for bounty-hunters in agency terms; see, eg, PO Higgins, 'Unlawful Seizure and Irregular Extradition' (1960) 36

reaffirmed in ILC Draft Article 8 which reads, in its current form, as follows: '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.'

The essential principle underlying this provision has remained intact throughout the ILC's work on the State responsibility project, though it has undergone a number of variations in drafting.[130] The major question that has concerned jurists and practitioners in this regard relates not to the principle itself, but to the nature of the link that must be established in order to transform acts of private individuals into the acts of *de facto* State agents.

For those who would rely on an agency paradigm to determine State responsibility in terrorism cases, this question is of central importance. Under the ILC framework, *de facto* agency will allow otherwise un-attributable acts of private terrorism to be deemed an act of State, attracting State responsibility for the private act itself. It is therefore necessary to consider the state of contemporary jurisprudence on this issue.

The starting point for any modern examination of this exception is the *Nicaragua Case*, decided by the International Court of Justice in 1986.[131] A central problem in the case concerned whether violations of international humanitarian law, committed by the *contras* in Nicaragua, were attributable to the United States by virtue of its relationship with the paramilitary force. The Court concluded that the question of attribution should be answered in the following way:

> What the Court has to determine is whether or not 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

Brit YB Intl L 279; PJ Seaman, 'International Bountyhunting: A Question of State Responsibility' (1985) 15 *Cal W ILJ* 397, 398; DL Kaufman, 'Do What I Mean, Not What I Say: A State's Responsibility for the Exploits of Individuals Acting in Conformity with a Statement from a Head of State' (2002) 70 *Fordham L Rev* 2603.

[130] For the evolution of Draft Art 8, see M Spinedi and B Simma, (eds), *United Nations Codification of State Responsibility* (New York, NY, Oceana Publications, 1987) 357 [hereinafter Spinedi and Simma]; see also Crawford, above n 9, pp 16–23. *But* see Kaufman, above n 129 (arguing that ILC Draft Art 8 may diverge somewhat from customary law by treating the elements of 'instruction', 'direction' and 'control' as disjunctive).

[131] *Military and Paramilitary Activities in and against Nicaragua (Nicar v US)* [1986] ICJ Rep 14 (27 June) [hereinafter *Nicaragua Case*]. The case of *Lozidou v Turkey* (1996–VI) Eur Ct HR 2216, is also cited as a more recent case of attribution of private acts on the basis of agency. But it is arguably more properly regarded as a case of State responsibility for the conduct of an organ of a territorial unit of the State, see de Hoogh, above n 26, pp 272–73; see also Kaufman, above n 129, pp 2648–49; *Ilascu and others v. Moldova and Russia, Application No. 48787/99, Judgement (Merits and Just Satisfaction)*, 8 July 2004, available at http://www.echr.coe.int (finding Russia responsible for acts of the Moldovia Republic of Transniestria (MRT) on the grounds that the MRT remained under the 'effective authority, or at least under the decisive influence, of the Russian Federation').

> Government . . . there is no clear evidence of the United States having actually exercised a degree of control in all fields as to justify treating the *contras* as acting on its behalf . . . . For this conduct to give rise to legal responsibility of the United States, it would 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.[132]

While in a number of individual instances the Court did attribute the acts of certain operatives to the United States, the 'effective control' test denied the possibility of attribution and responsibility for the vast majority of activities in which the *contras* were engaged. This conclusion was reached despite the finding that the US had provided the *contras* with heavy subsidies, trained its forces and granted them significant military, logistical and intelligence support. Invoking the principle of non-attribution and the separate delict theory the Court concluded:

> . . . the United States is not responsible for the acts of the *contras*, but for its own conduct vis-à-vis Nicaragua, including conduct related to the acts of the *contras*. What the Court has to investigate . . . [are] unlawful acts for which the United States may be responsible directly in connection with the activities of the *contras*.[133]

Roberto Ago, by then a judge on the Court, agreed with the majority that the activities of the *contras* were unattributable to the United States, but placed special emphasis on the need to establish evidence of specific State authorization of particular wrongful conduct to justify attribution, rather than on a general control-based test.[134] In addition, while asserting that the Court's conclusion was a dutiful application of the ILC Draft Articles, he regretted that it failed to seize the opportunity to 'underline the continuity and solidity of the jurisprudence' on the question of non-attribution of private acts.[135]

The *Nicaragua Case* provides modern authority for the proposition that the existence of an agency relationship between the State and the non-State actor is critical to the determination of the scope of a State's responsibility. Absent such a relationship, the State can be held responsible for its own wrongdoing but not for the private conduct itself. The result is to conflate the principles of attribution and the principles of responsibility, by using the de facto agency exception to both justify and circumscribe the responsibility that may be engaged by the State's illicit conduct.

[132] *Nicaragua Case*, above n 131, p 64–65. Similar reasoning was applied in a recent ICJ decision, see *DRC v Uganda Case*, above n 127, para 160–2 (finding that since acts of irregular forces were unattributable to Uganda, its responsibility would be limited to violations for the provision of training and military support).

[133] *Ibid*, p 65.

[134] *Ibid*, p 187–90 (separate opinion of Judge Ago). In this vein, the ILC Commentary has treated Art 8 as indicating that direction and control at a general level is insufficient and must be related to a specific operation—hence the phrase 'in carrying out the conduct' at the end of the Article, see Report of the International Law Commission to the General Assembly, UN GAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) 104; de Hoogh, above n 26, p 278–79. But see discussion below n 139.

[135] *Nicaragua Case*, above n 131, p 190; see also *ibid*, p 537–38 (dissenting opinion of Judge Jennings) (agreeing with the majority on the question of non-attribution).

The fact that the ICJ required such decisive evidence of effective control to establish an agency relationship has been criticized for transforming the prospect of direct State responsibility for private conduct into little more than a theoretical possibility.[136] According to the Court's strict formulation, the bond between the State and non-State actor must be shown to be so substantial and pervasive that it is virtually indistinguishable from the legal relationship between a State and its own officials.

Criticism of this narrow view of the *de facto* agency exception was expressed most prominently in the *Tadic Case* before the Appeals Chamber of the International Criminal Tribunal for Yugoslavia (ICTY).[137] In that case, in order to ascertain the applicable law it was considered necessary to determine whether the conflict was internal or international in character. In the view of the Trial Chamber and the majority of the Appeals Chamber, this turned on the question of whether the conduct of local Bosnian Serb forces could be attributed to Yugoslavia.

In this context, the Appeals Chamber questioned the validity of the effective control test established in the *Nicaragua Case*:

> The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control.[138]

The Chamber proceeded to argue that the 'effective control' test was not mandated by Article 8 of the ILC Draft Articles, citing judicial and State practice that was in its view at variance with the *Nicaragua* standard.[139] It considered the test too formalistic given that the purpose of the law of State responsibility was based on a 'realistic concept of accountability'.[140]

The Chamber concluded that the relevant test in circumstances involving organized and hierarchically structured private groups was whether the State

[136] But see Crawford, above n 9, p 23 (noting the broad acceptance of this aspect of the judgment).

[137] Case No IT–94–1–A *Prosecutor v Tadic* (1999) reprinted in (1999) 38 ILM 1518 [hereinafter, *Tadic Case*]. For the judgment of the Trial Chamber, see Case No IT–94–1–T *Prosecutor v Tadic* (1998) 112 ILR 1. For a general discussion of the attribution issues in this case, see de Hoogh, above n 26 (considering the possibility that *Tadic* should have been viewed as a case of State responsibility for a subordinate local administration rather than attribution of private conduct on an agency basis).

[138] *Tadic Case*, above n 137, p 1541.

[139] *Ibid*, p 1541–46. It might be noted that part of the practice and jurisprudence cited in this respect by the Appeals Chamber seems of limited relevance as it is brought to show that specific instructions are not needed for the attribution of private conduct to the State. However, it is far from clear from the *Nicaragua* judgment that the test of 'effective control' is limited to cases in which specific instructions were issued by the State. For discussion and criticism of these aspects of *Nicaragua* and *Tadic*, as well as the inter-relationship between the terms 'instructions', 'direction' and 'control' in Art 8 of the ILC Draft and in the ILC Commentary, see Kaufman, above n 129.

[140] *Tadic Case*, above n 137, p 1546.

exercised '*overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations'.[141] While contending that evidence of specific instructions was not necessary, the Chamber also conceded that in cases such as *Nicaragua*, where the controlling State was not the territorial state, or in cases of internal turmoil, 'more extensive and compelling evidence is required to show genuine control'.[142]

It may be legitimately questioned whether it was necessary to address the subject of State responsibility for private conduct on the facts of the *Tadic Case*. Judge Shuhabudeen's separate observations in this regard seem compelling, since the characterization of a conflict as international should arguably be grounded on evidence of intervention on the part of a non-territorial State through its support for local forces, without regard to the question of its direct legal responsibility for the conduct of such forces.[143] Examining *Nicaragua* principles of attribution in the context of the distinct questions raised by the *Tadic Case* is, as a matter of legal principle, somewhat difficult to comprehend.

In any event, the degree of linkage required between the State and the private actor to circumvent the principle of non-attribution has not been completely settled by the *Tadic Case*, which limited the 'overall control test' to cases of organized private groups, as opposed to any non-State actor.[144] Indeed, the ICJ may return to this issue in the context of separate proceedings instituted in the ICJ by Bosnia and Herzegovina and by Croatia, respectively, against Yugoslavia (Serbia and Montenegro) under the Genocide Convention.[145]

For present purposes, however, it is important to appreciate that the difference between the attitudes of these two courts is one of degree, not of kind. Significant evidence must still be presented to show that the private actor operated on behalf of the State in the context of an agency-type relationship. There is no question of State responsibility for private acts in cases where the State merely tolerates or fails

[141] *Tadic Case,* above n 137, p 1546 (emphasis in original). Elsewhere the Chamber used the following language: 'The control required by international law may be deemed to exist when a state . . . has a role in organizing coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group', *ibid*, p 1545.

[142] *Ibid*.

[143] *Ibid*, p 1612–15 (separate opinion of Judge Shuhabudeen); see also T Meron, 'Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout' (1998) 92 *Am J Intl L* 236, 238. Moreover, the authority of *Tadic* on general questions of State responsibility may be limited in light of the fact that the case concerned an examination of individual criminal responsibility.

[144] The Appeals Chamber in *Tadic* pointed out that the 'overall control' test was relevant only with respect to an organized and hierarchically structured private group. Attribution to the State of the conduct of private individuals or unorganized groups, remained dependent on effective control by the State in relation to the acts in question, and requiring proof of specific instructions, see *Tadic Case,* above n 137, p 1541.

[145] See Application of the Republic of Bosnia and Herzegovina, 20 March 1993, available at www.icj-cij.org/icjwww/idocket/ibhy/ibhyframe.htm; Application of the Republic of Croatia, 2 July 1999, available at www.icj-cij.org/icjwww/idocket/icry/icry_orders/icry_iapplication_19990702.pdf. The ICJ refrained from doing so, however, in its recent decision of 19 December 2005, see *DRC v Uganda Case*, above n 127, Separate Opinion of Judge Kooijmans, para 25, Separate Opinion of Judge Simma, para 8.

to prevent the private conduct. Nor will general forms of ideological, material or logistical support by a State suffice without a significant controlling influence. Moreover, since the burden of proof according to these cases remains on the party seeking to prove a relationship of de facto agency, neither case provides a substantial opportunity to establish direct State responsibility in circumstances of clandestine State support to private actors.[146]

For all the academic debate, there may be less of a practical difference between the two cases than is often admitted. Indeed, the underlying similarities between *Nicaragua* and *Tadic* are illustrated by the fact that the ILC Commentary to Draft Article 8 is perfectly comfortable addressing both cases under the general rubric of conduct undertaken 'on the instructions of, or under the direction or control of' the State.[147]

These conclusions are significant because many jurists presume that the *de facto* agency exception, as developed in *Nicaragua* and *Tadic*, represents the only real way to trigger direct State responsibility for private terrorist activity. In chapter 7 the validity of this assumption will be examined in detail. For present purposes it is sufficient to make the following observations.

Whatever the standard to be applied, there is of course nothing problematic with the notion that the State should be held directly responsible for private conduct if the private actor functions as a *de facto* State agent. The problem is that few principles which are as clear in theory, pose as great a difficulty or as rare an exception in practice. Even the *Tadic Case*, which champions the overall control test as 'realistic', adheres to agency-based criteria as the sole ground for engaging direct State responsibility for private activity. In so doing, it falls far short of reflecting the reality of the interaction between States and private actors that makes the infliction of private harm possible.

For one thing, the State will invariably hide whatever connections it has to the private actor, and the adoption of such strict criteria of agency encourages it to do so. Even in so straightforward a scenario as where the State exercises control over, or provides specific directives to, the private actors, such a link will be exceedingly difficult to prove.

More importantly, the adoption of an agency paradigm to rationalize direct State responsibility for private conduct ignores more subtle yet more prevalent forms of State involvement in private activity. Between the poles of de facto agency, under *Nicaragua* or even *Tadic*, and purely private conduct, as contemplated by the principle of non-attribution, lies a broad spectrum of possible

[146] For further discussion of burden of proof issues, see below sections 4.4.5 and 9.3.

[147] Noting the differences between the ICJ and ICTY approaches, the Commentary merely provides that 'it is a matter of appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it', see Report of the International Law Commission to the General Assembly, UN GAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) 107. At the same time, it may be regretted that the ILC Commentary is able to imply that it can embrace the approach of the Appeal Chamber in *Tadic*, while simultaneously insisting that control over the 'specific conduct' must be shown.

interactions between the State and the private actor, including toleration, ideological inspiration, material support and general guidance.

Through a broad range of actions and omissions, a functioning State can avoid a direct relationship that resembles agency but still utilize private conduct to further its own ends. And yet, under an agency paradigm of responsibility such conduct will be subject only to the default principles of non-attribution and the separate delict theory. These principles allow for the possibility that the State will have violated some parallel obligation, but not for the more serious assumption of direct responsibility for the harmful private conduct itself which the State has subtly, but knowingly, encouraged, facilitated or tolerated.

3.3.2 Attribution of Conduct Adopted by the State

The second major exception to the principle of non-attribution of private acts arises in cases where the State expressly adopts the private conduct as its own. This exception is provided for in current Draft Article 11 of the ILC State Responsibility text: 'Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.'[148]

It is important to bear in mind that this exception does not draw its authority from the condonation theory that had been advanced by some jurists in the early part of the 20th century.[149] It is concerned not with implied State complicity arising out of the failure to prevent or prosecute the private offender, but with explicit ratification and adoption of the private conduct by the State.

Unlike the condonation theory, Draft Article 11 does not advance an alternative theory of State responsibility for private acts. Rather, it offers a limited exception to the general principle of non-attribution and the separate delict theory that is arguably consistent with agency principles. While this exception does not rule out the possibility that acknowledgement and adoption may be inferred from State conduct, it is concerned not with inferences drawn from omissions but with conduct that unquestionably shows that the State regards itself as the author of the private act.

Both the formulation of the Article and the ILC Commentary bear this out. The early judicial and academic authorities that supported the condonation theory find no mention in the Commentary. Instead, the Commentary provides:

> . . . article 11 is based on the principle that purely private conduct cannot as such be attributed to a State. But it recognizes 'nevertheless' that conduct is to be considered as an act of a State 'if and to the extent that the State acknowledges and adopts the

[148] ILC Draft Articles, above n 4. Draft Art 11 was added to the ILC text, almost as an afterthought, on the recommendation of the Special Rapporteur James Crawford. It had not appeared previously in the ILC Draft, see Crawford, above n 9, p 42–43.

[149] See above section 2.4.

> conduct in question as its own' . . . conduct will not be attributable to a State under article 11 where a State merely acknowledges the factual existence of conduct or expresses its verbal approval of it. In international controversies States often take positions which amount to 'approval' or 'endorsement' of conduct in some general sense but do not involve any assumption of responsibility. The language of 'adoption', on the other hand, carries with it the idea that the conduct is acknowledged by the State as, in effect, its own conduct . . . the act of acknowledgement and adoption, whether it takes the form of words or conduct, must be clear and unequivocal.[150]

The most significant case that is cited as authority for this proposition is the *Tehran Hostages Case*. As noted above, the initial occupation of the United States Embassy in Tehran and the seizure of the Consulates at Tabriz and Shiraz were found not to be directly attributable to Iran.[151] However, in the days after the attacks numerous Iranian authorities expressed very clear endorsement and ratification of the militants' action. The Iranian foreign minister declared that the action 'enjoys the endorsement and support of the government . . .', while in a series of statements Ayatollah Khomenei himself not only expressed approval for the attacks but treated them as actions which the State was directing.[152] When accompanied with the instructions issued to students to evacuate the Iraqi Consulate that had been similarly occupied, with the refusal to meet US representatives sent to discuss the release of the hostages, and with the Ayatollah's authorization for the release of a limited number of US hostages, these statements left little doubt as to Iran's relationship to the events. In an important passage, the Court concluded:

> The policy thus announced by the Ayatollah Khomenei of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomenei and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State.[153]

[150] Report of the International Law Commission to the General Assembly, UN GAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) 121–122; see also Case No IT–94–2–PT *Prosecutor v Dragan Nikolic*, Decision on Defence Motion challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002 (2002) (using ILC Draft Art 11 'with caution' to deny that SFOR had adopted the conduct of unknown individuals as its own, merely by reason of the fact that it had taken custody of the accused from these individuals. The Tribunal also denied that mere co-operation between SFOR and the Prosecutor could be treated as a relationship of agency).

[151] See above section 3.2.5

[152] This included, for example, a decree of 17 November 1979 that 'the noble Iranian nation will not give permission for the release of the rest of them [the hostages]', *Tehran Hostages Case*, above n 111, p 35.

[153] *Ibid*, p 36.

It would appear from the judgment that the attribution of the conduct of the militants to Iran was prospective only. As noted in the ILC Commentary, this prospective application made little difference in this case since Iran was responsible for violations during the initial phase of the attack on the Embassy arising from its failure to protect the United States diplomatic premises and staff. Nevertheless, the emphasis of the Court on prospective rather than retroactive application is unexplained and departs from judicial pronouncements in some other cases.[154] The ILC Commentary is relatively unconcerned by this aspect of the judgment, declaring that 'where the acknowledgement and adoption is unequivocal and unqualified there is good reason to give it retroactive effect' so as to prevent gaps in responsibility for continuing acts.[155] And yet, the Court's curious insistence on distinguishing between the first and second phase of the Embassy seizure does give some pause as to whether the law on this point is settled.

In broader terms, it is appropriate to consider how this exception fits into the general ILC scheme of State responsibility for private acts. At some level, there appears to be a degree of conceptual confusion. Strict adherence to the principle of non-attribution, which seems to animate the ILC text, would suggest that conduct is either undertaken by the *de jure* or *de facto* agents of a State or it is not. In this instance, however, conduct that is private in nature is transformed and elevated to the public domain by the approval of the State. One is reminded of the admonition in the *Janes Case* that 'approving of a crime has never been deemed identical with being an accomplice to that crime'.[156] Some theoretical justification is needed to explain the logic of this exception. The ILC Commentary does not provided any.

It is possible that in this case too conceptions of agency that appear to underlie the ILC's approach in other Draft Articles may be in operation.[157] One option is to view Draft Article 11 as derived from the municipal law doctrine of agency by subsequent ratification.[158] Just like the *de facto* agency exception, attribution based on espousal turns on the fact that the private actor should be regarded as operating in the name of the State. But in this case, it is the State's

[154] In the *Lighthouses Arbitration*, for instance, Greece was held retroactively responsible for breaches of a concession agreement by Crete, in part because it endorsed that breach and continued it after it acquired sovereignty over the island, see *Lighthouses Arbitration (France v Greece)* (1956) 12 R Intl Arb Awards 160, 198. In *Tadic*, the Appeals Chamber similarly makes a reference to the idea that State responsibility can be engaged retroactively by the subsequent approval of private action, see *Tadic Case*, above n 137, p 1541.

[155] Report of the International Law Commission to the General Assembly, UN GAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) 120.

[156] *Laura MB Janes (USA) v United Mexican States* (1925) 4 R Intl Arb Awards 82, 87; see above section 2.5.

[157] The Article has sometimes been referred to as embodying the principle of the 'adopted agent', see, eg, JA Hessbruegge, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law' (2004) 36 *NYU J Intl L & P* 265, p 271.

[158] See, eg, FMB Reynolds, (ed), *Bowstead and Reynolds on Agency*, 17th edn, (London, Sweet & Maxwell, 2001) 54–85; GHL Fridman, *The Law of Agency*, 6th edn, (London, Butterworths, 1990) 74–96.

own admission, rather than the nature of the relationship, that creates the basis for treating the private actor as an agent of the State for the purposes of State responsibility.

Two importance differences between Draft Article 11 and its municipal equivalent are, however, worth noting. First, agency by ratification in municipal law is equivalent to antecedent authority—there is no question of limiting its application to future conduct only.[159] Second, in municipal law this form of agency presumes that the agent acts for the benefit of the principal though without any authority to do so. Under the ILC Draft, there is no suggestion that the private actor is necessarily acting in the interests of the State. It is the State alone that determines whether the act is attributable.

A more convincing analogy may be found in the municipal doctrine of agency by estoppel. In this case, a principal is prevented from denying the existence of an agency relationship, if they have allowed it to appear as though such a relationship exists.[160] In a similar way, a State that has unequivocally adopted private conduct as its own, cannot later deny its responsibility for that conduct. From a policy perspective also, a State that effectively presents itself as the author of an illicit private act should be held directly responsible for it.

In some respects, Draft Article 11 presents a unique form of attribution that remains under-theorized. But it does appear as though this exception to the principle of non-attribution invokes some notion of agency to determine when and how a State may be regarded as directly responsible for private activity, rather than responsible only for its own violations in relation to that activity.

3.3.3 Attribution of Conduct of Agents of Necessity and Insurrectional Movements

Before concluding this section, two related forms of ostensibly private conduct recognized as justifying direct State responsibility bear mention. Pursuant to Draft Article 9 of the ILC text, private conduct will also be regarded as an act of State if the private actors are: '. . . in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.'

This exception to the principle of non-attribution contemplates circumstances where the private actors function, out of necessity, in place of the official authorities of the State. In this case, even without an established relationship to the State, the situation allows these private actors to be regarded as State agents.

This provision was originally incorporated in Draft Article 8,[161] and was inspired by cases where the partial collapse of the State or its loss of control over

[159] Fridman, above n 158, p 74.

[160] See, eg, Reynolds, above n 158, pp 86–87; Fridman, above n 158, pp 98–105. In municipal law, however, there is generally a stipulation that a third party has relied on such a representation.

[161] See Spinedi and Simma, above n 130, p 357.

portions of its territory justified the exercise of governmental authority by private actors.[162] As the ILC Commentary explains, the circumstances must 'call for' the exercise of governmental functions, 'though not necessarily the conduct in question'.[163] The normative element in this form of attribution implies that the private function as a whole is both justified and legitimate, while State responsibility may be engaged for the wrongful manner in which such a function was implemented in a given instance. The ILC Commentary includes Article 9 in the scheme of its other principles of attribution by referring to it as a 'form of agency'.[164] But attribution in this case is based less on the relationship of the private actors to the State, and more on the need for private actors to fulfill functions of the State in its absence. In the words of the ILC Commentary itself 'the nature of the activity performed is given more weight than the existence of any formal link between the actors and the organization of the State'.[165]

This exception is similar to the principle embodied in Draft Article 10, whereby conduct of an insurrectional movement may be considered an act of the State if the movement becomes the new government of the State.[166] In both cases what is at issue is not the *legal* link between the private actors and the State, but the need, on *policy* grounds, to treat the private actors as though they were themselves State officials.[167]

As the ILC Commentary explains, it is the need for the exercise of governmental authority in the circumstances that 'distinguishes these situations from the normal principles that conduct of private parties, including insurrectionary forces, is not attributable to the State'.[168] Indeed, it has been suggested that the rationale for these rules has its origins not in any coherent legal theory but in the policies of Western States that sought to assert diplomatic protection on behalf of their nationals in the wake of civil unrest or periods of transition in

[162] The ILC Commentary refers to the case of *Yeager v Islamic Republic of Iran* as an example of State responsibility determined on this basis, see Report of the International Law Commission to the General Assembly, UN GAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) 110; see also de Hoogh, above n 26, pp 270–71; above section 3.2.1.

[163] Report of the International Law Commission to the General Assembly, UN GAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) 111.

[164] *Ibid*. This form of attribution also has its equivalent in the municipal law doctrine of agency of necessity, see Reynolds, above n 158, pp 125–35; Fridman, above n 158, pp 120–29. It was also referred to by early international legal theorists beginning with Emmerich de Vattel, see Hessbruegge, above n 157, p 291.

[165] Report of the International Law Commission to the General Assembly, UN GAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) 110.

[166] As the ILC Commentary explains, conduct that presents itself as private and unattributable in character, becomes an act of the State only if the movement succeeds in establishing itself as the new government, or forms a new State in part of the territory. 'The basis for the attribution of conduct of a successful insurrectional or other movement to the State lies in the continuity between the movement and the eventual government', *ibid*, p 113.

[167] See I Brownlie, *System of the Law of Nations: State Responsibility Part I* (Oxford, Clarendon Press, 1983) 178 (questioning this rationale on legal grounds).

[168] Report of the International Law Commission to the General Assembly, UN GAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) 111.

developing countries and thus sought to establish the accountability of those wielding effective power.[169]

The relevance of these two exceptions to an inquiry about State responsibility for private acts of terrorism is limited. What is of concern in this study is whether and how a State may be held directly responsibility for private acts of terrorism which the State has supported or tolerated in violation of its legal obligations. The exceptions under Draft Articles 9 and 10 address perceptibly different issues. With respect to successful insurrectional movements, the issue is whether the movement's conduct can be regarded as conduct of the new State that it establishes. With respect to agents of necessity, the issue is whether State responsibility may be engaged by the conduct of a private actor that seeks to fulfill governmental functions in the absence of State authority.

At the same time, at least with respect to the agents of necessity exception, an issue relevant to State responsibility for terrorism might arise. From a theoretical perspective, it may be regarded as unlikely that a private terrorist organization could engage State responsibility under this exception. The perpetration of cross-border terrorist attacks by a private group could hardly be considered an exercise of governmental authority 'called for' in the circumstances. It is conceivable, however, that a dispute could arise in such a case as to the applicability of Draft Article 9, particularly in failed State scenarios. In the absence or default of State authority, a private group may consider itself to be operating in the defense and security of the State. Paradoxically, the victim State may prefer to regard the private actors as agents of necessity, rather than renegade terrorist operatives, so as to justify the direct attribution of the wrongful private conduct to the State.[170]

This exception to the principle of non-attribution may therefore not be without significance in certain cases of private acts of terrorism. Given the expansion of terrorist activity in areas where governmental authority has collapsed, there may be attempts to rely on the principle encapsulated in Draft Article 9 by those seeking to maximize the legal responsibility of the sanctuary State.[171]

[169] Hessebruegge, above n 157, p 300.

[170] For example, one could argue that the conduct of Hizbollah in Southern Lebanon constitutes the exercise of governmental security functions in the absence of effectively deployed forces of the Lebanese army. In this regard, it is worth noting that resolutions of the Security Council following Israel's withdrawal from South Lebanon in May 2000 have repeatedly called on Lebanon to assume its effective control over the area as required by Security Council resolution 425 of 1978, and refer to Lebanon's obligation to assume its security responsibilities in place of Hizbollah operatives in the area, see discussions of the situation in Lebanon below sections 5.4.2 and 7.2.1.

[171] For an examination of the possible reliance on Draft Art 9 to explain the events of September 11th, see below section 6.2.2.

3.4 CONCLUSION

Chapters 2 and 3 of this study have traced the evolution and development of the legal framework that regulates State responsibility for private conduct. The underlying principle of non-attribution of private conduct and the separate delict theory, as well as the exceptions to them, are today widely accepted by jurists and viewed as being embodied in the ILC Draft Articles. Conceptually, they embrace a system of legal responsibility that is largely grounded on what we have called an agency paradigm.[172]

Practically, these principles extend beyond the original injury to alien cases and have been relied upon in a variety of international legal fields in a manner that seems to support assertions made about their trans-substantive application. As noted above, not all the cases considered offer definitive support for this approach. In some instances, the precise scope of State responsibility engaged by government wrongdoing in relation to private conduct has not required specific attention or arisen in plain terms. Still, while the point is not always made directly, the application of the agency paradigm has regularly resulted in the limitation of a State's responsibility to its own acts, with the implicit or express denial of any responsibility for unattributable private conduct.

For the purposes of this study, the principles of State responsibility for private acts as envisaged by the agency paradigm may be summarized as follows:

1) The acts or omissions of a State's organs and agents are acts of the State for which the State may be held legally responsible.
2) The acts or omissions of private actors will be regarded as acts of the State if the private actors are *de facto* agents by virtue of operating on the instructions of, or under the direction or control of, the State.
3) The acts or omissions of private actors will be regarded as acts of the State if, in clear and unequivocal terms, the State adopts the private conduct as its own.
4) In all other circumstances, the acts or omissions of private actors are not acts of the State and the State will not be responsible for them. However, the State may be responsible for its own acts or omissions in relation to that private conduct where it is subject to a separate legal obligation to prevent, punish or otherwise regulate that conduct.

The legal structure established by these principles carries with it some crucial assumptions about the function of the State, the nature and scope of legal responsibility and its relationship with the principles of attribution. There will be reason to revisit these assumptions later in this study,[173] but for now it is sufficient to formulate the common view.

[172] As noted in section 3.3.3 the exceptions for agents of necessity and insurrectional movements may be less connected to principles of agency than to policy considerations. However, the thrust of ILC principles of attribution are clearly grounded in agency conceptions.

[173] See below sections 7.3, 7.6 and 8.4.3.

At its heart, the agency paradigm contemplates a strict division between the public and private sphere that is broken only in the rare instances when private conduct is unmistakably elevated to the public domain through the establishment of a principal-agent relationship between the State and the non-State actor. Under this approach, attribution serves as a mechanism for limiting the scope of direct State responsibility by restricting such responsibility to cover only the unlawful conduct of actors that may, by one standard or another, be regarded as State agents.

Having established the principles of State responsibility that are commonly held to apply to private activity, it is necessary to consider whether these principles have been or should be relied upon in cases of State responsibility for private acts of terrorism. Part II turns to consider in detail the counter-terrorism obligations of States, and to examine the theories that have been used to assess State responsibility for private terrorist activity in the event of their violation.

PART II

State Responsibility for Private Acts of Terrorism: Conventional Perspectives

4

To Prevent and to Abstain: International Obligations of States with Respect to Terrorism

4.1 INTRODUCTION

This study is concerned with the principles that regulate State responsibility for private acts of terrorism. It is a search for a conceptual legal framework that explains the circumstances in which direct responsibility for terrorist activity, undertaken in a private capacity, will or will not take place. In this sense, the question of the State's responsibility for its own violations of counter-terrorism obligations, and the content of the obligations themselves, are of secondary interest. Indeed, studies of the substantive legal obligations of States in the field of terrorism have been undertaken elsewhere.[1]

At the same time, the possibility of direct responsibility for purely private acts exists only once wrongful State conduct in relation to those acts has been established.[2] For this reason, an appreciation of substantive counter-terrorism obligations and the way in which State responsibility for them is triggered are central building blocks of the present inquiry.

Understanding State counter-terrorism obligations is also relevant in another way. These substantive obligations might reveal something about the appropriate principles of responsibility to apply in cases of private terrorist activity.[3] The legal duties imposed upon States in relation to private acts of terrorism may indicate the existence of a *lex specialis* expressly applying special rules of attribution and responsibility that do not conform to ILC standards.[4]

[1] See, eg, E Rosand, 'Security Council Resolution 1373, the Counter-terrorism Committee and the Fight against Terrorism' (2003) 97 *Am J Intl L* 333; TM Franck and D Niedermeyer, 'Accommodating Terrorism: An Offence against the Law of Nations' (1989) 19 *Isr Y B Hum Rts* 75; RJ Erickson, *Legitimate Use of Military Force Against State-sponsored Terrorism* (Washington DC, Air University Press, 1989); RB Lillich and JM Paxman, 'State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities' (1977) 26 *Am U L Rev* 217.

[2] Unless, that is, a theory of absolute responsibility is adopted, see below section 5.2.2.

[3] See D Bodansky and JR Crook, 'Symposium: The ILC's State Responsibility Articles' (2002) 96 *Am J Intl L* 773, 780–81, (suggesting that substantive rules can inform the relevant principles of responsibility); see also AP Allott, 'State Responsibility and the Unmaking of International Law' (1988) 29 *Harv J Intl L* 1, 12 (denying a sustainable role for State responsibility as a separate topic disassociated from the nature and content of a particular wrong).

[4] Draft Art 55 of the ILC text expressly provides that the articles do not apply where the responsibility of a State is 'governed by special rules of international law', see below section 7.3.2.

By contrast, counter-terrorism obligations may mirror those of other legal fields involving the regulation of private conduct. In that case, it may be reasonable to expect that the principle of non-attribution and its limited exceptions, discussed in chapter 3, will be similarly applied. To examine whether responsibility in terrorism cases should be regulated by these standards, or by some other regime, it is thus necessary to first appreciate the nature of counter-terrorism obligations themselves.

With that in mind, this chapter sets out to achieve three objectives. First, it seeks to advance a working definition of terrorism for the purpose of this study that could meet with broad approval. Second, the chapter maps out the content of State counter-terrorism obligations in light of legal developments that have followed the September 11th attacks. And third, it will consider the problem of establishing when these obligations have in fact been violated so as to engage the State's responsibility for their breach.

4.2 TOWARDS A DEFINITION OF TERRORISM

All definitions are elusive to some degree. All have a core meaning and become indeterminate at their margins. Legal definitions are certainly no exception. And yet, the legal definition of terrorism has acquired a special reputation for controversy and elusiveness.[5] It is a reputation that is not entirely deserved.[6]

Terrorism, of course, has a long history and it takes many forms.[7] Beginning with attempts in the 1920s and 30s, there have been countless efforts to

[5] For a more philosophical analysis of the difficulties in reaching a legal definition of terrorism, see TM Franck and SC Senecal, 'Porfiry's Proposition: Legitimacy and Terrorism' (1987) 20 *Vand J Transnat'l L* 195.

[6] Some have argued that the term terrorism serves no operative legal purpose. See, eg, R Baxter, 'A Skeptical Look at the Concept of Terrorism' (1973) 7 *Akron L Rev* 380; R Higgins, 'The General International Law of Terrorism' in R Higgins and M Flory, (eds), *Terrorism and International Law* (London, Routledge, 1997) 13, 28. For the purposes of this study, a working definition is provided so as to have a broadly agreed basis for the examination of the regime of State responsibility engaged by this category of private activity. Given the abundant international attention devoted to the issue, and the risk that uncertainties of legal language will open the door to abuse by State and private actors alike, there seems to be ample support for the notion that terrorism is a unique form of violence that requires separate definition, see, eg, C Walter, 'Defining Terrorism in National and International Law' in C Walter, *et al*, (eds), *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (Berlin, Springer, 2004) 23, 24–25; see also JM Sorel, 'Some Questions about the Definition of Terrorism and the Fight against its Financing' (2003) 14 *Eur J Intl L* 365, 369–70

[7] For an overview, see KK Koufa, 'Terrorism and Human Rights', UN Doc E/CN.4/Sub.2/1997/28 (1997); UN Doc E/CN.4/Sub.2/1999/27 (1999); UN Doc E/CN.4/Sub.2/2001/31 (2001); UN Doc E/CN.4/Sub.2/2002/35 (2002); UN Doc E/CN.4/Sub.2/2003/WP.1 (2003). For a more methodological approach, see MC Bassiouni, 'A Policy-Oriented Inquiry into the Different Forms and Manifestations of 'International Terrorism' in MC Bassiouini, (ed), *Legal Responses to International Terrorism: US Procedural Aspects* (Dordrecht, Nijhoff, 1988) 1; see also AP Schmid and AJ Jongman, *Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories and Literature* (Amsterdam, Transaction Books, 1988) 39–56.

formulate a generally acceptable definition.[8] Definitions have been proposed in the academic literature, in national legislation and by regional and international organizations.[9] Admittedly, most of these proposals share common characteristics and involve some combination of four main factors: the goals, the means, the perpetrators and the victims of terrorist acts. But they have failed to acquire the status of a universally accepted legal definition.

The most significant recent attempts have arguably been those conducted by the Sixth (Legal) Committee of the General Assembly. Negotiations conducted in this context, particularly with respect to the draft comprehensive convention against terrorism, represent the only concerted effort of UN member States *as a whole* to agree on the parameters of a definition. They may thus represent the best gauge of progress towards an international legal definition that is politically acceptable to the overwhelming majority of States. And yet, at least on its surface, the deadlock in negotiations on the comprehensive convention, which continues as of this writing, has only proved the intractable nature of the problem.

The search for an acceptable definition has always been complicated by the fact that terrorism is a loaded term that is often used as a politically convenient label by which to deny legitimacy to an adversary while claiming it for oneself.[10] This insidious and wholesale use of the term for political advantage continues to confound the quest for a definition. Even after September 11th, the political rhetoric has remained robust and acrimonious, creating the impression that States are implacably divided.

[8] The first international attempts to legally define terrorism occurred in a series of conferences known as the International Conferences for the Unification of Penal Law. Most notably, at a conference held in 1935 in Copenhagen, delegates agreed on a model penal provision on terrorism which referred to a number of acts including 'willful acts directed against the life, physical integrity, health or freedom . . . [which have] endangered the community or created a state of terror calculated to cause a change in or impediment to the operation of the public authorities or to disturb international relations', see Sixth International Conference for the Unification of Penal Law, Copenhagen, 31 August–2 September 1935, Actes de la Conference, 420 (1938), reprinted in MC Bassiouni, (ed), *International Terrorism And Political Crimes* (1975) 472. This initiative was followed by the 1937 League of Nations Convention for the Prevention and Punishment of Terrorism, adopted in response to the assassination of King Alexander I of Yugoslavia and the French Foreign Minister in Marseilles in 1934. The Convention, which was signed by 20 states but never came into force, included in Art 1(2) a definition of 'acts of terrorism' that referred to 'criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public', see 19 League of Nations OJ 23 (1938), League of Nations Doc C.546.M.383.1937.V (1937); see also G Marston, 'Early Attempts to Suppress Terrorism: The Terrorism and International Criminal Court Conventions of 1937' (2003) 73 *Brit Y B Intl L* 293. Terrorist activities were also addressed in various extradition instruments of the period (and subsequently), so as to impose limitations on the political offense exception, see Study Prepared by the Secretariat in Accordance with the Decision Taken by the Sixth Committee at 1314th Meeting on 27 September 1972, UN Doc A/C.6/418 (1972) 16–21 [hereinafter, Secretariat Study]; see also J Dugard, 'Towards the Definition of International Terrorism' (1973) 67 *Am Soc Intl L Proc* 94.

[9] See below section 4.2.3 for a discussion of recent definitions. A study conducted in 1984, lists 109 different definitions of terrorism between 1936 and 1981, see Schmid and Jongman, above n 7, pp 5–6. For an overview of some more recent attempts see, eg, S Tiefenbrun, 'A Semiotic Approach to a Legal Definition of Terrorism' (2003) 9 *ILSA J Intl & Comp L* 357; Walter, above n 6.

[10] Bassiouni, above n 7, pp 15–16.

But none of this means that a useful *legal* definition of terrorism is unattainable. In fact, political slogans tend to obscure rather than illuminate the actual points in contention. In legal terms, the positions of most States today are more nuanced, the differences between them more subtle, and the areas of agreement more extensive, than is usually appreciated.

As discussed below, recent developments have generated some renewed hope that the search for a definition of terrorism in the context of the comprehensive convention can be successfully completed during the 60th session of the General Assembly. Indeed, while controversy remains, there has arguably been a sufficient convergence of views for it to be possible to offer a generally acceptable working definition.

In the context of a study that examines the nature of State responsibility for terrorism, it is useful to proceed on the basis of a general definition that can be said to reflect the broadest agreement amongst States. Because of a common tendency to view a terrorism definition as beyond reach, this section will survey in some detail the legal developments in this field in order to present, and justify, the definition of terrorism that underlies this study.

4.2.1 Recent Developments in the Definition of Terrorism

It remains popular to say that the international community has yet to agree on a legal definition of terrorism. It is more accurate to say that while there *is* growing consensus on what terrorism is, there is also a complex debate about what it is not.

As the High-Level Panel on Threats, Challenges and Change appointed by the Secretary General has recently noted, 'the search for an agreed definition of terrorism usually stumbles on two issues'.[11] The first is the claim that any definition should include so-called 'State terrorism' by a government's own military forces. As this study is concerned with terrorism by private actors this question will be addressed only marginally. The second issue relates to the seemingly interminable debate about whether acts undertaken in the context of national liberation struggles or as resistance to occupation can or should be excluded from the scope of the definition.

As is readily apparent, both these obstacles address not the component parts of an act of terrorism but rather its scope or, more precisely, its potential perpetrators. In the words of Antonio Cassese 'it is not true that a definition of terrorism was lacking . . . what indeed was lacking was agreement on the exception'.[12] Indeed, recent debates and negotiations within the Sixth Committee on the definition of terrorism have been almost exclusively

[11] Report of the High–Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, UN Doc A/59/565 (2004) 48 [hereinafter, High-Level Panel Report].

[12] A Cassese, 'Terrorism as an International Crime' in A Bianchi, (ed), *Enforcing International Law Norms Against Terrorism* (Oxford, Hart Publishing, 2004) 213, 214

preoccupied with possible exclusions from the scope of the convention rather than the definition itself.[13]

In recent years, a number of developments promised a potential breakthrough in the search for an internationally acceptable definition of terrorism. The first was the unanimous adoption by the Security Council, acting under Chapter VII of the Charter, of resolution 1566. Operative paragraph 3 of that resolution provides as follows:

> . . . criminal acts, including against civilians committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or abstain from doing any act, and all other acts which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature . . . .

This paragraph is not, technically speaking, a legal definition of terrorism nor was it necessarily intended to serve that role.[14] It is non-exhaustive and its terms remain subject to the definition and scope provisions of existing counter-terrorism conventions. Nevertheless, it is exceedingly difficult to read this paragraph and conclude that the elements of a definition cannot be formulated or that the Council intended to differentiate acts of terrorism from acts of resistance based solely on the cause espoused by the perpetrator. Given that the resolution is binding under Chapter VII of the Charter, these facts alone are highly suggestive of the acceptable parameters of any universal definition.

A second development concerns the treatment of terrorism in the High-Level Panel Report. Significantly, the Panel has openly welcomed the language of resolution 1566 and been quite definitive in its own views on the issue. It has noted that it does not find the claim regarding 'State terrorism' 'to be compelling' and that 'there is nothing in the fact of occupation that justifies the targeting and killing of civilians'.[15] Accordingly, it has recommended that the definition of terrorism adopted under the draft comprehensive convention should, *inter alia*, provide a description of terrorism as:

> . . . any action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate

[13] See below section 4.2.4.

[14] See UN SCOR, 59th Sess, 5053rd mtg, UN DOC S/PV.5053 (2004); UN SCOR, 59th Sess, 5059th mtg, UN Doc S/PV.5059 and S/PV.5059 (Resumption 1) (2004) (especially statements by Brazil, Pakistan and Algeria).

[15] High-level Panel Report, above n 11, p 48.

> a population, or to compel a Government or an international organization to do or to abstain from doing any act.[16]

While the specific terminology suggested in resolution 1566 and by the High-Level Panel may leave something to be desired in terms of legal precision,[17] their general thrust is clear. First, terrorism is to be generally understood as an act perpetrated by a non-State actor that is designed to intimidate a population or to achieve a political objective through the intentional infliction of harm. Second, both these formulations suggest that such acts would not be excluded from the definition merely because they were committed for the purpose of advancing a national liberation struggle.

The UN Secretary-General, in his 2005 report entitled 'In Larger Freedom', has welcomed these developments and called for the adoption of the comprehensive convention on the basis of this definition before the end of the 60th Session of the General Assembly—a call that has been echoed in the 2005 World Summit Outcome Document.[18] Additional momentum in this direction has been generated by the recent adoption by consensus of the Convention for the Suppression of Acts of Nuclear Terrorism, which was opened for signature on September 14, 2005.[19]

But to what extent can these developments be said to reflect a broad consensus of States on a terrorism definition? Despite these developments delegates to the 2005 World Summit were unable to agree on language that would identify the essential elements of terrorist activity, and discussions held thus far in the Sixth Committee during the 60th session of the General Assembly have failed to produce a breakthrough.

As of this writing, it is still unclear what ultimate effect, if any, the changes that have occurred will have on the adoption of a universal definition in the

[16] *Ibid*, p 49.

[17] See Report of the Coordinator concerning Informal Consultations on the Draft Comprehensive Convention on International Terrorism, reprinted in Report of the Ad Hoc Committee on Terrorism established by General Assembly resolution 51/210 of 17 December 1996, UN Doc A/60/37 (2005) (noting the views of several delegations that while the broad statements of principle were useful, it was necessary to develop terms in a more precise manner for the purpose of a criminal law enforcement instrument); see also below section 4.2.6; UN SCOR, 59th Sess, 5053rd mtg, UN DOC S/PV.5053 (2004) (where the US delegate raised the problem of intent in operative para 3 of resolution 1566); Letter dated 3 August 2005 from the Chairman of the Sixth Committee addressed to the President of the General Assembly, UN Doc A/59/894 (2005) (including the assessment of the ccordinator of the informal consultations of the convention that the definition already contained in the draft convention 'uses precise technical, legal language more suitable for a criminal law enforcement instrument').

[18] Report of the Secretary-General, In Larger Freedom: Towards Development, Security and Human Rights for All, UN Doc A/59/2005 (2005); GA Res 60/1, UN GAOR, 60th Sess, A/RES/60/1 (2005) para 83. See also UN Secretary-General, 'A Global Strategy for Fighting Terrorism', 10 March 2005, available at http://www.un.org/apps/sg/sgstats.asp?nid=1345.

[19] International Convention for the Suppression of Acts of Nuclear Terrorism, GA Res 59/290, UN GAOR, 59th Sess, UN Doc A/RES/59/290 (2005) (not yet in force); see also UN Doc GA/10340 (summarizing statements made by delegations on the occasion of the Convention's adoption); below section 4.2.2.

context of the draft comprehensive convention. Some states, for example, have been quite vocal in denying that resolution 1566 has any real influence on the definition of terrorism and have argued, however implausibly, that operative paragraph 3 retains the distinction between terrorism and the claimed right to resistance to occupation.[20]As for the High-Level Panel report, notwithstanding the Secretary-General's approval, it remains at this stage a recommendation of experts not an internationally endorsed proposal.

To test the significance of these developments it is necessary to delve deeper and see whether they reflect more far-reaching changes in international attitudes towards the definition of terrorism.

4.2.2 The Search for a Definition Before 9/11

The involvement of the United Nations in the definition of terrorism traces back to the killing of 11 Israeli athletes at the Munich Olympics in the summer of 1972. This event, together with a general rise in terrorist incidents around the globe, prompted then Secretary General Kurt Waldheim to assume a rarely used prerogative and request the inclusion of an additional item on the agenda of the 27th session of the General Assembly entitled 'Measures to prevent terrorism and other forms of violence which endanger or take innocent human lives or jeopardize fundamental freedoms'.[21] Terrorism has remained on the UN agenda ever since.

In the context of that first debate in the Sixth Committee, the United States presented a draft convention for the prevention and punishment of certain acts of terrorism, and called for the convening of a plenipotentiary conference in early 1973 to consider its adoption.[22] The convention envisaged a prosecute or extradite regime for terrorist acts perpetrated in a country not involved in the conflict with which the terrorist act was associated. Though limited in several key respects,[23] the US draft did propose a general definition of terrorist acts. The

[20] UN SCOR, 59th Sess, 5053rd mtg, UN DOC S/PV.5053 (2004). See UN SCOR, 59th Sess, 5059th mtg, UN Doc S/PV.5059 and S/PV.5059 (Resumption 1) (2004). (See, eg, statements by Algeria, Pakistan and Turkey).

[21] Note by Secretary General, UN GAOR, 6th Comm, 27th Sess, Annexes, Agenda Item 92, UN Doc A/8791 (1972) 1.

[22] UN Doc A/C.6/L.850 (1972); see also US draft resolution which proposed the plenipotentiary conference contained in UN Doc A/C.6/851 (1972), reprinted in UN GAOR, 6th Comm, 27th Sess, Annexes, Agenda Item 92, UN Doc A/8969 (1972) 3–4. For a general overview of the discussion, see 1972 UNYB 643–48, UN Sales No E.74.I.1.

[23] The draft was directed primarily at acts of terrorism committed in States that were not a party to a particular conflict. A number of conditions limited the scope of the convention: the act had to take place outside the State of which the offender was a national, as well as outside the State against which the act was directed; the convention also did not cover attacks by or against the military forces of a State. For a description of the Convention, its justification and limitations, see JN Moore, 'Towards Legal Restraints on International Terrorism' (1973) 67 *Am Soc Intl L Proc* 88; see also JF Murphy, 'Defining International Terrorism: A Way Out of the Quagmire' (1989) 19 *Isr Y B Hum Rts* 13, 16.

text referred, *inter alia*, to acts of unlawfully killing, causing serious bodily harm, or kidnapping another person, committed by non-State actors with the intent 'to damage the interests of or obtain concessions from a State or an international organization'.

By this time, of course, the ranks of the United Nations were swelled with third world countries, some of which had recently come into being by violent revolt against colonial powers. These States viewed with deep suspicion Western-initiated efforts to outlaw 'terrorist' violence by non-state actors. Many third world States and their supporters were concerned that the attempt to define and criminalize terrorism was designed to de-legitimize struggles for self-determination. They were equally wary that the focus on non-State actors would effectively justify repression by colonial powers that, in their view, was itself the quintessential form of terrorism.[24]

Both these concerns prompted developing States to demand that terrorism be distinguished from national liberation struggles *as a matter of principle* and that State terrorism be the focus of any UN initiative on the subject.[25] The statement of the representative of the Congo at the time reflected a typical sentiment:

> We Africans and Asians have experienced European terror when debarking on their shores, when they hunted us in order to sell us, when they stalked us in order better to enslave and exploit us . . . . That is terrorism . . . [we] do not dictate the form of struggle for those who are fighting for their rights and whom the oppressor forces to extremes where gestures of desperation are engendered. We cannot judge with the same severity the oppressor and the oppressed.[26]

The representative of Madagascar was equally clear referring to 'acts of political terrorism undertaken to vindicate hallowed rights' as 'praiseworthy'.[27] The Cuban delegate similarly dismissed the notion of any 'legal limits' being imposed on legitimate armed struggle.[28] And the Algerian specifically affirmed that 'those serving the cause in question should have a choice of the means to be used'.[29]

[24] G Levitt, 'Is "Terrorism" Worth Defining' (1986) 13 *Ohio N U L Rev* 97, 109.

[25] See generally Compilation of Relevant Views Expressed in the Course of the General Debate at the General Assembly prepared by the Secretariat, UN Doc A/C.6/L.867 (1972) [hereinafter Compilation of Relevant Views]. These views were often repeated, see, eg, Report of the Ad Hoc Committee on International Terrorism, UN GAOR, 34th Sess, Supp No 37, UN Doc A/34/37 (1979) 5-6 (referring to the view that it was unacceptable to adopt a 'broad interpretation of the conception of international terrorism which would include the national liberations struggle, acts of resistance against an aggressor . . . and demonstrations by workers . . . to draw a parallel between those phenomena and international terrorism would be an affront'); see also A Sofaer, 'Terrorism and the Law' (1986) 64 *Foreign Aff* 901.

[26] Compilation of Relevant Views, above n 25, pp 51–52.

[27] UN GAOR, 27th Sess, 6th Comm, 1365th mtg, UN Doc A/C.6/SR.1365 (1972) 311.

[28] UN GAOR, 27th Sess, 6th Comm, 1358th mtg, UN Doc A/C.6/SR.1358 (1972) 262.

[29] UN GAOR, 27th Sess, 6th Comm, 1367th mtg, UN Doc A/C.6/SR.1367 (1972) 333. A statement by Nigeria was equally forceful: 'What we cannot condone is an opportunity being given to those

For many Western States this approach was unacceptable.[30] They argued that addressing the problem of terrorism meant de-legitimizing the resort to certain violent *means* by private actors in pursuit of a cause, whatever its perceived or actual validity. As for State terrorism, most Western States rejected the idea that governmental violence could be so classified.[31] They emphasized that the resort to violence by the military forces of a State was adequately regulated under international law, while generally using the term terrorism to describe a distinctly sub-State phenomenon.

These fundamental differences were intensified by equally discordant perspectives about the causes of terrorism. Developing States in particular argued that it was necessary to give priority to the underlying factors that generated the phenomenon that could be traced, in their view, to the policies and practices of certain powerful Western countries.[32]

In one form or another, these issues have complicated every subsequent effort to reach an acceptable legal definition. In 1972, these deep divisions, fuelled by Cold War rivalry, meant that any attempt to address definitional issues in a

who organize the worst forms of terror to condemn as terrorists the victims of their inhumanity . . . We should therefore not leave the door wide open for reactionary regimes to erode the glorious struggles of [these] peoples', see Compilation of Relevant Views, above n 25, p 69. Many other developing States expressed this kind of view.

[30] See, eg, Statements by Australia, UN GAOR, 27th Sess, 6th Comm, 1368th mtg, UN Doc A/C.6/SR.1368 (1972) 338; by Spain, UN GAOR, 27th Sess, 6th Comm, 1369th mtg, UN Doc A/C.6/SR.1369 (1972) 350; by Canada, UN GAOR, 27th Sess, 6th Comm, 1362nd mtg, UN Doc A/C.6/SR.1362 (1972) 286; by Austria, UN GAOR, 27th Sess, 6th Comm, 1361st mtg, UN Doc A/C.6/SR.1361 (1972) 282; and by the Netherlands, UN GAOR, 27th Sess, 6th Comm, 1362nd mtg, UN Doc A/C.6/SR.1362 (1972) 288.

[31] TM Franck and BB Lockwood, 'Preliminary Thoughts towards an International Convention on Terrorism' (1974) 68 *Am J Intl L* 69, 74 ('Western states, however, rejected the invitation to include governmental acts within the category of terrorism. They did this not because state acts, however callous, are sacrosanct, but for exactly the opposite reason: that adequate international law already restrains state violence'). Western States have not always been consistent in this regard. Consider the treatment of the bombing of 1988 Pan Am Flight 103 over Lockerbie which was directly attributed to Libyan intelligence officials but was nevertheless referred to as an act of terrorism, see, eg, SC Res 731, UN SCOR, 47th Sess, 3033rd mtg, UN Doc S/RES/731 (1992); SC Res 748, UN SCOR, 47th Sess, 3063rd mtg, UN Doc S/RES/742 (1992); see also below section 5.4. Note also the reference by the United Kingdom to the Israeli targeting of Fatah military chief Khalil el Wazir (Abu Jihad) as 'a senseless act of terrorism'; UN SCOR, 2807th mtg, S/PV.2807 (1988) 47; compare with the comments by the United Kingdom, cited below n 105, denying the existence of 'State terrorism' as a legal category.

[32] This has been a permanent feature of the debate. Both sides have rejected or identified causes in a manner consistent with their own broader agenda. In contrast to the third world perspective, some Western States have maintained that the search for causes is an attempt to justify the unjustifiable and insist that efforts should be focused on outlawing the practice. Others have recognized that examining causes is necessary, but focus instead on factors such as fundamentalism, religious intolerance, and the lack of democracy. For a useful survey of the views of States, compare Report of the Ad Hoc Committee on International Terrorism, UN GAOR, 34th Sess, Supp No 37, UN Doc A/34/37 (1979) 12-26, with General Assembly Debate on Measures to Eliminate International Terrorism, UN GAOR, 56th Sess, 12th–22nd mtgs UN Doc A/56/PV.12–22 (2001). For a recent study on causes, see Norwegian Institute of International Affairs, *Root Causes of Terrorism* (2002), available at http://www.nupi.no/IPS/filestore/Root_Causes_report.pdf; Rama Mani, 'The Root Causes of Terrorism and Conflict Prevention' in J Boulden & TG Weiss (eds), *Terrorism and the UN* (Indiana, IA, Indiana University Press, 2004) 219; see also below section 9.1.

methodical way was probably doomed before it began. The United States' draft was quickly abandoned, and the work of an Ad Hoc Committee on International Terrorism that was subsequently established proved equally inconclusive.[33]

The alternative to the comprehensive approach was to negotiate 'sectoral' conventions that criminalized only specific kinds of terrorist acts, such as hijacking or attacking diplomatic personnel, though often without even invoking the term terrorism itself. In favoring what has been termed the inductive approach,[34] delegates hoped to circumvent the political debate by focusing on specific kinds of reprehensible conduct, without addressing the motives of the perpetrator.[35]

It is this alternate approach that has, until recently, governed counter-terrorism treaty making. In each case, the convention established a law enforcement regime for international cooperation in criminalizing and penalizing a given offence under a prosecute or extradite framework. Even here, the underlying tensions could not be completely avoided, as was amply illustrated in the passionate debates surrounding the 1979 Hostage Taking Convention.[36]

[33] At its first meeting in 1973, the Committee was unable to take any decisions or formulate any recommendations due to differences of views. For a summary of its discussions, see 1973 UNYB 777–79, UN Sales Doc E.75.I.1; see also Report of the Ad Hoc Committee on International Terrorism, UN GAOR, 28th Sess, Supp No 28, UN Doc A/9028 (1973). The Committee convened again in 1977, without reaching any conclusions, see Report of the Ad Hoc Committee on International Terrorism, UN GAOR, 32nd Sess, Supp No 37, UN Doc A/32/37 (1977). At its final meeting in this format, held in 1979, the Committee was able to reach some broadly worded recommendations, see Report of the Ad Hoc Committee on International Terrorism, UN GAOR, 34th Sess, Supp No 37, UN Doc A/34/37 (1979). The recommendations were duly adopted in GA Res 34/145, UN GAOR, 34th Sess, Supp No 45, UN Doc A/RES/34/145 (1979) 244.

[34] Levitt, above n 24, p 109.

[35] This approach had been suggested by scholars and by a number of States during the early UN debates as the most practical way forward, see, eg, 1977 UNYB 969, UN Sales No E.77.I.1. The approach drew inspiration from earlier conventions that had been adopted in response to specific terrorist incidents. These included, the Convention on Offenses and Certain Other Acts Committed on Board Aircraft, 14 September 1963, 704 UNTS 219 (in force, 4 December 1969); Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, 860 UNTS 105 (in force, 14 October 1971); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 23 September 1971, 974 UNTS 177 (in force, 26 January 1973); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons including Diplomatic Agents, 14 December 1973, 1035 UNTS 167 (in force, 10 February 1977); see also OAS Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, 2 February 1971 OAS TS, No 37, OAS/Ser.A/17, (in force for each State on day of ratification, this convention is open to the participation of non-member States).

[36] International Convention Against the Taking of Hostages, 17 December 1979, 1316 UNTS 205 (in force, 3 June 1983). Most of the text was drafted by a 35 member Ad Hoc Committee. A number of Arab, African, and communist States argued that the convention should not apply to acts by national liberation movements, while most Western states sought a blanket prohibition, see Report of the Ad Hoc Committee on the Drafting of an International Convention Against the Taking of Hostages, UN GAOR, 32nd Sess, Supp No 39, UN Doc A/32/39 (1977). As adopted, Art 12 of the convention has given rise to conflicting interpretations. Some have argued that it provides a limited exclusion clause for armed conflict situations, including national liberation struggles, while others deny that any exemption is granted for such struggles, see Sofaer, above n 25, p 916.

However, such differences could eventually be finessed as long as delegates technically reserved their position on an overarching legal definition.

Given the exigencies of multilateral diplomacy, the inductive approach to defining terrorism has proven an effective tool for concluding legal instruments. But it is not without shortcomings. For one thing, by addressing specific conduct without regard to the question of motivation, these definitions miss much of what is unique about terrorism. What distinguishes terrorism from other forms of violence is primarily the use of violence against an instrumental target *in order* to further a particular ideological or political objective. The inductive approach risks equating hostage taking by an extremist group pursuing a religious war, with similar acts perpetrated by criminals for personal gain or, for that matter, with the murder by an incensed spouse of a philandering diplomat.[37]

At the same time, the preference for the inductive approach should be appreciated in the context of the specific function it was intended to serve. In drafting a criminal law enforcement instrument, there was concern that the introduction of motive as an element of the offense would complicate criminal prosecutions.[38] In many cases this problem may not be insurmountable. But for those eager at the time to achieve some measure of progress in the fight against terrorism it was clearly beneficial to favor a practical approach that de-emphasized political and ideological motivations.

Paradoxically, in its attempt to side-step divisive political issues the inductive approach may have strengthened the view that terrorist conduct is illegitimate regardless of cause or grievance. Despite the protestations of those seeking to preserve a principled distinction between terrorism and liberation struggles, the fact that certain acts are outlawed with a broad brush may have undercut the authority of this qualification. In this way, the inductive approach may have contributed to the contours of a more comprehensive definition.

The sectoral approach has produced numerous conventions addressing specific types of terrorist offences.[39] The last conventions concluded under this category are the Convention for the Suppression of Acts of Nuclear Terrorism,

[37] Levitt, above n 24, p 115. For some other legal weaknesses in the 'sectoral' approach see Bassiouni, above n 7, pp 14–15; KJ Greene, 'Terrorism as Impermissible Violence: An International Law Framework' (1992) 16 *Vt L Rev* 461, 480–86.

[38] Franck and Lockwood, above n 31, pp 79–80 (arguing that it is far easier to filter out 'garden-variety' offenses, than to prove that the motive of the perpetrator was to advance a given political agenda).

[39] These include: International Convention Against the Taking of Hostages, above n 36; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, 24 February 1988, ICAO Doc 9518 (in force, 6 August 1989); Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 10 March 1988, IMO Doc SUA/Conf/15.Rev.1, (in force, 1 March 1992). For a detailed list of conventions touching upon terrorist offences see MC Bassiouni, *International Terrorism: A Compilation of UN Documents (1972–2001)* (Irvington,, NY, Transnational Publishers, 2002) 13–15.

adopted after considerable delay in April 2005,[40] the Convention for the Suppression of the Financing of Terrorism, adopted in 1999, and the Convention for the Suppression of Terrorist Bombings, adopted in 1997.[41]

Of these conventions, the terrorist financing convention was especially significant because it constituted something of a return to the early efforts to adopt a comprehensive definition. Article 2(1)(a) of the financing convention lists as an offense the provision or collection of funds for use in an act that is covered by the key sectoral counter-terrorism instruments. But Article 2(1)(b) takes a qualitative leap in definitional terms by including as an additional offense the provision of funds for:

> Any other act intended to cause death of serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.[42]

This provision should be read together with Article 6 that requires each State party to adopt legislation to ensure that the acts within the scope of the Convention are 'under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic or other similar nature'.[43]

This definition clearly departs from the inductive approach by including purpose as an element of the offense[44] and suggesting that no cause, not even

[40] See above n 19. See also Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 14 October 2005, IMO Doc LEG/CONF.15/21 (2005) (not yet in force) available at http://www.imodocs.imo.org/ENGLISH-pdf/CONF/LEG/15/21.pdf [herinafter Protocol to the SUA Convention].

[41] International Convention for the Suppression of Terrorist Bombings, 15 December 1997, GA Res 52/164, UN GAOR, 52nd Sess, Supp No 49, UN Doc A/RES/52/164 (1997) (in force, 23 May 2001); International Convention for the Suppression of the Financing of Terrorism, 9 December 1999, GA Res 54/109, UN GAOR, 54th Sess, Supp No 49, UN Doc A/RES/54/109 (1999) (in force, 10 April 2002).

[42] This trend has been followed to some extent in the nuclear terrorism convention which defines an offense as including the use of 'radioactive material or a device . . . with the intent to cause serious death or bodily injury; or with the intent to cause substantial damage to property or the environment; or with the intent to compel a natural or legal person, an international organization or a State to do or refrain from doing any act', see Art 2, International Convention for the Suppression of Acts of Nuclear Terrorism, above n 19; see also Art 4(5), Protocol to the SUA Convention, above n 40; Art 4, Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 14 October 2005, IMO Doc LEG/CONF.15/22 (2005) (not yet in force) available at http://www.imodocs.imo.org/ENGLISH-pdf/CONF/LEG/15/22.pdf

[43] Art 5 of the terrorist bombing convention, and Art 6 of the nuclear terrorism convention contain identical language. All three conventions also include a preambular clause, drawing from recent General Assembly resolutions, and condemning 'all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed'. In addition, they provide that the offenses cannot be regarded as political for the purposes of extradition or mutual legal assistance.

[44] In an apparent attempt to avoid the problem of proving the subjective motivation of the perpetrator, the provision defines the purpose element by reference to the 'nature or context' of the

national liberation, can serve as a legitimizing or distinguishing factor.[45] While limited to attacks against civilians or non-combatants, the definition extends to terrorist financing in situations of armed conflict without distinguishing between State and non-State actors. This may suggest that the armed forces of a State can engage in terrorist acts, and could arguably indicate an implicit acknowledgment of 'State terrorism' as a category.

Not all the definitional aspects of Article 2(1)(b) have been followed up in recent counter-terrorism treaty negotiations. For example, in the draft comprehensive convention, as in the recently adopted nuclear terrorism convention, the potential range of targets has been widened to include attacks against property, and the treatment of international humanitarian law issues and governmental action has been considerably revised.[46] It is also important to bear in mind that Article 2(1)(b) is a subsidiary clause of a convention that is preoccupied with the question of financing rather than terrorism *per se*.

Nevertheless, the adoption of the financing convention without a vote,[47] and its ratification by 147 States to date,[48] represented a potential breakthrough in the search for a legal definition. As the Supreme Court of Canada has noted in a recent case, Article 2(1)(b) of the financing convention 'catches the essence of what the world understands by terrorism'.[49] Together with related developments that will be addressed below, it has helped set the stage for a more serious and direct effort to formulate an acceptable and comprehensive legal definition.

4.2.3 Changes in the Attitude towards Terrorism at the United Nations

The political context within which counter-terrorism treaties have been negotiated has changed over time. In 1972, negotiations were conducted under the shadow of the de-colonization process. But as this process drew to a close, and as incidents of terrorism spread throughout the world, attitudes were

act itself, see Informal Summary of the Discussions in the Working Group Prepared by the Chairman, UN Doc A/C.6/54/L.2 (1999) 62.

[45] In fact, some delegations had initially argued against the inclusion of this paragraph precisely because it 'created a new crime of terrorism . . . without providing for the distinction between terrorist acts and the lawful acts of national liberation movements', *ibid*, p 61.

[46] See below section 4.2.4.

[47] GA Res 54/109, UN GAOR, 54th Sess, Supp No 49, UN Doc A/RES/54/109 (1999) 408. Only Lebanon voiced any reservations in the Assembly, see UN GAOR, 54th Sess, 76th mtg, UN Doc A/54/PV.76 (1999) 9. Notably, Lebanon has since informed the Counter-Terrorism Committee (CTC) of the Security Council of its intention to accede to this convention, see Report of Lebanon to the CTC, UN Doc S/2001/1201 (2001).

[48] See http://untreaty.un.org/English/Status/Chapter_xviii/treaty11.asp (last visited 8 November 2005). These include States traditionally associated with the position that terrorism and national liberation struggles should be strictly differentiated. Though some of these states, notably Jordan, Egypt and Syria, have submitted reservations to the effect that national liberation struggles are not covered by Article 2(1)(b) of the convention. Many States have lodged objections to these reservations, see below n 101.

[49] *Suresh v Canada* [2002] SCC 1, para 98.

modified. Certain ongoing territorial conflicts have continued to demand a measure of political fidelity to traditional positions.[50] But on the whole developing States have become less concerned with emphasizing the historic legitimacy of their anti-colonial struggles, than with confronting the contemporary threats posed to their own regimes by violent non-State actors. The rhetoric of States and the text of UN terrorism resolutions, adopted by overwhelming majorities, have best reflected this change.[51]

Within the political organs of the United Nations, the shift towards a clear and explicit condemnation of terrorist methods, regardless of cause or grievance, has been unmistakable.[52] The broad support for this transformation suggests that a legal definition of terrorism may yet be within reach. It also suggests that the continuing demands by some States for a differentiation between terrorism and national liberation struggles are perhaps not as far reaching, in legal terms, as the political oratory associated with them implies.

Early annual General Assembly resolutions on terrorism consistently included explicit reference to the legitimacy of national liberation struggles, creating the impression that any act conducted for that goal could not be classified as

[50] See, eg, Statement of Pakistan in the Security Council regarding the conflict in Kashmir, affirming the people of Kashmir's 'struggle for freedom against foreign occupation and alien domination', condemning State terrorism, but also noting that a 'just cause cannot be ennobled by the killing of innocent civilians', UN SCOR, 56th Sess, 4453rd mtg, UN Doc S/PV.4453 (2002) 31. The rhetoric of some States in relation to the Israeli–Palestinian conflict often uses the language that was popular when the UN debates on defining terrorism began, see, eg, Statement by Representative of Qatar on behalf of the OIC, UN SCOR, 56th Sess, 4453rd mtg, UN Doc S/PV.4453 (Resumption 1) (2002) 19; Statement by the Representative of Bahrain, 56th Sess, UN GAOR, 21st mtg, UN Doc A/56/PV.21 (2001) 14. But even with respect to this conflict, there has been some willingness from unfamiliar quarters to refer to certain actions by Palestinian groups as terrorism. The Palestinian representative at the UN, while affirming the legitimacy of resistance has stated that: 'we have also rejected suicide bombings carried out in Israel targeting Israeli civilians. We condemn them as terrorist acts . . .', UN SCOR, 56th Sess, 4438th mtg, UN Doc S/PV.4438 (2001); see also Y Arafat, 'A Palestinian Vision of Peace' *New York Times*, 3 February 2002, available at htttp://www.nyt.com/2002/02/03/opinion/03ARAF.html ('I condemn the attacks carried out by terrorist groups against Israeli civilians . . . They are terrorist organizations . . .'). Similarly, in the Final Statement adopted at the 'Summit of Peacemakers' held on March 13, 1996 Arab leaders declared 'strong condemnation of all acts of terror in all its abhorrent forms, *including recent terrorist attacks in Israel* . . .' (emphasis added). The participants included leaders from Jordan, Morocco, Bahrain, Mauritania, Saudi Arabia, Kuwait, Yemen, Qatar, Oman, UAE, Tunisia, Algeria, and the Palestinian Authority, see Co-Chairman's Statement of the Summit of the Peacemakers, reprinted in UN Doc A/51/91 (1996). In addition, agreements reached between Israel and the PLO, and other Middle East peace initiatives that have received the support of many States have consistently referred to Palestinian obligations to fight 'terrorism', see, eg, Performance-based Roadmap to a Permanent Two State Solution to the Israel–Palestinian Conflict, reprinted in UN Doc S/2003/529 (2003).

[51] It is instructive in this regard to compare statements of States, especially African and Asian states, in 1972 with those that have been made since 2001. Compare, for example, Compilation of Relevant Views above n 25, with General Assembly Debate on Measures to Eliminate International Terrorism, UN GAOR, 56th Sess, 12th–22nd mtgs UN Doc A/56/PV.12–22 (2001).

[52] It is significant that even in 1972, the UN Secretariat adopted this position, see Secretariat Study, above n 8, p 7 ('the legitimacy of a cause does not in itself legitimize the use of certain forms of violence, especially against the innocent').

terrorism.[53] By 1985, however, the Assembly began to include in its annual terrorism resolutions a condemnation of 'all acts, methods and practices of terrorism wherever and by whomever committed'.[54] On the basis of this phrase alone, the eminent jurist Oscar Schachter observed that:

> We often hear it said that one man's terrorist is another's freedom fighter. This may well be true but it does not mean that a person 'fighting for freedom' cannot be a terrorist. This is the clear purport of the unanimous General Assembly resolution that condemns as criminal 'all acts, methods and practices of terrorism wherever and whenever [sic] committed' It is true that the same Resolution recognizes the inalienable right to struggle for self-determination . . . . The great majority of governments voted for that provision on the understanding that the 'struggle' for self-determination must conform to the Charter principles relating to the use of force . . . . It is rather absurd for those opposed to terrorism to read into it an exception that is contrary to the main object of the Resolution.[55]

In 1994, the Assembly adopted without a vote the landmark Declaration on Measures to Eliminate International Terrorism. This Declaration not only deleted all previous references to the legitimacy of liberation struggles, but came close to formulating an all-embracing definition:

> . . . criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical,

[53] See GA Res 27/3034, UN GAOR, 27th Sess, Supp No 30, UN Doc A/RES/27/3034 (1972) 119; GA Res 32/147, UN GAOR, 32nd Sess, Supp No 45, UN Doc A/RES/32/147 (1977) 212; GA Res 34/145, UN GAOR, 34th Sess, Supp No 45, UN Doc A/RES/34/145 (1979) 244; GA Res 36/109, UN GAOR, 36th Sess, Supp No 51, UN Doc A/RES/36/109 (1981) 241; GA Res 38/130, UN GAOR, 38th Sess, Supp No 47, UN Doc A/RES/38/130 (1983) 266.

[54] GA Res 40/61, UN GAOR, 40th Sess, Supp No 53, UN Doc A/RES/40/61 (1985) 301. (adopted without a vote). This change was prompted by a series of terrorist incidents, including the hostage taking and murder on the Achille Lauro. Politically, it was facilitated by the Soviet Union's withdrawal of support for radical groups in the Middle East, see Higgins, above n 6, p 18; see also 1985 UNYB 1166–71, UN Sales No E.85.I.1. The same approach was followed in the following resolutions: GA Res 42/159, UN GAOR, 42nd Sess, Supp No 49, UN Doc A/RES/42/159 (1987) 299; GA Res 44/29, UN GAOR, 44th Sess, Supp No 49, UN Doc A/RES/44/29 (1989) 301; GA Res 46/51, UN GAOR, 46th Sess, Supp No 49, UN Doc A/RES/46/51 (1991) 283. In 1991, the Assembly adopted the short title 'Measures to Eliminate International Terrorism', abandoning qualifying language that had been appended, at the insistence of developing States, since 1972. The full title had been:

> Measures to prevent international terrorism which endangers or takes innocent lives or jeopardizes fundamental freedoms, and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair, and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes.

For its origins see 1972 UNYB 639, UN Sales No E.72.I.1.

[55] O Schachter, 'The Lawful Use of Force by A State against Terrorists in another Country' (1989) 19 *Isr YB Intl L* 209, 211; see also Murphy, above n 23, pp 19–20 (stating that reference to self-determination is limited to acts in accordance with international law and cannot include recourse to terrorism); Higgins, above n 6, p 18 (citing resolution 46/51 to argue that 'the implication is clear: the right to self-determination . . . cannot justify acts of terror').

> ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.[56]

This text represented an important turning point and has become the touchstone for all subsequent Assembly resolutions.[57] In fact, every annual resolution on the subject has repeated this language and has been invariably adopted by consensus, with the support of third world countries.[58] Significantly, the texts dealing with terrorism adopted at recent summit conferences of the Non Aligned Movement (NAM), that continue to affirm the legitimacy of national liberation struggles, have also incorporated this language.[59]

According to Christian Walter this formulation 'attempts to establish that a person committing certain criminal acts may (or even: must) be considered everyone's terrorist even if he or she is someone's freedom fighter or someone else's law-enforcement agent'.[60] Similarly, Malvina Halberstam has argued:

> . . . if inclusion of a reference to self-determination in the earlier resolutions suggested that resort to terrorism may be justified in the struggle for self-determination, the omission of any such reference in the later resolutions and the broad language condemning terrorism 'wherever and by whomever' committed are a clear rejection of that position.[61]

A similar trend has emerged in recent, unanimously adopted, Security Council texts. Resolution 1269 of 1999, for example, condemns 'acts of terrorism, irrespective of motive, wherever and by whomever committed', and draws from language of previous Assembly resolutions to label such acts as 'criminal and unjustifiable, regardless of their motivation'.[62] The Council has repeated this

[56] GA Res 49/60, UN GAOR, 49th Sess, Supp No 49, UN Doc A/RES/49/60 (1994) 303.

[57] Annual Assembly resolutions since this date have, despite requests from certain States, avoided any express reference to resolutions that pre-date the Declaration and deal more directly with the legitimacy of national liberation struggles. See GA Res 50/53, UN GAOR, 50th Sess, Supp No 49, UN Doc A/RES/50/53 (1995) 319; GA Res 51/210, UN GAOR, 51st Sess, Supp No 49, UN Doc A/RES/51/210 (1996) 346; GA Res 52/164, UN GAOR, 52nd Sess, Supp No 49, UN Doc A/RES/52/164 (1997) 394; GA Res 53/108, UN GAOR, 53rd Sess, Supp No 49, UN Doc A/RES/53/108 (1998) 364; GA Res 54/110, UN GAOR, 54th Sess, Supp No 49, UN Doc A/RES/54/110 (1999) 414; GA Res 55/158, UN GAOR, 55th Sess, Supp No 49, UN Doc A/RES/55/158 (2000) 513; GA Res 56/88, UN GAOR, 56th Sess, Supp No 49, UN Doc A/RES/56/88 (2001) 513; GA Res 57/27, UN GAOR, 57th Sess, Supp No 49, UN Doc A/RES/57/27 (2002) 514; GA Res 58/81, UN GAOR, 58th Sess, Supp No 49, UN Doc A/RES/58/81 (2003) 541; GA Res 59/46, UN GAOR, 59th Sess, UN Doc A/RES/59/46 (2004); GA Res 60/43, UN GAOR, 60th Sess, UN Doc A/Res/60/43 (2005).

[58] Only Syria and Lebanon have abstained on two occasions, with respect to the annual resolutions adopted in 1999 (54th Sess) and 2000 (55th Sess).

[59] See, eg, Final Document of the XIII Conference of Heads of State or Government of the Non-Aligned Movement Kuala Lumpur, 24 – 25 February 2003, available at http://www.nam.gov.za/media/030227e.htm.

[60] Walter, above n 6, p 36.

[61] M Halberstam, 'The Evolution of the United Nations Position on Terrorism: From Exempting National Liberation Movements to Criminalizing Terrorism Wherever and by Whomever Committed' (2003) 41 *Colum J Transnat'l L* 573, 577.

[62] SC Res 1269, UN SCOR, 54th Sess, 4053rd mtg, UN Doc S/RES/1269 (1999).

language in numerous resolutions, including resolution 1377 of 2001,[63] resolution 1456 of 2003,[64] and resolution 1624 of 2005.[65] As noted above in section 4.2.1, resolution 1566 of 2004 goes even further, not only condemning 'all acts of terrorism irrespective of their motivation' but also offering what are arguably the general parameters of a definition.

In the wake of the September 11th, the Council has also characterized individual acts of private violence as terrorism with greater frequency despite the fact that groups claiming to pursue national liberation struggles either took responsibility for the act or were assumed by the Council to be its perpetrator. The Council has thus condemned as 'terrorism' the suicide bombings in Israel in September 2002 for which Islamic Jihad and Hamas claimed responsibility;[66] the taking of hostages in a Moscow theatre by Chechen Rebels in October 2002; [67] and the March 2004 bombings at train stations in Madrid, on the (mistaken) assumption that the separatist group ETA was responsible.[68]

The point of these developments is not that support for the legitimacy of national liberation struggles has necessarily diminished amongst developing countries. It is that even amongst these States, there seems to be broader acceptance of the principle that the legitimacy of a liberation struggle does not preclude the possibility that certain acts undertaken in its name will qualify as terrorism.

4.2.4 The Draft Comprehensive Convention and the Search for a Legal Definition after 9/11

As the list of individual offences to regulate was reduced, the General Assembly began to turn its attention once again to a more comprehensive approach. In 1996, India proposed the adoption of a comprehensive convention on

[63] SC Res 1377, UN SCOR, 56th Sess, 4413th mtg, UN Doc S/RES/1377 (2001).

[64] SC Res 1456, UN SCOR, 57th Sess, 4688th mtg, UN Doc S/RES/1456 (2003).

[65] SC Res 1624, UN SCOR, 60th Sess, 5261st mtg, UN Doc S/RES/1624 (2005).

[66] SC Res 1435, UN SCOR, 57th Sess, 4614th mtg, UN Doc S/RES/1435 (2002). This included the affirmative vote of Syria, which has long championed the distinction between terrorism and national liberation struggles, especially in the context of the Israeli–Palestinian conflict. Presidential Statements have also been adopted by consensus condemning as 'terrorist' attacks in Israel by Palestinian groups, see, eg, UN SCOR, 50th Sess, UN Doc S/PRST/1995/3 (1995), (condemning the 'terrorist' attack of 22 January 1995 in Netanya for which Islamic Jihad claimed responsibility); see also UN SCOR, 51st Sess, UN Doc S/PRST/1996/10 (1996) (condemning 'terrorist' attacks on March 3 and 4 of 1996 in Jerusalem and Tel Aviv).

[67] SC Res 1440, UN SCOR, 57th Sess, 4632nd mtg, UN Doc S/RES/1440 (2002).

[68] SC Res 1530, UN SCOR, 59th Sess, 4923rd mtg, UN Doc S/RES/1530 (2004) (declaring ETA a 'terrorist group'). Subsequent investigation led to the Islamic Combatant Group, see explanation by the Spanish Permanent Representative to the UN in UN Doc S/2004/204 (2002) and the subsequent details provided as to the suspects, UN Doc S/2004/269 (2004); see also D Fuchs, 'Spanish Police Name Planner of Bombings' *New York Times,* 2 April 2004, available at http://www.nytimes.com/2004/04/02/international/europe/02spain.html. See also SC Res 1618, 59th Sess, 5246th mtg, UN Doc S/RES/1618 (2005) (regarding terrorist attacks in Iraq); UN Doc S/PRST/2005/53 (2005) (condemning terrorist attacks in India on 29 October 2005).

international terrorism that would establish a broad prosecute or extradite regime for all terrorist acts.[69] General Assembly resolution 51/210 of the same year established an Ad Hoc Committee that was focused on concluding the remaining sectoral conventions, but included in its mandate the responsibility to 'address means of further developing a comprehensive legal framework of conventions dealing with international terrorism'.[70]

With the rapid conclusion of the terrorist bombing and terrorist financing conventions, and the stalemate on the nuclear terrorism convention,[71] the Ad Hoc Committee shifted its focus to a revised comprehensive convention submitted by India in August 2000.[72] While most other provisions of the Indian text were negotiated in fairly quick succession, the question of definition and scope that had haunted the initial efforts to draft a general convention in 1972 returned to the fore.

Despite developments in attitudes towards terrorism, delegates were not capable of reaching agreement on a universal legal definition. Perhaps it was the idea that negotiations were culminating in a 'comprehensive' instrument that prompted a withdrawal to more traditional positions. At any rate, the summary of some controversial views provided by the Chairman of the Ad Hoc Committee in 2000 read like a document that could just have well been written three decades earlier:

> The point was made that the comprehensive approach raised the issue of the definition of terrorism. Failure to address that important issue in the draft comprehensive convention would bring into question the necessity and utility of the exercise. In particular, it was proposed that provision should be made for the recognition of the existence of State terrorism. It was also suggested that the draft comprehensive convention should unequivocally draw a distinction between terrorism and the legitimate struggle of peoples in the exercise of the right to self-determination as well as the right of self-defense against aggression and occupation.[73]

It took the tragic events of September 11th to produce the potential for a breakthrough. The magnitude of the attacks, and their widespread condemna-

[69] UN Doc A/C.6/51/6 (1996).

[70] GA Res 51/210, UN GAOR, 51st Sess, Supp No 49, UN Doc A/RES/51/210 (1996) 346.

[71] Introduced in 1998 by the Russian Federation, negotiations on the nuclear terrorism convention were long stalled over the question of 'State terrorism' and, as noted above, the convention was successfully concluded only in April 2005, see Report of the Ad Hoc Committee on Terrorism established by General Assembly resolution 51/210 of 17 December 1996, UN Doc A/60/37 (2005).

[72] UN Doc A/C.6/55/1 (2000). The mandate of the Ad Hoc Committee was appropriately revised in GA Res 54/110, UN GAOR, 54th Sess, Supp No 49, UN Doc A/RES/54/110 (1999) 414. All subsequent annual Assembly resolutions on the item entitled 'Measures to Eliminate International Terrorism' have focused on the need to elaborate a comprehensive convention. For a recently consolidated version of the draft comprehensive convention on international terrorism, see UN Doc A/59/894 (2005).

[73] Report of the Working Group of the Sixth Committee, UN Doc A/C.6/55/L.2 (2000) 43; see also Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, UN GAOR, 56th Sess, Supp No 37, UN Doc A/56/37 (2001).

tion, generated both a new sense of urgency and the hope that there was now an opportunity to overcome persisting divisions. In the General Assembly debate that followed the attacks many delegations addressed the question of definition and called for a speedy conclusion of the comprehensive convention. Secretary General Kofi Annan captured it best:

> It will also be important to obtain agreement on a comprehensive convention on international terrorism. In the post-11 September era, no one can dispute the nature of the terrorist threat, nor the need to meet it with a global response. I understand there are outstanding issues, which until now have prevented agreement on this convention. Some of the most difficult issues relate to the definition of terrorism. I understand and accept the need for legal precision. But let me say frankly that there is also a need for moral clarity. There can be no acceptance of those who would seek to justify the deliberate taking of innocent life, regardless of cause or grievance. If there is one universal principle that all peoples can agree on, surely it is this.[74]

In narrower political terms, an opening of sorts had also been created. The Security Council had adopted resolution 1373 on September 28, 2001—a far-reaching text imposing counter terrorism obligations on member States—without defining terrorism itself.[75] Security Council members, well aware of the explosive nature of the question of definition, had decided to steer clear of it.[76]

The approach adopted by the Council reflected a strong desire to maintain unity in addressing terrorism issues in the wake of September 11th. But by ignoring the elephant in the room, the Council provided the Assembly with an additional incentive and opportunity to make a significant contribution.[77] In the

[74] Statement of Secretary General, UN GAOR, 12th mtg, UN Doc A/56/PV.12 (2001) 3.

[75] See below section 4.3.2.

[76] Rosand, above n 1, p 334. Under the Chairmanship of British Ambassador Sir Jeremy Greenstock, the Counter Terrorism Committee (CTC)—established by resolution 1373 to monitor the implementation of its provisions – focused on a non-confrontational capacity building approach, while leaving it to each State to define terrorism under its domestic system, see Sir J Greenstock, Press Briefing Remarks on Combating International Terrorism, 4 June 2002, available at Http://www/un.org/docs/sc/committees/1373/viennabriefing.htm:

> Member States can decide what is terrorism within their own jurisdiction . . . the Counter Terrorism Committee will not try and sort out what is a freedom fighter, what is a terrorist, what is state terrorism which actually has no international legal definition or legal status as a concept. Those issues are political and need to be sorted in their own political context within their own diplomatic mechanisms. We're not going to be snagged by them, we are capacity builders and consciousness raisers against terrorism.

See also below section 4.3.2.

[77] In somewhat elliptical remarks to the Assembly, Greenstock referred to the search for a definition as a task for the Assembly, while intimating that no definition was really necessary since terrorism was like obscenity—we know it when we see it:

> . . . let me touch on one controversial area where this Assembly has a job to do. Increasingly questions are being raised about the problem of the definition of a terrorist... There is common ground amongst all of us on what constitutes terrorism. What looks, smells and kills like terrorism is terrorism.

He then added that controversial aspects of the definition concerned wars and armed struggles and should be left to 'the corpus of international humanitarian law', see Statement by Sir Jeremy

months that followed, delegates of the Sixth Committee set upon an intensive and strained series of negotiations in the hope of reaching an agreed definition and concluding the Indian draft text.

Under the efforts of Richard Rowe, the Australian coordinator, a proposal was eventually worked out that preserves the comprehensive definition of a terrorist offence under Article 2(1) of the Indian draft, but seeks to address the thorny questions of State terrorism and national liberation struggles in the context of a separate exclusion clause.[78] The definition in Article 2, built in some respects on the text of the financing convention, adopts broad and inclusive language:

> Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally causes:
>
> (a) Death or serious bodily injury to any person; or
> (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or
> (c) Damage to property, places, facilities or systems referred to in paragraph 1(b) of this article, resulting or likely to result in major economic loss;
>
> when 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.

As in the terrorist bombing, financing and nuclear conventions, the text also includes, in Article 6, a requirement that each State party adopt legislation to ensure that the acts within the scope of the convention are 'under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic or other similar nature'. In addition, the convention provides that no request for extradition or mutual legal assistance may be refused on the sole ground that the offense was inspired by political motives.

In these provisions, the convention defines as an offense acts by 'any' person, without distinction between governmental actors or non-State groups, including national liberation movements, and without regard for whether the act is committed during times of peace or in armed conflict. Unlike the financing convention, the offense is not limited to attacks against civilians and could include attacks against military personnel.[79] An additional feature is the

Greenstock, Permanent Representative of the UK, UN GAOR, 56th Sess, 12th mtg, UN Doc A/56/PV.12 (2001) 18.

[78] A recent consolidated text of the convention can be found at UN Doc A/59/894 (2005). The exclusion clause appeared traditionally in Article 18 of the draft comprehensive convention, but appears in Article 20 in the consolidated version.

[79] For example, attacks such as those on the USS Cole in October 2000 in Yemen, could thus properly be referred to as terrorism under this definition. In this sense, the current draft of Art 2 differs from the definition proposed by the High-Level Panel and endorsed by the Secretary-General, which refers only to attacks against civilians or non-combatants. By contrast, Security Council

inclusion of serious damage to property, infrastructure and the environment within the definition.

After providing this extensive definition, the coordinator's proposal comes to limit the scope of application of the convention. In doing so the proposal draws significantly from a similar provision in the terrorist bombing convention—reflecting a compromise that, at the time, was acceptable to all delegates,[80] and that has since been incorporated as well in the text of the nuclear terrorism convention and the protocol of 2005 to the convention for the suppression of unlawful acts against the safety of maritime navigation.[81] The proposal effectively denies coverage for the acts of governmental forces 'in the exercise of their official duties', while providing also that the convention will not govern the activities of 'armed forces during an armed conflict as those terms are understood under international humanitarian law'.[82]

In this way, the coordinator's proposal broadly excludes any notion of 'State terrorism' from the scope of the convention. With respect to non-State groups engaged in national liberation struggles, however, the proposal offers a far more limited exemption. Admittedly, the exclusion for 'armed forces' in armed conflict in the coordinator's text potentially encompasses the forces of non-State actors. The provision would hardly be of use otherwise, since State action is already exempted in a separate clause.[83] And though rejected by some States, Additional Protocol I provides that the 'armed forces' of national liberation movements—engaged in legitimate struggles in the exercise of their right to

resolution 1566 contemplates a broader range of potential targets by referring to 'criminal attacks, *including* against civilians' and thus more closely resembles, in this respect, Art 2 of the draft convention, see below text following n 139.

[80] Art 19, International Convention for the Suppression of Terrorist Bombings, above n 41. The treaty itself was adopted by the General Assembly without a vote, see GA Res 52/164, UN GAOR, 52nd Sess, Supp No 49, UN Doc A/RES/52/164 (1997) 389. At the time of its adoption, delegates from Iran, Pakistan, Jordan, Lebanon, Libya and Syria expressed some objections to the text, but nevertheless refrained from putting the text to a vote, see UN GAOR, 52nd Sess, 72nd mtg, UN Doc A/52/PV.72 (1997). It currently has 145 State parties, see htttp://untreaty.un.org/English/Status/Chapter_xviii/treaty9.asp (last visited 8 November 2005).

[81] See Art 4, International Convention for the Suppression of Acts of Nuclear Terrorism, above n 19; Art 3, Protocol to the SUA Convention, above n 40.

[82] The relevant text provides that:

> The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention.
>
> The activities undertaken by the military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.

See Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, UN GAOR, 57th Sess, Supp No 37, UN Doc A/57/37 (2002). *But* see Walter, above n 6, pp 18–19, (arguing that international humanitarian law and anti-terrorist law should not be so strictly separated).

[83] Walter, above n 6, pp 38–39; *cf* H Duffy, *The War on Terror and the Framework of International Law* (Cambridge, CUP, 2005) 22.

self-determination as defined in Article 1(4) to the Protocol—may acquire combatant status with the right to engage directly in hostilities.[84]

However, even under the looser definition embodied in Article 43 to Additional Protocol I, the term 'armed forces' is clearly circumscribed. It refers only to those 'organized armed forces, groups and units which are under a command responsible' to a party to the conflict and 'subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict'. In addition, such status is arguably conferred upon the armed forces of a national liberation movement only in relation to States party to Protocol I, and only in situations where the authority genuinely representing a people engaged in a liberation struggle makes an express declaration, pursuant to Article 96(3), that it will apply the Geneva Conventions and the Protocol.[85] Militant groups, even if claiming to advance a cause of national liberation, may fall short of these requirements, not least because they have not made such declarations and may adopt strategies that systematically ignore the principle of distinction between combatants and civilians.[86]

Under the coordinator's proposal, therefore, the armed elements of a national liberation movement that fail to meet these criteria would be covered by the terrorism convention, irrespective of whether an armed conflict exists. The mere fact of engaging in a national liberation struggle is not in itself a bar to classifying an act as a terrorist offense under the convention.

The coordinator's exemption for armed forces is also limited in another way. Even if conduct is governed by international humanitarian law, rather than the terms of the convention, it should not be forgotten that the laws of armed conflict themselves provide specific prohibitions against acts of terror[87]—as the

[84] See Arts 1(4) and 43(2), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (in force, 7 December 1978) [hereinafter, Additional Protocol I]. While many parts of Additional Protocol I are regarded as reflecting customary law, certain aspects remain controversial and some 30 States, including Indonesia, India, Iran, Israel, Pakistan and the United States, are still not parties. Art 1(4), for example, was one of the few provisions adopted by a vote, and its presence in the Protocol is one of the reasons that some States have refused to ratify it, see S Rosenne, *The Perplexities of Modern International Law* (Leiden, Nijhoff, 2004) 172; see also C Greenwood, 'Terrorism and Humanitarian Law—The Debate over Additional Protocol I' (1989) 19 *Isr YB Hum Rts* 187; G Abi–Saab, 'Wars of National Liberation in the Geneva Conventions and Protocols' (1979) 165(4) *Hague Recueil des Cours* 353.

[85] Greenwood, above n 84, p 190; S Vöneky, 'The Fight against Terrorism and the Rules of the Law of Warfare' in C Walter, *et al*, (eds), *Terrorism as a Challenge for National and International Law: Security Versus Liberty?* (Berlin, Springer, 2004) 925, 931–32.

[86] Thus far, no national liberation movement has made a declaration pursuant to Art 96, see Rosenne, above n 84, p 172.

[87] See Geneva Convention Relative to the Protection of Civilians in Times of War, 12 August 1949, 75 UNTS 287 (in force, 15 October 1950), Art 33 ('all measures of intimidation or of terrorism are prohibited'); Additional Protocol I, above n 84, Art 51(2) ('acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited'); Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-international Armed Conflicts, 8 June 1977, 1125 UNTS 609 (in force, 7 December 1978), Art 4(2) ('. . . the following acts . . . are and shall remain prohibited at an time and in any place whatsoever . . . (d) acts of terrorism'). Many other acts prohibited by the laws of armed conflict, such

Yugoslavia Tribunal in the *Galić Case* has recently affirmed.[88] The coordinator's text does not legitimize terrorist acts conducted by *properly constituted* State or non-State armed forces engaged in an armed conflict. It merely provides that they will be regulated by a different legal regime.

The coordinator's proposal has been challenged only by the Organization of the Islamic Conference (OIC), compromising some 56 States.[89] What is significant is not just the widespread support for the proposal, but the fact that the OIC has not rejected it out of hand. In the negotiations that preceded the September 11th attacks, the OIC had made its own proposals regarding definition and scope that emphasized the distinction between national liberation struggles and terrorism.[90] In responding to the coordinator's proposal, however, the OIC has not insisted on its own definition in Article 2.[91] Instead, it has only offered alternate language for the exclusion clause. While this language preserves the traditional OIC position that governmental action should be regulated by the terrorism convention (ie, that there is 'State terrorism'), there has been a change of emphasis in the way the OIC has addressed national liberation struggles.

The OIC proposal seeks to broaden the exemption for conduct in the context of an armed conflict by national liberation movements. Rather than

as deliberate attacks against civilian objects and hostage taking during hostilities, could also be classified as acts of terrorism, see generally HP Gasser, 'Acts of Terror, "Terrorism" and International Humanitarian Law' (2002) 84 *Intl Rev Red Cross* 547; WM Reisman, 'International Legal Responses to Terrorism' (1999) 22 *Hous J Intl L* 3, 11, ('one cannot, as an analytical matter, remove terrorism from the field of armed conflict'); see also High Level Panel Report, above n 11, p 48. This point is also expressed implicitly in a separate paragraph of the coordinator's proposal which provides that: 'Nothing in the present article condones or makes lawful otherwise unlawful acts, nor precludes prosecution under other laws'.

[88] See Case No IT–98–29–T *Prosecutor v Stanislav Galić*, 5 December 2003, available at http://www.un.org/icty/galic/trialc/judgement/galtj031205e.pdf. (The Majority of the Trial Chamber found that the crime of terror under Art 51(2) of Additional Protocol I comprised the following elements: acts of violence directed against civilians in circumstances where the offender willfully made the civilians the object of the acts of violence and where the offence was committed with the primary purpose of spreading terror among the civilian population. The Majority refrained, however, from deciding whether the infliction of terror was also a crime under customary international humanitarian law and Judge Nieto-Navia, in his dissent, contended that no such customary rule existed).

[89] The full text of the counter-proposal of the OIC can be found in Annex IV, Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, UN GAOR, 57th Sess, Supp No 37, UN Doc A/57/37 (2002). See also C Lynch, 'Islamic Group Blocks Terror Treaty' *Washington Post*, 10 November 2001, A19. Significantly, non-Islamic African and Asian states that traditionally championed the distinction between terrorism and national liberation have not objected to the proposal.

[90] See, in particular, Proposal submitted by Malaysia on behalf of the OIC, UN Doc A/C.6/55/WG.1/CRP.30, reprinted in Report of the Working Group of the Sixth Committee, UN Doc A/C.6/55/L.2 (2000) 37. Even this definition, which draws from the 1999 OIC terrorism convention, allows for an interpretation that certain acts of national liberation could qualify as terrorism, see discussion of OIC convention below section 4.2.5.

[91] Though technically all outstanding proposals remain on the table, it is understood that resolution of the differences over the exclusion clause will likely lead to the conclusion of the convention, see below n 107.

excluding only the conduct of 'armed forces', the OIC uses the term 'parties', and provides that 'the activities of the parties during an armed conflict, including in situations of foreign occupation, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention'. This may seem to be a customary appeal to the principled distinction between terrorism and national liberation struggles. But the language advanced by the OIC is more circumscribed than at first appears.[92]

Strictly speaking, there is room to doubt whether the use of the term 'parties' provides the OIC with the benefits it seeks. The term itself is somewhat ambiguous and usually appears capitalized in international humanitarian documents within the phrase 'Party to an armed conflict'.[93] The suggestion that any group engaged in violent activity in the context of hostilities is a 'party' to the conflict may run counter to the fundamental humanitarian principle that seeks to restrict hostilities to legitimate combatants.[94] In fact, Article 96(3) of Additional Protocol I suggests that the term refers to the authorities representing, and responsible for, combatants legitimately engaged in armed conflict.[95]

But even if the OIC advances this term in order to broaden the exclusion clause for national liberation movements, there is a second, more fundamental, point that emerges from their proposal. The OIC text effectively concedes that even if one supports in principle the legitimacy of a national liberation struggle, the methods adopted to advance that struggle can still qualify as terrorism. According to the OIC approach, acts undertaken outside the context of an

[92] But see Halberstam, above n 61, p 581, (arguing that the OIC proposal would signal a return to the resolutions of the 1970's and 1980's, that distinguished as a matter of principle between terrorism and national liberation, and would be in violation of current UN resolutions).

[93] See, eg, Common Art 3, Fourth Geneva Convention, above n 87; Arts 3, 35 and 43, Additional Protocol I, above n 84. Traditionally, the phrase referred to the High Contracting Parties engaged in an armed conflict; see also Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, UN GAOR, 59th Sess, Supp No 37, UN Doc A/59/37, (2004) 10–13 (summary of June 2004 Ad Hoc Committee meeting, discussing the terms 'parties' and 'armed forces'); Report of the Working Group, UN Doc A/C.6/60/L.6 (2005)

[94] Gasser, above n 87, p 554 ('the right to use force and commit acts of violence is restricted to the armed forces of each party to an armed conflict. Only members of such armed forces have the "privilege" to use force against other armed forces . . .').

[95] The provision reads: 'The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Art 1, para 4, may undertake to apply the Conventions and this Protocol in relation to that conflict . . . the Conventions and this Protocol are brought into force for the said authority *as a Party to the conflict* with immediate effect' (emphasis added). See Gasser, above n 87, p 559 (stating that national liberation movement can only become 'party' to an international armed conflict, if they meet the strict condition of Protocol I). A similar observation is made in the commentary of the ICRC to Additional Protocol I see Y Sandoz, *et al*, (eds), *Commentary on the Additional Protocols of 8 June 1977* (Geneva, ICRC, 1987) 56; see also Vöneky, above n 85, p 932 (noting that national liberation movements failing to meet conditions of Art 1(4), 43, and 96(3) 'cannot become *a party* to an international armed conflict', emphasis in the original); see also Abi-Saab, above n 84, pp 412–15.

armed conflict,[96] or by a group that is not regarded as a 'party' to the conflict can constitute an offense under the convention. And even acts undertaken by a 'party' during an armed conflict will be subject to the rules of international humanitarian law which themselves prohibit acts of terror.[97]

Even with the most generous interpretation, the OIC proposal cannot entitle those who are not lawful combatants to target legitimate military objectives, nor will it entitle lawful combatants belonging to a national liberation movement to violate the laws of war.[98] At most, it can provide the dubious rhetorical claim that such violations are war crimes rather than offenses subject to the terrorism convention.

On careful analysis, therefore, the two proposals could be said to share a basic commitment to de-legitimizing acts of terrorism, irrespective of cause, whether under the terrorism convention or the provisions of international humanitarian law. No doubt, the less precise language suggested by the OIC is designed to allow a more flexible political attitude to the acts of national liberation movements and avoid their easy classification under the terrorism convention.[99] In conceptual terms, however, the distinction between terrorism and national liberation struggles is no longer a matter of principle. Not all acts conducted to advance national liberation are legitimate simply because of the cause they champion. The proposals thus speak the same language and allow for a resolution of this question in a way that was not possible in 1972.

The degree of consensus on this aspect of the definition is further consolidated by the likelihood that the coordinator's proposal does not even really divide 56 Islamic countries from all other States.[100] There is some evidence to

[96] This would include acts undertaken outside the theatre of an existing conflict. The implication is that the OIC now accepts the general approach adopted in the draft US convention of 1972, see above n 23. However, it might conceivably be argued that the phrase 'during an armed conflict' exempts from the scope of the convention any activities conducted by a party to the conflict, for its duration, regardless of location.

[97] This reading is supported by the Aide-memoire presented by the OIC together with its proposal for the exclusion clause affirming that: 'the Islamic group has never sought exclusion or impunity for those who violate relevant norms and principles of international humanitarian law . . . The position of the OIC in this regard is clearly reflected in the amendments to para 2 of the coordinator's last proposal on Art 18', see Aide-memoire to the OIC proposal, 8 November 2001 (on file with author); see also Gasser, above n 87, p 563 (reading Additional Protocol I to assert that 'the ban on terrorist acts applies without doubt to wars of national liberation').

[98] Vöneky, above n 85, p 940.

[99] The position of the OIC should also be considered from the perspective of Islamic jurisprudence that has consistently valued struggles against oppression and tyranny. Indeed, the strong value placed on such struggles in the religio-political history of some Islamic states contributes to a continuing ambiguity in their position and a reluctance to neatly divide legitimate ends from illegitimate means. In recent decades, both Sunni and Shiite jurisprudence regarding martyrdom in these struggles has expanded considerably. With some notable exceptions, however, the general normative Islamic view continues to regard certain actions, and in particular the targeting of non-combatants, as contradictory to well-established principles of Islamic law even in the context of legitimate armed struggles, see generally BK Freamon, 'Martyrdom, Suicide and the Islamic Law of War: A Short Legal History' (2003) 27 *Fordham Intl L J* 299.

[100] N Rostow, 'Before and After: The Changed UN Response to Terrorism since September 11th' (2002) 35 *Cornell Intl L J* 475, 488.

suggest that the OIC position is the product of group solidarity rather than reflecting the actual national position of each group member. It is difficult to avoid this conclusion when considering the ratification by OIC States of counter-terrorism conventions, such as the terrorist bombing and financing conventions, as well as the universal adoption in the General Assembly of the nuclear terrorism convention, that include elements bearing a striking resemblance to the coordinator's proposal.[101] The voting record of most OIC countries on annual UN terrorism resolutions,[102] as well as the political statements and domestic legislation of some Islamic countries adds to this possibility.[103]

Similar progress has not been forthcoming on the issue of State terrorism. The OIC proposal seeks to include within the scope of the convention the acts of the military forces of a State that are not 'in conformity with international law'. The result of this amendment would be to regard military action by a State, outside the context of an armed conflict, as subject to the terms of the comprehensive convention.[104] This is in clear contrast to the coordinator's proposal, as well as that of the High-Level Panel and the Secretary-General, which adopts the conventional Western view that governmental action is appropriately regulated and restrained by other rules of international law and should not be covered by criminal law enforcement instruments in the field of counter-terrorism.[105] The

[101] Among the OIC States party, without reservation, to the terrorist bombing convention are Algeria, Brunei Darussalam, Burkina Faso, Kuwait, Libya, Malaysia, Mali, Mauritania, Mozambique, Senegal, Sierra Leone, Sudan and Turkey. Pakistan is also a party but has submitted a reservation regarding national liberation struggles to which numerous formal objections have thus far been submitted, see htttp://untreaty.un.org/English/Status/Chapter_xviii/treaty9.asp (last visited 8 November 2005). OIC States party to the terrorist financing convention include Libya, Brunei Darussalam, Burkina Faso, Mali, Mauritania, Morocco, Mozambique, Côte d'Ivoire, Sierra Leone, Uzbekistan, Turkey, Tunisia, and Algeria. Of OIC States party to the convention, Jordan, Egypt and Syria have submitted reservations regarding national liberation struggles to which many States have objected, see http://untreaty.un.org/English/Status/Chapter_xviii/treaty11.asp (last visited 8 November 2005). Other OIC states have informed the CTC of their intention to ratify these conventions, see, eg, Second Report of Indonesia to the CTC, UN Doc S/2002/731 (2002). Many OIC States are also parties, without reservation, to a host of other sectoral conventions that ban specific offenses regardless of cause or grievance.

[102] See above section 4.2.3

[103] See below section 4.2.5 In reports to the CTC, some OIC countries have officially expressed positions that appear more consistent with the coordinator's proposal than with the OIC draft, see, eg, Report of Burkina Faso to the CTC, UN Doc S/2002/444 (2002); Report of Mali to the CTC, UN Doc S/2002/613 (2002); see also above n 50 regarding willingness of some OIC countries to refer to certain attacks alleged to further a national liberation struggle as terrorism. See also OSCE, Bucharest Plan of Action for Combating Terrorism, 4 December 2001, MC(9).DEC/1, available at http://www.osce.org/documents/cio/2001/12/2025_en.pdf (the Plan, adopted by the OSCE, including its OIC members, declares, *inter alia*, that terrorism, whatever its motivation or origin, has no justification and makes no exception for national liberation struggles).

[104] Logically, the amendment cannot apply to military action of a State in the context of an armed conflict, since the OIC proposal already excludes the action of parties to an armed conflict from the scope of the Convention.

[105] According to this view, the phrase 'State terrorism' may have rhetorical or political force, but it does not add any operative legal value to include it under the counter-terrorism conventions. See, eg, Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, UN GAOR, 56th Sess, Supp No 37, UN Doc A/56/37 (2001) 13 ('other delegations noted that, while acts of State-sponsored terrorism may fall under the convention, other State

disparity between traditional positions on this issue remains therefore relatively unaltered.[106]

In sum, recent negotiations on the draft comprehensive convention have produced some significant developments in the search for a legal definition. Agreement has essentially been reached on a broad definition of the term in Article 2. At the legal level, differences regarding national liberation struggles seem to be more concerned with the applicable regime in certain cases of armed conflict, than with the legitimacy of resorting to terrorist methods to further such a struggle. There is growing approval for the idea that defending the cause of national liberation need not come at the expense of rejecting certain reprehensible tactics as terrorism.

As the coordinator has indicated, the conclusion of the convention depends on the successful resolution of the text of the exclusion clause.[107] As of this writing, however, member States have not yet succeeded in bridging outstanding gaps. There is a sense that the negotiating process has been somewhat re-energized, and some new proposals have recently been presented in an attempt to conclude the convention during the 60th session of the General Assembly.[108]

conduct, sometimes referred to as "State terrorism" was subject to a separate body of norms . . . and fell outside the scope of the convention'); see also Statement of the UK in the Security Council, UN SCOR, 56th Sess, 4453rd mtg UN Doc S/PV.4453 (2002) 24-25:

> . . . we also have to be conscious of the content of the 12 conventions on various aspects of terrorism. None of these seminal texts refer to State terrorism, which is not an international legal concept. We must be careful not to get caught up in the rhetoric of political conflict. If States abuse their power, they should be judged against the international conventions and other instruments dealing with war crimes, crimes against humanity and international human rights and humanitarian law.

See also above n 31 and accompanying text.

[106] But see C Tomuschat, 'Comments on the Presentation by Christian Walter' in C Walter, *et al*, (eds), *Terrorism as a Challenge for National and International Law: Security Versus Liberty?* (Berlin, Springer, 2004) 45, 47 (arguing that outside armed conflict 'State terrorism should also be recognized as a crime deserving the same classification as individual terrorism'); see also Walter, above n 6, pp 41–42; Schachter, above n 55, p 210, (arguing that there is no principled reason to exclude the acts of State officials from the definition of terrorism).

[107] See Report of the Coordinator on the Results of the Informal Consultation, reprinted in Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, UN GAOR, 57th Sess, Supp No 37, UN Doc A/57/37 (2002) 21. ('The key issue in relation to the comprehensive convention is clearly to resolve the text of art 18 . . . If we can do that, I believe, as many delegations have indicated, that the other outstanding issues will be capable of resolution and we will be able to conclude the Convention on which so much progress has been made over the past four months'); see also Report of the Coordinators on the Results of Informal Consultations, reprinted in Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, UN GAOR, 59th Sess, Supp No 37, UN Doc A/59/37 (2004) 10. ('Delegations continue to recognize that art 18 is the critical provision and that broad agreement on it is crucial for the adoption of the comprehensive convention'); Report of the Coordinators on the Results of Informal Consultations, reprinted in Report of the Working Group, UN Doc A/C.6/59/L.10 (2004) 4.

[108] See Proposal to facilitate discussion by the Friends of the Chair of the Working Group on measures to eliminate international terrorism, UN Doc A/C.6/60/INF/1 & 2 (2005) (suggesting an additional preambular paragraph reaffirming the right to self-determination and an additional sub-paragraph to the exclusion clause providing that 'Nothing in this Convention makes acts unlawful which are governed by international humanitarian law and which are not unlawful under that law'). As of yet, it is unclear whether these proposals have attracted general support.

However, the most recent meetings of the Sixth Committee have yet to produce a genuine breakthrough.[109]

While there is increasing agreement at the level of principle, some OIC States feel committed to supporting ongoing armed struggles and terrorist actions by non-State groups in places such as Iraq, the West Bank and Gaza Strip, and Jammu and Kashmir. They may be reluctant to facilitate the adoption of a comprehensive convention if it seen as imposing additional legal constraints and international opprobrium on these actors.[110] In this context, there may well be concern that highlighting the illegitimacy of the tactics adopted by these non-state actors will be used to overshadow the perceived legitimacy and justification of the struggles themselves.

As Helen Duffy has suggested, 'the quest for a global terrorism convention . . . [has] become accepted as a political reality while the feasibility of achieving such a convention, its precise content or scope, and of course the support that it might eventually muster, remain shrouded in uncertainty'.[111] As a result, the clearly identifiable progress on a universal definition of terrorism remains, at least for now, un-tethered to a binding, comprehensive and effective legal instrument. The question, for the purpose of this study, is whether this partial progress is sufficient to advance a generally acceptable working definition.

4.2.5 The Emerging Consensus?

The progress towards a definition of terrorism in negotiations on the draft comprehensive convention may be considered illusory. After all, Article 2 defines an offense 'within the meaning of this Convention' only. The definition is arguably undermined by continuing differences as to scope and complex arguments over the applicability of international humanitarian law. The fact that some movement has occurred in the negotiation of one particular legal instrument may not be viewed as evidence of a genuine change in national positions.

This objection overlooks not only the nature and history of the comprehensive convention, but the fact that developments in the Sixth Committee have not occurred in a vacuum. These developments are the product of a steady and clearly discernable trend that has been expressed in a myriad of ways,

[109] The most recent meetings were held in October 2004, March 2005, July 2005 and October 2005. The meetings are summarized in the following documents, respectively: Report of the Working Group, UN Doc A/C.6/59/L.10 (2004); Report of the Ad Hoc Committee on Terrorism established by General Assembly resolution 51/210 of 17 December 1996, UN Doc A/60/37 (2005); Letter dated 3 August 2005 from the Chairman of the Sixth Committee addressed to the President of the General Assembly, UN Doc A/59/894 (2005); Report of the Working Group, UN Doc A/C.6/60/L.6 (2005). An additional meeting of the Ad Hoc Committee is scheduled for February 2006.

[110] M Flory, 'International Law: An Instrument to Combat Terrorism' in R Higgins and M Flory (eds), *Terrorism and International Law* (London, Routledge, 1997) 30, 33.

[111] Duffy, above n 83, p 23.

culminating most recently in the formulations adopted in Security Council resolution 1566, the High-Level Panel and the Secretary-General reports, as well as in the adoption of the nuclear terrorism convention. The attacks of September 11th and growing international concern about the threat of terrorism to international peace and security strongly influenced this trend. The progress made on the comprehensive convention is thus best seen as a mirror on evolving attitudes towards terrorism, rather than an isolated event.

In technical terms, it may be admitted that acts to which a 'comprehensive' convention does not apply will not be regarded by some as terrorism.[112] But the fact that a given act is excluded from the scope of the convention does not mean that the act falls outside the definition. It is only once an act meets the definition in Article 2 that the possibility of exemption becomes relevant. The key point, however, is that whatever its terminological shortcomings, the general definitional approach followed in the draft comprehensive convention imitates a multitude of definitions contained in recent regional instruments, domestic legislation and scholarly works to such an extent that the contours of an emerging consensus can be mapped out.

Most recent efforts at defining terrorism are strikingly analogous to Article 2 of the comprehensive convention. While varying somewhat in range and emphasis, many share a core meaning by defining terrorism in reference to the threat or use of violence against persons or property for the purpose of intimidating a target group or achieving a political objective, regardless of cause. Of those definitions that refer to national liberation struggles, they do so in a manner that upholds the legitimacy of such struggles in principle, but suggest that certain acts undertaken to further them may still qualify as terrorism. A sample of definitions can be briefly mentioned.

Recent regional treaties have discarded the inductive approach followed by earlier texts, such as the 1977 European Convention.[113] The European Union itself adopted, in June 2002, a Framework Decision setting out a three-part definition of terrorism which refers to a series of acts including attacks on persons and property with the aim of either 'seriously intimidating a population', 'unduly compelling a Government or an international organization' to act or fail to act, or 'seriously destabilizing or destroying' institutional structures.[114] Borrowing language from the terrorist bombings convention, the preamble to the Decision excludes the actions of armed forces during armed

[112] Walter, above n 6, p 41.

[113] European Convention on the Suppression of Terrorism, 27 Jan 1977, 1137 UNTS 93 (in force, 4 August 1978). The recently adopted Inter-American Convention Against Terrorism of the OAS, has also continued to follow the inductive approach, see AG/RES 1840 (XXXII–O/02), OAS Doc OEA/Ser.P/AG/Doc4143/02 (2002); see also E Lagos and TD Rudy, 'Latin America: Views on Contemporary Issues in the Region Preventing, Punishing and Eliminating Terrorism in the Western Hemisphere: A Post 9/11 Inter-American Treaty' (2003) 26 *Fordham Intl L J* 1619.

[114] 2002 OJ (L 164/3).

conflict, as well as actions by the armed forces of a State 'inasmuch as they are governed by other rules of international law'.[115]

Similarly, the Convention of the Commonwealth of Independent States in Combating Terrorism of 1999 provides a broad definition of terrorism, without any qualifications for armed conflict situations. The definition covers violence against persons or property 'for the purpose of undermining public safety, influencing decision-making by the authorities or terrorizing the population'.[116]

Three other regional conventions define terrorism broadly, while also addressing the issue of national liberation struggles. The 1999 Convention of the Organization of African Unity, adopts an expansive Article 2 like definition of terrorism that embraces criminal acts against persons or property designed to intimidate the government or the public 'to do or abstain from doing any act, or to adopt or abandon a particular standpoint or to act according to certain principles'.[117] In Article 3, the convention stipulates that national liberation struggles conducted 'in accordance with the principles of international law', shall not be regarded as terrorist acts, while providing in the same article that 'political, philosophical, ideological, racial, ethnic, religious or other motives shall not be a justifiable defence against a terrorist act'.

The preamble to the 1999 Convention of the OIC on Combating International Terrorism[118] affirms that 'terrorism cannot be justified in any way . . . whatever its origin, causes or purposes'. In Article 1(2), the convention defines terrorism by referring to 'any act of violence or threat thereof notwithstanding its motives or intentions perpetrated to carry out an individual or collective criminal plan with the aim of terrorizing people . . . or threatening the stability, territorial integrity or political unity or sovereignty of independent States'.

On the other hand, the preamble of the OIC text affirms the 'legitimacy of the right of peoples to struggle against foreign occupation and colonial and racist regimes by all means, including armed struggle . . . in compliance with the purposes and principles of the Charter and resolutions of the United Nations'.

[115] See generally S Peers, 'EU Responses to Terrorism' (2003) 52 *Intl & Comp L Q* 227. The Council of Europe has also decided to commence work on a comprehensive European Convention that would include a general definition noting, *inter alia*, that 'the motive behind an act of terrorism does not change the nature of the act', see Council of Europe, Terrorism: A Threat to Democracies, Recommendation No 1644 (2004).

[116] Art 1, Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism, 1 June 1999, reprinted in International Instruments Related to the Prevention and Suppression of International Terrorism, 175 UN Pub Sales No E03.V9 (2004). [hereinafter International Terrorism Instruments]. The treaty also includes a definition of 'technological terrorism', referring to the use of nuclear, radiological, chemical or biological weapons; see also Shanghai Convention on Combating Terrorism, Separatism and Extremism (China, Kazakhstan, Kyrgyz Republic, Russian Federation, Tajikistan and Uzbekistan), 15 June 2001, reprinted in International Terrorism Instruments, *ibid*, p 226. (which embraces a similar definition but excludes attacks against persons 'taking an active part in the hostilities').

[117] OAU Convention on the Prevention and Combating of Terrorism, 14 July 1999, reprinted in International Terrorism Instruments, above n 116, p 210. The definition also covers acts designed to disrupt essential services or 'create general insurrection'.

[118] OIC Convention on Combating International Terrorism, 1 July 1999, reprinted in International Terrorism Instruments, above n 116, p 188.

Article 2(a) provides that such struggles when conducted 'in accordance with the principles of international law shall not be considered a terrorist crime'.[119] A comparable approach is adopted in the 1998 Arab Convention on the Suppression of Terrorism.[120]

The recognition of the legitimacy of liberation struggles in these three instruments can only be reconciled with their broad condemnation of terrorism, regardless of cause, by disentangling ends from means. While the struggles themselves may be legitimate, the means adopted can be regarded as terrorist offences if they do not conform to the requirements of international law.

As for domestic instruments, not all countries have adopted a definition of terrorism and many still follow an inductive approach in their national legislation.[121] But among those States that have a specific legislative definition there is often a strong resemblance to the draft comprehensive convention.

This is certainly true for States such as the Canada,[122] the United States,[123]

[119] It should be noted, however, that political resolutions adopted by the OIC have not always circumscribed national liberation struggles by reference to the requirements of international law, see, eg, Resolution No 51/31–P on Combating International Terrorism, adopted at the 31st Session of the Islamic Conference of Foreign Ministers (14–16 June 2004), reprinted in UN Doc A/58/856–S/2004/582 (2004) (declaring that 'the struggles of peoples plying under the yoke of foreign occupation and colonialism, to accede to national freedom and establish their right to self-determination, does not in any way constitute and act of terrorism').

[120] Arab Convention for the Suppression of Terrorism, 22 April 1998 reprinted in International Terrorism Instruments, above n 116, p 158. Art 1(2) provides a broad definition of terrorism, 'whatever its motives or purpose'. Art 2(a) provides that 'all cases' of liberation struggles 'by whatever means including armed struggle' that are 'in accordance with the principles of international law', will not be regarded as a terrorist offence. But the same provision stipulates that 'this exemption will not apply to any act prejudicing the territorial integrity of any Arab state'. It must be said that it is difficult to explain this selective standard.

[121] Countries falling under this category either define 'terrorism' or 'terrorist acts' by referring to specific criminal conduct without reference to motivation, or avoid any definition altogether and merely cover terrorist acts under standard criminal offences, see, eg, Report of Jamaica to the CTC, UN Doc S/2001/1314 (2001); Report of Senegal to the CTC, UN Doc S/2002/51 (2002); Report of Côte d'Ivoire to the CTC, UN Doc S/2002/75 (2002); Report of China to the CTC, UN Doc S/2001/1270 (2001); Report of Iran to the CTC, UN Doc S/2001/1332 (2001); Second Report of the Republic of the Maldives to the CTC, UN Doc S/2004/19 (2004); Report of Nicaragua to the CTC, UN Doc S/2002/582 (2002); Report of Brazil to the CTC, UN Doc. S/2001/1285 (2001) 20; Report of Vietnam to the CTC, UN Doc S/2002/148 (2002); Report of Morocco to the CTC, UN Doc S/2001/1288 (2001); Report of Singapore to the CTC, UN Doc S/2001/1234 (2001); Report of the Philippines to the CTC, UN Doc S/2001/1290 (2001).

[122] See Art 83.01(1)(b), Bill C–36, An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities in order to combat terrorism, 1st Session, 37th Parliament, 49–50 Elizabeth II (2001); M Wagner, 'Country Report on Canada' in C Walter, *et al*, (eds), *Terrorism as a Challenge for National and International Law: Security Versus Liberty?* (Berlin, Springer, 2004) 174.

[123] United States legislation has numerous definitions of terrorist offences that generally refer to criminal acts of sub-national groups designed to influence government policy, but vary depending on the purpose of the definition, see, eg, US Antiterrorism Act, 18 USC §2331 (1991); 22 USC §2656f (d)(1) (1994); USA Patriot Act, Pub LNo 107–56, 115 Stat 296–342 (2001). An interesting recent definition is included in the United States' Draft Crimes and Elements for Trials by Military Commission established to try certain terrorist offences committed in the context of an armed conflict, available at http://www.defenselink.mil/news/Feb2003/d20030228dmci.pdf. The definition refers to intentional killing or harm 'designed to intimidate or coerce a civilian population, to

New Zealand,[124] the United Kingdom,[125] India,[126] and the Russian Federation,[127] many of which have recently updated their terrorism legislation. But even some OIC member States have adopted a domestic definition that is comparable with Article 2 of the comprehensive convention. This is clear, for example, with respect to the legislation of countries such as Kyrgyzstan,[128] Mozambique,[129] Uzbekistan,[130] and Turkmenistan,[131] and to a lesser extent for

influence the policy of a government by intimidation or coercion, or to affect the conduct of a government'. The text expressly provides that the definition will be satisfied when the 'accused did not enjoy combatant immunity' *or* the target was not a military objective. It is clear from this definition that even attacks on military targets, such as the attack on the USS Cole in October 2000 or on the Pentagon on September 11th, can be regarded as terrorism if committed by individuals that are not legitimate combatants.

[124] See Art 5, Terrorism Suppression Act (2002), available at http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes (the definition refers to a variety of acts that are carried out 'for the purpose of advancing an ideological, political or religious cause' and with the intention 'to induce terror in a civilian population or to unduly compel or to force a government or an international organization to do or abstain from doing any act'. Interestingly, the definition covers acts committed during armed conflict if they are not committed 'in accordance with rules of international law applicable to the conflict').

[125] Report of the United Kingdom to the CTC, UN Doc S/2001/1232, (2001) 10 (citing Section 1 of the UK Terrorism Act of 2000 which defines terrorism as 'the use or threat, for the purpose of advancing a political, religious or ideological cause, of action which involves serious violence against a person or serious damage to property, endangers a person's life, creates a serious risk to the health or safety of the public or section of the public, or is designed to seriously interfere with or seriously to disrupt an electronic system.').

[126] Second Report of India to the CTC, UN Doc S/2002/283 (2002) 5 (citing the Indian Prevention of Terrorism Act of 2002 that adopts a broad definition encompassing violence against property or persons or disruption of essential services in order to 'compel the Government or any other person to do or abstain from doing any act').

[127] Second Report of the Russian Federation to the CTC, UN Doc S/2002/287 (2002) 13 (citing Art 205 of the Criminal Code, which defines terrorism as a separate offence by referring to acts endangering human life or causing significant material damage, 'if the acts were committed for the purpose of disturbing societal security, frightening the populace or exerting influence on the decision-making of government authorities'); see also TB Beknazar, 'Country Report on Russia' in C Walter, *et al*, (eds), *Terrorism as a Challenge for National and International Law: Security Versus Liberty?* (Berlin, Springer, 2004) 473, 474–76.

[128] Report of Kyrgyzstan to the CTC, UN Doc S/2002/204 (2002) 7 (citing Art 226, Criminal Code, '. . . acts that create the danger of loss of life, cause extensive property damage . . . . If these actions are committed in order to breach public security, frighten the population or influence the taking of decisions by the Government bodies').

[129] Report of Mozambique to the CTC, UN Doc S/2001/1319 (2001) 5 (citing Art 13(1), Act No 19/91, referring to the placing of explosives or other devices that can risk life or damage to goods 'with the intent of creating social insecurity, terror or fright in the population or exert pressure on the State . . . to carry out or refrain from carrying out certain activities').

[130] Second Report of Uzbekistan to the CTC, UN Doc S/2002/974 (2002) 13 (citing Art 155, Criminal Code, defining terrorism as 'violence, the use of force or other actions creating a danger to persons or property . . . undertaken with a view to forcing a State body, an international organization . . . individuals or legal entities to carry out, or to refrain from carrying out, any activity . . .).

[131] Second Report of Turkmenistan to the CTC, UN Doc S/2003/129 (2003) 4 (citing Art 271, Criminal Code, referring to acts of violence against persons or significant property damage committed in order to 'violate public security, cause panic or influence decision making by government authorities').

States such as Algeria, Egypt and Jordan.[132] Notably, none of these OIC country definitions contain any qualification for national liberation struggles.[133]

The definitional approach in the comprehensive convention also shares common characteristics with many scholarly works. Prominent among these are the proposals of writers such as Bassiouni,[134] Schachter,[135] Arend and Beck,[136] Sorel,[137] and the International Law Association.[138] None of these definitions restrict acts of terrorism to peace-time situations and all provide that acts meeting the definition can still be classified as terrorism even if pursued for the purpose of advancing a legitimate national liberation struggle.

Admittedly, many of these definitions address the phenomenon within a criminal context. However, this is certainly not the case with respect to all

[132] These definitions tend to focus more on criminal acts designed to instill fear or cause internal instability, rather than on the use of violence to achieve a political objective, see Report of Algeria to the CTC, UN Doc S/2001/1280 (2001) 6 (citing, Art 1, Decree No 92–03, which emphasizes acts seeking to spread panic or targeting State security, stability or territorial integrity, rather than the political objectives of the perpetrator); see also Report of Egypt to the CTC, UN Doc S/2001/1237 (2001) 4; Report of Jordan to the CTC, UN Doc S/2002/127 (2002) 3.

[133] Indeed, from surveying the reports of States to the CTC, including OIC members, it does not appear that any State includes an explicit provision to the effect that acts undertaken to advance national liberation struggles cannot be regarded as terrorism. States will, of course, be reluctant to adopt such a destabilizing provision in their domestic legislation; see also above n 120 (referring to the exception in the Arab convention which stipulates that the national liberation exemption 'will not apply to any act prejudicing the territorial integrity of any Arab state').

[134] Bassiouni, above n 7, pp 16–17 ('terrorism is an ideologically motivated strategy of internationally proscribed violence designed to inspire terror within a particular segment of society in order to achieve a power-outcome or to propagandize a claim or grievance, irrespective of whether its perpetrators are acting for and on behalf of themselves or on behalf of a State'). Bassiouni expressly acknowledges that terrorism can arise in the case of national liberation struggles waged in the context of an armed conflict.

[135] Shachter, above n 55, pp 210 ('[Terrorism] has a core meaning that virtually all definitions recognize. It refers to the threat or use of violence in order to create extreme fear and anxiety in a target group so as to meet political (or quasi-political) objectives of the perpetrators'). He goes on to insist that terrorism applies both in peace-time and in armed conflict and covers the conduct of 'freedom fighters' and the armed forces of the State. He notes also that 'Guerilla forces fighting in organized, distinguishable units against governmental troops are not terrorists unless they perform terrorist acts . . . The same holds true for regular military troops'. See also O Shachter, 'The Extraterritorial Use of Force against Terrorist Bases' (1989) 11 *Hous J Intl L* 309, 310.

[136] AC Arend and RJ Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (London, Routledge, 1993) 141 ('the threat or use of violence with the intent of causing fear in a target group in order to achieve political objectives').

[137] Sorel, above n 6, p 371:

> international terrorism is an illicit act (irrespective of its perpetrator or its purpose) which creates a disturbance in the public order as defined by the international community, by using serious and indiscriminate violence (in whatever form, whether against people or public or private property) in order to generate an atmosphere of terror with the aim of influencing political action.

[138] International Law Association, Committee on International Terrorism, Committee Report (1984) reprinted in Y Alexander, (ed), *International Terrorism: Political And Legal Documents* (Dordrecht, M Nijhoff, 1992) 524, 525 (citing a series of acts including 'atrocities, wanton killing, hostage taking, extortion or torture committed or threatened to be committed whether in peacetime or in wartime for political purposes . . .').

definitions.[139] More importantly, it seems reasonable to argue that while the range of legal responses and remedies, or even the applicable legal regime, may vary in the circumstances this would not alter the essential elements of the definition. A given act of terrorism may or may not constitute an armed attack, justify a forcible response, or amount to a war crime or a crime against humanity, but it will still remain an act of terrorism.

Interestingly, most of these definitions do not necessarily limit the potential targets of terrorism to civilians or non-combatants. They tend to focus on the purpose for which the harm is inflicted and the status of the actor inflicting the harm rather than the character of the target. In this respect, the definitions differ from the more limited language on targets adopted in Article 2(1)(b) of the financing convention and suggested by the High-Level Panel, preferring instead the wider approach recommended in Article 2 of the draft comprehensive convention and implied in Security Council resolution 1566, which speaks of 'criminal attacks, *including* against civilians'.

In light of the abundance of texts that resemble the approach followed in the comprehensive convention, it is untenable to suggest—as some jurists do—that divisions over the definition of terrorism remain unchanged. Whatever the differences as to scope or the variations of emphasis and terminology, the definition in Article 2 and the view that certain acts undertaken to further national liberation struggles may qualify as terrorism, have gained wide currency.

For some, it may be premature to conclude that these developments offer the kind of precise legal definition of terrorism under customary international law that is necessary for the purpose of establishing individual criminal responsibility.[140] But even today, it is not possible for States or scholars to contend persuasively that the obligations imposed on governments in relation to terrorism are somehow inconsequential on the grounds that the term terrorism remains undefined. Whatever the ambiguities that remain, terrorism has a core meaning that is broadly understood and accepted. While it may be politically inconvenient for some States to acknowledge it at this stage, key definitional issues surrounding this term are approaching resolution.

4.2.6 A Working Definition of Terrorism

In the context of a study on State responsibility for private acts of terrorism, the continuing differences over State terrorism are not a matter of concern. The focus here is only on issues of attribution and responsibility that arise with respect to acts of terrorism that are perpetrated by non-State actors. In this regard, it is suggested that recent developments indicate that it is possible to

[139] This is certainly true of most of the scholarly definitions cited which are of general scope, and some of the domestic definitions such as the United States and New Zealand definitions cited above notes 123 and 124.

[140] See, eg, Duffy, above n 83, pp 39–41.

present a working definition of terrorism that reflects the core elements of an emerging international agreement.

Drawing from Article 2 of the draft comprehensive convention, as well as other sources discussed above, an act will be regarded as terrorism for the purposes of this study, if a non-State actor unlawfully and intentionally causes death or serious injury to any person, or serious damage to property, when 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.[141] As a matter of principle, the fact that the act is conducted for the alleged purpose of furthering a national liberation struggle or in the context of an armed conflict will not prevent its classification as an act of terrorism.[142] Non-privileged combatants engaged in such activity, even in the context of an armed conflict, can be treated as terrorist offenders.[143] In each case, it will be a matter of appreciation whether there exists an armed conflict and whether the actors involved may be regarded as belonging to a legitimate combatant force. In these circumstances, the activity will be subject only to the rules of international humanitarian law.

It is of course one thing to describe the general contours of an emerging definition, and another to suggest that this definitional approach is desirable. From a legal perspective, this emerging definition is not without considerable imperfections.[144] It remains a work in progress and still lacks some terminological precision. Differences as to scope persist and are exacerbated by traditional political divisions and ongoing territorial conflicts. These, in turn, could encourage ambiguity and invite abuse.

From an academic standpoint, the formulation is somewhat problematic. For example, by defining terrorism as an act designed to intimidate a population the definition may cast too wide a net and encompass acts that are purely criminal in nature. The point, it may be suggested, is that in cases of terrorism the act seeks to advance a general political or ideological agenda not just strike fear into the hearts of a given community. Indeed, as George Fletcher has argued, several unique features of terrorism may be absent from this definition. In his view, the theatrical component of terrorist attacks, the likelihood of repetition and the

[141] Note, these elements are disjunctive. Acts designed to intimidate a population could amount to terrorism even without a traditional intent to influence the decision making of government officials.

[142] The act could still be regarded as an act of terrorism either because it technically meets the definition in Art 2 of the comprehensive convention, or to the extent that it violates the prohibition against terrorism under international humanitarian law.

[143] Arguably, the collective group to which these combatants belong could, in appropriate circumstances, similarly be treated as a terrorist organization. On the other hand, individuals belonging to a legitimate combatant force may individually commit violations of international humanitarian law that could qualify as acts of terrorism under that law, but the force would not be regarded as a terrorist organization as long as it met the 'armed forces' requirement, as understood under international humanitarian law.

[144] See, eg, AJ Notebom, 'Terrorism: I Know it When I See it' (2002) 81 *Or L Rev* 553; AV Orlova and JW Moore, '"Umbrellas" or "Building Blocks"? Defining International Terrorism and Transnational Organized Crime in International Law' (2005) 27 *Hous J Intl L* 267, 271–81.

lack of remorse are all aspects of terrorist activity that render it a unique and especially frightening phenomenon and yet they are under-developed or ignored in most treatments of the subject.[145]

Despite these flaws, the working definition proposed arguably meets with the general approval and support of the largest number of States today. Given the sensitivity of the subject matter, the fact that States are finally coalescing around a specific formulation is highly significant and should not lightly be unsettled by new proposals. For the purposes of this study, the proposed formulation allows us to proceed to examine State responsibility for terrorism on the basis of a definition that arguably reflects, despite its shortcomings, an emerging international consensus.

4.3 COUNTER-TERRORISM OBLIGATIONS OF THE STATE: THE DUTY TO PREVENT AND TO ABSTAIN

4.3.1 Counter-Terrorism Obligations before 9/11

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.[146]

Tied as it is to the very conception of sovereignty, this general obligation has a long pedigree and wide application. It is cited in such famous international decisions as the *Lotus Case*,[147] the *Island of Palmas Arbitration*,[148] and the *Corfu Channel Case*,[149] as well as in the work of prominent jurists.[150] The duties of prevention and abstention with respect to acts of domestic terrorism[151] similarly stem from a general obligation of the sovereign to safeguard aliens

[145] G Fletcher, *Defining Terrorism* (2003) available at http:www.project-syndicate.org/commentarias/commentary_text.php4?id1362&lan.

[146] The principle is covered by the general Latin maxim *sic utere tuo ut alienum non lædas*.

[147] *SS Lotus (France v Turkey)* 1927 PCIJ (ser A) No 10 (7 September) (dissenting opinion of Judge Moore) ('it is well settled that a State is bound to use due diligence to prevent commission within its dominions of criminal acts against another nation or its people').

[148] *Island of Palmas Case (US v Netherlands)* (1928) 2 R Intl Arb Awards 829, 839 (referring to sovereignty as involving 'the obligation to protect within the territory the rights of other States . . . together with the rights which each State may claim for its nationals in foreign territory').

[149] *Corfu Channel Case (UK v Albania)* [1949] ICJ Rep 4 (9 April) 22 (referring to 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States') [hereinafter, *Corfu Channel Case*].

[150] See, eg, R Jennings and A Watts, (eds), 1 *Oppenheim's International Law*, 9th edn, (Harlow, Longman, 1992) 549; H Kelsen, *Principles of International Law*, 2nd edn, (New York, NY, Holt, Rinehart & Winston, 1966) 205-206.

[151] The term 'domestic' terrorism is used to refer to acts of terrorism perpetrated by a State's own nationals on its soil and without foreign involvement, see, eg, FBI definition in 28 CFR 0.85 (2001).

from injury, and to provide for the security of the State's citizens and the protection of their human rights.[152]

While counter-terrorism obligations thus flow logically from these more general legal principles, the problem posed by terrorism has generated a significant corpus of legal obligations that deals specifically with this phenomenon. The 1937 League of Nations Convention on the Prevention and Punishment of Terrorism included, in Article 1, a reaffirmation of the 'principle of international law in virtue of which it is the duty of every State to refrain from any act designed to encourage terrorist activities directed against another State and to prevent the acts in which such activities take shape.'[153]

Even before the United Nations began to address the question of terrorism as a separate agenda item, counter-terrorism obligations received specific attention. For example, the ILC Draft Code of Offences Against the Peace and Security of Mankind of 1954, provided that 'the undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State' would be a crime under international law.[154] Analogous statements were also contained in other early UN texts.[155]

Perhaps the most important expression of this obligation before September 11th is contained in the unanimously adopted Friendly Relations Declaration of 1970,[156] which is widely regarded as reflecting customary international law.[157] In the section concerning the threat or use of force, the Declaration provides as follows:

[152] Above sections 3.2.1 and 3.2.2.

[153] League of Nations' resolutions from this period contained similar language. See, eg, 12 League of Nations OJ 1759, League of Nations Doc C.543.1934.VII (1934); see also Marston, above n 8.

[154] (1951) 2 *YB Intl L Comm'n* 134, UN Doc A/1858 (1951) 135. Reference to terrorism was also included in the Draft Code as provisionally adopted by the ILC in 1991, see (1991) 2 (2) *YB Intl L Comm'n* 94, UN Doc A/46/10 (1991) 97 (referring to the criminal offence committed by State agents 'undertaking, organizing, assisting, financing, encouraging or tolerating acts against another State directed at persons or property and of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public'). However, the final text of the Draft Code, used in the context of the work of the ILC on the International Criminal Court, excluded reference to terrorism, see (1996) 2 (2) *YB Intl L Comm'n* 17, UN Doc A/51/10 (1996). While the General Assembly has expressed appreciation for the Draft Code in the context of work on the International Criminal Court, the Code has not been formally adopted as an independent instrument.

[155] See, eg, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, GA Res 2131 (XX), UN GAOR, 20th Sess, Supp No 14, UN Doc A/RES/20/2131 (1965) 11; see also Declaration on the Strengthening of International Security, GA Res 2734, UN GAOR, 25th Sess, Supp No 28, UN Doc A/RES/25/2734 (1970) 22.

[156] Declaration on Principles of International Law concerning Friendly Relations and Co-operation 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 [hereinafter Friendly Relations Declaration].

[157] See, eg, *Military and Paramilitary Activities in and against Nicaragua (Nicar v US)* [1986] ICJ Rep 14 (27 June) 101 [hereinafter *Nicaragua Case*]; see also Schachter, above n 55, pp 211–12 (referring to duty to prevent, apprehend, and prosecute or extradite terrorists as part of 'general customary international law').

> 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.[158]

This language has often been repeated in General Assembly and Security Council resolutions that call upon States to fulfill their obligations in relation to terrorism under international law.[159]

The specific duties that stem from these core obligations were further articulated in scholarly works[160] and through the network of international and regional counter-terrorism conventions.[161] Because of the piecemeal nature of the conventional counter-terrorism framework, inconsistencies and gaps are sometimes evident.[162] On the whole though, this framework elaborates upon elements of the duty to prevent with respect to a wide range of activities, especially as far as obligations of prosecution and extradition of terrorist offenders are concerned.[163] The conventions generally require States to criminalize and establish jurisdiction over the acts covered, co-operate in criminal investigations, and apprehend and prosecute or extradite suspected offenders.

The draft comprehensive convention on international terrorism, if and when adopted, would consolidate and expand on these obligations with respect to all

[158] In the section regarding the duty of non-intervention, the Declaration similarly provided that: 'no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist, or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State'.

[159] From 1980 onwards, most General Assembly resolutions on terrorism have included the language of the Friendly Relations Declaration regarding terrorism, see above section 4.2.2. Similar language was also included in the 2005 World Summit Outcome Document, GA Res 60/1, UN GAOR, 60th Sess, A/RES/60/1 (2005) para 86. For a discussion of the legal status of these resolutions as customary law, see RE Schreiber, 'Ascertaining Opinio Juris of States Concerning Norms Involving the Prevention of International Terrorism: A Focus on the UN Process' (1998) 16 *B U Intl L J* 309; see also, eg, SC Res 748, UN SCOR, 47th Sess, 3063rd mtg, UN Doc S/RES/742 (1992); SC Res 1189, UN SCOR, 53rd Sess, 3915th mtg, UN Doc S/RES/1189 (1998) 110 and SC Res 1269, UN SCOR, 54th Sess, 4053rd mtg, UN Doc S/RES/1269 (1999).

[160] For a detailed review of jurisprudence regarding the specific duties to prevent and to abstain, see, eg, Lillich and Paxman, above n 1, Franck and Neidemeyer, above n 1.

[161] For a useful survey of this aspect of the conventions see M Lippman, 'The New Terrorism and International Law' (2003) 10 *Tulsa J Comp & Intl L* 297.

[162] See J Trahan, 'Terrorism Conventions: Existing Gaps and Different Approaches' (2002) 8 *New Eng Intl & Comp L Ann* 215 (for example, most of the conventions do not cover acts of domestic terrorism, and some do not include provisions denying the application of the political offense exception in cases of extradition); see also MC Bassiouni, 'Legal Control of International Terrorism: A Policy-Oriented Assessment' (2002) 43 *Harv J Intl L* 83, 91–92.

[163] Significantly, only the terrorist financing convention and the 1998 Arab Convention on the Suppression of Terrorism provide detailed obligations regarding the duties of prevention that go beyond prosecution or extradition obligations, see Arts 18(1), (2), Convention for the Suppression of Terrorist Financing, above n 41; Art 3.I, Arab Convention on the Suppression of Terrorism, above n 120.

acts of terrorism, as defined in Article 2.[164] This would include, *inter alia*, specific duties to prohibit activities that 'encourage, instigate, organize, knowingly finance or engage in terrorism', as well as adopting measures 'to prohibit the establishment and operation of installations and training camps for the commission of offences'.[165] States would also be required to maintain channels of communication and to deny refugee status, where legally appropriate, to terrorist offenders. The convention would also include important safeguards regarding the treatment of terrorist suspects taken into custody.

These binding treaty and customary obligations are echoed in United Nations resolutions that spell out a list of measures expected of States in confronting terrorism. The first such list was contained in General Assembly resolution 42/159 of 1987 and provided as follows:

> Urges all States to fulfill their obligations under international law and to take effective and resolute measures for the speedy and final elimination of international terrorism and to that end:
>
> (a) To prevent the preparation and organization in their respective territories, for commission within or outside their territories, of terrorist and subversive acts directed against other States and their citizens;
> (b) To ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts;
> (c) To endeavour to conclude special agreements to that effect on a bilateral, regional and multilateral basis;
> (d) To cooperate with one another in exchanging relevant information concerning the prevention and combating of terrorism;
> (e) To harmonize their domestic legislation with the existing international conventions on this subject to which they are parties.[166]

Similar language was repeated in subsequent resolutions,[167] and further developed in the 1994 Declaration on Measures to Eliminate International Terrorism so as to refer specifically to financing and terrorist training, systematizing and enhancing international co-operation, as well as denying

[164] The effectiveness of these additional factors may be limited, however, unless the comprehensive convention is regarded as superseding the existing conventions—a matter that is still under discussion in the Ad Hoc Committee, see generally Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, UN GAOR, 57th Sess, Supp No 37, UN Doc A/57/37 (2002) 6.

[165] Arts 8(1)(a) and (b), Draft Comprehensive Convention on International Terrorism, reprinted in Report of the Ad Hoc Committee on Terrorism established by General Assembly resolution 51/210 of 17 December 1996, UN GAOR, 57th Sess, Supp No 37, UN Doc A/57/37 (2002). The provision appears in Article 9 of the consolidated version issued in UN Doc A/59/894 (2005).

[166] GA Res 42/159, UN GAOR, 42nd Sess, Supp No 49, UN Doc A/RES/42/159 (1987) 299.

[167] See, GA Res 44/29, UN GAOR, 44th Sess, Supp No 49, UN Doc A/RES/44/29 (1989) 301. GA Res 46/51, UN GAOR, 46th Sess, Supp No 49, UN Doc A/RES/46/51 (1991) 283.

asylum status or safe haven to terrorist operatives.[168] Security Council resolution 1269 of 1999 also incorporated a similar list of measures.[169]

In sum, the duty to prevent acts of terrorism and to abstain from any form of encouragement, support or toleration of such activity was recognized as an integral part of international law well before September 11th. And while States have occasionally questioned the applicability of these obligations in a given circumstance, none have doubted their legal authority.

4.3.2 Legal Developments Following 9/11: Resolution 1373 and the CTC

Any questions regarding the scope and status of the various counter-terrorism obligations discussed in the previous section have been overshadowed by the adoption of Security Council resolution 1373, initiated by the United States in the wake of the September 11th attacks.[170] Quite apart from its detailed treatment of counter-terrorism obligations, the resolution is highly significant in that it involves the Security Council in an unprecedented quasi-legislative enterprise.[171]

Resolution 1373 represents the first time that the Council has used its Chapter VII powers to impose universally binding obligations without temporal or geographic limitations. It has since been followed by resolution 1540 of April 2004, imposing Chapter VII obligations on States to prevent the acquisition or manufacture by non-State actors of weapons of mass destruction or their means of delivery.[172] The Security Council, acting again under Chapter VII of the Charter, has also adopted resolution 1566 at the initiative of the Russian Federation.[173] This resolution, in addition to its treatment of the definition of terrorism discussed above, calls for the adoption of a number of measures to intensify international cooperation in combating terrorism.

[168] See also GA Res 51/210, UN GAOR, 51st Sess, Supp No 49, UN Doc A/RES/51/210 (1996) 346 (calling on States to consider the adoption of measures suggested by the G7 which included enhancing research in explosive detection methods and adopting measures to prevent abuse of charitable organizations as a cover for financing or engaging in terrorist activities. Reference to these G7 recommendations has been included in subsequent annual General Assembly resolutions).

[169] SC Res 1269, UN SCOR, 54th Sess, 4053rd mtg, UN Doc S/RES/1269 (1999); see also SC Res 1189, UN SCOR, 53rd Sess, 3915th mtg, UN Doc S/RES/1189 (1998) (calling on States to 'adopt, in accordance with international law and as a matter of priority, effective and practical measures for security cooperation, for the prevention of such acts of terrorism, and for the prosecution and punishment of their perpetrators').

[170] SC Res 1373, UN SCOR, 56th Sess, 4385th mtg, UN Doc S/RES/1373 (2001).

[171] P Szasz, 'The Security Council Starts Legislating' (2002) 96 *Am J Intl L* 901.

[172] SC Res 1540, UN SCOR, 4506th mtg, UN Doc S/RES/1540 (2004). Though the resolution deals with non-State actors in general terms, its focus and intent is to address the threat of terrorist groups acquiring WMD capability.

[173] SC Res 1566, UN SCOR, 59th Sess, 5053rd mtg, UN Doc S/RES/1566 (2004). The resolution was adopted following the terrorist atrocity in Beslan, though like resolution 1373 it addresses the problem of terrorism in universal terms.

The Council's recent use of Chapter VII to impose these kinds of legal obligations upon member States has not been without trenchant criticism. Some have cautioned that the resolutions reflects preponderant American influence on the law-making process,[174] while others have questioned its consistency with the original Charter framework and disapproved of the perceived usurpation of the General Assembly's 'legislative' powers.[175] Within the United Nations, this criticism has gradually increased with the adoption of resolutions 1540 and 1566.[176] While virtually all States praised resolution 1373 as a central component of the legal counter-terrorist architecture,[177] the latter two resolutions have received a more mixed response with some States criticizing what they regard as an excessive and inappropriate reliance on Chapter VII.[178]

Despite these reservations, the Council's measures reflect a growing appreciation that the maintenance of international peace and security in a globalized world cannot be restricted to *ad hoc* responses to conflict situations. It must also address systemic and immediate transnational threats in real time. In the words of Paul Szasz, 'if used prudently, this new tool will enhance the United Nations and benefit the world community, whose ability to create international law through traditional processes had lagged behind the urgent requirements of the new millennium'.[179]

[174] JE Alvarez, 'Hegemonic International Law Revisited' (2003) 97 *Am J Intl L* 873, 874–78.

[175] See, eg, M Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations' (2003) 16 *Leiden J Intl L* 593.

[176] See generally E Rosand, 'The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative' (2005) 28 *Fordham Intl L J* 101.

[177] See Statement of CTC Chairman, UN SCOR, 57th Sess, 4618th mtg, S/PV.4618 (2002) 6. In debates following the adoption of the resolution and in reports to the Counter-Terrorism Committee established by the resolution, wide support has been expressed for the initiative, though some concerns remain about the manner of its implementation. See, eg, Statements of support by the Foreign Ministers of countries such as Jamaica, China, Colombia, Ireland, Tunisia and Mali at the ministerial-level meeting held by the Council on November 12, 2001, UN SCOR, 56th Sess, 4413th mtg, UN Doc S/PV.4413 (2001); see also Statements in the Council by the Secretary General and by countries such as Costa Rica on behalf of the Rio Group, Spain on behalf of the EU, Morocco on behalf of the Arab Group, Qatar on behalf of the OIC, and Pakistan, UN SCOR, 56th Sess, 4453rd mtg, UN Doc S/PV.4453 (2002). At the same time, it should be acknowledged that some States might be hesitant to express reservations about this kind of use of Council powers for fear of being portrayed as uncommitted to combating terrorism.

[178] For a spectrum of views, see, eg, UN SCOR, 58th Sess, 4950th mtg, UN Doc S/PV.4950 (2004). In this context, criticism was expressed by States such as Switzerland, *ibid*, p 28 ('In principle, legislative obligations . . . should be established through multilateral treaties . . . it is acceptable for the Security Council to assume such a legislative role only in exceptional circumstances and in response to an urgent need'); Nigeria, *ibid*, p 14 (warning that the Council's legitimacy would come under increasing attack unless its resolutions were stipulated to be 'emergency regulations to address an imminent threat, perhaps of a time-limited duration until more legally founded instruments of law can be negotiated or come into force . . .'); India, *ibid*, p 23 (expressing concern that the Council was 'legislating on behalf of the international community'); Singapore, *ibid*, p 25; see also UN SCOR, 59th Sess, 5059th mtg, UN Doc S/PV.5059 and S/PV.5059 (Resumption 1) (2004) (especially statements by Brazil, Liechtenstein, Switzerland, Cuba, Nepal and Egypt with respect to resolution 1566).

[179] Szasz, above n 171, p 905.

It is certainly reasonable to consider what safeguards and guidelines might be adopted so as to ensure that these kinds of Council resolutions retain legitimacy and broad acceptance.[180] But in light of the continued difficulties in effective and timely treaty making by the General Assembly, and the broad powers granted to the Council under the Charter, it hardly seems warranted to deny the Council the authority to use its Chapter VII powers in this way when international circumstances so demand.

At any rate, the fact that this new kind of legislative mechanism was first used to respond to terrorism, is itself evidence of the gravity with which this threat is now perceived. It also demonstrates the heightened expectations of the international community for compliance with counter-terrorism obligations in the aftermath of September 11th.[181] It is in this context that resolution 1373, and subsequent counter-terrorism resolutions, should be examined.

In its preambular parts, resolution 1373 affirms that acts of international terrorism constitute threats to international peace and security, and repeats the reference to the inherent right to individual and collective self-defense inserted in resolution 1368, adopted on 12 September 2001.[182] In addition, the preamble refers to the need to take additional measures to prevent and suppress 'through all lawful means, the financing and preparation of acts of terrorism', and reaffirms the duty to refrain from any support for such acts, as articulated in the Friendly Relations Declaration.

The operative parts of the resolution establish an extensive set of legal duties, borrowing heavily from previous General Assembly texts and from select portions of the terrorist financing convention.[183] Expressly invoking Chapter VII of the Charter, the Council 'decides that all States shall', *inter alia*, prevent and suppress the financing of terrorist acts, criminalize such financing, and freeze the funds and assets of persons engaged in terrorist activity. In operative paragraph 2, all States are legally obliged to adopt a series of measures that merit recitation in full:

(a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;
(b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;
(c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;

[180] For some proposals in this regard, see Rosand, above n 176.

[181] See Rostow, above n 100, p 482 (suggesting that resolution 1373 would probably not have been adopted except 'under the immediate pressure of the September 11th attacks'. However, the recent adoption of resolutions 1540 and 1566 demonstrates that the resort to this quasi-legislative technique is more than a one-off event).

[182] SC Res 1368, UN SCOR, 56th Sess, 4370th mtg, UN Doc S/RES/1368 (2001).

[183] At the time resolution 1373 was adopted, only four States had ratified the financing convention, see Szasz, above n 171, p 903.

(d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;
(e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such 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;
(f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;
(g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents.

In addition, States are called upon to enhance and accelerate information exchange and cooperation, become parties to relevant counter-terrorism conventions and protocols, ensure that refugee status procedures are not abused by terrorist operatives, and that claims of political motivation are not recognized as grounds for refusing extradition.[184]

In order 'to monitor implementation' of this formidable legal regime, resolution 1373 established the Counter-Terrorism Committee (CTC), comprised of all Council members, to which member States are called upon to submit compliance reports. Finally, the Council expressed its 'determination to take all necessary steps in order to ensure the full implementation' of the resolution.

Theoretically, the mandate of the CTC, and the tenor of the resolution itself, may suggest an aggressive mechanism by which States failing to comply with the resolution would risk exposure to enforcement action by the Council. From a very early stage, however, States were assured that the Council would adopt a non-confrontational, consensus-based approach that is focused on assisting each government in developing its counter-terrorism capacities. In resolution 1377 of November 2001, adopted after a ministerial-level meeting, the Council recognized that many States would require assistance in implementing resolution 1373, invited States to inform the CTC of areas where support was required, and instructed the CTC to explore ways to provide such assistance.[185] In his first address to the Council as CTC Chairman, the then Permanent

[184] Security Council resolution 1540 supplements these obligations with specific reference to the following duties: the duty to refrain from any form of support to non-State actors seeking nuclear, chemical or biological weapons or their means of delivery; the duty to adopt and enforce laws that prohibit any efforts by non-State actors to acquire such capabilities; and a duty to establish appropriate domestic controls so as to prevent the proliferation, transfer or export of materials related to WMD development. The resolution urges States to assist one another in implementation and creates a reporting mechanism to a subsidiary committee of the Council.

[185] SC Res 1377, UN SCOR, 56th Sess, 4413th mtg, UN Doc S/RES/1377 (2001).

Representative of the United Kingdom, Sir Jeremy Greenstock, reinforced this conciliatory approach:

> The members of the Committee have decided to be proactive, cooperative and evenhanded in this task. Our aim is to raise the average level of government performance against terrorism around the globe. This means upgrading the capacity of each nation's legislation and executive machinery to fight terrorism . . . . I have said what the Counter-Terrorism Committee is and what our aims are for the next period. I should also set out what the Counter-Terrorism Committee is not. It is not a tribunal for judging States. It will not trespass onto areas of competence of other parts of the United Nations system. It is not going to define terrorism in a legal sense . . . .[186]

As Rosand has noted, the decision to adopt a non-belligerent and transparent posture no doubt helped to guarantee the cooperation of member States.[187] All member States have submitted reports focusing initially on their efforts to ensure that domestic legislation is in place to implement the resolution.[188] These reports have been reviewed by CTC experts, and have been followed up with supplementary reports, creating an open-ended dialogue with the CTC that enables States to identify legislative and administrative gaps and seek assistance where necessary.[189]

The intense focus on capacity building has been further enhanced by the creation of a directory of assistance and a matrix of assistance requests, providing States with resources and information, as well as offers of assistance by countries and organizations with more established counter-terrorism expertise.[190] In addition, the CTC has emphasized co-operation with international, regional and sub-regional institutions, in order to provide local

[186] UN SCOR, 56th Sess, 4453rd mtg, UN Doc S/PV.4453, (2002) 4–5. See also UN SCOR, 57th Sess, 4618th mtg, UN Doc S/PV.4618, (2002) 5 ('The CTC is not a tribunal and does not judge States . . . The CTC will continue to offer encouragement, advice and guidance to States . . .').

[187] Rosand, above n 1, p 335.

[188] The CTC has broadly divided the assessment of member state capacity into a three-stage process, which is currently subject to review. Stage A, which is still continuing, focuses on developing a domestic counter-terrorism legislative framework. Stage B, examines executive and administrative coordination in fighting terrorism. While Stage C is tentatively designed to focus on inter-State and judicial cooperation, see CTC Discussion Paper, 22 November 2002, available at http://www.un.org/Docs/sc/committees/1373/Stage%20Bhtm. For a discussion of the need to reevaluate these stages due to their somewhat artificial character, see Report by the Chair of the CTC on the Problems Encountered in the Implementation of Security Council resolution 1373 (2001), UN Doc S/2004/70, (2004) 10–20.

[189] As of September 2005, all member States had submitted initial reports, 169 had submitted second reports, 130 third reports, 101 fourth reports, and 22 fifth reports had also been submitted, see Work Program of the Counter-Terrorism Committee (1 October – 31 December 2005), UN Doc S/2005/ 663 (2005) 3. This is an unprecedented level of co-operation for any UN organ.

[190] See http://domino.un.org/ctc/CTCDirectory.nsf/frmSearch?OpenForm; http://www.un.org/Docs/sc/committees/1373/ctc_da/matrix.html; see also CA Ward, 'Building Capacity to Combat International Terrorism: The Role of the United Nations Security Council' (2003) 8 *J Conf & Sec L* 289, 300–5.

assistance and establish complementary counter-terrorism action plans and financial aid programs.[191]

After considerable delay, some of the structural, administrative and personnel weaknesses in the functioning of the CTC have also been addressed by 'revitalizing' the body through a newly established Executive Directorate (CTED).[192] The High Level Panel appointed by the Secretary General has recommended enhancing capacity building activity further by using the CTED as a clearing-house for State-to-State counter-terrorism assistance, as well as establishing a capacity-building trust fund.[193] Still, further restructuring of the Security Council's counter-terrorism apparatus may be required, given the magnitude of the task before it, and the substantive overlap between the work of the CTC and other subsidiary bodies of the Council that address counter-terrorism issues.[194]

The achievements of the CTC should be neither over-estimated nor overlooked.[195] As Alvarez has rightly observed, the reporting process has produced some 'predictably opportunistic' documents from 'reliable human rights violators, purportedly justifying old and new repressive national measures'.[196] But many reports submitted by States indicate significant efforts to improve and update counter-terrorism legislation, while many others have been candid in their need for financial assistance and expertise in developing their capacities.[197] The publicity and attention devoted to counter-terrorism issues by the Council and the CTC may well have encouraged an increasing number of States to ratify counter-terrorism conventions and ensure that they are in a position to report on progress in implementing their obligations.[198] In all these respects, resolution 1373 and the work of the CTC have made an important contribution to domestic

[191] See, eg, Outcome Document of the Special Meeting of the Counter Terrorism Committee with International, Regional and Sub-regional Organizations, UN Doc S/AC.40/2003/SM.1/4 (2003). For an example of such assistance see the G8 action plan entitled 'Building International Political Will and Capacity to Combat Terrorism', available at http://www.g8.fr/evian/english/navigation/2003_g8_summit. The plan includes ways to provide financial assistance to States seeking to enhance counter-terrorism capabilities.

[192] SC Res 1535, UN SCOR, 58th Sess, 4936th mtg, UN Doc S/RES/1535 (2004). For details of the considerations leading to these changes see Proposal for the Revitalisation of the Counter–Terrorism Committee, UN Doc S/2004/124 (2004).

[193] High-Level Panel Report, above n 11, p 47.

[194] In addition to the CTC, subsidiary bodies of the Council have been established under resolution 1267 (the Al-Qaeda and Taliban Sanctions Committee); resolution 1540 (the committee addressing WMD non-proliferation) and resolution 1566 (the working group examining the possible expansion of the counter-terrorism sanctions regime beyond Al-Qaeda and the Taliban and the establishment of a fund for terrorist victims).

[195] For a description of achievements, see, eg, Statement of CTC Chairman, UN SCOR, 57th Sess, 4618th mtg, S/PV.4618 (2002) 5–6; Statement of CTC Chairman, UN SCOR, 59th Sess, 5059th mtg, S/PV.5059 (2004) 2–5; Statement of CTC Chairman, UN SCOR, 60th Sess, 5293rd mtg. S/PV.5293 (2005) 4–6.

[196] Alvarez, above n 174, p 876.

[197] According to a study by an independent expert on the CTC, some 50 states indicated in their first reports that they were in need of assistance. By July 2003, that number grew to 80. All in all, as of July 2003, some 159 States have received some degree of assistance in legislative drafting, personnel training, and related areas, see Ward, above n 190, p 302.

[198] Rosand, above n 1, pp 337–38.

capacity building efforts and to elevating counter-terrorism obligations to the center of the international stage.

At the same time, the exclusive focus on capacity building, principally through the submission and review of written reports, exposes inherent weaknesses in CTC methodology. The capacity building approach tends to neglect the role of States in actually fostering terrorist activities. As essential as enhancing domestic capacity may be, there is also a need to focus on those States *able* but *unwilling* to implement resolution 1373. As the High Level Panel noted in its report, '[t]he crucial need, in relation to the states in the regions from which terrorists originate is to address not only their capacity but their will to fight terror'.[199] Written reports on legislative and administrative capabilities will not address whether States are in fact fulfilling their obligations to prevent, and abstain from supporting acts of terrorism.[200] In this sense, the CTC's credibility has been somewhat undermined by choosing to interpret its mandate in a conveniently minimalist way that concentrates on 'paper truth' rather than 'ground truth'.[201]

This approach may well be explained in light of the need for broad support from member States, especially in the relatively early stages of CTC activity.[202] In some respects also, a non-confrontational attitude is a function of the innovative nature of resolution 1373, and its failure to provide a definition of terrorism. A more aggressive assessment of State compliance may simply be more than the CTC or the Council can reasonably bear. But in the process, the terrorist phenomenon risks being treated as if it operates solely on the private plane. As a result, this approach can tend to legitimize those States that sponsor or tolerate acts of terrorism by accepting written reports without testing alleged capacity against actual compliance.

Other shortcomings of resolution 1373 and the CTC have also been raised. Most notably, concerns have been expressed about the failure of the resolution and the CTC to give due weight to the importance of compliance with human rights obligations in the fight against terrorism.[203] In this regard, the CTC has asserted that monitoring human rights compliance in the fight against terrorism is outside its mandate.[204] At the same time, it has established a relationship with the Office of the High Commissioner for Human Rights and the Council has

[199] High-Level Panel Report, above n 11, pp 45–46.

[200] Several states have referred to this problem, with varying degrees of clarity, see, eg, Statements of Colombia, Australia, the European Union, and Israel, UN SCOR, 57th Sess, 4618th mtg, UN Doc S/PV.4618 (and Resumption 1 and 2) (2002).

[201] Rosand, above n 1, p 339.

[202] *Ibid*, p 340.

[203] See generally, Alvarez, above n 174, pp 875–76; Ward, above n 190, pp 296–97; Rosand, above n 1, p 340. For example, it is significant that the resolution did not draw from those portions of the financing convention that called for respect for the rights due to terrorist suspects. The High Level Panel has also addressed the human rights and accountability problems associated with the way entities and individuals allegedly belonging to or associated with Al-Qaeda or the Taliban are added to the sanctions list maintained pursuant to Security Council resolution 1267, see High Level Panel Report, above n 11, p 47.

[204] Rosand, above n 1, p 340.

recently emphasized that 'States must ensure that any measure taken to combat terrorism comply with all their obligations under international law . . . in particular human rights, refugee and humanitarian law'.[205]

Despite its weaknesses, resolution 1373 signals an important change in community expectations regarding State compliance with counter-terrorism obligations. This trend has been reinforced by the terms of resolution 1566 which has called on States to become party to counter-terrorism conventions, intensify interaction with the CTC and cooperate fully in the fight against terrorism 'in order to find, deny safe haven and bring to justice . . . any person who supports, facilitates, participates or attempts to participate' in terrorist activity. It has also requested the CTC to develop a set of best practices in relation to terrorist financing and to commence State visits 'with the consent of the States concerned'.[206] The resolution's establishment of a working group to consider 'practical measures to be imposed upon individuals, groups or entities involved in or associated with terrorist activities' and to examine the possibility of a compensation fund for victims of terrorist acts at least opens the door for more assertive Council action in the future. Both these resolutions have been supplemented more recently by Security Council resolution 1624 which, *inter alia*, calls on States to prohibit and prevent incitement to terrorism and to deny safe haven to those engaged in such conduct.[207] When read together with resolution 1373, these texts are indicative of the fact that strengthening compliance with counter-terrorism obligations remains firmly on the international agenda.

In the short term at least, the reluctance to examine compliance on the ground renders it unlikely that these kinds of resolutions will serve as a general mechanism to hold member States accountable for counter-terrorism violations.[208] Existing divisions and political alliances place significant obstacles before the adoption of a broadly applicable confrontational posture on the part of the Council. In this sense, the resolutions offer a basis for enhanced State responsibility for terrorism in potential only. Nevertheless, the fact that all States have

[205] See, eg, SC Res 1456, UN SCOR, 57th Sess, 4688th mtg, UN Doc S/RES/1456 (2003); SC Res 1535, UN SCOR, 58th Sess, 4936th mtg, UN Doc S/RES/1535 (2004); SC Res 1566, UN SCOR, 59th Sess, 5053rd mtg, UN Doc S/RES/1566 (2004). In addition, as of May 2003, letters from the CTC Chairman to member States regarding their reporting requirements include this statement, see Ward, above n 190, p 298; see also Report of the High Commissioner for Human Rights, Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc E/CN.4/2005/100 (2004).

[206] A limited number of such visits have been held thus far with the consent of the host State. For the modalities of such visits, see generally Framework Document for CTC Visits to States in order to Enhance the Monitoring of the Implementation of resolution 1373 (2001), available at http://www.un.org/Docs/sc/committees/1373/frameworkdocument.htm (2005).

[207] SC Res 1624, UN SCOR, 60th Sess, 5261st mtg, UN Doc S/RES/1624 (2005). Resolution 1624 directs the CTC to incorporate the implementation of the resolution into its work with member States.

[208] In specific political circumstances, however, these resolutions may give additional legitimacy to more assertive Council actions against individual States, as has been evident in the Council's treatment of Syria following the killing of former Lebanese Prime Minister, Rafik Hariri, see SC Res 1636, UN SCOR, 60th Sess, 5297th mtg, UN Doc S/RES/1636 (2005).

subjected their counter-terrorism capabilities to the scrutiny of the CTC, points to mounting recognition of the need to demonstrate commitment and progress in meeting counter-terrorism obligations.

4.3.3 Re-Conceptualizing the Duty: Expectation and Reality

The content of State obligations in respect of terrorism has not changed in any fundamental way after the attacks of September 11th.[209] The essential obligation to prevent and to abstain remains, though its component elements have been considerably clarified and intensified through resolution 1373 and the work of the CTC, as well as subsequent resolutions. These obligations may be broadly summarized as follows:

(a) The duty to exercise due diligence in preventing all acts of terrorism, including preventing incitement, financing, recruitment, weapons acquisition or transfer, and the free movement of terrorist operatives;
(b) The duty to criminalize acts of terrorism and associated offences and to exercise due diligence in apprehending terrorist offenders, and to prosecute or extradite them once apprehended, as well as the denial of refugee or asylum status to terrorist operatives;
(c) The duty to actively and fully cooperate with other States and intergovernmental bodies in preventing and prosecuting terrorist offences, including through early warning and the exchange of information and intelligence; and
(d) The duty to abstain from any form of toleration, acquiescence, encouragement, or support for acts of terrorism and associated offences, including the provision of safe harbor for terrorist operatives or groups, their installations, training facilities or support structures, as well as any kind of logistical, financial or military assistance.

While the obligations themselves are not new, what is new is the international atmosphere in which they are imposed. The heightened sense of the threat posed by terrorism has in turn deepened concern about non-compliance. The fact that these obligations are now imposed under Chapter VII of the Charter and create the possibility of collective action gives expression to this growing apprehension. The realization that toleration or active support for private acts of terrorism by the State can have devastating consequences for international peace and security has become a central anxiety. The prospect of non-conventional weapons in the hands of terrorists is the doomsday scenario of our age.

These trends have been strengthened by the adoption of Security Council resolutions 1566 and 1624, and the recent call of the High Level Panel for the CTC to devise a schedule of 'predetermined sanctions' for State non-

[209] G Guillame, 'Terrorism and International Law' (2004) 53 *Intl & Comp L Q* 537, 542.

compliance.[210] Still, without an agreed definition of terrorism and the political will to hold States accountable for the violations of these obligations, there is a limit to how much can be expected from these legal developments.

It is unrealistic to expect that resolution 1373 and the CTC monitoring mechanism will ensure that every single State has the capacity to meet these obligations, much less the willingness to do so. The existing defects in the collective enforcement mechanism of the Security Council, and the political context in which it operates, as well as the bureaucratic limitations of the CTC mechanism, are likely to ensure both that violations persist and that some victim States will pursue legal remedies outside the United Nations system for the foreseeable future.

At the same time, the emphasis on specific and onerous duties to prevent acts of terrorism and to abstain from any assistance or toleration of them creates the context in which State responsibility for acts of terrorism can be taken seriously. Indeed, the increased risk of catastrophic terrorism in a post September 11th world makes this an imperative.

4.4 THE STANDARD OF CARE AND THE BURDEN OF PROOF: DETERMINING STATE RESPONSIBILITY FOR VIOLATIONS OF COUNTER-TERRORISM OBLIGATIONS

4.4.1 General Observations

It is one thing to determine the content of a legal obligation. It is another to establish the conditions by which compliance with that obligation is measured. This latter issue concerns the standard of care owed by the State in respect of the duty in question and identifying the party or parties who bear the burden of establishing that that standard has or has not been satisfied.

In some circumstances, an exacting standard of care or a lax approach to evidentiary problems can be unrealistic and inappropriate, serving as a pretext for those eager to allege a violation. By the same token, an undemanding standard of care or too rigid an approach to the burden of proof can lead to impunity for the violating State. Many studies of terrorism ignore these issues. But if an examination of State responsibility for terrorism is to be more than an academic exercise the problems of standard of care and burden of proof deserve separate attention.

The duty to prevent acts of terrorism, and the duty to abstain from any involvement or encouragement of terrorist acts, are fundamentally different kinds of duties. Duties of prevention impose *positive* obligations on the State to adopt a wide range of measures in an effort to suppress terrorist activity. In

[210] High Level Panel Report, above n 11, p 47.

this sense, they may be regarded as duties of diligent conduct rather than of result.[211]

As will be noted below, international law does not impose an absolute duty on the State to guarantee that no act of terrorism will emanate from its territory. Instead, a standard of due diligence is entailed, requiring the State to use all means at its disposal to prevent and suppress terrorist activity.[212] If the State meets the due diligence standard but the private terrorist activity nevertheless occurs, no State responsibility is engaged.

By contrast, duties of abstention are primarily *negative* duties, requiring the State to avoid certain conduct. These duties are violated whenever a State, through its organs or officials, adopts measures or policies that result in supporting, facilitating or tolerating private terrorist activities. They are not circumscribed by a due diligence standard.

Notwithstanding the distinction between these two kinds of legal duties, there are circumstances in which the line between them is blurred. In the first place, violations of the duty to abstain always involve, in some sense, a violation of the duty to prevent as well. This is because once it is established that a State has provided support for terrorist activity it will, to that extent at least, have failed to exercise due diligence in forestalling those activities.[213]

A more complicated question arises when the State is accused of tolerating terrorist activity. Unlike positive actions of encouragement and assistance, toleration can take the form of an omission by the State and can be exceedingly difficult to identify. There is a fine line, for example, between toleration—which connotes acquiescence and acceptance—and the mere failure to exert best efforts in prevention.[214] In practice, if the State has failed to prevent acts of terrorism, it may be hard to determine whether this involves no violation, a

[211] These terms are used in the way advanced by European scholars and adopted by Special Rapporteur James Crawford to examine whether a State must apply its best efforts (ie due diligence in prevention of terrorism), or guarantee a specific outcome (ie ensure no acts of terrorism occurs), see J Crawford, 'Second Report on State Responsibility', UN Doc A/CN.4/498 (1999) (rejecting the previous way in which terms duty of conduct and of result were used by the ILC); see also R Pisillo–Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States' (1992) 35 *German Y B Intl L* 9, 46–49.

[212] See below section 4.4.3 (regarding the content of the due diligence standard).

[213] Lillich and Paxman, above n 1, p 237; see also C Eagleton, *The Responsibility of States in International Law* (New York, NY, NYU Press, 1928) 92 ('the participation of the state is conclusive proof of failure of the state to use the means at its disposal for preventing the injury'). With respect to general duties of prevention, it has been suggested that where the injury to be prevented does not take place State responsibility can arise only where there is a violation of a duty to abstain, see R Ago, 'Seventh Report on State Responsibility' (1978) 2 (1) *YB Intl L Comm'n* 31, 36 UN Doc A/CN.4/307 and Add.1–2. However, in the case of counter-terrorism obligations, the duty of prevention is extensive and requires the State to forestall not only the terrorist attacks but also all activities associated with them. As such, in these cases, any illicit act of encouragement or toleration necessarily involves a failure of prevention, regardless of the actual occurrence of a terrorist attack.

[214] But see Pisillo-Mazzeschi, above n 211, p 34; G Townsend, 'State Responsibility for Acts of De Facto Agents' (1997) 14 *Ariz J Intl & Comp L* 635, 651 (both of whom equate failure of due diligence with toleration).

violation of the due diligence standard only or amounts to acquiescence in the terrorist activity.

This problem is complicated by cases where the State claims a limited capacity to meet its obligations. The State may contend that it was simply unaware of unlawful terrorist activity taking place in its territory. It may argue that its weak or collapsing institutional mechanisms denied it the opportunity to fulfill its legal obligation. In either case, it will not be possible to give the appropriate legal weight to these kinds of explanations, without appreciating the conditions by which compliance is measured.

In short, State failure can take many forms and the legal nuances between different situations can be difficult to gauge. In order to properly assess these scenarios it is important both to have a clearer idea about the standard of care that must be met, and about where the burden of proof lies in establishing a violation of that standard. This section considers the operation of the legal concepts of knowledge, fault and capacity in addressing the standard of care, as well as considering the burden of proof problem.

4.4.2 The Role of Knowledge

In the case of both kinds of counter-terrorism obligations, actual or presumed knowledge will be necessary to engage State responsibility. This is fundamental to general principles of State responsibility for private conduct that deny responsibility in the absence of culpability.[215]

This approach receives clear support in the case law[216] and academic literature.[217] While much of the writing on this subject concerns failures with respect to the duty of prevention, it appears equally clear that a State will not violate the duty to abstain unless it knew, or should have known, that the assistance it was extending to a private actor was furthering illicit activity.

The most authoritative illustration of the role of knowledge in State responsibility is the *Corfu Channel Case*. The case concerned the responsibility of Albania for damage caused to British warships by explosive mines in the North

[215] See above section 2.4. Naturally, if an absolute standard of responsibility were adopted, knowledge would be immaterial.

[216] Some examples include: *Laura MB Janes (USA) v United Mexican States* (1925) 4 R Intl Arb Awards 82, 87; *Case Concerning United States Diplomatic and Consular Staff in Tehran* (*US v Iran*) [1980] ICJ Rep 3 (24 May) 33 [hereinafter *Tehran Hostages Case*] (where the ICJ felt it necessary to establish that Iranian authorities were 'fully aware . . . of the urgent need for action on their part'); *Nicaragua Case*, above n 157, pp 83–86 (where the Court considered it necessary to determine whether Nicaragua had knowledge of arms traffic through its territory); see also discussion of *Corfu Channel Case* in this section.

[217] See, eg, H Grotius, JB Scott, (tr), *2 De Jure Belli Ac Pacis* (1646) 523 (rulers have responsibility for a crime 'if they *know* of it and do not prevent it when they could and should prevent it', (emphasis added); see also S Pufendorf, CH Oldfather and WA Oldfather, (trs), *7 De Jure Naturae Et Gentium Libri Octo* (1688) ch. 6, sec. 12 ('what is required is a union of knowledge and of power to prevent it'); Lillich and Paxman, above n 1, p 275 (noting that a breach requires 'knowledge or notice that the territory is being used a base for terrorist operations').

Corfu Channel. Lacking clear evidence that Albania itself laid the mines, the Court's inquiry turned on whether Albania had knowledge of their existence and yet failed to act appropriately to prevent the ensuing harm. In that context, the Court affirmed 'every State's obligation not to allow *knowingly* its territory to be used for acts contrary to the rights of other States'.[218]

In practice, the ICJ adopted a flexible approach to establishing Albania's knowledge of the events. It recognized that the mere control of territory does not admit of the conclusion that the State 'knew, or ought to have known, of any unlawful act perpetrated therein'.[219] By the same token, the Court affirmed that 'liberal recourse to inferences of fact and circumstantial evidence' was justified given the exclusive control of the territorial State.[220] In this regard, the generally vigilant attitude of Albania in watching its territorial waters and the actual possibility of detecting the mine-laying from observation posts, rendered an assertion of ignorance on Albania's part untenable.

As the *Corfu Channel Case* suggests, while the requirement of knowledge does not allow for automatic presumptions on the basis of territorial control it need not demand actual and demonstrable awareness on the part of State officials of particular unlawful conduct. The State cannot simply turn a blind eye to the evidence of ongoing illicit activity within its territory in the hope of avoiding responsibility. Especially with respect to the duty of prevention, the requirement of knowledge should be understood in the context of the State's genuine opportunity to avert the offence.[221] What is essential, therefore, may not be knowledge of specific activity *per se*, but actual or constructive notice that should alert the State of conduct against which it is necessary for it to take precautionary and preventive measures.

Early arbitral awards have reflected this principle. In the *Wipperman Case*, for example, the Commission noted that 'sudden and unexpected deeds of violence' could not usually engage State responsibility, since such acts could not be prevented by 'reasonable foresight and the use of ordinary precautions'. However, the Commission proceeded: 'A different rule of responsibility applies where the act complained of is only one in a series of similar acts, the repetition, as well as the open and notorious character, of which raises a presumption in favor [of it] being [known] to the authorities and with it a corresponding accountability'.[222]

Likewise, in the *Mead Case*, the arbitral tribunal noted that a general environment of notorious criminal activity in certain parts of Mexico could

[218] *Corfu Channel Case*, above n 149, p 22 (emphasis added).
[219] *Ibid*, p 18.
[220] *Ibid*.
[221] Lillich and Paxman, above n 1, pp 245–46.
[222] *Wipperman Case* (*United States of America v Venezuela*) (1887), reprinted in JB Moore, 3 *History and Digest of International Arbitrations to which the United States has been a Party* (1898) 3039, 3041.

itself 'be reasonably considered as warning as to the need for protection'.[223] And as Lillich and Paxman have similarly concluded, 'notice need not take the form of a special request for protection, it may be inferred from the level of lawlessness in the locality'.[224]

The role of knowledge in establishing violations of counter-terrorism obligations is perhaps best demonstrated by example. In the case of the duty of prevention, due diligence must be exercised in detecting illicit terrorist activity including, where possible, the use of modern technologies to monitor that activity. Clearly suspicious conduct, increased threats of terrorist activity or notice from States or from international organizations, demand special attention. State responsibility will thus be engaged if the State fails to adequately act on that information by investigating and suppressing the unlawful activities where it should reasonably have been expected to do so.

Similarly, if a State provides funding to a charitable organization in circumstances where it could not reasonably have known or discovered that the organization served as a front for terrorist activities, it will not be responsible for terrorist financing.[225] On the other hand, if the State had notice of this fact, or should have known of it, State responsibility will be engaged for a violation of the duty to abstain.

In an international atmosphere of heightened terrorist activity, and intensified expectations for compliance with counter-terrorism obligations after September 11th, some level of notice is effectively built into the system. The determination of whether knowledge may be established or presumed will of course depend on the facts of the case. But while a *specific* terrorist action may not be preventable without a *specific* degree of knowledge, neither can the absence of such detailed knowledge serve today as an excuse for a general lack of vigilance.

These issues have received considerable attention in the context of the investigations of the National Commission on Terrorist Attacks Upon the United States (The 9/11 Commission), established by congressional legislation in 2002.[226] In considering the circumstances surrounding the September 11th

[223] *Elmer Elsworth Mead (USA) v United Mexican States* (1930) 4 R Intl Arb Awards 653, 655 (the case concerned the murder of the claimant's husband in a sparsely populated part of Mexico); see also *The Saint Albans Raid Case (United Kingdom v United States)* (1873), reprinted in JB Moore, 4 *History and Digest of International Arbitrations to which the United States has been a Party* (1898) 4042, 4054 (where the absence of State responsibility for a private raid emanating from Canadian territory turned on the fact that the raiders had planned their operation with such secrecy that knowledge on the part of the government could not reasonably be expected).

[224] Lillich and Paxman, above n 1, p 246; see also Pufendorf, above n 216 (asserting that 'it is presumed that the heads of a state know what is openly and frequently done by their subjects').

[225] The issue has arisen, for example, with respect to allegations that Saudi Arabian governmental officials have provided donations to charities that had links to terrorist operatives. Saudi authorities have generally denied any knowledge that the charities were front organizations, see generally M Levitt, *Targeting Terror: US Policy toward Middle Eastern State Sponsors and Terrorist Organizations Post-September 11th* (Washington DC, Washington Institute for Near East Policy, 2002) 76–87.

[226] See generally The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States (New York, NY, W.W. Norton, 2004).

attacks, the Commission has addressed the question as to whether the United States had specific prior knowledge of the attacks, as well as the more general question of whether the US had diligently pursued its counter-terrorism activity before September 11th.[227] Usually such questions are asked of the State from which the terrorists originated. But the work of the Commission highlights that even the victim State is not absolved of its duties of prevention. In that context, the State's presumed or actual knowledge of impending terrorist atrocities is central to the inquiry as to whether it has met its own obligations to exert best efforts in safeguarding its citizens and residents.[228]

4.4.3 The Role of Fault

State responsibility for violations of international law does not, as a general rule, depend on proof of intention or negligence on the part of the State or its individual agents.[229] Though early international legal theorists imported conceptions of fault from municipal law,[230] it is now well established that State responsibility is generally based on what has been termed 'objective responsibility'. Dionisio Anzilotti, one of the first proponents of objective responsibility, explained the notion in the following way:

> The State is responsible not for the direct or indirect connection between its will and the action of the individual, not for possible culpable or malicious intention, but for not having fulfilled the obligation imposed upon it by international law, for having violated a duty to other States, a duty consisting in the non-toleration of the fact or in its punishment if it has occurred. It is not fault (*culpa*) but a fact contrary to international law which creates international responsibility.[231]

More recently, Ian Brownlie has put the principle concisely by stating that 'provided that agency and causal connection are established, there is a breach of duty by result alone'.[232] Indeed, the presumption that fault—in the form of

[227] For its conclusions, see *ibid* pp 339–60.

[228] See below section 9.4.2 (discussing responsibility of 'victim' States).

[229] For a more detailed study of the various theories of fault developed in international legal jurisprudence, see Pisillo-Mazzeschi, above n 211.

[230] Among the prominent theorists supporting this view see, eg, R Ago, 'Le Délit International' (1939) 68(2) *Hague Recueil des Cours* 419, 450–598; A Ross, *A Textbook of International Law* (London, Longmans and Green, 1947) 242.

[231] D Anzilotti, *Teoria Generale Della Responsibilità Dello Stato Nel Diritto Internazionale* (Firenze, 1902) 172 (translated from the Italian); see also H Triepel, *Völkerrecht und Landsrecht* (Leipzig, CL Hirschfeld, 1899) 334. Even some of the theorists that use the general term 'fault' in describing State wrongdoing, in fact adopt an objective standard and invoke the term loosely, see, eg, B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London, Stevens, 1953) 218.

[232] I Brownlie, *System of the Law of Nations: State Responsibility Part I* (Oxford, Clarendon Press, 1983) 39.

proof of intention or negligence[233]—plays no role in determining an internationally wrongful act explains the absence of any reference to the concept in the ILC Draft Articles.[234] As the ILC Commentary puts it, 'in the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of a State that matters, independently of any intention'.[235]

Though the subject receives less attention in contemporary academic literature, the doctrine of objective responsibility, while once hotly contested, enjoys wide support in jurisprudence and in scholarly works.[236] As Eduardo Jiménez de Aréchaga has noted, in determining responsibility tribunals have not inquired into the intentions of the specific individual who caused the damage, but only whether the State has objectively failed to perform an international legal duty.[237] Cases such as *Neer*,[238] *Venable*,[239] *Caire*,[240] *Montijo*,[241] and the *Alabama Claims*,[242] as well as more recent cases before the ICJ,[243] all confirm

[233] The term fault is used in the sense referred to by Brownlie as evidence of intention (*dolus)* or negligence (*culpa*), *ibid*, p 44.

[234] J Crawford, 'First Report on State Responsibility', UN Doc A/CN.4/490/Add.4 (1998) 10; see also J Crawford, 'Revising the Draft Articles on State Responsibility' (1999) 10 *Eur J Intl L* 435, 438.

[235] Report of the International Law Commission to the General Assembly, UN GAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) 73.

[236] See, eg, H Kelsen, 'Unrecht und Unrechtsfolge im Völkerrecht' (1932) 12 *Zeitschrift für öffentliches Recht* 537; P Guggenheim, 2 *Traité De Droit International Public, Avec Mention de la Pratique Internationale et Suisse* (Geneva, Georg, 1954) 129; EJ de Aréchaga, 'International Law in the Past Third of a Century' (1978) 159(1) *Hague Recueil des Cours* 1, 269. For a more recent statement to this effect, see I Brownlie, 'State Responsibility and the International Court of Justice' in M Fitzmaurice and D Sarooshi, (eds), *Issues of State Responsibility before International Judicial Institutions* (Oxford, Hart Publishing, 2004) 11, 12. For a useful analysis of the development of this field, see UN Secretariat, '"Force majeure" and "fortuitous event" as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine', reprinted in (1978) 2 (1) *YB Intl L Comm'n* 61, UN Doc A/CN.4/315, p 188–201.

[237] EJ de Aréchaga, 'International Responsibility' in M Sørensen, (ed), *Manual of Public International Law* (New York, NY, St Martin's Press, 1968) 531, 535.

[238] *LFH Neer (USA) v United Mexican States* (1926) 4 R Intl Arb Awards 60, 62 (referring to 'insufficiency of governmental action so far short of international standards').

[239] *HG Venable (USA) v United Mexican States* (1927) 4 R Intl Arb Awards 219, 229 (using same language as in *Neer* and specifying that this is without regard to whether there was 'willful neglect of duty').

[240] *Estate of Jean–Baptiste Caire (France) v United Mexican States* (1929) 5 R Intl Arb Awards 516, 529–31 (referring specifically to the fact that 'international responsibility of the State has a purely objective character . . . where the subjective notion of fault plays no part').

[241] *The Montijo (US v Colombia)* (1875), reprinted in JB Moore, 2 *History and Digest of International Arbitrations to which the United States has been a Party* 2050 (1898) 1421, 1444 (establishing breach of duty of protection without regard to means or intent and stating that the 'absence of power does not remove the obligation').

[242] *The Alabama Claims* (*US v Great Britain*) (1871), reprinted in JB Moore, 1 *History and Digest of International Arbitrations to which the United States has been a Party* (1898) 495 (measuring due diligence of Britain in complying with neutrality obligations without any reference to fault).

[243] As a rule, in contentious cases before the ICJ, alleged violations have been measured on an objective standard without examinations as to fault. See, most recently, *Case Concerning Avena and Other Mexican Nationals (Mexico v United States of America)* (31 March) reprinted in (2004) 43 ILM 581 (finding violations by the United States of provisions of the Vienna Convention on Consular Relations in respect of Mexican nationals).

that responsibility is usually founded on the objective insufficiency of governmental action, without investigation of subjective elements.[244]

The objective approach to the question of fault is motivated, in large part, by the view that a subjective or psychological component cannot be transferred to the wrongdoing of complex abstract entities such as States, acting through a variety of organs and agents. In this way, State responsibility differs substantially from individual criminal or civil responsibility. It will be founded on objective factors without proof of intention, recklessness, or negligence on the part of any given State official.[245] Individual errors of judgment or *bona fide* compliance with domestic law by State agents will similarly provide no excuse or justification on the international plane.[246]

Considerable confusion with respect to the concept of objective responsibility has been generated with regard to duties of prevention. Where a due diligence obligation is applied, some jurists have considered this as dictating a fault standard in establishing State responsibility.[247] In this vein, the judgment in the *Corfu Channel Case* has occasionally been interpreted as applying a theory of subjective fault because it based responsibility on the fact that the laying of the mines 'could not have been established without the knowledge of Albania's government'.[248]

These are difficult issues. Notions of fault provide an easy analogy when a diligence standard is imposed. Indeed, subjective factors can often supply evidence of a violation, and the relationship between objective responsibility and fault in due diligence cases is not always neatly separated.[249]

[244] Only a small number of cases make reference to fault, though even then it is not always clear whether this is due to a doctrinal commitment or terminological carelessness, see, eg, *Home Frontier and Foreign Missionary Society of the United Brethren in Christ (USA v Great Britain)* (1920) 6 R Intl Arb Awards 42, 44; *Several British Subjects (Great Britain) v United States (Iloilo Claims)* (1925) 6 R Intl Arb Awards 158, 160; *L'Incident de Walwal, Italy v Ethiopia* (1935) 3 R Intl Arb Awards 1658. See generally G Schwarzenberger, *1 International Law as Applied by International Courts and Tribunals*, 3rd edn, (London, Stevens & Sons, 1957) 634–37.

[245] See generally PM Dupuy, 'International Criminal Responsibility of the Individual and International Responsibility of the State' in A Cassese, *et al*, (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol 2 (Oxford, OUP, 2002) 1085, 1095–96.

[246] For some cases on this point see *Lillie S Kling (USA) v Mexican States* (1930) 4 R Intl Arb Awards 575, 579; *Owners, Officers and Men of the Wanderer (Great Britain) v United States* (1921) 6 R Intl Arb Awards 68, 74; *Laughlin McLean (Great Britain) v United States* (1921) 6 R Intl Arb Awards 82, 84; see also Cheng, above n 231, pp 226–27.

[247] See, eg, B Conforti, *Diritto Internationale*, 3rd edn, (Naples,1987) 346–50; FV García Amador, 'State Responsibility—Some New Problems' (1958) 94(2) *Hague Recueil des Cours* 370, 382; K Strupp, *Éléments Du Droit International Public,* 2nd edn, (Paris, Les Éditions Internationales, 1930) 330; see also *The Case of Italian Property in Tunisia*, Decision No 196 of the French/Italian Conciliation Commission (1955) 13 R Intl Arb Awards 422, 432. For similar use of the term fault in connection to State counter-terrorism obligations, see, eg, Erickson, above n 1, p 102; see also G Arangio–Ruiz, 'State Fault and the Forms and Degrees of International Responsibility: Questions of Attribution and Relevance' in D Bowett, (ed), *Le Droit International au Service de la Paix, de la Justice at du Développement: Mélanges Michel Virally* (Paris, Pedone, 1991) 25.

[248] *Corfu Channel Case*, above n 149, p 22. See, eg, 1 *Oppenheim's International Law*, above n 150, p 343 (stating that the case provides an 'instructive affirmation of the principle that there is no liability without fault').

[249] Brownlie, above n 232, p 47; see also Schwarzenberger, above n 244, p 633.

Properly understood, however, the concept of due diligence 'does not represent a subjective element of responsibility but rather the content of a specific international duty'.[250] We are not concerned, even in due diligence cases, with whether the failure to prevent a given act resulted from the subjective intent of State officials or their negligence. While actual or presumed knowledge remains an important element of the offense, the motivation of State actors in failing to act properly on that knowledge is not relevant to the determination of State responsibility for the internationally wrongful act. The fact that the State as a whole fell short of an obligation to act, in circumstances that required it to do so, is sufficient to establish State responsibility without additional inquiry.[251] In the words of Riccardo Pisillo-Mazzeschi:

> International practice confirms, in our view, that diligence has an objective content . . . to be precise this does not mean that the subjective negligence of single individuals acting as State organs is not sometimes important in order to establish the State's lack of due diligence; but it means that such negligence is not an essential requisite for responsibility, since responsibility can arise also from an objective breach of the due diligence standard by the State system as a whole.[252]

It is misleading therefore to consider due diligence obligations as consistent with domestic conceptions of fault. In the *Corfu Channel Case*, the Court did not inquire as to fault. Liability rested, as Ian Brownlie explains, 'upon the violation of a particular duty', knowledge was merely 'a condition of responsibility'.[253] Indeed, it would have been unnecessary for Judges Krylov and Ečer to embrace fault in explaining their dissent had the principle been inherent in the majority opinion.

It is important to appreciate, however, that while fault is not assumed to play a role in the determination of an internationally wrongful act, a particular rule of international law may stipulate a subjective element.[254] In this light, it is proper to examine the question of fault not just in global terms but also with specific reference to counter-terrorism obligations.

It is immediately apparent, however, that neither the duty to prevent, nor the duty to abstain from acts of terrorism require inquiry into the subjective intent of State officials. This issue has not received detailed attention in the

[250] Pisillo-Mazzeschi, above n 211, p 17.

[251] de Aréchaga, above n 237, pp 536–37 ('Due diligence is not a subjective element, but the content of the pre-existing obligation for violation of which the state is responsible').

[252] Pisillo-Mazzeschi, above n 211, p 42.

[253] Brownlie, above n 232, p 43; see also Aréchaga, above n 237, p 537; R Higgins, *Problems and Process: International Law and How We Use it* (Oxford, OUP, 1994) 160–61.

[254] See J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge, CUP, 2002) 12–14. For example, prohibitions on expropriation of foreign property may depend on an intention to engage in political reprisals or retaliation, see Brownlie, above n 232, p 46; de Aréchaga, above n 237, p 536. The crime of genocide offers another example, see Art II, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277 (in force 12 January 1951).

counter-terrorism context. But it is clear both from the manner in which the rules are articulated and from the practice of States that terrorism cases present no exception to the general rule.[255]

In practical terms, this means that with respect to the duty to abstain it is not necessary to prove that a given State official intended to facilitate terrorist activity or was negligent or reckless in that regard. It is sufficient if the State itself has actual or constructive knowledge of terrorist activities and *in fact* provides the terrorist operatives with support in those activities. Logistical support, weapons or safe harbor provided to known or reasonably discoverable terrorist operatives will violate the duty to abstain, even if the individual State officials providing such support were unaware, or kept in the dark, about the nature of the persons to whom the assistance was extended, and even if they personally did not intend the assistance to facilitate the illicit conduct.

Turning to due diligence obligations to prevent terrorist activity, similar considerations will apply. Assuming actual or constructive knowledge of terrorist activity, the State will violate its obligations if it *in fact* failed to reasonably harness the powers at its disposal to prevent the activity. Provided that in the circumstances the due diligence standard obligated a certain course of conduct, it is sufficient to establish wrongfulness on the basis of the objective fact that such conduct was not undertaken.

4.4.4 Due Diligence, Capacity and the Problem of the Failing State

As has been noted, unlike duties of abstention, duties of prevention impose only a due diligence obligation.[256] The case law and State practice on this point is vast, and is supported by an equally impressive number of academic writings.[257] The concept of due diligence has been regularly invoked in all kinds of cases involving the duty to prevent private harm, including with respect to injury to aliens,[258] human rights,[259] the environment,[260] and the protection of foreign States and their nationals from cross-border hostile activity.[261]

Duties of prevention with respect to terrorism adopt the same standard. This is a natural consequence of the fact that counter-terrorism obligations flow from the more general obligation of the State to prevent harm emanating from its

[255] But see below section 9.2.4 (referring to the possible relevance of 'subjective' factors in determining the consequences that flow from State responsibility for the violation of counter-terrorism obligations).

[256] Unless, of course, a higher standard is expressly imposed by the primary rule in question.

[257] Extensive examples of the application of due diligence obligations to specific cases can be found in: UN Secretariat, '"Force majeure" and "fortuitous event" as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine', reprinted in (1978) 2 (1) *YB Intl L Comm'n* 61, UN Doc A/CN.4/315.

[258] See cases cited above sections 2.7.2 and 3.2.1.

[259] See above section 3.2.2

[260] See above section 3.2.3

[261] See above section 4.3.1.

territory—an obligation that is itself circumscribed by the notion of due diligence. As a result, studies on terrorism refer to due diligence with near unanimity.[262] Similarly, counter-terrorism treaties that refer to the general duty of prevention use relative terms such as 'practicable', 'appropriate', and 'endeavour', rather than language that would enforce an absolute obligation of result.[263]

This general observation, however, merits qualification. On careful analysis, some of the measures imposed upon the State in the framework of the duty of prevention may be better regarded as involving an absolute standard. It is difficult to see how or why the duty to criminalize terrorist activity, or the duty to prosecute or extradite a terrorist offender, once apprehended, should be circumscribed by a due diligence requirement. These obligations should be regarded as absolute and distinguished from more general duties of prevention that are appropriately judged on due diligence terms.

This distinction has been made with respect to injury to aliens,[264] and it seems equally apposite in the counter-terrorism field. Indeed, the text of counter-terrorism treaties seem to support this approach by generally invoking absolutist language when referring to obligations to criminalize specific terrorist offences and to prosecute or extradite offenders, while restricting its use of relative terms to the general duty to prevent terrorist activity or apprehend suspected offenders.[265]

While the scope of the due diligence requirement can be determined, it is more difficult to articulate its exact content.[266] By its very nature, due diligence is a

[262] See, eg, L Condorelli, 'The Imputability to States of Acts of International Terrorism' (1989) 19 *Isr Y B Intl L* 233, 240–41; Lillich and Paxman, above n 1, pp 309–10; Franck and Niedermeyer, above n 1, pp 114–15.

[263] See, eg, Art 4, International Convention against Taking of Hostages, above n 36; Art 9, Convention for the Suppression of Terrorist Financing, above n 19; Arts 8(1)(a) and (b), Draft Comprehensive Convention on International Terrorism, reprinted in Report of the Ad Hoc Committee on Terrorism established by General Assembly resolution 51/210 of 17 December 1996, UN GAOR, 57th Sess, Supp No 37, UN Doc A/57/37 (2002); Art 3.I, Arab Convention on the Suppression of Terrorism, above n 120.

[264] Pisillo-Mazzeschi, above n 211, pp 29–30.

[265] See, eg, International Convention for the Suppression of Terrorist Bombings, above n 41 (Art 4: 'Each State Party shall adopt such measures as may be necessary'; Art 8: 'The State Party . . . shall . . . if it does not extradite that person, be obliged, without exception whatsoever . . . to submit the case without undue delay to its competent authorities for the purposes of prosecution'); International Convention against the Taking of Hostages, above n 36 (Art 2: 'Each State Party shall make the offences set forth in Art 1 punishable by appropriate penalties . . .'; Art 8: 'The State Party . . . shall . . . if it does not extradite that person, be obliged, without exception whatsoever . . . to submit the case to its competent authorities for the purposes of prosecution'). These conventions do not generally refer to an obligation to impose an adequate penalty in cases of conviction but this is arguably subsumed within the duty to prosecute, and similarly not subject to a due diligence standard. The language used in United Nations resolutions, including resolution 1373, is less precise and somewhat confusing in this regard. The terms 'deny', 'ensure', 'prevent' and 'necessary measures' may have an absolute connotation. But no new standard is clearly specified. The language adopted probably derives from the less rigorous approach to drafting resolutions, than from any new attempt to imply an exceptional standard of care in terrorism cases.

[266] The *Alabama Claims* arbitration, concerning the duties of neutrality, includes an interesting discussion of the content of the due diligence obligation. In this case, the United States argued, *inter*

flexible test that cannot be formulated in precise terms and must be judged relative to the capacity of the State and the magnitude of the terrorist threat.[267] In the counter-terrorism context, it can only broadly be summarized as a duty on the State to use all the administrative, legal and security measures at its disposal to prevent and suppress terrorist and related activity as effectively as possible.

The problem of testing compliance by a relative due diligence standard is complicated by its inherent relationship to the available resources of the State. Due diligence is about the failure of the State to make the best use of a genuine opportunity to avert privately inflicted harm. Compliance is measured not against an absolute standard but by reference to the actual capacity of the State in the circumstances.[268] For this reason, the ICJ in the *Corfu Channel Case* and the *Tehran Hostages Case*, for example, was constrained to establish not only that the State was aware of the need for conduct on its part, but also had the means at its disposal to comply with its obligations.[269]

In the ideal and fully functioning State due diligence can more easily be comprehended. But what of the State that lacks the very apparatus to prevent terrorist activity? This problem is especially acute in terrorism cases, since

alia, that diligence 'should be proportioned to the magnitude of the subject, and to the dignity and strength of the power which is to exercise it . . . a diligence which prompts the neutral to the most energetic measures to discover any purpose of doing the acts forbidden by its good faith as a neutral'. Britain pursued a narrower and more vague standard. The tribunal held diligence to mean the requirement to act 'in exact proportion to the risks to which either of the belligerents may be exposed' and that in the circumstances this called for 'all possible solicitude for the rights and the duties involved'. For all the attention given to the matter in this case, it is unclear whether it really contributes a great deal to appreciating the content of the due diligence rule, see *The Alabama Claims (US v Great Britain)* (1871), reprinted in JB Moore, 1 *History and Digest of International Arbitrations to which the United States has been a Party* (1898) 495, 654.

[267] Pisillo-Mazzeschi, above n 211, p 44. Eagleton, above n 213, p 88:

> The duty of prevention is not, of course, an absolute one. Whether the state has fulfilled its obligation in this regard is measured by the rule of due diligence; and it is impossible to state this rule with precision. No clear and definite formula has ever been promulgated: it is necessary to study the cases and to judge according to the circumstances in any particular situation.

[268] For some early cases on this point, see *The Jamaica* (*Great Britain*) v *United States* (1798), reprinted in JB Moore, 4 *History and Digest of International Arbitrations to which the United States has been a Party* (1898) 3983, 3990–91:

> According to the principles of justice on which is founded the law of nations, no government can be liable to compensate for a . . . loss when out of their power to prevent it . . . nothing could be more incongruous with the principles of natural justice, as well as with the law of nations, than to render an individual or government under an obligation to restore that which was never in his power to restore.

Salvador Prats (*United Mexican States*) *v United States* (1868), reprinted in JB Moore, 3 *History and Digest of International Arbitrations to which the United States has been a Party* (1898) 2886, 2893 ('The duty of protection on the part of the government . . . only goes as far as permitted by possibility'); *Spanish Zone of Morocco Case* (*United Kingdom v Spain*) (1923) 2 R Intl Arb Awards 615, 644 ('the State is obliged to exercise only that degree of vigilance which corresponds to the means at its disposal').

[269] *Corfu Channel Case*, above n 149, p 23; *Tehran Hostages Case*, above n 216, p 33.

terrorist organizations may specifically seek out the territory of weak or failing States as a base of operations.[270] Without the means to confront terrorist activity, but with the sovereign status that can provide insulation against foreign remedial action, such States can offer the ideal sanctuary for contemporary terrorist groups.[271]

In assessing compliance with due diligence obligations, international jurisprudence has tended to one of two extremes. Some sources simply assume State capacity, or ignore its relevance, and then proceed to condemn the State for failures of prevention.[272] Other sources seem to grant the requirement of capacity undue deference such that the State is effectively absolved of responsibility for its persistent inability to deal with harmful private activity.[273]

Neither of these responses is adequate in the context of terrorism. The first places an unreasonable burden of responsibility on the State that simply lacks the means to fight terrorism. The second, places an unreasonable burden on potential victims by allowing the ineffective State to ignore terrorist activity within its borders on the grounds that it is powerless to prevent it. Both

[270] The term failing State is used to refer to States 'in which institutions of law and order have totally or partially collapsed', see D Thürer, 'The "Failed" State and International Law' (1999) 81 *Intl Rev Red Cross* 731, 732.

[271] WM Reisman, 'International Legal Responses to Terrorism' (1999) 22 *Hous J Intl L* 3, 50, see also D Byman, *Deadly Connections: States that Sponsor Terrorism* (Cambridge, CUP, 2005) 219.

[272] In the *Alabama Claims* arbitration, for instance, the tribunal held expressly that 'the government of her Britannic Majesty cannot justify itself for a failure in due diligence on the plea of insufficiency of legal means of action which it possessed', see *The Alabama Claims (US v Great Britain)* (1871), reprinted in JB Moore, 1 *History and Digest of International Arbitrations to which the United States has been a Party* (1898) 495. Similarly, in the *Monitjo Case* the tribunal admitted that Colombia lacked the means to fulfill its obligations but stated that even if the failure stemmed from 'no fault of its own' it was still liable, see *The Montijo (US v Colombia)* (1875), reprinted in JB Moore, 2 *History and Digest of International Arbitrations to which the United States has been a Party* (1898) 1421, 1444; see also Reisman, above n 271, p 50 (noting 'tendency in international law for purposes of responsibility not to distinguish between States capable of controlling their territory and those that are not'); see also Eagleton, above n 213, p 90 ('awards have been made against states on the grounds that they had failed their duties, even when they were incapable of performing them'); BA Feinstein, 'The Legality of the Use of Armed Force by Israel in Lebanon–June 1982' (1985) 20 *Isr L Rev* 362, 381 ('Lebanon's responsibility as a State is unrelated to its ability to control the carrying out of acts which emanate from its territory').

[273] General Memorandum Opinion of the Commission on the *Texas Cattle Claims*, 30 December 1944, reprinted in (1967) 8 *Whiteman Digest* 748 [hereinafter, *Texas Cattle Claims*] (noting the view of Commissioner Underwood that the US Government failed to show that Mexico had 'the means to restrain the acts complained of.'); *Sambiaggo Case (Italy v Venezuela)* (1903) 10 R Intl Arb Awards 499, 513 (Venezuela could not be responsible for acts beyond its control); *Nicaragua Case*, above n 157, pp 83–86 (where Nicaraguan responsibility for arms traffic through its territory was judged, *inter alia*, by reference to its available resources and the 'circumstances characterizing this part of Central America'); see also Thürer, above n 270, p 747 (adopting the general position that failure to prevent due to a lack of the necessary power to act cannot engage responsibility); Lillich and Paxman, above n 1, p 270 ('where a state actually has no ability to stop terrorists . . . when no reasonable possibilities exist for preventing the activities, it may be proper to conclude that immunity follows inability'). In the *Buckingham Case*, the tribunal took a more sophisticated approach. Recognizing that Mexico might not be able to protect foreigners in certain parts of the country, the tribunal required Mexico to know of the extent of it ability to provide protection, and warn foreigners of any relevant limitations of its capacity, see *Leonor Buckingham (Great Britain) v United Mexican States* (1931) 5 R Intl Arb Awards 286, 288.

responses are at odds with the central place given to capacity building by the international community through resolution 1373 and the work of the CTC.

It is suggested that the due diligence standard in fact incorporates two distinct and parallel duties. The first is for the State to *pursue and acquire* the requisite territorial control, as well as the legal, security and administrative apparatus to meet its due diligence obligations. The second, is to *employ* its capabilities with due diligence in order prevent and suppress private terrorist activity. In principle, therefore, a failure of prevention in a given case could arise either due to a violation of a general duty to maintain counter-terrorism capacity, or a specific failure to adequately utilize that capacity to prevent particular terrorist operations.

This dual feature of the due diligence standard has surfaced in some of the jurisprudence, though on the whole it has received minimal attention. Writing in 1915, Edwin Borchard mentions the State's duty to 'furnish legislative, administrative and judicial machinery' as well as the secondary duty to use 'due diligence to prevent the injury'.[274] Hersch Lauterpacht and Clyde Eagleton reached the same conclusion a decade later.[275] And Riccardo Pissilo-Mazzeschi, in a 1992 study of the due diligence rule, also emphasized this distinct obligation.[276]

A reference to a separate duty of capacity building has also appeared in some early arbitral awards. In the *Noyes* claim, the tribunal specifically provided that responsibility for the failure to prevent could be grounded either in the conduct of the authorities 'in connection with the particular occurrence' or on the basis of 'a general failure to comply with their duty to maintain order'.[277] In the *Santa Clara Estates Case*, for example, the tribunal went to considerable lengths to examine the general question whether the Venezuelan government had exerted sufficient effort to wrest control over part of its territory from the hands of revolutionaries who had inflicted damage to private British property.[278] In *Neer*, the Commission recognized that failure could derive from 'deficient execution' or from a deficient legal system.[279] And in the *Kennedy Case*, the tribunal referred to the general duty of the State to 'maintain the usual order' in its territory, quite apart for a specific duty of protection in any given case.[280]

[274] EM Borchard, *The Diplomatic Protection Of Citizens Abroad* (New York, NY, Banks Law Publishing, 1915) 213.

[275] H Lauterpacht, 'Revolutionary Activities by Private Persons against Foreign States' in E Lauterpacht, (ed), *The Collected Papers of Hersch Lauterpacht*, vol 3 (Cambridge, CUP, 1970) 251, 276; Eagleton, above n 213, p 86.

[276] Pisillo-Mazzeschi, above n 211, p 26.

[277] *Walter A Noyes (United States) v Panama* (1933) 6 R Intl Arb Awards 308, 311.

[278] *The Santa Clara Estates Co Case (United Kingdom v Venezuela)* (1903) 9 R Intl Arb Awards 455 (finding that Venezuela had exercised due diligence in its efforts to regain control of its lost territory and restore general order).

[279] *LFH Neer* (*USA*) v *United Mexican States* (1926) 4 R Intl Arb Awards 60, 62.

[280] *George Adams Kennedy* (*United States*) v *United Mexican States* (1927) 4 R Intl Arb Awards 194, 198; see also *Spanish Zone of Morocco Case* (*United Kingdom v Spain*) (1923) 2 R Intl Arb Awards 615, 641–42; *Canahl Case* (*United States v Mexico*) (1928) 4 R Intl Arb Awards 391.

Formulating a distinct obligation to acquire counter-terrorism capacities is a natural corollary of the due diligence standard, especially in light of the capacity building focus of resolution 1373. Indeed, the duty of the State to maintain general order in its territory is inherent in the obligation on the State to prevent harm to others, and inextricable from the very notions of sovereignty and territorial integrity.[281] But affirming the existence of this duty is not enough. It is necessary to determine by what standard a violation of this separate obligation will be measured.

Pisillo-Mazzeschi has argued that the 'duty of the State to possess a minimum legal and administrative apparatus is not in any way conditioned by the due diligence rule'.[282] In other words, if a failure of prevention can be said to derive from a general lack of capacity on the part of the State, that will suffice to engage State responsibility.[283]

There are several reasons why this approach to the capacity requirement should be rejected. First, for States that lack counter-terrorism capabilities this standard has the effect of transforming due diligence into an absolute obligation. This would be inconsistent with the very nature of the due diligence rule, as well as its underlying rationale.

Second, in current international conditions developing or failing States may be unable to acquire the necessary capabilities to confront terrorism through no fault of their own. For all the efforts of the CTC and other organizations to develop assistance programs and offer financial aid, counter-terrorism capacity is far from being a commodity that can be purchased 'off the shelf' at bargain prices. Lack of capacity may also stem from more widespread and systemic problems, such as civil unrest, poverty, limited territorial control and generally weak institutional structures. It is seems unconscionable to punish fragile States, genuinely attempting to comply with their due diligence obligations, for lacking the resources to do so.

Third, the absolutist standard is contrary to the way in which the Security Council has interpreted compliance with resolution 1373. It will be recalled that in resolution 1377 the Council recognized that States would need assistance in acquiring the capacity to comply with counter-terrorism obligations, and invited them to work with the CTC to that end.[284] This open-ended and incremental dialogue on capacity building is incompatible with the idea that the failure to possess such a capacity is judged in absolute terms.

The alternative is to view the State's capacity building obligation as itself regulated by the due diligence standard. The obligation could thus be described

[281] See *Island of Palmas Case* (*United States v Netherlands*) (1928) 2 R Intl Arb Awards 829, 839.

[282] Pisillo-Mazzeschi, above n 211, p 27. The injury to alien cases on which Pisillo-Mazzeschi relies to reach this conclusion are of questionable relevance. First, they are not primarily concerned with the issue. Second, while these cases emphasize due diligence with respect to prevention only, it seems mistaken to infer from this that the duty of capacity building is necessarily subject to a different and absolute standard.

[283] See also S Farrior, 'State Responsibility for Human Rights Abuses by Non-state Actors' (1998) 92 *Am Soc Intl L Proc* 299, 303.

[284] SC Res 1377, UN SCOR, 56th Sess, 4413th mtg, UN Doc S/RES/1377 (2001).

as a duty to pursue and acquire, through reasonably available opportunities, the means and degree of control necessary to comply with counter-terrorism obligations.

Arguably, this construction fits appropriately into the concept of *force majeure* as a circumstance precluding wrongfulness under the rules of State responsibility. Pursuant to Article 23 of the ILC Draft, which is based on extensive case law,[285] non-performance of an obligation may be excused if the situation of *force majeure* is not due 'to the conduct of the State invoking it'.[286] It follows, that only if the material impossibility of performing a due diligence obligation derives from the State's own failure to pursue the requisite capacity will its responsibility be engaged.[287]

Expressing the obligation in this relative sense does not render it devoid of substance. In a specific instance a State may violate the duty to prevent not because it has failed to adopt a certain course of conduct, but because over time it has failed to exercise due diligence in attaining the requisite counter-terrorism capacity. States in this position should be required to aggressively pursue capacity building taking into account the resources at their disposal. These States might also be expected to invite and cooperate in counter-terrorism operations within their territory that are offered by the appropriate outside sources and suitably circumscribed.[288]

Barring exceptional circumstances, the failure to notify the CTC of areas in which assistance is required or the failure to take advantage of offers of aid, can be treated either as a lack of due diligence or as an admission of capacity.[289] In such a situation, the State may be prevented from claiming incapacity in the event of a subsequent failure to prevent terrorist activity.

4.4.5 The Burden of Proof

As a rule, the burden of proof lies with the party seeking to establish the elements of fact and law necessary to support its claim.[290] This principle is

[285] See generally UN Secretariat, '"Force majeure" and "fortuitous event" as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine', reprinted in (1978) 2 (1) *YB Intl L Comm'n* 61, UN Doc A/CN.4/315; see also Cheng, above n 231, pp 227–31.

[286] Art 23, Responsibility of States for internationally wrongful acts, GA Res 56/83, UN GAOR, 56th Sess, Supp No 49, UN Doc A/RES/56/83 (2001) 499.

[287] R Grote, 'Between Crime Prevention or Prosecution and the Laws of War: Are the Traditional Categories of International Law Adequate for Assessing the Use of Force against International Terrorism?' in C Walter, *et al*, (eds), *Terrorism as a Challenge for National and International Law: Security Versus Liberty?* (Berlin, Springer, 2004) 951, 977.

[288] *Ibid* (referring to a duty to consent in these circumstances to enforcement action engaged in by those States that are able to act and have a legitimate interest in doing so).

[289] See below section 9.3.

[290] In international law, the burden lies on the party alleging a certain fact, not necessarily on the party that institutes proceedings, M Kazazi, *Burden of Proof and Related Issues: A Study on Evidence before International Tribunals* (The Hague, Kluwer Law International, 1996) 221.

expressed in the legal maxim *actori incumbit probatio*, which is regarded as generally applicable in international as in domestic law.[291]

In the case of State responsibility for private conduct this position has usually been followed, and is evident in most of the arbitral awards and international decisions on the subject considered thus far in this study.[292] Accordingly, it has been the task of the victim State to establish not only that it has suffered harm but also to demonstrate the respondent State's wrongdoing in relation to that harm.

The ILC Draft does not devote any real attention to burden of proof questions and even less to the issue of evidentiary standards, appropriately regarding these issues as contingent on specific circumstances and beyond the scope of the project. However, an early version of Draft Article 8 regarding *de facto* agency did specify that the relationship of agency had to be 'established' for direct State responsibility to be engaged. As the ILC Commentary explained at the time, 'in each specific case in which international responsibility has to be established, it must be genuinely proved'.[293]

These portions of the text were subsequently deleted on the recommendation of the Special Rapporteur James Crawford who argued that the term was superfluous since 'it is always the case that a claimant has to show that the conditions for State responsibility are satisfied'.[294] The idea is still retained, however, in the Commentary's introduction to the chapter on circumstances precluding wrongfulness, which provides succinctly that 'in a bilateral dispute over State responsibility the onus of establishing responsibility lies in principle on the claimant State'.[295]

The consequence of adopting this approach in terrorism cases would be to demand that the claimant State show not only that it was the target of a terrorist attack, but to demonstrate also the wrongdoing of the State—in terms of a failure to comply with the duty to prevent or abstain—in relation to that attack. If direct responsibility were alleged on the basis of an agency standard, it would

[291] *Ibid*, pp 116–117, 221–223; S Rosenne, *3 The Law and Practice of the International Court 1992–1996*, 3rd edn, (The Hague, Nijhoff, 1997) 1082.

[292] See, eg, arbitral awards in injury to alien cases cited above section 2.7.2; Iran–US Claims Tribunal cases cited above section 3.2.1; see also *Nicaragua Case*, above n 157, p 437 ('it is the litigant seeking to establish a fact who bears the burden of proving it'). For a more detailed list of examples, see Kazazi, above n 290, pp 66–112. *But* see *William A Parker (USA) v United Mexican States* (1926) 4 R Intl Arb Awards 21, 39 (where the tribunal stated that it 'denies the existence in international procedure of rules governing the burden of proof borrowed from municipal procedure'); see also Kazazi, above n 290, pp 232–34 (arguing that the *Parker Case* has been misread and is referring to the rule that the burden lies on the party alleging a certain fact rather than necessarily on the party instituting proceedings).

[293] (1974) 2 (1) *YB Intl L Comm'n* 284–85, UN Doc A/CN.4/SER.A/1974/Add.1.

[294] J Crawford, 'First Report on State Responsibility' (1998) 17, UN Doc A/CN.4/490/Add.5; see also *ibid*, p 7 ('where there is doubt it will be for the claimant to establish attribution, in accordance with the applicable standard of proof, in the same way as the claimant will have to establish that there has been a breach of obligation').

[295] Report of the International Law Commission to the General Assembly, UN GAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) 172.

be for the claimant State to prove the existence of a relationship of direction or control or alternatively to prove that the State had adopted the terrorist conduct as its own.

Cases of terrorism have rarely been the discussed before international tribunals, but State practice, which is examined in more depth in section 5.4 below, has generally followed this pattern. While it is not possible to identify a fixed evidentiary standard, States alleging the wrongdoing of the sanctuary State in relation to a terrorist attack have been expected to adduce reasonable evidence of that wrongdoing and have encountered difficulties in attracting international support in its absence.[296]

It would be mistaken, however, to assert on the basis of this trend that the *actori incumbit probatio* rule is applied uniformly or rigidly. There are some prominent cases in international jurisprudence in which burden of proof issues were not handled in this way. The most interesting example can be found in the *Corfu Channel Case*. As noted above, the ICJ recognized that knowledge of minelaying in the Corfu Channel could not be imputed to Albania by the mere fact of territorial control. Nevertheless the Court observed:

> It is true, as international practice shows, that a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation. It is also true that that State cannot evade such a request by limiting itself to a reply that it is ignorant of the circumstances of the act and of its authors. The State may, up to a certain point, be bound to supply particulars of the use made by it of the means of information and inquiry at its disposal . . . . This fact [of territorial control], by itself and apart from other circumstances neither involves prima facie responsibility nor a shift the burden of proof. On the other hand, the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized in international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion.[297]

This nuanced assessment of evidentiary issues has echoes in other judicial decisions. As discussed in section 3.2.2, the Inter-American Court of Human

[296] See generally below section 5.4.

[297] *Corfu Channel Case*, above n 149, p 18. (The Court went on to say that Albania's knowledge of the minelaying operation could be 'drawn from inferences of fact, provided that they leave *no room* for reasonable doubt'). Several judges on the Court saw things differently. Judge Alvarez, for example, argued that the notion of sovereignty justified shifting the burden of proof onto the territorial state, see *ibid*, p 44. On the other hand, Judge Badawi Pasha dismissed the idea that more a flexible attitude to proof was warranted, see *ibid*, p 65. See also dissenting opinion of Judge Ečer, *ibid*, p 127, and declaration of Judge Zorcic, *ibid*, pp 37–38.

Rights was willing to give weight to circumstantial evidence so as to shift the burden of proof and require the respondent State to refute the allegations. Similarly, in the case of *Short v Iran* before the Iran–US Claims Tribunal, Judge Brower argued in his dissent that given evidence of hostile anti-Americanism promoted by the Khomenei regime it would have been appropriate to establish a rebuttable presumption that Iran was responsible for the wrongful expulsion.[298]

Similar kinds of burden of proof issues emerged recently in the *Oil Platforms Case* before the International Court of Justice. The case involved US military action against offshore Iranian oil installations during the Iran–Iraq war in response to alleged attacks by Iran against US vessels.[299] In that context, the majority of the ICJ held that the burden of proof lay on the United States to show that its vessels had been the victim of an armed attack that was attributable to Iran such as to justify the use of force against Iran in self-defense. With respect to the strike against the tanker the *Sea Isle City*, hit by a missile in October 1987, the Court held that the burden of proof had not been discharged by the US.[300] As for the *Samuel R Roberts*, which struck a mine in international waters in April 1988, the Court noted that both Iran and Iraq were laying mines in the waters at the time, and that the evidence produced by the US was 'highly suggestive, but not conclusive' as to the origins of the particular mine that had struck the US vessel.[301]

While the majority adopted a relatively strict position on the burden of proof, several judges took issue with that approach.[302] Judge Higgins argued, for example, that the Court had been unclear as to whether it would accept indirect evidence as it had in the *Corfu Channel Case*.[303] Judge Buergenthal criticized the Court, *inter alia*, for failing to analyze the evidence produced by the United States in a cumulative way and from neglecting the 'assumptions that could reasonably be made about Iran's role in the attacks'.[304] Finally, Judge Owada maintained that the Court should have taken a 'more proactive stance' on the issue of evidence. While conceding that this case differed from the *Corfu*

[298] See above section 3.2.1; see also Kazazi, above n 290, pp 239–73; *Grant–Smith Claim (UK v Italy)* (1952) 22 Intl L Rep 966, 972 (shifting the burden of proof to Italy after its Navy had captured seized the *Gin and Angostura* to show that the ship was not 'a victim of an act of war'). In addition, at the Hague Codification Conference of 1930, six States argued that in the case of mob violence directed against a particular nationality, it was appropriate to shift the burden of proof onto the host State, see Observations of Finland, Great Britain, India, New Zealand, Norway and South Africa on Basis of Discussion 22(c), Preparatory Committee of the Conference for the Codification of International Law, Bases of Discussion (1929), League of Nations publication, V Legal, 1929.V3 (document C.75.M.69.1929.V), reprinted in S Rosenne, (ed), *2 League of Nations Conference For The Codification Of International Law* (Dobbs Ferry, NY, Oceana Publications, 1975) 540–42.

[299] *Case Concerning Oil Platforms* (*Islamic Republic of Iran v United States of America*) (6 November 2003) reprinted in (2003) 42 ILM 1334.

[300] *Ibid*, pp 1355–57.

[301] *Ibid*, p 1360.

[302] They were also critical of the Court's failure to establish by what standard the burden of proof would be discharged.

[303] *Ibid*, p 1385 (separate opinion of Judge Higgins).

[304] *Ibid*, pp 1416–17 (separate opinion of Judge Buergenthal) (suggesting also that the evidence may have been sufficient to shift the burden to Iran).

Channel Case in that the incidents took place in international waters, Judge Owada nevertheless concluded that 'the *dictim* of the *Corfu Channel* case contains some valid points which could be susceptible of general application to an international court, where the procedure and rules on evidence seem to be much less developed'.[305]

There thus seems to be some degree of confusion as to the appropriate attitude towards the burden of proof in cases where attribution to the State is a contested issue. If the more flexible approach followed in the *Corfu Channel Case* and apparently advocated by some of the judges in the *Oil Platforms Case* were to be adopted in instances of terrorist attack, more sophisticated burden of proof solutions could be envisaged. The claimant would still have to demonstrate that the terrorist attack against it emanated from the territory of a given State and provide some evidence of actual or constructive knowledge of the terrorist activity. But once this was established, the sanctuary State might at least be required to 'give an explanation' if not be subject to the burden of refuting the allegation that it failed to meet its counter-terrorism obligations.[306] In addition, 'liberal recourse to inferences of fact and circumstantial evidence' could be justified since, as in the *Corfu Channel Case*, the illicit activities in question took place in the territory of the sanctuary State.

There is much to recommend a more flexible approach to evidentiary issues in terrorism cases. A State's involvement in terrorism is inevitably clandestine and exceedingly difficult to prove.[307] When the counter-terrorism violation involves a due diligence failure or toleration through acts of omission this problem is only exacerbated. An exacting approach to burden of proof along the lines followed, for example, by the Iran–US Claims Tribunal or the majority in the *Oil Platforms Case*, could result in impunity for the violating State. At the same time, caution is warranted. Because terrorist attacks can potentially involve forcible responses by the victim State, an overly casual attitude to issues of proof is susceptible to abuse.

It is also important to appreciate that different evidentiary standards may apply in political arena, where most terrorism cases are assessed, as compared to judicial fora. The legitimacy afforded a counter-terrorism response will be contingent on numerous considerations and may vary considerably depending on the circumstances. Relevant factors in this regard could include the gravity of the terrorist attack, the nature of the State's wrongdoing, the particular response pursued by the victim, and the political standing and credibility of the accuser and the accused respectively.[308]

Questions concerning the burden of proof and evidentiary standards in terrorism cases have not received the kind of detailed analysis they deserve. As a

[305] *Ibid*, p 1428 (separate opinion of Judge Owada).

[306] See Rosenne, above n 291, pp 1089–90 (regarding the possibility of 'a burden of negative proof' for acts occuring on a State's territory, in certain circumstances).

[307] See below section 7.3.1.

[308] See below section 9.3.

result, the legitimacy of claims and counterclaims regarding violations of the duty to prevent and to abstain may often be debated even if the content of the obligations and the standard of care required to meet them are more settled. After advancing a working theory of State responsibility for terrorism, it will be necessary for this study to return to these problems so as to better illustrate how such responsibility could be determined in practice.[309]

4.4.6 Assessing Violations of Counter-Terrorism Obligations

Establishing State responsibility for the breach of counter-terrorism obligations is not always, or often, a straightforward exercise. The variables and scenarios are almost endless. The subject matter is highly charged politically and the violation itself is invariably concealed from public view. The result may be that despite the capacity to articulate counter-terrorism obligations in theory, establishing their violation in practice can be hotly contested. This is especially the case when the State is charged with failing to prevent or tolerating the terrorist activity through acts of omission.

That said, a more refined appreciation of standard of care issues could aid the process of substantiating a counter-terrorism violation even in difficult cases. Three paradigmatic cases may be presented. A State may possess the capacity to prevent acts of terrorism, but merely goes through the motions, thus effectively acquiescing to the terrorist conduct. In this way, inaction or omission by the State, through half-hearted implementation of the duties of prevention, can be equivalent to a violation of the absolute duty to abstain. In another case, a State that fails to meet the due diligence standard will violate the duty of prevention but may not be regarded as tolerating terrorist activity, at least until its failure becomes repeated or prolonged. Finally, in a third case, a State with minimal capabilities that is using its best endeavors to prevent acts of terrorism and enhance its counter-terrorism capacity, but recording little success, might not be regarded as violating either standard.

Classifying any of these cases with confidence can be difficult in real life situations. In each case, the determination will be complicated by factors such as the intensity of the terrorist activity, the actual nature of the State's attempts to prevent the activity or acquire the capabilities to do so, and the clandestine character of the relationship between the State and the terrorist group.

In these more difficult scenarios the most useful determinant is the behavior of the State over time. While lack of knowledge or capacity may preclude responsibility in individual instances, these factors will gradually diminish in significance. Ongoing threats or acts of terrorism and the opportunity for States to improve their counter-terrorism capabilities, limits the reach of these defenses.[310]

[309] See below section 9.3.
[310] See below section 9.3.

It may be difficult after a single terrorist incident to establish toleration or acquiescence on the part of the State or even a lack of diligence. The State can claim insufficient knowledge, insufficient capacity or simply the failure, despite its best efforts, to prevent the illicit conduct. But each of these claims becomes less convincing the more persistent and enduring the terrorist activity. In this context, it is not difficult to see how the failure to prevent can lead to the more serious charge that the State is in fact tolerating and facilitating the activity through its inaction.[311]

The increased precision introduced by standard of care principles to the assessment of counter-terrorism violations is undermined by a lack of clarity surrounding the question of the burden of proof. In practice, much will depend on the degree to which it is the victim State that is expected to prove its allegations or the sanctuary State that is expected to refute them. Even if most cases of terrorism are not dealt with in the judicial arena, the legitimacy of claims and counterclaims advanced before the international community will turn in part on which party is expected to discharge the burden of proof. We will return to this question in section 9.3, after settling upon a system by which State responsibility for acts of terrorism may be examined.

4.5 CONCLUSION

In this chapter it has been argued that the elements for establishing State responsibility for violations of counter-terrorism obligations are less ambiguous than is sometimes suggested. Despite persisting differences, the international community has moved towards a consensus on the definition of terrorism. The substantive obligations of States to prevent and to abstain from acts of terrorism are well established, and have been both clarified and intensified, particularly as a result of resolution 1373 and the CTC mechanism. Finally, the standards by which violations of these obligations are measured provide the tools that enable actual State conduct to be examined more effectively, though they need to be supplemented by clearer formulations regarding the burden of proof.

By identifying all these elements, a legal framework is established to determine whether the State has violated its counter-terrorism obligations. As noted, it is only once such a violation has occurred that the possibility of direct responsibility for purely private terrorist activity can arise. Closer attention to the way in which violations of counter-terrorism obligations are established thus

[311] A good illustration of this approach is the *Texas Cattle Claims* arbitration. In that case, the Commission found, *inter alia*, that the raids from Mexico into the US were not sporadic but part of a 'general lawless condition' and that they were 'openly and notoriously organized'. In addition it held that Mexican officials failed over many years to take steps to prevent the activity, while other officials were themselves implicated in the raids. The Commission concluded therefore that the raids 'were made possible by the conduct of the Mexican government' implying not just a failure of prevention but ongoing toleration of the illicit activity, see *Texas Cattle Claims*, above n 273, p 753.

opens the door to a broader examination of State responsibility issues. The next chapters will consider the models that have been proposed to determine the circumstances in which the State can be held responsibility not only for violating its counter-terrorism obligations in relation to private terrorist activity but for the terrorist activity itself.

5

State Responsibility for Private Acts of Terrorism

5.1 A DISTINCTION WITH A DIFFERENCE

At first glance, it may appear immaterial whether the State is treated as directly responsible for the harmful acts of private individuals that it supports or tolerates, or only for its own misconduct in relation to those acts. After all, what is essential is that the State be held accountable. But there are some far-reaching implications that flow from the way State responsibility for private conduct is spoken about. The language and conceptions of State responsibility define the boundaries of a sovereign's accountability in its relations with other States. And they set the limits of what citizens can expect and demand from the countries in which they live.[1]

The differences between holding the State accountable for failing to prevent, or for offering support to illicit private activity, on the one hand, and for engaging in the activity itself, on the other, emerge quite clearly in the field of counter-terrorism. Indeed, these differences are precisely why the 'Bush Doctrine'—equating the States that harbor terrorists with the terrorists themselves—challenges prevailing approaches to State responsibility. This section will introduce some of these differences so as to set the stage for a more detailed analysis in the coming chapters.

5.1.1 The Heuristic Dimension: A Preview

From a purely heuristic perspective, treating the State as responsible only for its own failures in relation to private conduct, rather than for the conduct itself, influences the way we comprehend and use the rules of State responsibility. This point will be addressed in detail later in this study, but the essential issue here is that an agency paradigm of responsibility can blinker our legal range of vision when observing State conduct.[2]

[1] See below section 7.5.

[2] DD Caron, 'The Basis of Responsibility: Attribution and Other Trans-substantive Rules' in RB Lillich and DB Magraw, (eds), *The Iran–United States Claims Tribunal: Its Contribution to State Responsibility* (Irvington-on-Hudson,, NY, Transnational Publishers, 1998) 109, 153–54; see also below sections 7.3 and 8.4.1.

As presently interpreted, the ILC principles of attribution operate to restrict the responsibility of the State to that which the State itself, through its *de jure* or *de facto* agents, has performed. This approach does not look to the consequences of those actions in terms of their influence on the conduct of non-State actors. In the absence of an agency relationship, the principles of non-attribution and the separate delict theory preclude direct State accountability for the harm caused by third parties, even where the State's own misconduct has facilitated or encouraged that harm.

When speaking about direct State responsibility for the acts of private individuals in the way intimated, for example, by the 'Bush Doctrine', State responsibility is perceived through a broader and fundamentally different lens. The first question remains what wrongful act has the State itself committed. But we also ask what are the consequences of that wrongful act. And we may view the State as a direct party to those consequences even if a non-State actor is their immediate author. In other words, under this view the role of the purely private actor in perpetrating the terrorist activity need not break the link—the chain of causation—between the State and the terrorist activity that the State's own wrongdoing has facilitated.

The conceptual difference between these two approaches to State responsibility is profound. It is best regarded as a movement away from an agency paradigm of responsibility and towards a causal paradigm. And it will require, in Part III of this study, a re-evaluation of some fundamental notions about how State responsibility for terrorism has been conceived thus far.

5.1.2 The Role of the State

If the State is treated as *directly* responsible for the very private terrorist activity that it supports or fails to prevent, special prominence is given to the role of the State in making private terrorism possible. State sponsorship or toleration of private acts of terrorism is thus regarded as a key factor in the terrorist phenomenon to which the rules of State responsibility must respond. In addition, the State and the private terrorist group are more readily viewed as functioning on the same plane, as capable of operating in some kind of partnership without necessitating a principal-agent relationship.

By contrast, restricting State responsibility under conceptions of agency tends to de-emphasize the influence of the State on purely private terrorist activity. It highlights the role of the sub-State terrorist group as the driving force behind terrorist atrocities and views the State as shouldering less responsibility unless it directs, controls or espouses the private action. This approach treats terrorism as a phenomenon that operates essentially on the private plane and it limits the ways in which the State may be regarded as party to it.

These divergent perspectives dictate different strategies in confronting modern day terrorism. For one, emphasis may need to be placed not just on the

private terrorist operatives but equally—if not more so—on the State facilitating or tolerating their activity. For the other, terrorism has become essentially a private phenomenon and, as a result, solutions must be directed primarily against the private actors while the State's contribution to their activity is relegated to a secondary status.

These different approaches also produce discordant views about the relationship between the public and the private spheres. The more restrictive view of State responsibility regards these spheres as conceptually distinct, and evinces a concern about increased State control over the private sector. As a result, it imposes strict divisions between the public and the private, broken only by agency-type relationships. By contrast, a broader vision of responsibility emphasizes the more subtle ways in which the State can operate through the private sphere. It embraces a wider conception of State action and is more willing to 'pierce the veil' between the State and non-State domains so as to ensure State accountability.

Chapter 7 will consider whether the involvement of States in contemporary forms of terrorism justifies a preference for one perspective or the other, or perhaps presents a more complicated picture. This will also demand a more general assessment of the desired approach to the public-private relationship in instituting rules of State responsibility.

5.1.3 Political Accountability

The considerations addressed above also impact upon the available political responses to the State's failure to comply with its counter-terrorism obligations. In terms of the gravity associated with the offense, there is a clear distinction between failing to prevent, or even assisting, a terrorist act and actually perpetrating it. The political response to the latter offense is likely to be more severe and may, in appropriate circumstances, lead more easily to collective action by the international community. It is far less likely that a counter-terrorism failure, distinguished from engaging in the harmful conduct itself, will be treated with the same severity. As a result, the capacity to deter States from tolerating or sponsoring acts of terrorism is affected by the willingness to view the State as directly responsible for the private terrorist offense.

Admittedly, State responsibility for egregious and ongoing violations of the duty to prevent and to abstain has sometimes been the basis of Security Council action under Chapter VII with respect to countries such as Libya, Sudan and the Taliban regime in Afghanistan.[3] In these instances, even without a finding of direct State responsibility, sanctions have been imposed and the State in question has been called upon to meet its legal obligations. But these cases represent the exception rather than the rule. In addition, by limiting the responsibility of the

[3] See discussion below section 5.4.

State to its own counter-terrorism violations the range and severity of the options available to the Council in confronting the malfeasant State are limited.

As the international support for the response to September 11th demonstrated, a readiness to hold the State directly responsible for private terrorist activity can attract acceptance of a broader range of measures designed to maximize State accountability,[4] with all the attendant risks and benefits of such an approach. If the State is viewed as the author of the terrorist atrocities it is far easier to harness support for more extensive action under Chapter VII of the Charter, or to engage in robust remedial measures against the State with the endorsement or acquiescence of the international community.

5.1.4 Forcible Responses to Private Acts of Terrorism

It is in the field of the right to self-defense that divergent views on State responsibility for terrorism have their most profound impact. In the academic literature, many scholars have expressed views regarding the permissibility of recourse to self-defense in response to terrorist attacks by non-State actors.[5] Amongst these views, two prominent schools of thought have relied heavily on principles of attribution and responsibility in examining the legality of defensive counter-terrorist action. It is not necessary for this study to pronounce conclusively on the merits of these two different approaches. It is important, however, to demonstrate that under either view the means of assessing State responsibility for terrorism plays a decisive role.

One group of scholars considers forcible responses to terrorism as illegitimate unless the terrorist attack can be regarded as emanating from the State itself. This view was especially popular before September 11th, but it continues to have many adherents today. While there are variations in approach, the essential argument is that any coercive action in a third State, even if limited to terrorist targets, necessarily involves a violation of that State's sovereignty and territorial integrity. The right of self-defense could justify such a violation, but only if the target State is itself directly responsible for the terrorist attack.

Some jurists reach this view on the basis of a restrictive reading of Article 51 of the Charter, arguing that self-defense is limited to cases of armed attack *by* a State.[6] A right to engage in coercive measures against terrorism under Article 51

[4] See below section 6.1.

[5] For a general survey of views see, eg, AC Arend and RJ Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (London, Routledge, 1993) 38–173.

[6] PL Zanardi, 'Indirect Military Aggression' in A Cassese, (ed), *The Current Regulation of the Use of Force* (Dordrecht, Nijhoff, 1986) 111, 112 (arguing that the notion of armed attack in Art 51 denotes an *internationally* wrongful act and must therefore be directly attributable to the State); RJ Erickson, *Legitimate Use of Military Force Against State-sponsored Terrorism* (Washington DC, Air University Press, 1989) 134 (treating armed attack as direct or indirect use of force *by* one State against another); FA Frowein, 'The Present State of Research Carried out by the English Speaking Section of the Center for Studies and Research' in *Legal Aspects of Terrorism* (Hague Academy of International Law, 1988) 55, 64 ('[T]here cannot be any question that an armed attack cannot consist of a terrorist action . . . even if tolerated by the territorial state'); see also G Gaja, *In What Sense was*

would thus arise if, and only if, the State could be regarded as the author of the terrorist activity. This view was recently supported in the Advisory Opinion of the International Court of Justice on Israel's barrier in the West Bank, issued on 9 July 2004.[7] In that context, the Court held that Article 51 'recognized an inherent right of self-defense in the case of armed attack *by one State against another State*'.[8] As Israel had not demonstrated that the terrorism to which its citizens were subjected was 'imputable to a foreign State', the issue of self-defense under Article 51 was, in the Court's view, irrelevant.[9] This observation has generated considerable criticism, not least in the separate statements issued by some of the Judges on the Court.[10] But for those adhering to the majority's reading of Article 51, the question of the mechanism for establishing direct State responsibility assumes critical importance since without it no self-defense measures against terrorism are permissible.

One need not take such a limited view of self-defense in order to conclude that direct State responsibility must be required to justify most defensive measures against terrorist targets. For some proponents of this view, non-State terrorist violence could amount to an 'armed attack' within the meaning of Article 51 of the UN Charter.[11] As a result, targeting such terrorist groups on the high seas, with the consent of the host State or within the victim State's own territory would present no legal difficulty, assuming the other conditions for the exercise of self-defense are met. It is only when the victim seeks to engage in a forcible response within the territory of a non-cooperative State that it becomes necessary, under this view, for the terrorist attack to be directly attributable to that State.

there and 'Armed Attack'? (2001) available at http://www/ejil.orf/forum_WTC/ny-gaja.html (arguing that 'when terrorist acts are not attributable to a state . . . one could not say that an armed attack occurred'); PM Dupuy, *The Law after the Destruction of the Towers* (2001), available at http://www/ejil.orf/forum_WTC/ny-dupuy.html. (stating that self-defense 'only permits armed reaction to foreign aggression coming from a State, not a nebulous transnational movement'); S Yee, 'The Potential Impact of the Possible US Responses to the 9–11 Atrocities on the Law Regarding the Use of Force and Self-defence' (2002) 1 *Chinese J Intl L* 289, 291 ('State involvement to a significant extent is required for a finding of an armed attack').

[7] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion of 9 July) reprinted in (2004) 43 ILM 1009 [hereinafter, *Israel Barrier Advisory Opinion*]. See also *Case Concerning Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*) (19 December 2005) para 146–7 available at http://www.icj-cij.org/icjwww/idocket/ico/ico_judgments/ico_judgment_20051219.pdf [hereinafter, *DRC v Uganda Case*] (adopting the same position, at least implicitly).

[8] *Israel Barrier Advisory Opinion*, above n 7, pp 1049–50 (emphasis added).

[9] *Ibid*.

[10] Separate opinions of Judge Higgins, *ibid*, p 1063; Judge Kooijmans *ibid*, p 1072; Declaration of Judge Buergenthal, *ibid*, p 1079; see also *DRC v Uganda Case*, above n 7, Seperate Opinion of Judge Kooijmans, para 16–32, Separate Opinion of Judge Simma, para 4–15; Explanation of Vote of the EU following the adoption of GA Res ES–10/15, UN GAOR, 10th Emergency Special Session, 27th mtg, UN Doc A/RES/ES–10/15 (2004), reprinted in UN Doc GA/10248 (2004) (stating that the EU would not conceal its disagreement with some of the elements of the advisory opinion and supporting 'Israel's right to act in self-defence'). See also R Wedgwood, 'The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-defence' (2005) 99 *Am J Intl L* 52; SD Murphy, 'Ipse Dixit at the ICJ' (2005) 99 *Am J Intl L* 62, 63–70; *cf* I Scobbie, 'Words My Mother Never Taught Me—In Defence of the International Court' (2005) 99 *Am J Intl L* 76, 80–81.

[11] See below notes 20 and 21.

The scholars that have supported this general approach are too numerous to mention, but some representative samples may be cited.[12] Writing in 1989, Antonio Cassese has argued that in cases where the State merely failed to discharge its own counter-terrorism obligations 'the attack will not become the State's act, so there can be no question of a forcible response to it'.[13] More recently, Mary Ellen O'Connell has asserted that if the terrorist attack is not attributable to the State, 'no state can be the target of defensive counter-attack . . . [and] measures other than self-defense on the territory of a state must be taken by the victim'.[14] Finally, Travalio and Altenburg have expressed the proposition in the following way: 'Because an attack against the terrorists violates the territorial integrity of the host state the "armed attack" of the terrorists must be attributable to that state. Only then can force be used against the terrorists in that state or against the forces of that state itself.'[15]

It is clear that under this approach the determination of direct State responsibility is central to the legitimacy of any defensive measure within the territory of a sanctuary State. If this State is considered responsible only for failing to prevent the attack, or for its own violations of the duty to abstain, it may not be permissible to resort to force.[16] By contrast, if the State is deemed directly responsible for the terrorist attack, a violation of its sovereignty and territorial

[12] In addition to the authors cited in the text see, eg, JP Rowles, 'Military Responses to Terrorism: Substantive and Procedural Constraints in International Law' (1987) 81 *Am Soc Intl L Proc* 307, 314; L Stuesser, 'Active Defence: State Military Response to International Terrorism' (1987) 17 *Cal W Intl L J* 1, 17–18; SA Alexandrov, *Self-defence against the Use of Force in International Law* (The Hague, Kluwer, 1996) 182–83; J Lobel, 'The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan' (1999) 24 *Yale J Intl L* 537, 541; Gaja, above n 6; J Cerone, *Acts of War and State Responsibility in 'Muddy Waters': The Non-State Actor Dilemma* (2001), available at http://www.asil.org/insights/insigh77.html; J Delbrück, 'The Fight against Global Terrorism: Self-defence or Collective Security as International Police Action? Some Comments on the International Legal Implications of the "War against Terrorism"' (2001) 44 *German Y B Intl L* 9, 15; AM Slaughter and W Burke–White, 'An International Constitutional Moment' (2002) 43 *Harv Intl L J* 1, 20; M Byers, 'Terrorism, the Use of Force and International Law After 11th September' (2002) 51 *Intl & Comp L Q* 401, 408; MA Drumbl, 'Judging the 11 September Terrorist Attack' (2002) 24 *Hum Rts Q* 323, 330; EPJ Myjer and ND White, 'The Twin Towers Attack: An Unlimited Right to Self-defence?' (2002) 7 *J Conflict & Sec L* 5, 7; J Quigley, 'The Afghanistan War and Self-defence' (2003) 37 *Val U L Rev* 541, 546; KM Meesen, 'Current Pressures on International Humanitarian Law: Unilateral Recourse to Military Force against Terrorist Attacks' (2001) 28 *Yale J Intl L* 341, 341.

[13] A Cassese, 'The International Community's "Legal" Response to Terrorism' (1989) 38 *Intl & Comp L Q* 589; see also A Cassese, 'Terrorism is also Disrupting Some Crucial Legal Categories of International Law' (2001) 12 *Eur J Intl L* 993, 994–98.

[14] ME O'Connell, 'Lawful Self-defence to Terrorism' (2002) 63 *U Pitt L Rev* 889, 899; See also A Randelzohfer, 'Art 51' in B Simma, (ed), *Charter of the United Nations: A Commentary*, 2nd edn, (Oxford, OUP, 2002) 801, 802 (stating that 'if large scale armed acts of terrorism of private groups are attributable to a State, they are an armed attack in the sense of Article 51'. But he also concedes that in the case of a failed State, the victim may resort to military measures against terrorist targets within the territory of the failed State).

[15] G Travalio and J Altenburg, 'State Responsibility for Sponsorship of Terrorist and Insurgent Groups: Terrorism, State Responsibility and the Use of Military Force' (2003) 4 *Chi J Intl L* 97, 102; But see also G Travalio, 'Terrorism, International Law, and the Use of Force' (2000) 18 *Wis Intl L J* 145, 172 (suggesting that if the terrorist attack was un-attributable to the host State, force could still be used against terrorist targets, but not against institutions of the host State itself).

[16] ME O'Connell, 'Evidence of Terror' (2002) 7 *J Conflict & Sec L* 19, 28–32.

integrity may be justified in the exercise of the right to self-defense. In these cases, and subject to the usual conditions that circumscribe that right, the defensive response may be directed both against the terrorist group and, where appropriate, against legitimate military targets of the State itself.

A second group of scholars does not condition the legitimacy of a defensive response to terrorism on the direct attribution of the armed attack to the host State. Under this view, transnational terrorist atrocities that reach the level of 'armed attack' can justify a forcible reaction against the responsible terrorist group, subject to the usual self-defense criteria.

This perspective has achieved far wider currency following the attacks of September 11th. The willingness of the Security Council in resolutions 1368 and 1373 to invoke the 'inherent right of individual and collective self-defense' in reference to the Al-Qaeda attacks,[17] and the specific endorsements of defensive measures by organizations such as NATO and the OAS, has been treated as evidence that private terrorist violence of a sufficient magnitude can constitute an armed attack that will justify the resort to self-defense without regard to its attributability to a sovereign State.[18]

Similarly, in contrast to the position expressed by the ICJ, a substantial number of States have, for example, affirmed Israel's right of self-defense in response to Palestinian terrorist attacks, without conditioning that right on any direct State responsibility for such attacks.[19] Indeed, numerous scholars have argued that the wording of Article 51[20] and the history of self-defense clearly

[17] See discussion below section 6.1.

[18] While the Council did not explicitly refer to an armed attack, the reference to self-defense and the decisions of NATO and the OAS seem to support this assessment of the Al-Qaeda attacks, see C Stahn, *Security Council Resolutions 1368 (2001) and 1373 (2001): What they Say and What they do not Say* (2001), available at http://www.ejil.org/forum_WTC; See also discussion of the September 11th attacks and authorities cited therein, below section 6.1.

[19] Among many recent statements to this effect, see, eg, Quartet Communique, 4 May 2004, available at www.un.org/News/dh/infocus/middle_east/quartet-comque-4may04. ('The Quartet members recognize Israel's right to self-defence in the face of terrorist attacks against its citizens . . .'); Statement by Italy on behalf of the European Union, UN SCOR, 58th Sess, 4841st mtg, UN Doc S/PV.4841 (2003) 42 ('The European Union understands the security preoccupation of Israel and recognizes its legitimate right to self-defence in the face of terrorist attacks against its citizens'); see also UN SCOR, 59th Sess, 5049th mtg, UN Doc S/PV.5049 (2004) 6 (especially statements by Romania, Chile, Germany, Russian Federation, UK, Netherlands on behalf of the EU); UN SCOR, 58th Sess, 4929th mtg, S/PV.4929 (2004).

[20] The language of Art 2(4) of the Charter prohibiting the use of force by a member State is not repeated in Art 51 which refers to an 'armed attack' without any qualification as to its source. For recent examples of this view of Art 51, see Separate Opinions of Judge Higgins, Judge Buergenthal and Judge Kooijmans, *Israel Barrier Advisory Opinion*, above n 7; MB Baker, 'Terrorism and the Inherent Right of Self-defence (A Call to Amend Art 51 of the United Nations Charter)' (1987) 10 *Hous J Intl L* 25, 41; TM Franck, 'Terrorism and the Right of Self-defence' (2001) 95 *Am J Intl L* 839, 840; R Wolfrum and CE Phillip, 'The Status of the Taliban: Their Obligations and Rights Under International Law' (2002) 6 *Max Planck Y B UN L* 559, 589; SD Murphy, 'Terrorism and the Concept of "Armed Attack" in Art 51 of the UN Charter' (2002) 43 *Harv Intl L J* 41, 50; C Stahn, 'International Law under Fire: Terrorist Acts as "Armed Attack": The Right to Self-defence, Art 51 (1/2) of the UN Charter and International Terrorism' (2003) 27 *Fletch F World Aff* 35, 42; MN Schmitt, 'Bellum Americanum Revisited: US Security Strategy and the Jus Ad Bellum' (2003) 176 *Mil L Rev* 362, 383–84; MS King, 'The Legality of the United States War on Terror: Is Article 51 a

demonstrate that this right is not limited only to armed attacks for which the host State is directly responsible.[21]

Under this view, the principles of sovereignty and territorial integrity should not necessarily insulate the State from forcible defensive action against terrorist targets. The State's failure or inability to prevent terrorist attacks, or its involvement in them, even if insufficient to justify direct responsibility, will enable the victim to resort to coercive action against the terrorists themselves. Indeed, the State's inability to act may involve no wrongdoing on its part, and yet self-defense against terrorist targets could still be a legitimate measure.

Defensive measures against the terrorist group are thus justified on the basis that the host State has, for whatever reason, failed to take the necessary suppressive measures in response to an armed terrorist attack originating from its territory. In these cases, it is regarded as legitimate for the victim State to infringe upon the territorial integrity of the host State rather than continue to suffer violations of its own sovereignty.[22] At the same time, respect for territorial

Legitimate Vehicle for the War in Afghanistan or Just a Blanket to Cover-up International War Crimes' (2003) 9 *ILSA J Intl & Comp L* 457, 462; see also R Higgins, *The Development of International Law Through the Political Organs of the United Nations* (London, OUP, 1963) 200–4.

[21] Indeed, the famous *Caroline Case* and many subsequent incidents seem to suggest that self-defense is permissible in response to armed attacks by non-State actors, without attribution to a State, provided the other conditions for resort to self-defense have been met. In the *Caroline Case* this right was essentially affirmed following the assistance given by individuals operating from US territory—but without US involvement—for the Mackenzie rebellion against British rule in Canada, see RY Jennings, 'The Caroline and McLeod Cases' (1938) 32 *Am J Intl L* 82, 82–88; Murphy, above n 10, pp 67–70; C Greenwood, 'International Law and the War against Terrorism' (2002) 78 *Intl Aff* 301, 308; TD Gill, 'The Eleventh of September and the Right of Self-defence' in WP Heere, (ed), *Terrorism and the Military: International Legal Implications* (The Hague, TMC Asser, 2003) 23, 25–27. Similar early evidence is found in US raids to suppress armed bands in Mexico in the 19th and early 20th century which the US justified on the grounds that its right to self-defense prevailed over Mexico's claim to territorial integrity, see (1941) 2 *Hackworth Digest* 289; see also I Brownlie, *International Law and the Use of Force by States* (Oxford, Clarendon Press, 1963) 732–33. For recent examples of authorities that examine contemporary State practice and conclude a right to self-defense against private un-attributable terrorist attacks, see, eg, TM Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge, CUP, 2002) 53–69; Y Dinstein, *War Aggression and Self-defence,* 3rd edn, (Cambridge, CUP, 2001) 218–19. C Kress, *Gewaltverbot Und Selbstverteigungrecht Nach Der Satzung Der Vereinten Nationen Bei Staatlicher Verwicklung In Gewaltakte Privater* (Berlin, Duncker & Humblot, 1994) 351; see also below section 5.4.

[22] For examples of jurists who argue for this balancing approach between the competing rights to territorial integrity of the victim and the host State, see MJ Glennon, 'The Fog of Law: Self-Defense, Inherence and Incoherence in Art 51 of the United Nations Charter' (2002) 25 *Harv J L & Pub Pol'y* 539, 550; BA Feinstein, 'Operation Enduring Freedom: Legal Dimensions of an Infinitely Just Operation' (2002) 11 *J Transnat'l L & Pol'y* 201, 286–87; MN Schmitt, *Counter-Terrorism And The Use Of Force In International Law* (Garmisch-Partenkirchen, George C Marshall European Center for Security Studies, 2002) 32–33; see also D Bowett, *Self-Defence In International Law* (New York, NY, Praeger, 1958) 40. Other jurists have argued that since the action is directed against terrorist targets it is not really a violation of the host State's territorial integrity or political independence under Art 2(4) of the Charter, see, eg, Travalio, above n 15, p 166. J Paust, 'Responding Lawfully to International Terrorism' (1986) 8 *Whittier L Rev* 711, 716–17. This view would arguably undermine the broad ban on the use of force intended by Art 2(4) and cuts across the notion that any non-consensual incursion into another State's territory infringes upon its territorial integrity, see O Schachter, 'The Lawful Use of Force by a State Against Terrorists in Another Country' (1989) 19 *Isr Y B Hum Rts* 209, 213; R Higgins, *Problems And Process: International Law And How We Use It* (Oxford, OUP, 1994) 240.

integrity, as well as the principle of necessity, would usually demand that the host State be given the opportunity to comply with its obligations before a resort to defensive action.[23]

While according to this position direct State responsibility is not relevant in examining the inherent legitimacy of a defensive response, it becomes significant when the victim State seeks to target not just the terrorist group but institutions or forces of the host State itself.[24] Yoram Dinstein has perhaps articulated this view in the greatest detail. He notes that States that are unwilling or unable to prevent terrorist activities are not necessarily directly responsible for the private terrorist attack.[25] Nevertheless, 'it does not follow that Utopia must patiently endure painful blows, only because no sovereign State is to blame for the turn of events'. In such circumstances Dinstein argues for a right of self-defense, which he terms extra-territorial law enforcement, while clearly limiting this right to measures directed against the terrorists themselves. The rationale provided is that the victim State should be entitled to engage in those measures of prevention and suppression which the host State should itself have performed. However, the victim may not directly target the institutions of the host State itself absent an armed attack for which that State is directly responsible.[26]

Ruth Wedgwood has similarly asserted that 'if a host country permits the use of its territory as a staging area for terrorist attacks when it could shut those operations down, and refuses to take responsible action, the host government cannot expect to insulate those facilities against proportionate measures of

[23] For the articulation of this position see, eg, AD Sofaer, 'Terrorism, the Law and the National Defence' (1989) 126 *Mil L Rev* 89, 108; WM Reisman, 'International Legal Responses to Terrorism' (1999) 22 *Hous J Intl L* 3, 54; Stahn, above n 20, p 47; C Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al Qaida and Iraq' (2003) 4 *San Diego Intl L J* 7, 17; Schmitt, above n 20, p 392.

[24] In addition to the authorities cited in this text, this view is reflected, for example, in *DRC v Uganda Case*, above n 7, Separate Opinion of Judge Kooijmans, para 26–32; Arend and Beck, above n 5, p 200; Stahn, above n 20, p 42; Schmitt, above n 20, p 398; Franck, above n 20, p 841; M Sassòli, 'State Responsibility for Violations of International Humanitarian Law' (2002) 84 *Intl Rev Red Cross* 401, 409; Wolfrum and Phillip, above n 20, pp 591–96; Gill, above n 21, p 29; AE Wall, 'International Law and the Bush Doctrine' (2004) 34 *Isr YB Hum Rts* 193, 215–17; see also R Grote, 'Between Crime Prevention or Prosecution and the Laws of War: Are the Traditional Categories of International Law Adequate for Assessing the Use of Force against International Terrorism?' in C Walter, *et al*, (eds), *Terrorism as a Challenge for National and International Law: Security Versus Liberty?* (Berlin, Springer, 2004) 951, 976 (regarding action directed solely against terrorist targets as a legitimate sanction for non-compliance rather than self-defense under Art 51, whereas action directed against the State itself requires that the attack can be attributed to the State). For earlier formulations of this view see JJ Fawcett, 'Intervention in International Law: A Study of Some Recent Cases' (1961) 103(2) *Hague Recueil des Cours* 343, 363; AR Coll, 'The Legal and Moral Adequacy of Military Responses to Terrorism' (1987) 81 *Am Soc Intl L Proc* 297, 305; Kress, above n 21, p 351.

[25] Dinstein, above n 21, p 215; but see also below section 6.2.2 (discussing Dinstein's view that some cases of State failure may amount to espousal of the armed attack).

[26] *Ibid*, pp 213–17; see also Y Dinstein, 'Comments on the Presentations by Nico Krisch and Carsten Stahn' in C Walter, *et al*, (eds), *Terrorism as a Challenge for National and International Law: Security Versus Liberty?* (Berlin, Springer, 2004) 915, 923 (stating that 'an "extra-territorial law enforcement" operation by State B, albeit conducted within the territory of State A, is directed not against State A but exclusively against the terrorists finding sanctuary in the latter's territory'); Y Dinstein, 'Terrorism as an International Crime' (1989) 19 *Isr Y B Intl L* 55, 67.

self-defense'.[27] She emphasizes, however, that self-defense in these cases cannot target the 'independent assets of the host countries' but should rather be limited to the 'direct instrumentalities of the armed attack'.[28] Jordan Paust has recently echoed this approach by insisting that unless the State itself was responsible for the terrorist attacks 'the use of military force against the state, as opposed only to the non-state terrorists, would be impermissible'.[29]

This requirement for direct State responsibility so as to permit the targeting of institutions of the State itself is grounded in the view that the right to self-defense must be directed only against the party that is itself responsible for the armed attack. Even if self-defense against the responsible terrorist group is permissible, the targeting of independent State assets cannot be justified without direct culpability on its part. In a similar vein, the ILC, in its own examination of this issue, concluded that:

> For action of the State involving recourse to the use of armed force to be characterized as action taken in self-defence, the first and essential condition is that it must have been preceded by a specific kind of international wrongful act, entailing wrongful recourse to the use of force, *by the subject against which the action is taken*.[30]

Proponents of this view may nevertheless be willing to concede that certain institutions or forces of the State may, in some circumstances, be legitimate *incidental* targets of a self-defense action directed against a terrorist group even in the absence of direct State responsibility. While this position is rarely articulated in clear terms, it could be argued that direct State responsibility for acts of terrorism is not required, for example, to justify the targeting of those specific segments of a State's armed forces that are deliberately interfering with a legitimate defensive operation against terrorist targets.

That being said, the capacity to direct a self-defense response specifically against *independent* State targets would, according to this view, be impermissible in all circumstances unless direct State responsibility for the private

[27] R Wedgwood, 'Responding to Terrorism: The Strikes against Bin Laden' (1999) 24 *Yale J Intl L* 559, 565.

[28] *Ibid*, p 566.

[29] JJ Paust, 'Use of Armed Force against Terrorists in Iraq, Afghanistan and Beyond' (2002) 35 *Cornell Intl L J* 533, 540.

[30] Report of the International Law Commission to the General Assembly (1980) 2 (2) *YB Intl L Comm'n* 1, 53, UN Doc A/CN.4/SER.A/1980/Add.1 (emphasis added). In the Commission's view at the time, the use of force against private terrorist attacks, when no State responsibility was involved, could be justified only on exceptional grounds of necessity rather than self-defense; see also Schachter, above n 22, pp 228–29; R Ago, 'Addendum to Eighth Report on State Responsibility' (1980) 2 (1) *YB Intl L Comm'n* 13, UN Doc A/CN.4/318/Add. 5–7. However, the vast majority of scholars assess forcible responses to terrorism within the framework of self-defense rather than necessity and State practice seems to clearly support this view. It is also telling that reference to necessity in response to private violence is not repeated in the 2001 ILC Commentary to the Draft Articles. For a discussion of this issue, see Dinstein, above n 21, p 217; C Stahn, 'Collective Security and Self-defence after the September 11 Attacks' (2002) 10 *Tilburg Foreign L Rev* 10, 18–20.

terrorism were established. This is not just because a response ostensibly justified on the basis of self-defense can rarely be necessary or proportionate if it targets a State that is not regarded as directly responsible for the terrorist attack. Under this view, necessity and proportionality are relevant factors in assessing the legitimacy of a defensive response directed against a State *only* after it is determined that the State is itself responsible for the illicit attack.[31]

From the analysis above it is clear that the determination of direct State responsibility for a private terrorist attack plays a critical role under either of these views of self-defense. The difference is that while for the first school direct State responsibility would affect the legitimacy of a defensive response itself, for the second school it affects only the range of permissible targets. According to either perspective, however, a theory of State responsibility which eases the criteria for engaging direct responsibility for the private terrorist activity would have the effect of significantly expanding the potential scope of self-defense to terrorism.

As shall be discussed in section 5.3 below, there is an alternative approach to self-defense against terrorism that is unrelated to questions of attribution or responsibility, and relies instead on special rules applicable to the use of force. Under this third perspective, it is not that private terrorist attacks are attributed to the State, but that certain degrees of State involvement in those attacks are themselves treated—albeit somewhat artificially—as constituting armed attacks. Substantial involvement of the State in private terrorist activity is *deemed* to be an armed attack justifying a forcible defensive response. State assistance or toleration that does not meet this threshold, however, would probably not justify defensive measures, at least not against the State itself.

This third view is not, strictly speaking, relevant to an inquiry into State responsibility for private terrorism. It is concerned not with State responsibility for private action but with the classification of the State's own action by reference to use of force rules. However, as it may represent an alternative explanation for international attitudes towards State sponsorship or toleration of private terrorist activity, this approach has a direct bearing on this study and merits consideration.

5.1.5 Application of the Laws of Armed Conflict

A further difference between State responsibility for failing to prevent a terrorist attack and State responsibility for perpetrating the attack itself could arise with respect to the application of the laws of armed conflict. Several jurists have argued that the armed confrontation between a State and a transnational

[31] This point was recently reaffirmed by Judge Kooijmans in the *Oil Platforms Case*, see *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* (6 November 2003) reprinted in (2003) 42 ILM 1334, 1402–3 (separate opinion of Judge Kooijmans).

terrorist organization is not generally subject to regulation under the laws of war. David Turns, for instance, maintains that:

> Individuals or groups cannot be 'at war' with States, for the same reason that the September 11th attacks cannot be regarded as an 'act of war' in any legally meaningful sense. In the parlance of international law, 'armed conflict' requires two or more State belligerents, or a conflict within one State, but with a high threshold of intensity.[32]

For these scholars, the private terrorist actors would have to be State agents in order to convert the hostilities into an inter-State confrontation that may be governed by the laws of armed conflict.[33] Without such responsibility, only the principles of criminal law would apply.[34]

In the wake of the September 11th attacks, this view has given ground to an alternative perspective. There has been an increasing willingness to view acts of terrorism, even if unattributable to the State, as susceptible of regulation under the laws of armed conflict. As discussed below in section 7.6.2, the recognition that terrorist organizations can engage in hostilities of a high intensity that resemble traditional armed conflicts has forced a re-evaluation of the crime/war distinction in terrorism cases. Under this view, the assessment of State responsibility in relation to private terrorist activity has been viewed by some as relevant not to the determination of whether an armed conflict exists, but rather to the determination of which specific armed conflict regime to apply.

It will be recalled that in the *Tadic Case* the application of the laws of international as opposed to non-international armed conflict turned, in the majority's view, on whether the conduct of local Bosnian Serb forces could be attributed to Yugoslavia.[35] Only if that conduct were regarded as the conduct of Yugoslavia itself could the conflict be treated as international in character. As Vöneky has recently argued, if one applies the same approach to transnational terrorist attacks it would be necessary to show that a State was in fact the author of the terrorist attacks for the laws of international armed conflict to be applicable to them.[36]

[32] D Turns, *Terrorism and the Laws of War: September 11th and its Aftermath, The Crimes of War Project*, available at http://www.crimesofwar.org/expert/attack-turns.html (2001); see also H Duffy, *The War on Terror and the Framework of International Law* (Cambridge, CUP, 2005) 250–53.

[33] See, eg, SN Sinha, *Terrorism and the Laws of War: September 11th and its Aftermath: The Crimes of War Project* (2001), available at http://www.crimesofwar.org/expert/attack-sinha.html.

[34] See, eg, G Hart, 'Sept 11 Has Scrambled Our Concept of War' *Boston Globe*, 11 February 2002. ('. . . terrorism is not war; it is crime on a mass scale); see also G Abi–Saab, *There is No Need to Reinvent the Law* (2002), available at http://www.crimesofwar.org/sept-mag/sept-abi-printer.html.

[35] See above section 3.3.1.

[36] S Vöneky, 'The Fight against Terrorism and the Rules of the Law of Warfare' in C Walter, *et al*, (eds), *Terrorism as a Challenge for National and International Law: Security Versus Liberty?* (Berlin, Springer, 2004) 925, 931–33; see also M Sassòli, 'La "guerre contre le terrorisme" le droit international humanitaire et le statut de prisonnier de guerre' (2001) 39 *Canadian YB Intl L* 211, 217; L Condorelli and Y Naqvi, 'The War against Terrorism and Jus in Bello: Are the Geneva Conventions Out of Date?' in A Bianchi, (ed), *Enforcing International Law Norms Against Terrorism* (Oxford, Hart Publishing, 2004) 25, 30–33.

In the context of the September 11th attacks, for example, Derek Jinks has suggested that without the attribution of these attacks to Afghanistan the law of international armed conflict cannot be said to apply, and that therefore the only potentially applicable body of law is that governing 'armed conflicts not of an international character'.[37] The mechanism by which such attribution takes place would thus have a direct impact on the relevant humanitarian regime, assuming of course that the terrorist attacks were of sufficient intensity and scope as to give rise to an armed conflict situation.[38]

There is room, however, to question the validity of these observations. As noted in section 3.3.1, there has been some sharp criticism of the reliance on an attribution test in order to characterize a conflict as international. Arguably, an inquiry into attributability is no more relevant to the application of international humanitarian law to transnational terrorist attacks as it is to Yugoslavia type hostilities. In both cases, it may be contended that it is the involvement of a non-territorial State, through its support for sub-State forces, rather than the strict attribution of the conduct of such forces to the State, that should decisive.

Moreover, reference to issues of responsibility in this context might, in any event, be of limited temporal significance. Once a victim State responds to terrorist attacks by defensive actions that infringe upon the sovereignty of a non-cooperative host State, it is often thought that the conflict would be treated as international regardless of whether the initial terrorist attack justified that designation.[39]

5.1.6 Damages

The fact that the State is held responsible only for its own violations need not prevent a calculation of damages based on the actual harm caused by private terrorist activities. In section 2.6, it was demonstrated that privately occasioned harm can serve as a yardstick for assessing the compensation owed by the State without implying direct legal responsibility for the harm itself. Nevertheless, the method for classifying State responsibility for private acts of terrorism could

[37] D Jinks, 'September 11 and the Laws of War' (2003) 28 *Yale J Intl L* 1, 41 (taking the view that Common Art 3 of the Geneva Conventions applies to all armed conflicts not defined as international in character).

[38] Precisely how to define an armed conflict is a matter of considerable debate, see *ibid*, pp 20–38.

[39] See, eg, Vöneky, above n 36, p 944; G Gaja, 'Combating Terrorism: Issues of Jus ad Bellum and Jus in Bello—The Case of Afghanistan' in W Benedek and A Yotopoulos–Marangopoulos, (eds), *Anti-terrorist Measures and Human Rights* (Leiden, Nijhoff, 2004) 161, 170. It has recently been argued, however, that to the extent that the victim State limits its response to the non-State terrorist operatives the conflict should not be characterized as international but deserves separate classification. Under this view, the direct responsibility of the host State for the terrorist activity might remain relevant in characterizing the conflict, since only in the case of direct responsibility would hostilities between the State and the terrorist group in the territory of the host country be classified as international, see R Schondorf, 'Extra-territorial Armed Conflicts between States and Non-State Actors: Is There a Need for a New Legal Regime?' (forthcoming, 2005) 37 *NYU J Intl L & P*.

potentially influence the assessment of reparations owed by the wrongdoing State at the international or domestic level.

At the moment, there is little opportunity for domestic legal action against States that violate their counter-terrorism obligations.[40] To the extent that such suits have been pursued, questions of direct State responsibility have been of marginal relevance. In cases involving State sponsorship of terrorism in US courts, for example, damages have occasionally been awarded in amounts corresponding to the private harm but without a doctrinal commitment to a specific form of responsibility.

Until very recently,[41] the Foreign Sovereign Immunities Act (FSIA) was thought to include an exception allowing for a civil cause of action directly against State sponsors of terrorism. Pursuant to this reading of the FSIA, damages may be awarded against the State for personal injury or death caused by acts of torture, extra-judicial killing, aircraft sabotage and hostage taking, or for 'the provision of material support or resources' for such acts.[42] In calculating the damages, however, the courts have not engaged in any detailed analysis as to whether the State is responsible only for its own counter-terrorism violations or for the terrorist act itself. Instead, where State agents are not themselves the perpetrators of the act, the Court has relied on the material support provision to grant large monetary awards against State sponsors that are said to correspond to the actual harm suffered.

In the 2003 case of *Dammarell et al. v Iran*,[43] for instance, victims of the Hizbollah bombing of the US Embassy in Beirut in 1983 were awarded 123 million dollars in compensatory damages against Iran. The District Court of Columbia found Iran liable under FSIA 'inasmuch as Iran undeniably sponsored Hizbollah's bombing'. There was no finding that Iran, by virtue of its sponsorship, could be regarded as the actual author of the attack. Nevertheless, the assessment of damages in the case turned on the 'battery, including pain and suffering, and the intentional infliction of emotional distress' arising from the terrorist act itself. Other cases under FSIA have followed an analogous approach.[44]

The US courts in these cases do not seem all that pre-occupied with questions of international law, much less the application of State responsibility rules. Damages are essentially calculated under domestic principles of tort liability. While this neglect for international legal principles may be regrettable, it confirms a longstanding practice according to which the manner of assessing

[40] The Lockerbie bombing case represented an interesting exception where domestic and international pressure combined to eventually extract compensation from Libya. In that case, however, State agents were directly involved in the terrorist act, see discussion below section 5.4.

[41] See *Cicippio–Puleo v Islamic Republic of Iran* 353 F 3d 1024 (2004) (holding that the FSIA does not create a private right of action against the State, but only against individual officials of the State).

[42] 28 USC §1605(a)(7).

[43] *Dammarell v Islamic Republic of Iran* 281 F Supp 2d 105 (DDC, 2003).

[44] See, eg, *Stern v Islamic Republic of Iran* WL 21670671 (DDC, 2003); *Eisenfeld v Islamic Republic of Iran* 172 F Supp 2d 1 (DDC, 2000).

damages for private action does not revolve around a particular approach to State responsibility.

That being said, there is still a difference as far as calculation of damages is concerned between the direct responsibility of the State for an act of terrorism, and its parallel responsibility for violating the duty to prevent, or to abstain from supporting, that act. Where the State is held responsible only for its own counter-terrorism failures, awards corresponding to the private harm *may* be given but there is no international legal requirement to do so. In such circumstances the wrongdoing State could still argue that compensation should be commensurate with the lesser violation which it has committed. By contrast, where the State is held directly accountable for the private terrorist attack this option is closed off. The State will be liable, as a matter of law, to compensate for the harm caused.[45]

As long as the international legal system and domestic legal regimes lack an effective mechanism for legal action against States that violate their counter-terrorism obligations, these considerations will not be of central importance. Given the immunity afforded to State actors by most judicial systems, this situation is unlikely to change in the foreseeable future. But to the extent that a measure of deterrence could be created by such civil actions, the possibility of compelling States that violate counter-terrorism obligations to pay damages, as a matter of law, that are commensurate to the actual harm suffered arguably creates a more effective prophylactic.

5.2 STATE RESONSIBILITY FOR PRIVATE ACTS OF TERRORISM BEFORE SEPTEMBER 11: THREE THEORIES

If there are these distinctions between a State's failure to comply with its counter-terrorism obligations, on the one hand, and its direct responsibility for the actual perpetration of a terrorist attack, on the other, it becomes important to determine how such an assessment is made. When is the State liable only for its own violations? When is it considered responsible for the private terrorist attack itself? And what legal principles apply to distinguish between these two situations?

Before the September 11th attacks very little specific attention was devoted to the principles of responsibility and attribution in terrorism cases. References to these questions appeared peripherally in discussions about the legitimacy of forcible responses to terrorist attacks or were implicit in general observations about State responsibility for private conduct. Still, it is possible to identify three theories of responsibility for terrorism in the pre-September 11th literature that closely mirror the three general historical approaches to State responsibility for private conduct examined in section 2 of this study.

[45] Of course, other factors could affect the amount of damages and their distribution amongst responsible parties.

This section briefly sketches these three theories, while section 5.3 presents an alternative approach to the problem that has not relied on rules of State responsibility for private action. These various positions will then be examined in light of State practice and in terms of their capacity to explain the attitude of States to the events surrounding the September 11th attacks.

5.2.1 Terrorism and the Agency Paradigm

In terms of substantive law, the obligations of States in relation to private terrorist activity do not differ, in any fundamental sense, from other international requirements to regulate non-State conduct. The duty to prevent and to abstain exists in relation to human rights obligations, environmental law, injury to aliens and arguably other forms of potentially harmful private activity that has an international dimension. It is perhaps natural to assume that the regime of State responsibility generally applied in these cases will similarly dictate the treatment of State responsibility for private acts of terrorism.

As discussed in chapters 2 and 3, State responsibility for private conduct has typically been governed by the principle of non-attribution and the separate delict theory. Direct responsibility of the State for private conduct seems to arise only by operation of principles of agency—whether through direction or control of the private activity or by its unequivocal espousal by the State. Indeed, jurists have presented these principles as the only basis upon which a State may be directly responsible for the conduct of private persons.[46] Given this claim to universality, it is not surprising that some writers have simply assumed that the agency paradigm governing State responsibility for private conduct enjoys exclusive authority with respect to responsibility for private terrorist activity as well.

It is worth noting, however, that not all scholars adhering to this approach accept that the standard by which an agency relationship is determined in relation to most private acts applies in the case of armed attacks by private actors. Some have relied on Article 3(g) of the General Assembly's Definition of Aggression of 1974 to suggest that the 'substantial involvement' of the State in the acts of armed bands or analogous groups is sufficient to attribute the private violence to the State, without necessarily requiring the kind of direction and

[46] Report of the International Law Commission to the General Assembly, UN GAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) 83; see also J Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 *Am J Intl L* 874, 878–79 ('ILC principles of attribution are the implicit basis of all international obligations so far as the state is concerned'); L Condorelli, 'L'imputation a` L`etat d'un Fait Internationalement Illicite: Solutions Classique et Nouvelles Tendances' (1984) 189(4) *Hague Recueil Des Cours* 9, 164–67 (ILC principles of attribution should be presumed to apply to every field of international law, unless the existence of a *lex specialis* can be demonstrated); GA Christenson, 'The Doctrine of Attribution in State Responsibility' in RB Lillich, (ed), *International Law of State Responsibility for Injuries to Aliens* (Charlottesville, VA, University of Virginia Press, 1983) 320, 327 ('these categories are universal; they do not apply only to aliens').

control implied by Article 8 of the ILC Draft Articles.[47] As explained in section 5.3 below, this appears to be a misreading of Article 3(g) in that what is at issue there is not so much an alternative standard of attribution as an independent assessment regarding what forms of State conduct could constructively be treated as an act of aggression.

But even if 'substantial involvement' is treated as some kind of special standard to be applied to the attribution of the acts of armed bands to the State, it is widely seen as referring to a very considerable degree of active State support, going beyond the provision of weapons or logistical support. As discussed below, in section 5.3, toleration of terrorist activity or the harboring of terrorist operatives, while undoubtedly a violation of the State's legal obligations, is not commonly regarded as 'substantial involvement'. As a result, such violations would not be regarded, under this view, as a basis for attribution of the private conduct to the State or justify treating the State as responsible for the private act itself.

As shall be discussed in chapter 6, the agency approach to State responsibility for private conduct has dominated much of the discourse in the wake of the September 11th attacks. Prior to September 11th, only a handful of scholars directly addressed the issue of State responsibility for terrorism, but among this group support for an agency paradigm features prominently.

Not surprisingly, Roberto Ago viewed all forms of private violence as falling into this category. In his fourth report to the ILC, he argued that such actions 'do not constitute a separate category distinct from other hypothetical acts of individuals'.[48] His general position regarding a State's responsibility for private armed bands was articulated in these terms:

> The Government of that State will be accused of having failed to fulfill its international obligations with respect to vigilance, protection and control, or having failed in its specific duty not to tolerate the preparation in its territory of actions which are directed against a foreign Government or might endanger the latter's security and so on. In other words, it will always be a question of the same internationally wrongful acts of omission . . . which are habitually attributed to States with respect to the acts of individuals. In order for the State to incur responsibility arising from other causes—responsibility arising directly from actions by the groups or bands in question—the situation must be different. Where it can be seen that that Government encourages or even promotes the organization of such groups, that it provides them with financial assistance, training and weapons, and coordinates their activities with those of its own forces for the purpose of conducting operations, and so on, the groups in question cease to be individuals from the standpoint of international law. They become entities which act in concert with, and

[47] See Zanardi, above n 6, p 155 (arguing that 'the involvement must be so substantial as to transform the armed group . . . into *de facto* organs of the State'); I Brownlie, *International Law and the Use of Force by States* (Oxford, Clarendon Press, 1963) 370 (reading the Definition of Aggression in terms of establishing the requirements for an agency relationship). For a more general discussion of Article 3(g), see below section 5.3.

[48] R Ago, 'Fourth Report on State Responsibility' (1972) 2 *YB Intl L Comm'n* 71, UN Doc A/CN.4/264 and Add 1, p 120.

> at the instigation of, the State, and perform missions authorized by or even entrusted to them by that State. Such groups then fall into the category of those organs which are linked, in fact if not formally, with the State machinery, and frequently called 'de facto organs' . . . When such groups carry out the activities planned, those activities are attributed to the State and constitute internationally wrongful acts of the State: wrongful acts of commission rather than omission . . .[49]

Another Italian scholar, Luigi Condorelli, followed in the footsteps of Roberto Ago in advocating strict adherence to the principle of non-attribution and the separate delict theory. In a 1989 article entitled 'The Imputability to States of Acts of International Terrorism', Condorelli could not have been clearer. He affirmed that 'the fundamental idea underlying the entire regime of imputability is well-known and appears perfectly suitable to deal with State terrorism'. Unless the terrorists were *de facto* or *de jure* agents of the State within the meaning of the ILC Draft Articles, he wrote, 'it is legally impossible to claim that the terrorist act is imputable to the State'. At the same, he noted that the terrorist act could 'catalyze' the responsibility of the State for violation of its own counter-terrorism obligations.[50]

Antonio Cassese similarly asserted that where the terrorists are 'de facto controlled' by the State 'the terrorist attack is attributable to the State'. If the attack is private in nature it is 'entirely unimputable . . . State responsibility may still be engaged, however, because the State failed to discharge some international obligation in connection with the attack'.[51] Finally, Zanardi held that the actions of private individuals involved in the illicit use of force can be a basis of direct responsibility only if it is established that they are *de facto* acting on behalf of the State. '[I]f the State does no more than give various kinds of assistance (organizational, financial, military) or simply tolerates the presence of these groups in its territory, the conduct of the armed bands cannot constitute an internationally wrongful act because it cannot be attributed to a State'.[52]

Other references to agency conceptions in relation to State responsibility for terrorism—embracing either an effective control test or a somewhat lower standard—can be found in studies by Brownlie,[53] Gill,[54] Alexandrov[55] and

[49] R Ago, 'Fourth Report on State Responsibility' (1972) 2 *YB Intl L Comm'n*, UN Doc A/CN.4/264 and Add. 1, p 121.

[50] L Condorelli, 'The Imputability to States of Acts of International Terrorism' (1989) 19 *Isr Y B Intl L* 233, 234, 245.

[51] Cassese, above n 13, p 597.

[52] Zanardi, above n 6, pp 112–13.

[53] Brownlie, above n 47, pp 369-72. ('If rebels are effectively supported *and controlled* by another state that state is responsible for a 'use of force' as a consequence of the agency . . . [if] aid is given but there is no agency established . . . it is very doubtful if it is correct to describe the responsibility of that government in terms of a use of force or armed attack') (emphasis in original).

[54] TD Gill, 'The Law of Armed Attack in the Context of the *Nicaragua* Case' (1988) 1 *Hague Y B Intl L* 30, 39–40.

[55] Alexandrov, above n 12, pp 182–83. Oscar Schachter seems to be adopting a similar approach in the following passage: 'Obviously it would go too far to say that the mere presence of terrorists in a State meant that the State was involved in their armed attacks, but when a government provides

others.[56] They may also be extrapolated from references to the universality of agency standards of responsibility that provide no exception for cases of private terrorist activity.[57]

In some sense, this reliance on an agency paradigm to regulate State responsibility for terrorism is understandable. These principles are broadly accepted and applied in other legal fields. And yet, the strength of this assumption needs to be measured against its ability to actually explain and regulate responsibility assessments in terrorism cases. And as shall be seen, State practice in terrorism cases and especially the response to the September 11th cannot always be easily rationalized by reference to agency criteria.

5.2.2 Absolute Responsibility

A modest number of scholars have argued for a regime of absolute responsibility in cases of terrorism. Properly understood, a doctrine of absolute responsibility would render the State directly accountable for any and all terrorist activity emanating from its territory. Such responsibility is not contingent on a violation of the duty to prevent or to abstain, or on any other wrongful conduct by the State. It is simply viewed as an automatic consequence of sovereignty.

Absolute responsibility revives notions of collective guilt from the medieval period. It rejects the Grotian concept that responsibility in international law is predicated on culpability.[58] It should not be confused with ideas of absolute liability, where international law imposes a duty on the State to compensate for private harm without implying that the State itself should be regarded as the author of the private act and legally responsible for it.[59]

Absolute responsibility is not a popular doctrine. The most articulate formulation of this approach in recent times has been in a 1962 work by Manuel Garcia-Mora.[60] Garcia-Mora justified his position on policy grounds and on a broad conception of sovereignty. He acknowledged the prevalence of the view that 'a hostile action of an individual against a foreign government does not *per se* engage the responsibility of the state'.[61] But he argued that the general obligation of States 'to protect each other's independence and well-being' ought

weapons, technical advice, transportation, aid and encouragement to terrorists on a substantial scale, it is not unreasonable to conclude that the armed attack is imputable to the government', see Schachter, above n 22, p 218.

[56] See, eg, SN Scheideman, 'Standards of Proof in Forcible Responses to Terrorism' (2000) 50 *Syracuse L Rev* 249, 266 (relying on Nicaragua to hold that a State will be liable for terrorist activity only if there is evidence of 'direct state control over each terrorist group and over every terrorist action undertaken').

[57] See above n 46.

[58] See above sections 2.3 and 2.4.

[59] See above section 3.2.4.

[60] M Garcia–Mora, *International Responsibility for Hostile Acts of Private Persons against Foreign States* (The Hague, Nijhoff, 1962).

[61] *Ibid*, p 17.

to be a sufficient basis for responsibility for any hostile action emanating from their territory.[62] In this way, Garcia-Mora posited that:

> . . . the responsibility of states for hostile acts of private persons is a requirement of the world community deeply concerned with peace and security in international relations. Peace and security may become illusory should the states be able to escape responsibility merely by pleading a lack of knowledge of these acts or impossibility of fulfilling the duty of prevention.[63]

Some later authors have relied on this work in analyzing terrorism cases, but with little sophistication—either ignoring its prescriptive nature[64] or simply misunderstanding its implications.[65]

It is clear that the notion of absolute responsibility is a radical departure from the prevailing view of State responsibility for private acts that lacks support in international practice. It is mentioned here not because it reflects a currently applicable standard, but because it represents an academic attempt to confront the problem posed by terrorism through the adoption of an exacting responsibility standard. Whether this doctrine offers an explanation of the response to September 11th or a useful prescription for regulating State responsibility for terrorism in a post-September 11th world will be addressed below.[66]

5.2.3 A Return to the Theory of Complicity

A final group of pre-September 11th sources seem to invoke early theories of complicity in their examination of State responsibility for terrorism. When used in this sense, complicity resurrects early theories about the common criminal intent of the State and the private actor that is presumed to emerge from the State's violations of its own counter-terrorism obligations.[67]

[62] M Garcia–Mora, *International Responsibility for Hostile Acts of Private Persons against Foreign States* (The Hague, Nijhoff, 1962), p 27.

[63] *Ibid*, pp 28–29. He went on to say that 'if a State has obviously used all the means at its disposal to prevent a hostile act of a private person against a foreign nation but is physically unable to suppress it, it has certainly not discharged its international duty', *ibid*, p 30.

[64] See, eg, LM Gross, 'The Legal Implications of Israel's 1982 Invasion into Lebanon' (1983) 13 *Cal W Intl L J* 458, 472 (simply asserting a doctrine of 'absolute vicarious liability' according to which 'the State in which the hostile act has developed is . . . automatically responsible despite either non-complicity or failure to prevent the act'); see also Feinstein, above n 22, p 381; BA Feinstein, 'A Paradigm for the Analysis of the Legality of the Use of Armed Force Against Terrorists and States that Aid and Abet Them' (2004) 17 *The Tranat'l Lawyer* 51.

[65] See, eg, B Levenfeld, 'Israel's Counter-fedayeen Tactics in Lebanon: Self-defence and Reprisal Under Modern International Law' (1982) 21 *Colum J Transnatl L* 1, 11 (citing Garcia-Mora as a basis for 'strict liability' and misinterpreting it as responsibility for 'negligent failure to prevent'). A more accurate reference to Garcia-Mora is found in Stuesser, above n 12, p 20.

[66] See below sections 6.2.4 and 7.5.

[67] See B Graefrath, 'Complicity in the Law of International Responsibility' (1996) 29 *Revue Belge de Droit Intl* 370, 370 (discussing the criminal connotations of complicity under municipal law and distinguishing it from the notions of complicity, in the form of aid and assistance by one State to another, covered in Art 16 of the present ILC Draft); see also below section 6.2.2.

In a 1989 article, Sompong Sucharitkul argued that 'assisting the commission of terrorist acts engages the responsibility of the State for complicity in the execution of an international crime', and failure to prevent or punish such acts was similarly viewed as engaging 'State responsibility for the resultant acts of terrorism'.[68] Violations of the duty to abstain or the duty to prevent were treated, in Sucharitkul's view, as the basis for regarding the State 'as an accomplice' with direct responsibility for the terrorism itself.

In the same year, Thomas Franck and Deborah Niedermayer addressed State responsibility for terrorism by drawing an analogy from the laws of criminal complicity in domestic legal systems. They showed that most municipal legal systems regarded active facilitation of a crime as a basis for criminal liability. In addition, persons in a position of authority could be regarded as criminal accomplices for failing to prevent the crime when they should have done so. The article did not conclude decisively whether complicity in terrorism should be treated as a basis for responsibility for the act itself or for a distinct offense. Nevertheless, the theory of complicity was used to argue that: '. . . a government that encourages, facilitates, or knowingly tolerates the commission of an illegal act of terrorism by persons on or from its territory is itself either guilty of that act or guilty of another crime of equal or proportionate gravity.'[69]

There is some other limited evidence in the literature of a similar reliance on complicity to account for State responsibility for terrorism.[70] However, it is not always clear whether this terminology is invoked in the strict legal sense used by earlier theorists, or as a loose substitute for the term responsibility.[71]

What is striking about these authorities is that they make little attempt to explain their rejection of the separate delict theory, or the prevailing case law, in favor of an approach that had been quite clearly discarded in the international jurisprudence on State responsibility for private conduct.[72] There is no concerted attempt to reconcile this approach with the ILC Draft or to argue that private terrorist activity somehow presents a unique challenge that justifies the adoption of a different standard.[73]

[68] S Sucharitkul, 'Terrorism as an International Crime: Questions of Responsibility and Complicity' (1989) 19 *Isr Y B Intl L* 247, 256–58.

[69] TM Franck and D Niedermeyer, 'Accommodating Terrorism: An Offence against the Law of Nations' (1989) 19 *Isr Y B Hum Rts* 75, 99.

[70] See, eg, Stuesser, above n 12, p 22 (arguing that encouragement or knowing toleration are sufficient to treat the harboring State as 'complicit' in the terrorist activity and thus to justify forcible measures, provided they are limited to terrorist targets); LJ Capezzuto, 'Preemptive Strikes against Nuclear Terrorists and Their Sponsors: A Reasonable Solution' (1993) 14 *NYL Sch J Intl & Comp L* 375, 382 (asserting that States are responsible if they acquiesce to terrorist activities within their borders on the basis of the 'accomplice theory' and citing the Model Penal Code as support).

[71] See, eg, BA Feinstein, 'The Legality of the Use of Armed Force by Israel in Lebanon–June 1982' (1985) 20 *Isr L Rev* 362, 381; MF Lohr, 'Legal Analysis of US Military Responses to State-sponsored International Terrorism' (1985) 34 *Nav L Rev* 1, 7–10; GF Intoccia, 'American Bombing of Libya: An International Legal Analysis' (1928) 19 *Case W Res J Intl L* 177, 194; D Turndof, 'The US Raid on Libya: A Forceful Response to Terrorism' (1988) 14 *Brooklyn J Intl L* 187; see also D Shelton, 'Private Violence, Public Wrongs and the Responsibility of States' (1990) 13 *FordhamIntl L J 1,* 24–25.

[72] See above section 2.7.

[73] See below section 6.2.2.

It is also unclear why complicity necessarily means that the State should be treated as the actual author of the private act, rather than as responsible for a distinct and lesser role as an accomplice. Numerous domestic criminal jurisdictions distinguish between the responsibility of accomplices and co-perpetrators, and even in circumstances where the accomplice is treated as responsible for the crime itself such responsibility may be grounded in participatory intent or specific policy considerations that do not have obvious application in the field of State responsibility.[74]

This is not to say that notions of complicity are without any merit in analyzing State responsibility for terrorism. While the analogy to a joint criminal enterprise is arguably misplaced in a legal system of sovereign States that has rejected the concept of State crimes,[75] there are elements underlying the theory of complicity that may provide useful inspiration. Indeed, complicity may be linked to broader principles of causation that will greatly exercise our attention in Part III of this study.[76]

5.3 USE OF FORCE AS *LEX SPECIALIS*

An alternative approach has addressed issues of State involvement in private terrorist activity solely within the context of the rules regulating the use of force.[77] Rather than determining whether the private actors are *de facto* State agents, this approach focuses on whether the State's own conduct in assisting the private actors could *constructively* be treated either as a prohibited use of force, an act of aggression or an armed attack justifying defensive measures.

These three terms are, of course, not synonymous in international law, and they may entail different legal consequences if committed.[78] But in making the

[74] See below section 8.3.5.

[75] Though long debated, both within and outside the ILC, the final version of the ILC Draft Articles recognizes a distinction between different kinds of primary obligations but rejects the concept of State crimes, not least because of the problematic analogy to *mens rea*, see Report of the International Law Commission to the General Assembly, UN GAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) 277–82. For a sample of the range of views on this issue see J Weiler, *et al*, (eds), *International Crimes of States: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (Berlin, De Gruyter, 1989); see also 10 Eur J Intl L (1999); J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge, CUP, 2002) 16–20.

[76] See also below section 7.6.3.

[77] Private acts of terrorism are treated in this context as one category of sub-State hostile activity in which the State may be involved. The reliance by the State on private actors to engage in hostile or subversive activity against other States has long been a feature of international practice and has been addressed in a number international legal documents. The legal terminology has varied widely over time embracing phrases such as 'armed bands', 'mercenaries' 'subversion', 'proxy wars', 'indirect aggression', 'hostile expeditions', 'breaches of neutrality' and, of course, 'terrorism'—but all relate essentially to the relationship of the State to the use of force by private actors.

[78] In brief, the determination of a 'use of force' concerns violation of Art 2(4) of the Charter, whereas the determination of 'armed attack' or 'act of aggression' concerns respectively whether a use of force justifies either a self-defense response under Art 51 of the Charter, or collective action

determination that a State's connection to a private terrorist attacks warrants any of these designations, there are some sources that suggest that questions of attribution and responsibility in relation to the private act itself are of secondary importance, if not totally obscured.

The most familiar example of this attitude to private violence is found in the Definition of Aggression adopted by the General Assembly in 1974, after decades of extensive negotiations.[79] In the non-exhaustive list provided in the Definition, Article 3(g) treats 'as an act of aggression': '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 the acts listed above, or its substantial involvement therein.'

To the extent that this clause refers to 'sending by or on behalf' it may be regarded as co-extensive with ILC principles that establish attribution to the State for acts of *de facto* agents. However, several features of the definition suggest that classifying the State's act as aggression does not really involve the operation of principles of attribution but an independent assessment of the State's own conduct. Certainly, there is no textual basis to suggest that the drafters of this provision had principles of attribution in mind. As noted above, some have argued that Article 3(g) provides the standard by which *de facto* agency is determined in such cases.[80] However, the language of the provision and numerous other sources suggests that it is the substantial involvement or sending *itself* that is the 'act of aggression', presuming of course that the armed bands have subsequently engaged in armed force of sufficient gravity.

This interpretation is strengthened by the *Nicaragua Case*, where the Definition of Aggression was treated as the basis for determining the existence of an armed attack. In that instance, a distinction was drawn between the responsibility of the United States for the *jus in bello* violations of the *contras*—a determination which turned on attributability—and the *jus ad bellum* determinations of unlawful use of force, aggression or armed attack as a result of United States and Nicaraguan involvement in non-State hostile activity.[81]

While the majority disagreed with Judges Schwebel and Jennings over the degree of State involvement that would constitute an armed attack,[82] there was

by the Security Council pursuant to Chapter VII. A determination of aggression may also have separate significance in the context of individual criminal responsibility. For a general discussion of these terms see Alexandrov, above n 12, pp 105–20.

[79] GA Res 3314, UN GAOR, 29th Sess, Supp No 31, UN Doc A/9631 (1974) 142.

[80] See above n 47 and accompanying text.

[81] But see, eg, Gill, above n 54, pp 39–40 (interpreting the *Nicaragua Case* as examining when an armed attack is 'imputable to the State').

[82] Both Schwebel and Jennings argued that sufficient financial and logistical support could justify treating the State as engaged in an armed attack. Jennings, for example, concluded that 'it may be readily agreed that the mere provision of arms cannot be said to amount to an armed attack. But the provision of arms may nevertheless be an important element in what might be thought to amount to an armed attack where it is coupled with other kinds of involvement', see *Military and Paramilitary Activities in and against Nicaragua (Nicar v US)* [1986] ICJ Rep 14 543 (27 June) (dissenting opinion of Judge Jennings) [hereinafter, *Nicaragua Case*].

no suggestion in the judgment that this *jus ad bellum* determination was grounded in questions of agency. As Judge Schwebel pointed out in regards to the requirement of 'substantial involvement': '. . . it is not required to show that the irregulars operating on its territory act as agents of the foreign States or States which support them. It is enough to show that those States are "substantially involved" in the sending of those irregulars on to its territory.'[83]

In Schwebel's view, the evidence suggested that Nicaragua's support for Salvadoran insurgents was clearly sufficient to treat Nicaragua's action as an act of aggression and 'tantamount to an armed attack'.[84] By contrast, in the opinion of the majority, Nicaraguan support for insurgents in El Salvador, Honduras and Costa Rica—such as it could be established—did not amount to an armed attack: 'The Court does not believe that the concept of "armed attack" includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support.'[85]

All judges seemed to agree that mere toleration or encouragement was not sufficient to view the State as the perpetrator of an armed attack, and they agreed as well, together with both parties in the case,[86] that significant material support to irregulars could be so treated.[87] They differed primarily on the degree of active support necessary to meet that test, with Judges Jennings and Schwebel heavily criticizing the majority's strict standard as a license for low intensity warfare.[88]

What is striking for present purpose, however, is that whatever their disagreements on the level of active State involvement required for an armed attack, there

[83] *Military and Paramilitary Activities in and against Nicaragua (Nicar v US)* [1986] ICJ Rep 14, 334 (27 June) (dissenting opinion of Judge Schwebel).

[84] *Ibid*, p 336.

[85] *Ibid*, pp 103–4.

[86] *Ibid*, p 269.

[87] See also DRC v Uganda Case, above n 7, para 146, Separate Opinion of Judge Koroma, para 9; Zanardi, above n 6, p 115 (arguing that the use of terms such as 'involvement' or 's'engager' in the French text, 'require active participation on the part of the State' and do not embrace 'mere acquiescence').

[88] *Nicaragua Case*, above n 82, p 349 (dissenting opinion of Judge Schwebel) ('The Court appears to offer—quite gratuitously—a prescription for overthrow of weaker governments while denying potential victims what in some cases may be there only hope of survival); *ibid*, p 543–44 (dissenting opinion of Judge Jennings). This criticism has been evident in the academic literature, see, eg, Sofaer, above n 23, pp 100–1; WM Reisman, 'No Man's Land: International Legal Regulation of Coercive Responses to Protracted and Low Level Conflict' (1989) 11 *Hous J Intl L* 317. In this context, several jurists argue that self-defense is not limited to uses of force of a particular gravity, otherwise low-level violence may be engaged in with relative impunity, see, eg, Higgins, above n 20, p 251; Sofaer, above n 23, p 94; Dinstein, above n 21, p 176. For an early expression of this view see CHM Waldock, 'The Regulation of the Use of Force by Individual States in International Law' (1952) 81(2) *Hague Recueil des Cours* 451, 495–96; but see *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* (6 November 2003) reprinted in (2003) 42 ILM 1334, 1433 (where the Court, relying on the *Nicaragua Case*, seems to affirm the view that self-defense is available only in response to an armed attack involving a 'most grave' form of the use of force); *cf* WH Taft IV, 'Self-defence and the Oil Platforms Decision' (2004) 29 *Yale J Intl L* 295, 300–2 (questioning this implication in the *Oil Platforms* decision and suggesting that the question of gravity is relevant only in relation to the use of force by irregular actors).

seemed to be general agreement amongst the judges that in analyzing Nicaragua's responsibility it was not necessary to show that the insurgents acted on its behalf. The essential question addressed by the Court was not whether the acts of the insurgents could be attributed to Nicaragua but whether the alleged supply of arms by Nicaragua was *itself* tantamount to an illegal use of force of sufficient magnitude to qualify as an armed attack. A similar approach was adopted in assessing whether the United States, while not responsible for *contra* violations,[89] had nevertheless engaged in an unlawful use of force as a result of its support for the insurgents. In that context, the Court held that the arming and training of the *contras* were, in and of themselves, a 'threat or use of force against Nicaragua'.[90]

This seeming reliance on a constructive formulation in assessing *jus ad bellum* questions finds additional support in the *travaux prepatoires* of the Definition of Aggression.[91] It is important to recall that this text was negotiated during the height of the Cold-War period. The use of proxy warfare was a common tool of powerful States, generating broad concern that such tactics could escalate into a broader conflagration between the nuclear powers.[92] Against this background, negotiators sought to determine the circumstances in which a State's misconduct in relation to private violence could be treated as the pursuit of aggressive designs.

Early Soviet proposals, for example, referred to 'support for armed bands' or the refusal to 'deny such bands any aid or protection' as sufficient to '*declare*' a State as an 'attacker'.[93] The Syrian delegate similarly proposed to '*recognize*' as an 'armed attack':

> The organization, or the encouragement of the organization by a State, of armed bands within its territory, or any other territory, for incursions into the territory of another State or the toleration of the use of such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another State as well as direct participation in, or support of such incursions.[94]

The delegate from Paraguay used a similar formulation in enumerating acts that 'shall be *deemed* to constitute armed aggression'.[95]

[89] In this regard, Judge Schwebel pointed out that there could similarly be no attribution to Nicaragua of violations of the laws of war committed by insurgents in El Salvador, see *Nicaragua Case*, above n 82, p 387.

[90] *Ibid*, p 119; see also *ibid*, pp 146–47 (regarding the finding by the Court that the United States by 'training, arming, equipping, financing and supplying the *contra* force or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua' had breached its customary obligations of non-intervention and non-use of force).

[91] For earlier examples in State practice of this approach to private violence see Brownlie, above n 21, pp 731–33; see also examples cited in R Higgins, 'The Legal Limits to the Use of Force by Sovereign States: United Nations Practice' (1961) 37 *Brit Y B Intl L* 269, 288–95.

[92] See generally SG Kahn, 'Private Armed Groups and World Order' (1970) 1 *Neth Y B Intl L* 32.

[93] UN Doc A/AC.66/L.2/Rev.1 (1953) (emphasis added).

[94] UN Doc A/C.6/SR.517 (1957) (emphasis added).

[95] UN Doc A/AC.77/L.7 (1956) (emphasis added); see also Proposal of Panama and Iran, UN A/AC.77/L.13 (1956). Interestingly, the Paraguayan draft included the provision that 'a State shall not

In each of these above instances, the proposals endorsed the constructive terminology of 'deemed', 'recognize' or 'declare' rather than the language of State responsibility for private action. The dispute provoked by these proposals did not touch upon the conditions for attribution, but on the wisdom of so broadly defining an armed attack or act of aggression that the scope of self-defense would in turn be expanded. These kinds of objections were voiced, for example, by delegates from Britain,[96] Peru,[97] and the Netherlands[98] in opposing the incorporation of toleration or encouragement within the definition.[99] Other States, principally from the developing world, were concerned that too broad a definition would enable them to be regarded as aggressors for the conduct of armed non-State actors originating from their territories.[100] The resulting text of Article 3(g), recognized by the ICJ as embodying a customary norm,[101] appears to be the product of a compromise between these positions as to what may be treated as a constructive act of aggression,[102] not of any debate about principles of attribution or direct State responsibility for private acts.

Further evidence of this constructive approach to use of force issues emerges from the Friendly Relations Declaration of 1970.[103] The Declaration addresses the duty to refrain from organizing, instigating, or acquiescing in terrorist activities in the section concerning the threat or use of force. In this way, it suggests that it is the organization, instigation or acquiescence that is itself an illegal resort to force in violation of Article 2(4) of the Charter, irrespective of whether the private actors may be said to be *de facto* State agents. This reading of the Friendly Relations Declaration is reinforced by the *Nicaragua Case*, discussed above, where both the majority and dissenting opinions referred to the Declaration in deciding that assistance to private armed groups could be an unlawful threat or use of force by the State, even if it did not necessarily amount to an armed attack.[104] Similarly, in addressing Libyan responsibility for the

be considered to be an aggressor if, being unable to suppress the activities of such bands in its territory or having justifiable reasons for nor undertaking their suppression, it reports the matter to the competent organ of the United Nations and offers its cooperation'.

[96] UN Doc A/AC.66/SR.8 (1953).

[97] UN Doc A/C.6/SR.418 (1954).

[98] UN Doc A/C.6/SR.417 (1954).

[99] See also Alexandrov, above n 12, pp 105–20.

[100] See, eg, Report of the Sixth Committee, UN Doc A/9411 (1973) 11; see also B Ferencz, 2 *Defining International Aggression* (New York, NY, Oceana Publications, 1975) 39; J Stone, *Conflict Through Consensus: United Nations Approaches to Aggression* (Baltimore, MD, John Hopkins University Press, 1977) 74–75.

[101] *Nicaragua Case*, above n 82, pp 103–4.

[102] Stone, above n 100, p 40; O Corten and F Dubuisson, 'Operation "Liberte Immuable": Une Extension Abusive de Concept de Legitime Defense' (2002) 106 *RGDIP* 51, 57.

[103] Declaration on Principles of International Law concerning Friendly Relations and Co-operation 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 [hereinafter Friendly Relations Declaration].

[104] *Nicaragua Case*, above n 82, pp 118–19 (majority); *ibid*, p 324 (Schwebel); *ibid*, p 542 (Jennings). As noted above, the majority, relying expressly on the Friendly Relations Declaration, found that the US had violated the prohibition against the use of force by arming and training the

Lockerbie bombing in resolution 748 of 1992, the Security Council referred to support or toleration of terrorist activity as itself a violation of the prohibition on the use of force.[105]

The curious tendency to ignore, or at least downplay, issues of attribution when determining whether the State has violated its use of force obligations is echoed in the work of a number of earlier authorities. Unlike the many contemporary publicists reviewed in section 5.1.4, these jurists do not refer expressly to principles of attribution or general rules of responsibility for private acts in examining the legitimacy of a defensive response to private acts of violence. In addition, a number of these scholars are more willing to stray from Nicaragua-type criteria and admit that toleration or encouragement alone is sufficient to treat the State as constructively engaged in a use of force or an armed attack. Hans Kelsen, for instance, argued that:

> There are a number of way in which force may be used indirectly by a state that may be interpreted as constituting an armed attack, for example, . . . the undertaking or encouragement by a state of terrorist activities in another state or the toleration by a state of organized activities calculated to result in terrorist acts in another state.[106]

Rosalyn Higgins adopted a similar view:

> 'Use of force' by Governments can also be passive, as well as active, can be indirect as well as direct: thus the arming of rebel groups in another State or the refusal to forbid the training of rebels against another Government on one's own territory, or the failure to restrain volunteers from fighting in another State, are all forms of aggression commonly termed 'indirect aggression'—and from a functional point of view are a use of force.[107]

contras. Interestingly, though, the majority held that the financing of the *contras* was not a violation of Art 2(4) in that it did not 'in itself amount to a use of force'. This seems to be a misreading of the Declaration since any encouragement of private acts would arguably violate its terms provided *the acts* 'involve a threat or use of force'. It is also noteworthy that the Court formulated its position by saying that financing was not 'in itself' a use of force, thereby implying that arming and training the *contra* were 'of themselves' a use of force. This seems to give additional support to the view that the Court was adopting a constructive standard in analyzing the *jus ad bellum* issues.

[105] SC Res 748, UN SCOR, 47th Sess, 3063rd mtg, UN Doc S/RES/742 (1992), see below section 5.4.

[106] H Kelsen, *Principles of International Law*, 2nd edn, (New York, NY, Holt, Rinehart & Winston, 1966) 62–63; see also MS MacDougal and FP Feliciano, *Law and Minimum World Public Order: The Regulation of International Coercion* (New Haven, CT, Yale University Press, 1961) 192; EC Stowell, *International Law: A Restatement of Principles in Conformity with Actual Practice* (New York, NY, Holt, 1931) 89–91 (treating state encouragement or toleration of hostile expeditions as a 'constructive attack').

[107] Higgins, above n 91, p 278.

Other scholars too, such as Skubizewski,[108] Rifaat,[109] Thomas and Thomas,[110] Moore,[111] Erickson,[112] Terry,[113] and Rostow[114] have produced this type of analysis. Though they have differed on what may amount to 'substantial involvement', an armed attack or a use force, they all seem to have embraced a constructive standard in making that determination, in the sense of not approaching the issue as one of assessing whether an agency relationship could be established.[115]

The tenor of these views stands in stark contrast to the attribution-based analysis of self-defense to terrorism that is so prevalent today. But it may be possible to partly explain this discrepancy as a product of its times. During the Cold War period, perceptions of the use of force were decidedly State-centric, and sub-State hostile activity was often the direct result of the strategies of world powers. Non-state actors were often regarded as posing only a minimal danger to the existing regime or to world order, unless State patrons were behind their activities.

It was foreign, and especially superpower, involvement in this kind of private violence that rendered the non-State activity a matter of acute international concern. The primary focus of the international community was thus not private acts of terrorism, but the use, or alleged use, by States of irregular armed insurgents to pursue their Cold War objectives in other countries. Real or alleged foreign intervention in insurgencies and subversive activities in countries such as Korea, Greece, Hungary, Czechoslovakia, Vietnam, Nicaragua and Lebanon, to mention but a few, preoccupied much of the international agenda.[116] In this light, it may have been reasonable to overlook the precise relationship between the State and the private group and debate instead the circumstances in which it

[108] K Skubizewski, 'Use of Force by States, Collective Security, Law of War and Neutrality' in M Sørensen, (ed), *Manual of Public International Law* (New York, NY, St Martin's Press, 1968) 739, 748.

[109] AM Rifaat, *International Aggression* (Stockholm, Almqvist & Wiksell, 1979) 217–18; see also GB Roberts, 'Self-help in Combating State Sponsored Terrorism: Self-defence and Peacetime Reprisals' (1987) 19 *Case W Res J Intl L* 243, 265–66.

[110] AVW Thomas and AJ Thomas Jr, *The Concept of Aggression in International Law* (Dallas, TX, Southern Methodist University Press, 1972) 65–68.

[111] JN Moore, 'The Secret War in Central America and the Future of World Order' (1986) 80 *Am J Intl L* 43, 82–85.

[112] Erickson, above n 6, p 134.

[113] JP Terry, 'Countering State-sponsored Terrorism: A Law–Policy Analysis' (1986) 26 *Nav L Rev* 159.

[114] N Rostow, 'Nicaragua and the Law of Self-defense Revisited' (1986) 11 *Yale J Intl L* 437, 453.

[115] See also T Franck, 'Who Killed Article 2(4) Or: Changing Norms Governing the Use of Force by States' (1970) 64 *Am J Intl L* 809, 812 (saying that mere encouragement would not justify saying an armed attack has taken place, at least in the conventional sense); YZ Blum, 'The Legality of State Response to Acts of Terrorism' in B Netanyahu, (ed), *Terrorism: How The West Can Win* (New York, NY, Farrar, Straus and Giroux, 1986) 133, 137 (arguing that 'an attacked state is entitled to regard the sanctuary state itself as the aggressor, whether or not the state has been unwilling, or unable, to curb terrorist activities from its territory'); Baker, above n 20, pp 37–38 (suggesting that support or toleration of terrorist organizations are themselves an act of aggression).

[116] See discussion of these cases in Higgins, above n 91, pp 288–95; see also Franck, above n 21, pp 69–75.

would be appropriate to view State assistance to private actors as a constructive act of aggression pursued by the sponsoring States themselves.[117] International legal documents and the scholarly works of the period may well have been drafted with these threats in mind.

Today, non-State violence is often far less dependent on State patrons 'pulling the strings' from behind the scenes, and less focused on State-to-State confrontations. As discussed in chapter 7, there is a greater preoccupation with non-State acts of terrorism than with warfare by proxy, and a greater willingness to recognize non-State actors as players on the international stage in their own right. Private actors operate internationally with greater freedom and are able to resort to force on a scale traditionally associated with governmentally directed violence, without necessarily acting as State surrogates.[118] In the light of these developments, State responsibility for private terrorism is more readily viewed as something that must be established rather than presumed. And it may be perceived as more appropriate to treat these questions of State responsibility like any other instance involving conduct that appears genuinely private in nature.

But whatever the origins of the constructive use of force standard, it is necessary to independently examine its merits in regulating modern forms of State involvement in private acts of terrorism. It is important to appreciate that this approach neither replaces the rules of State responsibility for private acts nor denies their relevance whenever use of force questions are not at issue. It merely suggests that the determination of a *jus ad bellum* violation by a State in relation to private violence need not depend on whether the private act is attributable to that State. The relevance of this approach to the present study lies in its potential to provide an appropriate response to the specific problem of private terrorism, and adequately explain the practice of States, without recourse to notions of State responsibility for private conduct.

Of course, the practical difference between a constructive use of force standard and the agency standard may not be all that substantial. Both share the common characteristic that the toleration of private terrorist activity, and the provision of safe harbor or minimal support, is not generally viewed as an armed attack justifying self-defense. As mentioned, there is some support in the literature for a low threshold for triggering this constructive standard that could include mere toleration,[119] but the position of the ICJ in *Nicaragua*, the 'substantial involvement' test in Article 3(g) of the Definition of Aggression, and the position of most commentators, militate against this conclusion.

On this view, the actual difference between the agency and the constructive use of force standard is likely to emerge only when there is substantial State involvement in the private terrorist violence that does not amount to an agency relationship of direction or control. In this case, traditional responsibility criteria may not regard the State as having perpetrated an armed attack, whereas

[117] Schmitt, above n 20, p 400.
[118] For more general discussion of this issue see below section 7.2.
[119] See, eg, authorities cited above n 106 and 107.

the constructive approach examined in this section could allow for such a finding, with the effect of potentially allowing the resort to force in self-defense against the State in a broader range of cases.

As a matter of principle, however, it is not clear whether use of force rules really displace issues of attribution and responsibility.[120] If the question is whether the State has engaged in an act of violence when the immediate perpetrators of that violence are private terrorist actors it would seem that principles of responsibility for the conduct of private actors, rather than constructive legal formulations, are more appropriate tools to use. As Rüdiger Wolfrum has recently argued:

> It has been doubted that principles pertaining to the rules of State responsibility, such as imputability, may be used in the context of self-defence. Through the mechanism of imputability it is established whether a subject may be held internationally responsible for a particular action or omission. Thus, imputability constitutes the indispensable link between an action, relevant in international relations and an entity which may be held accountable for such action. Borrowing in this respect from the Rules on State Responsibility, self-defence is justified if one considers that both state responsibility and self-defence are mechanisms for the enforcement of international law. On the basis of that approach, the rules on imputability should apply to both mechanisms.[121]

It is difficult to avoid the conclusion that the sources surveyed in this section rely on a somewhat artificial mechanism to overcome a specific problem, rather than a legal theory grounded in firm conceptual foundations. In reality, it is the terrorist attack by the private actors that constitutes the actual armed attack. Pretending that the State's involvement in that attack somehow independently constitutes an armed attack provides a possible way to justify coercive action against the State, but it lacks underlying coherence. It seems more reasonable to treat the question of whether an armed attack has occurred, and whether the State may be regarded as directly responsible for that attack, as two distinct issues rather than conflating them into one.

As shall be argued below,[122] these considerations suggest that a constructive approach to State responsibility for private acts of terrorism represents an unsatisfactory solution. Beyond its failure to provide an adequate explanation for the international response to the September 11th attacks, it will be suggested that the artificial nature of this view renders it an inappropriate legal mechanism for dealing with contemporary forms of terrorism by non-State actors.

At the same time, embedded in the constructive use of force standard is an appreciation that it is sometimes necessary to look beyond the formal

[120] See discussion below section 7.4.

[121] R Wolfrum, 'The Attack of September 11, 2001, The Wars against the Taliban and Iraq: Is There A need to Reconsider International Law on the Recourse to Force and the Rules in Armed Conflict?' (2003) 7 *Max Planck YBUN L* 1, 37; see also J Brunnée and SJ Toope, 'The Use of Force: International Law After Iraq' (2004) 53 *Intl & Comp L Q* 785, 795.

[122] See below sections 6.2.3 and 7.4.

relationship between the State and the private actor and consider the actual contribution of the State to the private terrorist activity. In this sense, perhaps, the notion that a State's involvement in private acts of terrorism can itself constitute an unlawful use of force bears some resemblance to the causal analysis of State responsibility for private violence that will be examined in Part III of this study.

5.4 STATE PRACTICE BEFORE SEPTEMBER 11TH

5.4.1 Looking at State Practice

In trying to ascertain the merits of these different approaches to State responsibility for terrorism it is natural to turn to the practice of States. Indeed, there are abundant examples of State action that have been broadly characterized as a response to alleged terrorist attacks. The problem is that it is exceedingly difficult to distil from these cases a consistent commitment to any particular State responsibility regime.

Extrapolating legal principles from State practice is often a complex exercise. International reactions to a given terrorist incident are always a function of its peculiar facts and context.[123] In addition, terrorism cases have been considered primarily by political rather than judicial organs. As a result, the outcome can sometimes be dictated more by national interest than by dispassionate legal analysis.[124] As the High Level Panel appointed by the UN Secretary General has noted, in the case of Security Council there is a certain 'lack of confidence in the quality and objectivity' of decisions that 'have often been less than consistent, less than persuasive and less than fully responsive to very real state and human security needs'.[125]

[123] C Stahn, '"Nicaragua is dead, long live Nicaragua"—the Right to Self-defence under Article 51 UN Charter and International Terrorism in National and International Law' in C Walter, *et al*, (eds), *Terrorism as a Challenge for National and International Law: Security Versus Liberty?* (Berlin, Springer, 2004) 827, 832. In addition, there is sometimes a tendency, especially in the Security Council, to treat incidents in isolation without reference to the overall context of the relationship between the parties, see D Bowett, 'Reprisals Involving Recourse to Armed Force' (1972) 66 *Am J Intl L* 1, 8–9 (referring to how this makes the task before the Council easier, but may work to the disadvantage of the State claiming the right to act in self-defense); see also WV O'Brien, 'Reprisals, Deterrence and Self-defence in Counter–terror Operations' (1990) 30 *Va J Intl L* 421, 475 (criticizing the Council's record on counter-terrorist activity); Arend and Beck, above n 5, pp 156–57 ('some international criticism of counter-terrorist operations has been informed by geopolitical and ideological considerations, not by strictly legal ones').

[124] Franck, above n 21, p 96:

> whether an action is deemed lawful or not has come to depend on the special circumstances of each case, as demonstrated to, and perceived by, the political and legal institutions of the international system. Of course, in any debate on the use of force, some states will respond solely by ideology, political alignment, national self-interest, or historical imperatives. Many others, however, will consider evidence of the circumstances and manner in which force was deployed.

[125] Report of the High–Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, UN Doc A/59/565 (2004) 56.

Legal arguments raised by States in response to international incidents may reflect a desire to coat a particular political position in a veneer of legitimacy rather than reflect a general commitment to a given rule of law. Cases that raise national security concerns and attract power politics do not always make for tidy, consistent jurisprudence, or allow for confident assertions about applicable norms.

These considerations dictate a measure of circumspection in any analysis of State practice, but they do not undermine its central role in the effort to identify normative expectations. For the purposes of this inquiry, the most useful potential source of evidence lies in those instances where States have engaged in forcible defensive measures in response to what they allege, and what have been widely regarded as, private terrorist attacks.

In all these instances, the responding State has needed to justify its conduct, and its resort to force has often prompted an international reaction. Conceivably, such cases could show that the terrorist attack and the legitimacy of the counter-terrorist response were measured in part either on the basis of an agency standard, absolute or complicity responsibility, specific rules on the use of force, or some other standard. The following sections survey some prominent examples from State practice prior to September 11th, to consider what, if anything, they reveal about the mechanism for engaging the direct responsibility of the State in cases of private terrorism.[126]

5.4.2 State Responses to Terrorism: A Survey

Israel–Egypt (1956)

The Arab–Israeli conflict provides many examples of terrorist and counter-terrorist activity that have generated an international response. In the period following the Israeli–Arab Armistice of Agreements of 1949,[127] the Security

[126] It can, of course, be difficult to distinguish acts of terrorism from other forms of private violence such as insurgencies, civil riots, criminal enterprises and the like. States may be involved in many forms of private violence that need not be generally regarded as support or toleration for a terrorist group. International actors also often disagree whether a given act qualifies as terrorism. For the purpose of this more limited inquiry, however, this study relies on prominent cases that have generally been treated by the international and academic community as instances of terrorism and meet the working definition suggested in section 4.2.6. The aim is not to look at all possible forms of State action in relation to private violence but to see what may be learnt about direct State responsibility from the more standard terrorism cases in which specific counter-terrorism obligations are widely regarded as applicable. For a broader survey of different kinds of State involvement in private violence, beyond the classic terrorism cases, see Kress, above n 21.

[127] Egyptian–Israeli General Armistice Agreement, 24 Feberuary 24, 1949, 42 UNTS 251; Israeli–Lebanese General Armistice Agreement, 23 March 1949, 42 UNTS 287; Hashemite Kingdom of Jordan–Israel General Armistice Agreement 42 UNTS 303, 3 April 1949; Israeli–Syrian General Armistice Agreement, 20 July 1949, 42 UNTS 327. It is worth recalling in this context that the Security Council, in resolution 56 of 19 August 1948, decided that: '(a) Each party is responsible for the actions of both regular and irregular forces operating under its authority or in territory under its

Council was regularly called upon to intervene after forcible Israeli responses to raids by non-State forces from neighboring States.[128] In these instances, the scope of self-defense served as a general framework for the debate. In general, Israeli justifications—based on the right of self-defense and repeated violations of the armistice—were not often well received in the Council. Criticism for Israeli action focused on the proportionality of the response or its alleged reprisal character. While Israel occasionally made reference to the responsibility of the host State, issues of direct responsibility for private terrorist acts did not receive specific consideration by the Council.

The events of October 1956 present a useful example. In the midst of the Suez Canal crisis, Israeli armed forces entered the Sinai Peninsula in pursuit of *fedayeen* guerillas and the removal of their bases of operation in Egyptian territory.[129] At the Security Council, Israel justified its action by referring to repeated infiltrations and terrorist attacks by the *fedayeen* in Israeli territory and relied on the right of self-defense under Article 51 of the Charter.[130] Citing official Egyptian support for the *fedayeen* and its condemnation by United Nations authorities, Israel also asserted that 'it cannot seriously be suggested that these activities are not the direct responsibility of the Government of Egypt'.[131]

It is not entirely clear whether Israel considered the claim of direct Egyptian responsibility as indispensable to the justification of self-defense that it advanced in this case.[132] What is clear is that most Security Council members were unmoved by these explanations and ignored any reference to Egyptian responsibility in their statements. Cuba, China, Iran, Peru, United States, Yugoslavia and the Soviet Union were prepared to support a resolution that found Israel in violation of its armistice obligations.[133] They were satisfied in justifying their positions, however, on the basis that Israel's response was disproportionate or amounted to an armed reprisal, without taking a position on Israel's claim of direct State responsibility.[134] Even Britain and France, who

control; (b) Each party has the obligation to use all means at its disposal to prevent action violating the Truce by individuals or groups who are subject to its authority or who are in territory under its control', SC Res 56, UN SCOR, 3rd Sess, 354th mtg, UN Doc S/983 (1948). Reference to the prohibition of action by 'non-regular forces' and to the prevention of hostile activity from the territory of the Parties was also included in the Armistice Agreements.

[128] For a more general discussion, see Bowett, above n 123 (demonstrating a checkered record, influenced by a variety of legal and political factors, by which certain Israeli actions were condemned while others were tolerated).

[129] Franck, above n 21, pp 55–56.

[130] UN SCOR, 11th Sess, 749th mtg, UN Doc S/PV.749 (1956) 8.

[131] *Ibid*, p 15. For the Egyptian response, see *ibid*, pp 18–20.

[132] Indeed, Israel has—before and since—justified counter-terrorist activity as self-defense without necessarily alleging direct host State responsibility for the terrorist acts themselves, see below n 141.

[133] *Ibid*, p 31.

[134] See, eg, UN SCOR, 748th mtg, UN Doc S/PV.748 (1956) (US) 2; *ibid*, p 4 (Yugoslavia); *ibid*, p 5 (USSR.); UN SCOR, 749th mtg, UN Doc S/PV.749 (1956) (China) 22. The kinds of views of self-defense offered by the scholars surveyed in section 5.1.4 did not feature in the debate. None of the

vetoed the resolution, did not expressly endorse Israel's position regarding Egyptian responsibility for the terrorist attacks, justifying their position on the basis of political considerations.[135]

At the subsequent meeting of the General Assembly—its first emergency special session convened under the Uniting for Peace procedure—similar views were expressed.[136] In the end, the Assembly concluded, by a vote of 64 to 5 with 6 abstentions, that Israel had violated the armistice, but refrained from condemning its action and referred also to the need to end 'raids across the armistice lines'.[137]

In general terms, it is difficult to isolate this incident from the broader conflict regarding the Suez Canal that engaged the interests of several influential States. To the extent that it concerned Israeli counter-terrorist activity, the record of both the Council and the Assembly does not reveal a great deal about the views of States regarding Egyptian responsibility for the *fedayeen* raids.

Theoretically, it might be argued that the failure to address Israel's assertion of Egyptian responsibility is evidence that Member States did not accept that direct responsibility could be established on the facts. But many other legal and political factors were at play. No State condemned the Israeli action on the specific ground that direct State responsibility had not been demonstrated. In the circumstances, it may be equally plausible to suggest that Member States were simply unconcerned with this issue in determining their response to the situation.

Portugal–Zambia, Senegal, Guinea (1969), South Africa–Angola (1981)

During the 1960's, 1970's and early 1980's colonial powers such as Portugal and South Africa resorted to forcible measures against irregulars in foreign States alleged to be engaged in terrorist activity within their colonial territories.[138] In

States claimed, for example, that the *fedayeen* violence was unattributable to Egypt and that therefore no right to self-defense could arise in principle. Certain Arab States argued that the *fedayeen* attacks were themselves legitimate such that any response by Israel was unjustified.

[135] While France made detailed reference to Egyptian hostility and support for the *fedayeen*, the general Anglo-French position in the Council argued more broadly that the resolution was inappropriate in the circumstances—a position motivated, no doubt, at least in part by their own military engagement in the Suez crisis, see Bowett, above n 123, p 12.

[136] See generally, UN GAOR, 1st Emergency Special Session, 561st–567th mtg UN Doc A/PV.561–567 (1956).

[137] GA Res 997 (ES-I), UN GAOR, 1st Emergency Spec Sess, Agenda Item 5, Annexes, UN Doc A/RES/390 (1956) 33. A series of other resolutions were adopted during the session, including the establishment of UNEF to interpose between the sides.

[138] Other examples include a 1964 attack by British forces on a fort in Yemen claimed to serve as a base for raids into the South Arabian Federation, a British Protectorate. While Britain justified its action as self-defense, most States viewed it as an unlawful reprisal and it was expressly condemned as such by the Council without any reference to State responsibility issues, see 1964 UNYB 182, UN Sales No E.65.I.1; SC Res 188, UN SCOR, 19th Sess, 1111th mtg, UN Doc S/5649 (1964). Britain itself abstained on this resolution, see generally, Alexandrov, above n 12, pp 170–71. A similar situation occurred with French troops in Algeria who in 1958 and 1961 used force against alleged FLN targets in Tunisia, see *ibid*, pp 168–70; see also 1961 UNYB 107, UN Sales No E.62.I.1.

these cases, justifications of self-defense provided by the colonial powers were treated with little sympathy, often because they were regarded as attempts to maintain illegal colonial control.[139] As a result, hostile sub-State activity by anti-colonialist forces and the support provided for them by third States were generally tolerated, while forcible responses of the colonial power were almost automatically condemned as illegitimate.

In 1969, for example, several complaints were brought to the Security Council by Zambia, Senegal and Guinea regarding multiple military incursions of Portuguese forces into their territory.[140] Portugal retorted that these States had illegally permitted the use of their territory as a sanctuary for private terrorists engaged in armed attacks against Portuguese colonies, and that Portugal had thus been compelled to resort to defensive action against these non-State actors.[141] The Council dismissed these explanations and Portuguese action was bluntly condemned.[142] None of these occasions, however, prompted an investigation into the precise nature of host State responsibility for the attacks against Portugal. The record clearly indicates that the treatment of the incidents was dictated by antipathy to ongoing Portuguese control over its colonial possessions.[143]

The international community reacted in a similar way to raids by the apartheid regime of South Africa into neighboring States justified as defensive

[139] C Gray, *International Law and the Use of Force*, 2nd edn, (Oxford, OUP, 2004) 111–13.

[140] For a survey of these incidents see 1969 UNYB 135–45, UN Sales No E.71.I.1. For other incidents involving Portugal see 1966 UNYB 117, UN Sales No E.67.I.1; 1967 UNYB 123, UN Sales No E.68.I.1; 1968 UNYB 159, UN Sales No E.70.I.1; 1970 UNYB 187, UN Sales No E.72.I.1; 1971 UNYB 113, UN Sales No E.73.I.1; 1972 UNYB 136, UN Sales No E.74.I.1; 1973 UNYB 109, UN Sales No E.75.I.1; see also AM Weisburd, *Use of Force: The Practice of States Since World War II* (Philadelphia, PA Pennsylvania University Press, 1997) 77–85.

[141] Gray argues that these claims suggest implicit acknowledgement that 'if there is no state involvement in the actions of irregular forces there can be no self-defence against the state'. She claims also that Portugal and other States in fact tried to argue that the host 'States were responsible for the acts of terrorists operating from their territories', see Gray, above n 139, pp 111–12. Gray makes a similar argument with respect to Israeli incursions in Lebanon, claiming that Israel has 'stressed that Lebanon and Syria were colluding with Hezbollah; that is, it did not claim a right to act against non-state actors in the absence of territorial state involvement', see *ibid*, p 173. But, as the survey in this section reveals, this seems to be reading too much into the State practice. The fact that States have pointed to counter-terrorism violations by the host State does not mean that a claim of direct responsibility was being made or that such direct responsibility was necessary to justify defensive action against terrorist targets. For example, while Portugal did allege violations of counter-terrorism obligations by the host State it did not expressly justify its actions on this basis, and there is no indication that it claimed that the host State was itself responsible for the terrorist acts. As for Israel, it has consistently advocated that the right of self-defense extends to attacks by non-State actors irrespective of the attributability of those attacks to a host State. In general terms, allegations of State involvement or failure to act in these cases may have been offered not to allege *direct* State responsibility for the terrorist activity, but merely to explain the necessity for defensive action against the terrorist targets in the absence of appropriate measures being taken by the host State. Moreover, even if Gray's interpretation is correct, these cases do not reveal by what standard such direct responsibility is determined.

[142] SC Res 268, UN SCOR, 24th Sess, 1491st mtg, UN Doc S/9360 (1969) (Zambia); SC Res 273, UN SCOR, 24th Sess, 1520th mtg, UN Doc S/9542/Rev.1 (as orally amended) (1969) (Senegal); SC Res 275, UN SCOR, 24th Sess, 1526th mtg, UN Doc S/9574 (1969) (Guinea).

[143] Bowett, above n 123, p 12.

measures or hot pursuit against SWAPO and ANC forces.[144] While Cold War tensions occasionally influenced the outcome of debates in the Security Council, the evidence suggests that strong aversions to the apartheid regime shaped the views of many States.

One such incident involved a large-scale military incursion by South African forces into Angola in 1981. South Africa insisted that its acts were directed solely against SWAPO forces, and that such action was necessary given the organization's involvement in numerous terrorist attacks in Namibia, with safe harbor and support being provided by neighboring States.[145] Most UN members participating in the debate reacted scornfully to South African arguments, and many justified SWAPO violence. The incursion was broadly condemned as a violation of Angola's sovereignty, with significant emphasis placed on the repressive nature of the apartheid regime and its illegal occupation of Namibia. In the end, a resolution that would have condemned South Africa's invasion was vetoed by the United States on the grounds that it failed to address the role of the Soviet Union and Cuba in providing arms to SWAPO and fuelling the explosive atmosphere.[146] But the general response to the conflict was clearly affected by attitudes towards the South African regime, and legal questions regarding the precise nature of Angola's responsibility for SWAPO activity were of little concern. As Reisman has argued, opposition 'seemed to arise more from revulsion at South Africa . . . than a considered legal judgment of the lawfulness of pursuing terrorists into the territory of a state in which they have found haven'.[147]

Interestingly, the Appeals Chamber in the *Tadic Case* has relied on these cases as evidence that financial or military assistance to a non-State armed group is insufficient for direct attribution. The majority in *Tadic* argued that despite the support provided by States for groups such as the PLO, SWAPO or the ANC 'other states, including those against which the movements were fighting, did not attribute international responsibility for the acts of the movements to the assisting States'.[148]

It is true, of course, that in these cases States claiming to be engaged in counter-terrorist activity have ventured at most broad generalizations about the responsibility of sponsoring States without claiming that the terrorist attacks to which they were victim were directly attributable to them. The conclusion drawn

[144] For additional examples involving South Africa see, eg, 1976 UNYB 161, 167 UN Sales No E.78.I.1;(Zambia, Lesotho); 1980 UNYB 263, UN Sales No E.83.I.1. (Zambia); 1981 UNYB 221 UN Sales No E.84.I.1; (Mozambique); 1985 UNYB 189, UN Sales No E.89.I.1; (Botswana, Lesotho); see also FM Higginbotham, 'International Law, the Use of Force in Self-defence and the Southern African Conflict' (1987) 25 *Colum J Transnatl L* 529. For a discussion of South African reliance on hot pursuit, see Gray, above n 139, p 112.

[145] UN SCOR, 36th Sess, 2298th mtg, UN Doc S/PV.2298 (1981) 3.

[146] UN SCOR, 36th Sess, 2300th mtg, UN Doc S/PV.2300 (1981) 5–6. Condemnation was included, however, in subsequent resolutions of the General Assembly, see, eg, GA Res 36/172, UN GAOR, 36th Sess, 102nd mtg, UN DOC A/RES/36/172 (1981).

[147] Reisman, above n 23, p 53; see also Bowett, above n 123, p 12.

[148] Case No IT–94–1–A *Prosecutor v Tadic* (1999) reprinted in (1999) 38 ILM 1518, 1544.

by the Appeals Chamber in *Tadic* from this conduct is thus plausible, but it is not incontestable.

For one thing, the Tribunal seems to assume that direct State responsibility must be established in order to justify a counter-terrorist response directed specifically against terrorist targets. However, the absence of a reference to direct responsibility in these cases could also serve as evidence that the legitimacy of self-defense measures that are limited to terrorist targets does not turn on establishing host State responsibility.[149] For the inference drawn by the Appeals Chamber to be more convincing, it would be useful if the counter-terrorist activity had been specifically rejected because of a failure to attribute the terrorist conduct to the State. Such evidence, however, is in short supply.

Israel–Lebanon (1968), (1982)

Hostile confrontations between Israel and non-State armed groups operating from Lebanese territory have long been a central feature of Israeli–Lebanese relations. Over the decades, numerous violent incidents have involved terrorist attacks and Israeli counter-terrorist activity of varied duration and intensity.

In general terms, the legal argumentation that has accompanied these events mirrors that used in hostilities between States and terrorist groups elsewhere in the world. Israel has pointed to Lebanon's failure to prevent terrorist activity emanating from its territory, it has accused Lebanon and other regimes of support for the terrorist groups, and has argued that in the face of such violations it is entitled to resort to defensive action against terrorist targets. On some occasions, Israel has alleged that the toleration and support offered by certain States, including Lebanon, to non-State forces engaged their direct responsibility.[150] The success of these arguments in averting international condemnation for Israeli counter-terrorist measures has depended on the circumstances, but they have often fallen on stony ground.[151]

The Beirut Raid of 1968, represents a rare occasion on which issues of State responsibility for private terrorist activity were directly considered.[152] In response to an attack on an Israeli civilian aircraft at Athens airport, Israeli forces

[149] For a discussion of this view, see above section 5.1.4.

[150] See, eg, Statement of Representative of Israel, UN GAOR, 30th Sess, 6th Committee, 1580th mtg, UN Doc A/C.6/SR.1580, 281 ('where a State was directly or indirectly involved in acts of terror, direct State responsibility was involved'); see also *Accessories to Terror: The Responsibility of Arab Governments for the Organization of Terrorist Activities*, reprinted in Letter dated 20 November 1972 from the Permanent Representative of Israel to the United Nations addressed to the Secretary–General, UN Doc A/C.6/L.872 (1972).

[151] For a very useful survey of the arguments and themes that have been invoked in assessing Israel's claims to self-defense, see O'Brien, above n 123.

[152] For a full discussion of the incident see RA Falk, 'The Beirut Raid and the International Law of Retaliation' (1969) 63 *Am J Intl L* 415; YZ Blum, 'The Beirut Raid and the International Double Standard: A Reply to Professor Richard A Falk' (1970) 64 *Am J Intl L* 73. Blum, in his argument, seems to deny that there is a distinction between responsibility for the act itself and responsibility for encouraging or tolerating the act. He also points to 'official post factum approval or ratification of this Lebanon-based guerilla act', see *ibid*, pp 82–83.

destroyed thirteen empty civilian Arab aircraft in their hangars at Beirut airport. In addressing the Council, Israel identified the assailants in Athens as members of 'a paramilitary organization which operates quite openly in Beirut and with the full knowledge and the blessing of the Lebanese Government'.[153] Pointing to evidence of support and safe haven provided by Lebanon for major terrorist groups, Israel argued that Lebanese responsibilities 'are direct responsibilities not vicarious ones',[154] and justified its action as self-defense. In a later statement, the Israeli representative quoted from a Danish jurist that the 'State from whose territory a group of armed men carry out actions against another State carry the full responsibility for the acts of the group'.[155]

Israel's arguments found no support in the Council and a resolution condemning the raid was unanimously adopted.[156] During the debate, the United States delegate condemned the Israeli action stating that 'nothing we have heard has convinced us that the government of Lebanon is responsible for the occurrence in Athens'.[157] In that context, he argued that the Government of Lebanon had made efforts to control *fedayeen* groups, and that in any event the Israeli action was clearly disproportionate.[158] In doing so, he may have inferred that had Lebanon's failure to control the fedayeen been established, its direct responsibility would have been triggered and it would have been appropriate to engage in proportionate defensive action against Lebanese targets.[159] Though, it is also plausible that the US delegate was merely countering the Israeli claim, without intending to convey any position on the grounds on which direct responsibility might be triggered.

The Lebanese representative felt compelled to respond to Israeli accusations of responsibility by asserting that 'in international law the theory that a State can be held responsible for acts done by its inhabitants abroad of their own choice no longer has to be shown: the answer is clearly in the negative'.[160] At the same time, he denied any allegation of Lebanese encouragement for *fedayeen* attacks.[161] Several other States, including France, Brazil and the Soviet Union denied that there was evidence suggesting Lebanon could be held directly responsible for the Athens attack, without explaining the circumstances in which direct responsibility could, in their view, be triggered.[162]

[153] UN SCOR, 23rd Sess, 1460th mtg, UN Doc S/PV.1460 (1968) 3.
[154] *Ibid*, p 5.
[155] UN SCOR, 23rd Sess, 1461st mtg, UN Doc S/PV.1461 (1968) 18.
[156] SC Res 262, UN SCOR, 23rd Sess, 1462nd mtg, UN Doc S/RES/262 (1968).
[157] UN SCOR, 23rd Sess, 1460th mtg, UN Doc S/PV.1460 (1968) 6.
[158] *Ibid*.
[159] Gray, above n 139, p 161.
[160] UN SCOR, 23rd Sess, 1461st mtg, UN Doc S/PV.1461 (1968) 3. As evidence of his argument, The Lebanese representative referred to the initial Israeli denials of responsibility for abducting the Nazi war criminal, Adolf Eichmann, in Argentina in 1960.
[161] *Ibid*, p 14.
[162] See UN SCOR, 23rd Sess, 1462nd mtg, UN Doc S/PV.1462 (1968) 5. The Soviet Union did comment, however, that 'a State can be held responsible only for acts committed by its own organs, armed forces *and citizens* in the territory of a State. International law does not hold a state responsible for acts of citizens of other States in the territory of a third State' (emphasis added).

This curious exchange on the issue of responsibility was not the decisive factor in the adoption of a resolution condemning the Israeli action. The bulk of attention was devoted to denouncing the raid as a reprisal action. Still, the positions expressed by some States are at least evidence of their rejection of any notion of absolute State responsibility[163] and may allow for suppositions regarding their views on whether the failure to prevent or abstain is a sufficient basis for direct responsibility.[164] Any such inferences are speculative, however, given that these States generally disputed the fact that a failure to prevent or to abstain had been established.

In June 1982, the situation between Israel and Lebanon escalated significantly, after Israel responded to ongoing attacks by the PLO and other armed groups originating from Lebanese territory with a large-scale invasion.[165] The details of this long and complex conflict are beyond the scope of this study, but several of its aspects deserve attention.[166]

In defending its 1982 operation, Israel generally avoided claims of direct Lebanese responsibility.[167] It consistently maintained that it had no territorial ambitions in Lebanon, and was engaging in defensive action against terrorist targets only, in view of Lebanon's ongoing failure to meet its counter-terrorism obligations.[168] While accusing Lebanon of abdicating its legal duties, Israeli representatives occasionally referred to the difficulties Lebanon faced in doing

[163] Bowett, above n 123, pp 13–15. Bowett also suggests that given the fact that Lebanon and other Arab states considered themselves politically unable to risk campaigns against popular guerilla forces, Israeli action directed at the governments themselves are, in his view, 'misplaced'. He thus suggests that the reasonableness of counter-terrorist activity will often depend on the target chosen, *ibid*, p 20. For a factual and legal response to this argument see Blum, above n 152, pp 83–85.

[164] See discussion below section 5.4.3.

[165] There were, of course, numerous incidents in the intervening period, see O'Brien, above n 123, pp 426–54. These included, for example, the 1978 Litani operation which led to the adoption of Security Council resolution 425 and the establishment of UNIFIL, see SC Res 425, UN SCOR, 33rd Sess, 2074th mtg, UN Doc S/RES/425 (1978) (calling, *inter alia*, for Israeli withdrawal, and for the return of Lebanon's effective authority to the area).

[166] For conflicting views regarding the Israeli operation see, eg, Feinstein, above n 71; T Mallison, 'Aggression or Self-defence in Lebanon in 1982?' (1983) 77 *Am Soc Intl L Proc* 174.

[167] It is worth noting that PLO activity in Lebanon was allegedly regulated by the terms of a 1969 agreement with Lebanon, and later protocols, which granted the PLO security and administrative control over Palestinian refugee camps in Lebanon as well as the authority to conduct operations into Israel, see Gross, above n 64, pp 462, 467–68; Feinstein, above n 71, p 371. In this sense, it may have been possible to argue that the PLO operated as a *de facto* organ of Lebanon within the meaning of Art 4 of the ILC Draft Articles.

[168] See, eg, Statement of Ambassador Blum, UN SCOR, 37th Sess, 2375th mtg, UN S/PV.2375 (1982) 3. The tenor of the Israeli argument is striking in its similarity to the arguments used by the US in the early 20th century to justify entering Mexico to target bands of marauders that had attacked American villages, see, eg, Letter from Secretary of State Lansing to the Mexican Ambassador, 26 August 1919, reprinted in (1941) 2 *Hackworth Digest* 300:

> The Mexican government has had ample time and warning to adopt adequate measures to restore orderly conditions. The government of the United States cannot be expected to suffer the indefinite continuance of existing lawless conditions along its border which expose its citizens to maltreatment at the hands of ruffianly elements of the Mexican population, which their government seems unable to control, and which have undoubtedly been encouraged to continue their acts of aggression . . . by reason of the immunity from punishment for such acts which they have enjoyed.

so, owing to the control of south Lebanon by non-State armed groups and the support offered them by third States, including Syria and Iran.[169] Indeed, the debates held, and resolutions adopted, during the crisis placed significant emphasis on the need to restore Lebanese sovereignty, which in part reflected recognition that the non-State violence emanating from its territory was generated by forces beyond its control.[170] For its part, Lebanon, though it objected most strenuously to the Israeli action, argued that it could 'in no way be held accountable' since the bases from which the attacks emanated were not subject to its authority.[171]

Multiple legal issues were raised by the 1982 Israeli operation, but most member-States limited discussion to the legitimacy and scope of military measures in response to terrorist attacks, without deliberating on the nature of Lebanon's responsibility for Palestinian terrorist activity. Many Arab and developing States regarded the Israeli invasion as aggressive rather than defensive in nature, while many others treated it as wholly disproportionate to the attacks that preceded it, and some sought to justify PLO violence as legitimate resistance.[172]

The Israeli–Lebanese experience reveals the reluctance of many States at the time to accept self-defense claims against terrorist operatives, at least where they are perceived to be disproportionate or politically counterproductive.[173] As

[169] Statement of Ambassador Blum, UN SCOR, 37th Sess, 2375th mtg, UN S/PV.2375 (1982) 5–6 (referring, in particular, to the lack of effective Lebanese authority due to foreign intervention); see also UN SCOR, 37th Sess, 2376th mtg, UN S/PV.2376 (1982) 3. A precursor to these statement can be found, for example, in the remarks of Israeli Ambassador Herzog in the debates regarding the 1978 Litani operation, see UN SCOR, 33rd Sess, 2071st mtg, UN Doc S/PV.2071, pp 6–7 ('the Government of Lebanon has lost control and, I dare say, sovereignty over a significant part of its own territory'); see also Bowett, above n 123, p 20. For a broader discussion of this issue, see below section 7.2.1.

[170] See, eg, SC Res 508, UN SCOR, 37th Sess, 2374th mtg, UN Doc S/RES/508 (1982); SC Res 520, UN SCOR, 37th Sess, 2395th mtg, UN Doc S/RES/520 (1982) (referring, indirectly, to the presence of Syrian forces in Lebanon, and the need to remove 'all non-Lebanese' forces); see also below n 176.

[171] See, eg, Letter dated 17 May 1983 from the Permanent Representative of Lebanon to the United Nations to the President of the Security Council, UN Doc S/15087 (1982); Franck, above n 21, p 57; B Gemayel, 'The Price and the Promise' (1985) 63 *Foreign Aff* 759. This view was also reflected in earlier statements by Lebanese representatives, see, eg, Statement of the Permanent Representative of Lebanon to the United Nations to the General Assembly, UN GAOR, 31st Sess, 32nd plenary mtg, UN Doc A/PV.32 (1976) 602 ('The Palestinians acted as if they were a "State" or "States" within the State of Lebanon . . . the arm of Lebanese law could not reach them. Those camps in fact became centers for the training of mercenaries who were sent and financed by some other Arab States . . .').

[172] For a general survey of the views expressed see O'Brien, above n 123, pp 454–60; see also Alexandrov, above n 12, pp 177–79. See also Gray, above n 139, p 113 (for the view that Israel's action was rejected because its presence in Lebanon was regarded as an illegal occupation). For a response to this argument see Franck, above n 21, pp 59–60 (drawing a distinction between attacks within territories held by Israel, and attacks on Israeli sovereign territory); see also Bowett, above n 123, p 19.

[173] A similar pattern of activity in the Security Council followed Israeli counter-terrorist activity against Fatah operatives in Tunisia in 1985 and 1988, respectively. Israel justified its action as self-defense against terrorism and argued that Tunisia had to accept the consequences of allowing its territory to serve as a base for Palestinian terrorist groups, stating, for example, that: 'We have struck only at this base and at no other facility . . . a country cannot claim the protection of sovereignty when it knowingly offers a piece of its territory for terrorist activity against other nations . . .'. Both actions were strongly condemned as illegal uses of force, without reference to Tunisian

Franck has noted, 'Israel's claim to be acting in self-defense precisely poses the question whether such a right arises against a state which harbors infiltrators and permits trans-border subversion, yet has not itself participated in these armed attacks'.[174]

In the context of the 1982 crisis, most States have answered this question without express reference to direct State responsibility, and have preferred to limit their response to an examination of the necessity and proportionality of the action. This may be partly explained by the fact that Lebanon's effective control over the territory was limited and that, unlike the response to September 11th, Israeli measures were directed primarily against alleged terrorist targets,[175] rather than facilities of the host State itself.[176]

responsibility. For the 1985 incident, see UN SCOR, 40th Sess, 2615th mtg, UN S/PV.2615 (1985); SC Res 573, UN SCOR, 40th Sess, 2615th mtg, UN Doc S/RES/573 (1985). Significantly, on this occasion the United States expressed principled support for self-defense operations against terrorists, while abstaining on the resolution. For the 1988 targeting of Khalil el Wazir (Abu Jihad), see UN SCOR, 43rd Sess, 2807th–10th mtg, UN S/PV.2807–2810 (1988); SC Res 611, UN SCOR, 43rd Sess, 2810th mtg, UN Doc S/RES/611 (1988). These cases may be contrasted with the Israeli action in Entebbe, Uganda in 1976 to rescue hostages of an Air France airbus that had been hijacked by pro-Palestinian terrorists. In that context, Israel alleged co-operation by Idi Amin with the terrorists, or at least an inability to deal with the matter, but did not expressly claim direct Ugandan responsibility see UN SCOR, 31st Sess, 1939th mtg, UN Doc S/PV.1939 (1976) 12. Efforts to chasten Israel failed, and many Western states including France, Sweden, Britain, the US, and others defended the Israeli action despite the fact that Ugandan soldiers were killed in the course of the rescue operation and considerable damage was sustained to Ugandan property, see JA Sheehan, 'The Entebbe Raid: The Principle of Self–help in International Law as Justification for State Use of Armed Force' (1977) 1 *Fletch F World Aff* 136, 147; Franck, above n 21, pp 82–85; O'Brien, above n 123, pp 443–45. Note also the failure to condemn Egypt when it acted in 1978 to free hostages taken by Palestinian terrorists in Cyprus and in the process engaged in an armed confrontation with members of the Cypriot National Guard, see Franck, above n 21, p 85.

[174] Franck, above n 21, p 59.

[175] According to Dinstein: 'Israeli and Lebanese forces did not exchange any fire at any point in 1982, and the Israeli operation did not amount to war with Lebanon'. There were, however, clashes with Syrian forces but these are regarded by Dinstein as part of the ongoing armed conflict between Israel and Syria, see Dinstein, above n 21, p 218; see also Feinstein, above n 71, p 391.

[176] Subsequent to Israel's withdrawal from South Lebanon in May 2000, there has been an increased focus on the need to ensure Lebanese compliance with its counter-terrorism obligations. This has not developed, however, into a discussion of whether Lebanon as the host State or Syria and Iran, as States allegedly sponsoring Hizbollah activity from Lebanon, might be directly, as opposed to indirectly, responsible for that activity. Following the withdrawal, clashes between Hizbollah and Israel have erupted intermittently. Israel has continued to justify its responses against Hizbollah as self-defense in the face of Lebanese inaction. The Security Council, while calling for an end to military action on both sides of the border, has intensified its pleas that Lebanon ensure the return of its effective authority to the area and recently insisted on the withdrawal of Syrian forces and an end to Syrian interference, as well as the disarming of all militia, see, eg, SC Res 1553, UN SCOR, 58th Sess, 5012th mtg, S/RES/1553 (2004); SC Res 1559, UN SCOR, 58th Sess, 5028th mtg, UN Doc S/RES/1559 (2004); SC Res 1583, SCOR 59th Sess, 5117th mtg, S/RES/1583 (2005); SC Res 1614, UN SCOR, 59th Sess, 5241st mtg, UN Doc S/RES/1614; see also First semi-annual report of the Secretary–General to the Security Council on the implementation of resolution 1559 (2004), UN Doc S/2005/272 (2005); Second semi-annual report of the Secretary–General to the Security Council on the implementation of resolution 1559 (2004), UN Doc S/2005/673 (2005). Lebanon, together with other Arab states, have tended to defend Hizbollah conduct as legitimate resistance, while condemning what is regarded as Israeli provocation and aggression across the line of withdrawal. Lebanon has also contended that it is not required to ensure the safety of Israel's northern border

Switzerland–Jordan (1970)

In September 1970, members of the Popular Front for the Liberation of Palestine (PFLP) hijacked four airliners, including one belong to Swissair. The planes were forced to land in Zerka, Jordan whereupon the hijackers demanded that members of their organization, incarcerated by the Swiss government, be released within 72 hours. The Swiss government decided to submit to the hijacker's demands and freed the prisoners in order to secure the release of the hostages.[177]

The following year, the Chief of the Federal Political Department was called upon to address the question of Jordanian responsibility for the hijacking before the Swiss National Council. He concluded as follows:

> . . . according to the principles of international law, a State is not responsible for the unlawful conduct of persons under its jurisdiction but only for any negligence it may itself have committed in regard to preventing such conduct or bringing it to an end. . . . In the case of Jordan, which is the State primarily concerned in the incidents at Zerka, it is a known and certain fact that the Palestinian movements were defying the power of the Government and had almost entirely removed themselves from that power. Accordingly, Jordan cannot be held responsible for the acts of persons who were no longer subject to its authority. It remains to be seen whether the Jordanian authorities did everything in their power to reestablish the authority of the State. The reply, I believe, admits of no doubt whatsoever, since in fact Jordan has engaged in a civil war and has thereby incurred the gravest risks, precisely in order to eliminate the dissidence of the Palestinian movements.[178]

The above statement appears to invoke the separate delict theory as the relevant legal principle in examining the responsibility of the State for private terrorist acts. Jordan could be responsible not for the hijacking itself, but only for 'any negligence it may itself have committed'. At the same time, this narrow construction may have been connected to the fact that the case concerned only a single terrorist incident directed against a Swiss airline and perhaps reflected Switzerland's desire, having released the persons in its custody, to avoid any further embroilment in the affair. On the facts, the Swiss contended in any event that Jordanian authorities had, despite the turmoil in their country, complied with their due diligence obligations to the best of their abilities in the circumstances.

pending a comprehensive peace settlement, see generally Gray, above n 139, pp 172–75; see also below section 7.2.1 (discussing recent developments in relation to Syria's involvement in Lebanon).

[177] Details of the event are summarized in L Caflisch, 'La Pratique Suisse en Matière de Droit International Public 1970' (1971) 27 *Annuaire Suisse de Droit International* 153, 182.

[178] Reprinted in L Caflisch, 'La Pratique Suisse en Matière de Droit International Public 1971' (1972) 28 *Annuaire Suisse de Droit International* 193, 249–50 (translation from the French).

US–Egypt (1985–86)

An interesting case of counter-terrorist activity directed against State property arose in the wake of the Achille Lauro incident. On 7 October 1985, Palestinian terrorists hijacked the Italian cruise ship with over 400 persons on board and murdered Leon Klinghoffer, a wheelchair bound American passenger. Egyptian authorities later negotiated the release of the vessel and its passengers in return for safe passage for the hijackers on an Egyptian aircraft bound for Tunis. US planes intercepted the flight and forced it to land at a NATO base in Italy to allow for the apprehension and trial of the hijackers.[179]

In this case, the US did not allege direct Egyptian responsibility for the hijacking or rely, explicitly at least, on a right of self-defense. Indeed, it was not particularly obliging in offering any legal justification for its conduct, though it was suggested that the terrorists were akin to pirates, seemingly implying a right of universal jurisdiction to arrest and try them.[180] While Egypt and several other Arab States objected to the action, most other States were either silent or tolerant of the interception, presumably because it resulted in the arrest of terrorists who would otherwise have escaped with impunity.[181] At the same time, there was considerable criticism of the action by legal commentators.[182]

Not all actions of this sort have met with this kind of muted response. In 1973, and again in 1986, Israel intercepted civilian aircraft and forced them to land in order search for suspected terrorists believed to be on board.[183] In both cases the action was broadly condemned in the Security Council, but in the latter instance no resolution was adopted owing to a US veto. Each time, however, the international response was unrelated to the question whether the State in which the

[179] The US did not in fact implement the arrest order. Instead Italian forces, whose jurisdiction over the incident was grounded in the fact that the Achille Lauro flew the Italian flag, took the hijackers into custody. For a more detailed description of the events, see A Cassese, *Terrorism, Politics and Law: The Achille Lauro Affair* (Princeton, NJ, Princeton University Press, 1989) 23–44.

[180] *Ibid*, pp 68–72; GV Gooding, 'Incident–Fighting Terrorism in the 1980's: The Interception of the Achille Lauro Hijackers' (1987) 12 *Yale J Intl L* 158, 160.

[181] See Weisburd, above n 140, p 291; Gooding, above n 180, pp 169–74. For the restrained debate in the Security Council see UN SCOR, 41st Sess, 2622nd mtg, UN Doc S/PV.2622 (1986).

[182] See, eg, O Schachter, 'In Defence of International Rules on the Use of Force' (1986) 53 *U Chic L Rev* 113, 140; Cassese, above n 179, pp 62–76.

[183] The 1973 incident involved the interception of a Lebanese aircraft leased to Iraqi airways. The terrorist suspects were not on board, and Israel released the aircraft following several hours of questioning at an Israeli military base. See UN SCOR, 28th Sess, 1736th – 1739th mtgs, UN Doc S/PV.1736–39 (1973); SC Res 337, UN SCOR, 28th Sess, 1740th mtg, UN Doc S/RES/337 (1973). The 1986 incident involved the interception of a Libyan aircraft believed to be carrying senior terrorist operatives to a meeting in Damascus. The plane was released once it was established that the suspects were not in fact on board. See UN SCOR, 41st Sess, 2651st mtg, UN Doc S/PV.2651 (1986). On this occasion, no resolution was adopted owing to US opposition, while Australia, Denmark, France and Britain abstained on the grounds that the resolution failed to address the terrorism to which Israel was responding. The US itself, while it opposed the Israeli action, did not accept that interception of aircraft for counter-terrorist purposes was 'wrongful *per se*', see UN SCOR, 41st Sess, 2655th mtg, UN Doc S/PV.2655 (1986) 112–13.

aircraft was registered was somehow directly responsible for the acts of the terrorists allegedly on board.

While the specific facts differed somewhat in each instance, the problem raised by such forcible interceptions seemed to concern their implications for international civil aviation rather than any preoccupation with the rules of attribution and State responsibility. Indeed, few would argue that it was illegitimate in principle to seek the arrest and extradition of terrorist suspects for trial. But the legitimacy of intercepting a foreign civilian vessel alleged to carry them in order to effect that arrest has been considered far more controversial.

US–Libya (1986)

In April 1986, following a series of US–Libyan confrontations in the Gulf of Sidra, a discotheque in West Berlin popular with US service personnel was bombed, killing two US servicemen and a Turkish civilian, and injuring 229 other individuals.[184] The Libyan leader, Qaddafi, who had previously threatened attacks against US targets, and was widely regarded as sponsoring and supporting terrorist groups, congratulated the attackers and warned of further violence, though he denied involvement in the discotheque bombing. The Reagan Administration claimed to have conclusive evidence that Libyan agents were directly involved in the attack,[185] and launched air strikes that targeted various facilities, including Libyan State targets, inflicting numerous casualties.[186]

While the United States characterized its measures as self-defense, many States, including Western States, questioned whether the assaults against US personnel amounted to an armed attack, and saw the US response as disproportionate or unnecessary pointing, *inter alia*, to the limited number of casualties as well as the failure to exhaust peaceful alternatives.[187] Third World and Communist States were virtually unanimous in regarding the raid as an act of aggression.[188] A draft resolution submitted in the Council that condemned the US garnered the support of 9 States, with 5 States, including France, the UK

[184] This bombing was preceded by attacks at Israel's El Al airline offices in Rome and Vienna in December 1985, which was perpetrated by the Abu Nidal organization, but for which Libya was also implicated by some States.

[185] Presidential Address to the Nation, International Terrorism, US Department of State Bureau of Public Affairs, Spec Rep No 24 (1986) 1 (President Reagan stated, *inter alia*, that 'Libya's agents planted the bomb').

[186] Targets included the Tripoli and Benina Military Air Field and Tarabulus and Benghazi Military Barracks, as well as Colonel Qaddafi's private residence, alleged to serve also as Libyan military headquarters. According to Libyan officials, 37 people were killed and another 93 injured in the strikes, including Qaddafi's stepdaughter. For details, see Intoccia, above n 71, pp 179–80.

[187] For the discussion in the Security Council, see UN SCOR, 41st Sess, 2674–80th mtg, UN Doc S/PV.2674–80 (1986); see also Alexandrov, above n 12, p 185; Arend and Beck, above n 5, p 154; JM Beard, 'America's New War on Terror: The Case for Self-defence under International Law' (2002) 25 *Harv J L & Pub Pol'y* 559, 564.

[188] O'Brien, above n 123, p 464.

and the US, voting against it.[189] In the General Assembly a condemnatory resolution passed by 79 to 28, with 51 States absent or abstaining.[190]

At the time, the claim of direct Libyan involvement in the discotheque bombing was broadly asserted rather than specifically and publicly demonstrated.[191] Several States made reference to this evidentiary failing in explaining their opposition to the US operation.[192] But for the US as well as the United Kingdom,[193] the fact that they regarded the attack as the direct work of Libyan officials meant that the strikes against Libyan targets could be justified without resorting to claims of State responsibility for non-State acts of terrorism.[194] In contrast to the September 11th attacks, issues of attribution or direct responsibility for private acts did not arise since the US argued that Libyan officials were themselves involved in perpetrating the bombing.[195]

During this period, senior US officials offered a broader justification for responding to terrorism that foreshadowed some of the arguments used following the September 11th attacks. In remarks to the National Defense University early in 1986, Secretary of State, George Schultz, claimed that 'a state which supports terrorist or subversive attacks against another state, or which supports or encourages terrorist planning within its own territory, is responsible for such

[189] UN SCOR, 41st Sess, 2682nd mtg, UN Doc S/PV.2682 (1986) 43.

[190] GA Res 41/38, UN GAOR, 41st Sess, Supp No 53, UN Doc A/RES/41/38 (1986) 34.

[191] Franck, above n 21, p 90. These allegations were only fully substantiated after the United States permitted decoded interception transcripts to be made public in the Berlin Chamber Court where the matter was being investigated, see B Gertz, 'US Intercepts from Libya Play Role in Berlin Bomb Trial' *Washington Times*, 19 November 1997, A13.

[192] O'Brien, above n 123, p 465. See generally UN SCOR, 41st Sess, 2673rd, 2674th, 2676th–2682nd mtg, UN Doc S/PV.2673-74, UN Doc S/PV.2676-82 (1986).

[193] The United Kingdom allowed the use of American bases in its territory to launch the attack. Prime Minister Thatcher explained that this was on the condition that the action 'was directed against specific Libyan targets demonstrably involved in the conduct and support of terrorist activities', see Statement by Prime Minister Margaret Thatcher to the House of Commons, 95 Parl Deb, HC (6th Ser) 726, (1986) 879.

[194] See Letter Dated 14 April 1986 from the Acting Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc S/17990 (1986); Letter Dated 2 October 1987 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary General (detailing official Libyan involvement in bombing that had 'been considered convincing by all who have had access to it'); Statement by the UK, UN SCOR, 41st Sess, 2679th mtg, UN Doc S/PV.2679 (1986) 22, 27 (stating, *inter alia*, that 'the United States has made clear that it has conclusive evidence of direct Libyan involvement in recent terrorist acts and in planning for further such acts. My own Government also has evidence beyond dispute'). In August 2004, Libya agreed to pay compensation to victims of the Berlin attack, see BBC News, Libya Inks $35m Berlin Bomb Deal, 3 September 2004, available at http://news.bbc.co.uk/1/hi/world/europe/3625756.stm.

[195] A similar observation is warranted with respect to US attacks on Iraqi intelligence headquarters in 1993 in response to an alleged Iraqi assassination attempt against ex-President Bush. While the legitimacy of this action on self-defense grounds was questioned by some, it does not raise issues of State responsibility for private acts since Iraqi officials were regarded as responsible for the assassination attempt, see Alexandrov, above n 12, p 188; N Kritsiotis, 'The Legality of the 1993 US Missile Strike on Iraq and the Right of Self-defence in International Law' (1994) 45 *Intl & Comp L* 162; Franck, above n 21, p 94 (arguing that the US action was generally 'supported or understood').

attacks'.[196] President Reagan similarly declared that by supporting terrorist groups 'Libya has engaged in armed aggression . . . just as if he [Qaddafi] had used its own armed forces'.[197]

These statements marked a shift from previous US policy that had favored sanctions and diplomatic pressure against State sponsors of terrorism.[198] But, as noted above, because State officials were implicated in the bombing it was not necessary for States to object to this position when opposing the US raid in Libya. Indeed, the political and academic discourse generated by the incident focused on issues of evidence, defining 'armed attack', and measuring proportionality, leaving aside the nature of State responsibility engendered by the sponsorship or toleration of terrorism.[199]

France, Britain, US–Libya (1988, 1989)

On 21 December 1988, Pan Am Flight 103 exploded over Lockerbie, Scotland killing all 259 passengers and 11 local residents. This was followed by the bombing on 19 September 1989, of UTA Flight 772 as it flew over Niger on its way to Paris, killing 171 people—for which France alleged Libyan involvement. Following indictments against two Libyan officials believed to be responsible for the Lockerbie bombing, the United Kingdom, France and the US issued a tripartite declaration that referred to State responsibility for terrorism without clear reference to the issue of direct responsibility:

> The three States reaffirm their complete condemnation of terrorism in all its forms and denounce any complicity of States in terrorism acts . . . They consider that the responsibility of States begins whenever they take part directly in terrorist actions, or indirectly through harbouring, training, providing facilities, arming or providing financial support, or any form of protection, and that they are responsible for their actions before the individual States and the United Nations . . . Libya [must] commit

[196] GP Schultz, 'Remarks before the Low-intensity Warfare Conference, National Defence University, Low Intensity Warfare: The Challenge of Ambiguity' reprinted in (1986) 25 ILM 204. Interestingly, Schultz was also an early advocate of 'pre-emptive defense' in response to terrorism, foreshadowing the approach of the Bush administration following September 11th, see GP Schultz, 'Terrorism: The Challenge to Democracies' 84 *Dept of State Bull* 21 (August 1984) 33.

[197] Weekly Compilation of Presidential Documents, 17–18 (7 Janusry 1986), reprinted in Sofaer, above n 23, p 104.

[198] The impetus for this shift in US policy may be traced to the Hizbollah bombing of Marine barracks in Beirut in October 1983, that killed 241 servicemen—regarded as the largest single terrorist attack against the US until September 11th. It lead to the adoption of National Security Decision Directive 138 in 1984 that advocated a pro-active posture in confronting terrorism, see Roberts, above n 109, pp 266–67; Turndof, above n 71, p 193. Though, it was not until after September 11th that this strategy was forcefully implemented as US policy in countering terrorism.

[199] For examples of scholarly works that address this issue from different perspectives, see, eg, C Greenwood, 'International Law and the United States Operation against Libya' (1987) 89 *W Va L Rev* 933; Turndof, above n 71; Intoccia, above n 71; P Thornberry, 'International Law and its Discontents: The US Raid on Libya' (1986) 8 *Liv L Rev* 53.

itself concretely and definitively to cease all forms of terrorist action and all assistance to terrorist groups . . . [200]

This declaration was followed by the adoption of Security Council resolution 731 urging the Government of Libya to cooperate fully in the requests to surrender the accused for trial, accept responsibility and pay appropriate compensation.[201] Libya rejected these demands and instituted parallel proceedings against the US and the UK before the International Court of Justice arguing that it had met its relevant obligations under the 1971 Montreal Convention.[202] The Security Council subsequently adopted resolution 748, under Chapter VII of the Charter, in which it found Libya's failure to comply with resolution 731 a 'threat to international peace and security' and indicated that 'organizing, instigating, assisting or participating in terrorist attacks in another state or acquiescing' in such activities was a violation of Article 2(4) of the Charter.[203] Resolution 748 also imposed an embargo on Libya that was expanded in 1993 by the terms of resolution 883.[204]

After years of negotiations, a compromise was reached whereby the Lockerbie suspects were to be extradited to the Netherlands and tried by a special Scottish court.[205] Sanctions were suspended under the provisions of Security Council resolution 1192, once it was established that the Libyan nationals had arrived in the Netherlands and the Libyan Government had 'satisfied the French judicial authorities with regard to the bombing of UTA 772'.[206] In 2003, after further negotiations, Libya informed the Security Council that it accepted responsibility 'for the actions of its officials', agreed to pay compensation, and declared that it renounced terrorism.[207] Consequently, the Council officially lifted all sanctions and ended its consideration of the matter.[208]

[200] See Letter dated 20 December 2001 from the Permanent Representatives of France, the United Kingdom of Great Britain and Northern Ireland, and the United States of America to the United Nations addressed to the Secretary General (20 December 1991), UN A/46/828–S/2309 (1991).

[201] SC Res 731, UN SCOR, 47th Sess, 3033rd mtg, UN Doc S/RES/731 (1992).

[202] See *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Preliminary Objections), (*Libya v UK*) [1998] ICJ 9 (27 February); *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Preliminary Objections), (*Libya v US*) [1998] ICJ 115 (27 February).

[203] SC Res 748, UN SCOR, 47th Sess, 3063rd mtg, UN Doc S/RES/742 (1992).

[204] SC Res 883, UN SCOR, 48th Sess, 3312th mtg, UN Doc S/RES/883 (1993).

[205] For details on the Court, see The Netherlands–United Kingdom, Agreement Concerning the Scottish Trial in the Netherlands, reprinted in (1999) 38 ILM 926.

[206] SC Res 1192, UN SCOR, 53rd Sess, 3920th mtg, UN Doc S/RES/1192 (1998). For the announcement regarding the suspension of sanctions see UN Doc S/PRST/1999/10 (1999). In 2001, one of the suspects in the Lockerbie case, a Libyan intelligence agent named Abdel al-Marahi was convicted by the Scottish court.

[207] Letter dated 15 August 2003 from the Charges D'affaires ai of the Libyan Arab Jamahiriya to the United Nations to the President of the Security Council, UN Doc S/2003/818; see also *New York Times*, 29 April 2003, Libya Accepts Responsibility for Lockerbie Bombing, available at http://www.nytimes.com/reuters/international/international-libya-lockerbie.html (citing Libyan Foreign Minister Mohammed Chagalm as saying 'We have taken on responsibility for this case on the basis of the international law which states that the state takes on responsibility for what its employees do').

[208] SC Res 1506, UN SCOR, 57th Sess, 4820th mtg, S/RES/1506 (2003). Proceedings before the

For all the interesting legal issues associated with this episode, it does not provide much enlightenment about State responsibility for private terrorism. It is certainly notable that the Council seemed to rely on constructive use of force criteria to refer to toleration for terrorism as an Article 2(4) violation. But beyond this, the fact that the case involved agents of the Libyan intelligence services rather than private actors, and was concerned with individual criminal responsibility more than issues of State responsibility, renders it of limited relevance to this inquiry.

Turkey–Iraq (1995–96); Iran–Iraq (1996)

In 1995, Turkish forces pursued Kurdish fighters in north-western Iraq. In the correspondence between Turkey and Iraq, the latter alleged violations of its sovereignty and illegal attacks on civilian objects.[209] Turkey justified its action on the basis of self-defense arguing that in the absence of Iraqi control in the area, it was left with no option but to resort to defensive measures to prevent the use of Iraqi territory 'for the staging of terrorist acts'.[210] In the following year, Turkish and Iranian forces repeated the scenario, targeting 'organized terrorist mercenaries' and their military bases in Iraq.

As Thomas Franck notes, the Security Council took no action in response to Iraqi complaints, but this may have had more to do with a lack of sympathy for the Hussein regime than with any legal position on the validity of Turkish and Iranian operations.[211] In any event, while on this occasion there seemed to be some toleration for the counter-terrorist activity, there is no clear indication that this necessarily involved any particular doctrinal commitment to a specific rule of State responsibility.

US–Sudan, Afghanistan (1998)

On 7 August 1998 twin terrorist attacks at the United States embassies in Nairobi, Kenya and Dar-es-Salaam, Tanzania killed over two hundred people and injured some five thousand others. This was the first attack planned, directed and executed directly by Al-Qaeda operatives, which was believed to have previously limited its activity to assisting allied terrorist groups.[212] The

ICJ were also discontinued by an order of 10 September 1993, available at http://www.icj-cij.org/icjwww/idocket/iluk/ilukord/iluk_iorder_20030910.PDF.

[209] 1995 UNYB 494; see also UN Doc S/1995/272 (1995); UN Doc S/1995/540 (1995).

[210] UN Doc S/1995/605 (1995).

[211] The Turkish action was, however, criticized in Europe primarily on the basis of its alleged disproportionality, see Alexandrov, above n 12, p 181; see also Schmitt, above n 22, p 35 (arguing that due to the no-fly zone there was minimal concern for Iraqi sovereignty in the area, and that the criticism of the Turkish action related to general disquiet regarding the treatment of the Kurdish population and disruptions to coalition operations in the no-fly zone).

[212] See The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States (New York, NY, W.W. Norton, 2004) 59–70 [hereinafter, The 9/11 Commission Report]. Among the attacks perpetrated by other groups for which Al-Qaeda was

Security Council was quick to condemn the attacks unanimously, though it treated the incident as essentially a law enforcement issue requiring that the perpetrators of these 'criminal acts' be 'swiftly brought to justice', and calling on all States to live up to their counter-terrorism obligations.[213]

On 20 August, US cruise missiles struck the El Shifa pharmaceutical plant in Sudan—suspected by the US of producing chemical weapons and being associated with Osama bin Laden. The US also attacked targets in Afghanistan alleged to serve as Al-Qaeda training bases. In a letter to the Security Council, the United States referred to the facilities of Osama bin Laden in Afghanistan and Sudan, and specified that its missiles strikes 'were carried out only after repeated efforts to convince the Government of the Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down and to cease their cooperation with the Bin Ladin organization'.[214]

The international reaction to these attacks was mixed.[215] In general terms, most Western States were either supportive or mute, while Russia, China and several Arab countries expressed varying degrees of criticism.[216] The Secretariat of the League of Arab States,[217] as well as the Non-Aligned Movement,[218] condemned the attack on Sudan as a violation of international law, but remained conspicuously silent on the Afghanistan attack. Despite the submission of official complaints,[219] neither the Security Council nor the General Assembly took any formal action in response to the US strikes.

The limited international criticism against the United States was generally non-specific, but to the extent that it included legal elements it seemed directed primarily at the necessity and proportionality of the strikes. The criticism was most pointed in its treatment of the evidentiary basis upon which the US justified the targeting of the pharmaceutical plant in Sudan.[220] Countries did not really

suspected of playing a role were the December 1992 bombings at hotels in Aden where US troops routinely resided, the November 1995 car bombings outside a Saudi–US facility in Riyadh; and the June 1996 Khobar Towers explosion. For more details, see *ibid*, pp 59–61.

[213] SC Res 1189, UN SCOR, 53rd Sess, 3915th mtg, UN Doc S/RES/1189 (1998).

[214] UN Doc S/1998/780 (1998); see also Presidential Address to the Nation on Military Action Against Terrorist Targets in Afghanistan and Sudan, 34 Weekly Comp Pres Docs 1642 (20 August 1998).

[215] See generally, SD Murphy, 'Contemporary Practice of the United States Relating to International Law' (1999) 93 *Am J Intl L* 161, 161–67.

[216] *Ibid*, pp 164–65. Among the States that expressed support were Australia, France, Germany, Japan, Spain and the UK, while protests came, for example, from Iran, Iraq, Libya, and Pakistan.

[217] Letter dated 21 August 1998 from the Charge D'affaires ai of the Permanent Mission of Kuwait to the United Nations to the President of the Security Council, UN Doc S/1998/789 (1998).

[218] The Final Document of The XIIth Summit Of The Non-Aligned Movement, 2–3 September 1998 (1998) para 179.

[219] Letter dated 21 August 1998 from the Permanent Representative of the Sudan to the United Nations to the President of the Security Council, UN Doc S/1998/786 (1998). Complaints to the Council were also lodged by the Arab Group, the OIC and the group of African States, see UN Doc S/1998/902 (1998); UN Doc S/1998/790 (1998); UN Doc S/1998/791 (1998).

[220] Beard, above n 187, p 576 (noting that doubts about the evidence 'contributed significantly to criticism of US actions'). For detailed discussion on the decision to target the pharmaceutical facility see Wedgwood, above n 27, pp 569–74; Lobel, above n 12, pp 544–47; J Risen, 'Question of Evidence: A Special Report' *New York Times*, 27 October 1999, A1.

question the authority, in principle, to act in self-defense in the circumstances[221] nor did they address the precise nature of Sudanese or Afghan responsibility for the embassy bombings.

Security Council resolutions adopted at the time with respect to Sudan and Afghanistan also made no reference to the possible direct responsibility of these States for the terrorist attacks emanating from their territory. Sudan was already the subject of Security Council resolutions following the assassination attempt on President Mubarak of Egypt in Addis Ababa in June 1995, for which terrorist operatives based in Sudan were believed to be responsible. However, these resolutions referred only to Sudan's responsibilities to desist from supporting or providing shelter to terrorist elements without any intimation of its direct culpability for ensuing terrorist attacks.[222] As noted above, Security Council resolution 1189, adopted after the embassy bombings, echoed this message.[223] Similarly, in the series of subsequent Council resolutions adopted against the Taliban regime, the emphasis was placed only on Taliban obligations to end the harboring of Al-Qaeda rather than any implication of direct State responsibility.[224]

The international response to the East Africa bombings offers an interesting parallel to the response to the September 11th attacks that followed just three years later. While the US had officially warned Sudan and Afghanistan in early 1998 that they would be treated as responsible for any Al-Qaeda attacks,[225] it did not publicly equate their legal responsibility with that of Al-Qaeda in the way that it was to do on September 11th. More significantly, the United States military response was limited to Al-Qaeda associated targets and did not attempt to engage independent assets of the Sudanese or Taliban regimes. By contrast, after September 11th, the Taliban was treated as directly responsibility for Al-Qaeda's terrorist activity and its assets were independently targeted on that basis. On this occasion, and despite Security Council silence on this specific issue, there seemed to be widespread support for ascribing direct responsibility for the September 11th attacks to the Taliban regime.[226]

Because of the limited nature of the response to the embassy bombings, it was possible for States to skirt the issue of direct responsibility. Still, it is telling that

[221] Though this issue did receive attention in the academic literature, see eg, Lobel, above n 12; Wedgwood, above n 27; MF Brennan, 'Avoiding Anarchy: Bin Laden Terrorism, the US Response and the Role of Customary International Law' (1999) 59 *La L Rev* 1195; LM Campbell, 'Defending Against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan' (2000) 74 *Tul L Rev* 1067; Scheideman, above n 56.

[222] SC Res 1044, UN SCOR, 51st Sess, 3627th mtg, S/RES/1044 (1996); SC Res 1054, UN SCOR, 51st Sess, 3360th mtg, UN Doc S/RES/1054 (1996).

[223] Above n 213 and accompanying text.

[224] SC Res 1193, 52nd Sess, 3921st mtg, UN Doc S/RES/1193 (1998); SC Res 1214, UN SCOR, 52nd Sess, 3952nd mtg, UN Doc S/RES/1214 (1998); SC Res 1267, UN SCOR, 52nd Sess, 4051st mtg, UN Doc S/RES/1267 (1999); SC Res 1333, UN SCOR, 55th Sess, 4251st mtg, UN Doc S/RES/1333 (2000).

[225] See The 9/11 Commission Report, above n 212, p 121.

[226] See below section 6.1.

the United States did not really attempt to make a public claim for direct responsibility and the Security Council restricted itself to calling on Sudan and Afghanistan to fulfill their counter-terrorism responsibilities. Carsten Stahn has relied on this evidence to suggest that the 'activities of the Taliban have obviously not been considered enough by the Council to establish a sufficient link to a state-sponsored armed attack. On the contrary, one must infer . . . that the mere harboring of terrorists as such was apparently not reason enough to hold the Taliban accountable for an armed attack'.[227]

This may be going too far. There may have been a variety of political and tactical considerations that prevented the United States from seeking at the time to press its case for direct responsibility. The fact that other Council members did not do so on their own initiative, does not necessarily suggest that they would have been unreceptive to a US claim to that effect. Moreover, as noted by the 9/11 Commission, 'not until 1998 did al Qaeda undertake a major terrorist operation of its own'.[228] It may be that States would have been willing to endorse direct Taliban responsibility for harboring Al-Qaeda had the full extent of the threat been more established at the time. Indeed, the response to the September 11th attacks seems to bear out this prediction.

Notwithstanding these considerations, the silence of the international community surrounding the possible direct responsibility of Sudan or Afghanistan for the 1998 bombings, does suggest a reluctance to go beyond demanding compliance with counter-terrorism responsibilities in these situations.[229] Indeed, this reluctance was also apparent in other examples of State practice surveyed above. This discrepancy between international attitudes before and after September 11th requires explanation and will be the focus of attention in the coming chapters.

Other Cases

There are many other cases that have been categorized as counter-terrorist activity involving States such as Uganda,[230] Tajikstan,[231] Thailand,[232] Senegal[233] and Russia.[234] Yet, all these cases follow a familiar pattern in which

[227] Stahn, above n 18, p 4.

[228] The 9/11 Commission Report, above n 212, p 62.

[229] See discussion below section 5.4.3.

[230] For a discussion of the treatment of Ugandan incursions against Hutus in the DRC in 1999 following the massacre of foreign tourists, see Reisman, above n 23, pp 53–54.

[231] In 1993, Tajikistan engaged in military actions against *mujahadin* in Afghanistan, see 1993 UNYB 382.

[232] Thai forces pursued guerillas into Burma in 1995, after warning Burma to prevent cross-border attacks by the guerillas, see Gray, above n 139, p 115.

[233] In 1992 and 1995, Senegal took measures against irregulars in Guinea-Bissau, see *ibid*.

[234] For example, Russia claims a right to resort to self-defense against terrorists operating in the Pankrisi Gorge in Georgia, alleging Georgian inability to control the violence. At the same time, the US has been reluctant to support this claim and is seeking instead to strengthen Georgia's counter-terrorism capacity, see Gray, above n 139, pp 189–90.

any possible State responsibility issues have been largely obscured by discussion regarding, *inter alia*, the necessity and proportionality of the response or its prudence in the particular circumstances at hand. In each case, the international reaction to a terrorist attack and the counter-terrorist response can be explained without necessarily relying on a particular theory of State responsibility for private acts of terrorism.[235]

5.4.3 An Analysis of State Practice

In general terms, State practice prior to September 11th indicates a growing tolerance for some forcible responses to private terrorist attacks.[236] Reactions have often referred to the necessity or proportionality of forcible counter-terrorist action, rather than the legal authority, in principle, to engage in it.[237] State practice does not, however, reveal a great deal about how direct State responsibility is to be determined in such cases.[238]

To be sure, claims of direct State responsibility for acts of terrorism were made in some cases, particularly by the victim State. But the treatment of terrorist incidents and the responses to them was rarely grounded, at least ostensibly, in any of the theories examined thus far. Reactions were more usually dictated by a variety of factors unconnected to questions of direct State responsibility, including one or more of the following considerations:

(1) The terrorist attack may not have been regarded as amounting to an armed attack justifying a defensive response;

[235] It might be argued that a possible exception to this trend lies in the treatment of Israeli military measures in the West Bank and Gaza in response to Palestinian terrorist attacks. In the context of the violence, Israel has targeted not only the terrorist groups themselves but also institutions and facilities of the Palestinian Authority, and it has occasionally alleged that the Palestinian Authority's support and toleration for acts of terrorism justify its direct responsibility for them. However, such a conclusion would not be warranted. In these cases Israel has generally alleged that security personnel of the Palestinian Authority have themselves been engaged in terrorist attacks. Moreover, as the Palestinian Authority is generally regarded to be a non-State entity, it is possible that different rules of responsibility apply. In these circumstances, it may be easier to regard the passive or active involvement of the Palestinian Authority in terrorist attacks by other Palestinian groups as a joint enterprise for which there is shared responsibility. In more specific terms, the criticism of Israeli counter-terrorism measures has often turned on assessments of their proportionality or wisdom, rather than on their inherent legitimacy or any question of attribution, see, eg, SC Res 1544, UN SCOR, 58th Sess, 4972nd mtg, UN Doc S/RES/1544 (2004). In this sense they follow the general pattern of cases that have been examined in the survey.

[236] See, eg, Franck, above n 21, p 64 ('the international system now appears increasingly to acquiesce in this expanded reading of the right of self-defense under Charter Art 51'); Stahn, above n 123, p 836 ('there has generally been a growing tendency in the 1990's to respond benevolently to limited forcible counter-terrorism operations . . .'); Schmitt, above n 22, p 64. But see, eg, Gray, above n 139, p 134 ('the vast majority of other states remained firmly attached to a narrow conception of self-defence').

[237] Gill, above n 21, p 25.

[238] But see Corten and Dubuisson, above n 102, pp 59–62.

(2) The terrorist attack may have had the sympathy of some States, or have been viewed as a legitimate resort to force rather than an act of terrorism;
(3) The terrorist attack or the degree of State involvement therein may not have been sufficiently established on the facts;
(4) The counter-terrorist response may have been viewed as an illegitimate reprisal rather than a self-defense measure;
(5) The counter-terrorist response may have been regarded as failing the criteria of necessity and/or proportionality;
(6) The counter-terrorist response may be viewed as politically unwise or counterproductive;
(7) The counter-terrorist response may be viewed as legitimate because the act was perpetrated directly by State agents;
(8) The counter-terrorist response may be viewed as legitimate because it was a necessary and proportionate response to an armed attack, and was directed solely at terrorist targets rather than the State itself;
(9) The counter-terrorist response may have been tolerated because of underlying sympathy for the victim State or political opposition to the terrorist group and its State sponsor.

In any of these cases, the fact that a counter-terrorist action was condemned, tolerated or supported was not presented as having anything to do with whether, or how, a State may be held directly responsible for the private terrorist attack. While certain assumptions about responsibility may have motivated international reactions, it was not considered necessary to refer expressly to rules of attribution or responsibility in justifying or denouncing a counter-terrorism action.

What lessons, then, can be learned about attitudes to direct State responsibility from this record? It is clear that there has been a reluctance to explicitly treat host States as the authors of private terrorist attacks emanating from their territory. As noted above, scholars have sometimes taken this reluctance as evidence that the failure to prevent, toleration or even active assistance is not a basis for direct State responsibility. The fact that victim States have not often made that charge, and the fact that the international community has not embraced it, apparently offers support for this assessment.

Pre-September 11th practice suggests not only that absolute responsibility is not viewed as an applicable standard but also that standard violations of a State's counter-terrorism obligations have not generally been regarded as sufficient to engage a State's direct responsibility for the private terrorist attack. In this sense, there is room to argue that State practice in respect of terrorism is at least consistent with, if not dictated by, the principles of non-attribution and the separate delict theory, as embodied by the agency paradigm.

That broad assessment, however, requires considerable qualification. First, it is always dangerous in examining State practice to draw conclusions from silence. States will usually respond to the issue before them in general or minimalist terms—it is wrong to assume too much from the mere absence of a

more extensive legal exegesis. The fact that there were rarely attempts to label the State as the author of a private terrorist attack where only violations of the duty to prevent or abstain were concerned need not necessarily mean that all countries considered that label legally inappropriate. A variety of political, factual and tactical considerations may have dictated a less aggressive approach without ruling out the possibility that a higher degree of State responsibility was still defensible.

Second, while the pre-September 11th record may suggest what does not amount to direct responsibility, it does not reveal decisively what does do so. There is no consistent and explicit embrace of agency principles, of a use of force standard, or of any other criteria. It remains conceivable, for example, that persistent and egregious violations of counter-terrorism obligations would have served as a basis for direct State responsibility, even in the absence of an agency relationship, but the factual scenarios that would have tested this possibility simply have not surfaced with sufficient clarity.

Third, for those scholars who consider direct State responsibility to be a precondition for any defensive action against foreign terrorist targets, the State practice surveyed above presents considerable challenges. Scholars insistent on adhering to this view are left to explain why certain counter-terrorism actions were tolerated, while others were condemned without ever expressly referring to a lack of direct State responsibility. The fact that most debates about counter-terrorism measures related to their necessity and proportionality, rather than their authority in principle, is difficult to reconcile with the view that direct State responsibility must be established even when targeting is limited to terrorist facilities only.

These qualifications aside, it must be acknowledged that the international community has preferred to treat States as responsible only for violating the duty to prevent and to abstain, while limiting the appellation of perpetrator to the immediate private offenders. States have not generally targeted the host State itself in response to private terrorist attacks, nor have they sought endorsement for treating a State that merely tolerates or harbors terrorist operatives as the author of such attacks. The parallels to the agency paradigm of responsibility are therefore evident.

But whatever the legal authority of these conclusions, something fundamental seems to have happened following the attacks of September 11th. In the wake of those attacks, not only did the United States regard the Taliban as equally responsible for the Al-Qaeda attacks on the basis that it had harbored the organization, but it seemed to receive the endorsement of most of the international community in doing so. In this case, the absence of an agency relationship did not prevent treating the Taliban as itself responsible, not just for its own counter-terrorism violations, but also for the act of terrorism perpetrated by Al-Qaeda. The coming chapters will try to better understand the response to the September 11th attacks and examine what it might reveal about contemporary attitudes towards direct State responsibility for terrorism.

5.5 CONCLUSION

This chapter has suggested that there may be far reaching consequences to a determination that a State is itself responsible for a private terrorist attack. This is particularly the case with respect to the legitimacy of forcible responses to purely private terrorist activity. Prior to September 11th various standards were suggested in the literature for making such a determination. The problem has been to find echoes of any of those standards in the actual practice of States.

Before September 11th, international practice reveals a certain reluctance to label States as directly responsible for private acts of terrorism, but it falls short of expressly endorsing any of the responsibility standards examined thus far. Too often, the positions of States on this issue have been obscured by other considerations that have played a more decisive role in dictating international reactions.

It has been difficult to find a factual scenario in which the question of direct State responsibility for private terrorist activity could be neatly isolated and tested against prevailing perspectives. Only following September 11th was this obstacle largely overcome. Because the United States alleged direct Taliban responsibility for tolerating Al-Qaeda action, and then targeted Taliban assets on that basis, questions of the mechanism for engaging direct State responsibility emerged perceptibly into view. Because so many States addressed this response it has been possible, perhaps for the first time, to gauge the attitudes of States on this elusive question.

The unique circumstances of September 11th thus create an opportunity to examine normative expectations regarding this issue and, as shall be argued in the coming chapters, reveal a picture that diverges markedly not only from preceding State practice but from the academic literature that has until now dictated the comprehension of this field.

6

The Challenge of September 11th and the Academic Response

6.1 SEPTEMBER 11TH AND THE INTERNATIONAL REACTION

At 8:46 am on 11 September 2001, a hijacked American Airlines Boeing 767, with 92 persons on board, crashed into the North Tower of the World Trade Center in New York City. Seventeen minutes later, a United Airlines plane, with 65 persons on board, slammed into the South Tower. At 9:37 am, a third hijacked American Airlines flight, with 64 passengers, hit the Pentagon. And less than half an hour later, a United Airlines flight with 44 persons on board crashed in a field in Pennsylvania, after passengers struggled with hijackers who had intended to fly the plane into the Capitol or the White House. With the ensuing collapse of the two towers, close to 3000 people of over 80 nationalities were killed.[1]

The unprecedented magnitude of the September 11th attacks prompted the United States to clearly articulate a State responsibility doctrine that would justify targeting not only the immediate perpetrators but also those States alleged to have supported or tolerated their conduct. In his address to the nation on the evening of September 11th, President Bush declared that the United States would make 'no distinction between the terrorists who committed the attacks and those who harbor them'.[2]

On 14 September, a congressional joint resolution authorized the President to 'use all necessary and appropriate force' against those behind the attacks and

[1] Full a full description of these events, see The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States (New York, NY, W.W. Norton, 2004) 1–14 [hereinafter, The 9/11 Commission Report]. See also SD Murphy, 'Contemporary Practice of the United States Relating to International Law' (2002) 96 *Am J Intl L* 237.

[2] Presidential Address to the Nation, (11 September 2001), available at http://www.white housegov/news/releases/2001/09/20010911-16.html. According to one account, while the administration was inching towards such a public policy, the decision to include these words in the address was made by the President and his National Security Adviser, without consulting the Secretaries of State or Defense, or the Vice President, see B Woodward, *Bush at War* (New York, NY, Simon & Schuster, 2002) 30. However, it should be noted that as early as 1998 the United States had issued formal warnings to the Taliban, and to Sudan, that they would be held directly responsible for Al-Qaeda terrorist attacks as long as they continued to provide sanctuary to the organization, see The 9/11 Commission Report, above n 1, p 121. Similar comments had been made by US officials with respect to Libya in the late 1980s, see above section 5.4.2.

those who 'harbored such organizations and persons'.[3] On 20 September, with mounting evidence against the Afghan based Al-Qaeda organization, this so-called 'Bush Doctrine' was reinforced in a Presidential address to a special joint session of Congress:

> By aiding and abetting murder, the Taliban regime is committing murder. And tonight, the United States of America makes the following demands of the Taliban regime: Deliver to the United States authorities all the leaders of al Qaeda who hide in your land . . . Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist, and every person in their support structure, to appropriate authorities. Give the United States full access to terrorist training camps, so we can make sure they are no longer operating. These demands are not open to negotiation or discussion. The Taliban must act, and act immediately. They will hand over the terrorists or they will share in their fate.[4]

On 7 October, after concluding that the Taliban had not met these demands, the President launched 'Operation Enduring Freedom' authorizing military attacks on suspected Al-Qaeda and Taliban targets throughout Afghanistan. In a letter sent that same day from the Permanent Representative of the United States to the President of the Security Council, the US explained its actions in the following terms:

> The attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation. Despite every effort by the United States and the international community, the Taliban regime has refused to change its policy. From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad. In response to these attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States. These actions include measures against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan.[5]

[3] Authorization for Use of Military Force, Pub L No 107–40, 115 Stat 224 (2001).

[4] Presidential Address to a Joint Session of Congress and the American People (20 September 2001), available at http://www.whitehousegov/news/releases/2001/09/20010920–8.html; see also Address to the Nation Announcing Strikes Against Al Qaeda Training Camps and Taliban Military Installations, 37 Weekly Comp Pres Docs 1432, 1432 (7 October 2001). ('If any government sponsors the outlaws and killers of innocents, they have become outlaws and murderers themselves. And they will take that lonely path at their peril'); Remarks by President to Troops and Families at Fort Campbell, Kentucky (21 November 2001) available at http://www.whitehousegov/news/releases/2001/11/20011121–3.html. ('If you harbor terrorists, you are terrorists. If you train or arm a terrorist, you are a terrorist. If you feed a terrorist or fund a terrorist, you're a terrorist and you will be held accountable . . .').

[5] Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc S/2001/946 (2001).

The Taliban's initial response to these events was to appeal to the United States not to attack, to deny involvement with Bin Laden and to demand evidence of Al-Qaeda responsibility.[6] Following meetings with Pakistani envoys, the Taliban leader Mullah Mohammed Omar announced that Bin Laden would be extradited to the US only if the evidence against him was presented before an Afghan court, his surrender was approved by the Organization of the Islamic Conference (OIC), and the surrender was accompanied by formal recognition of the Taliban regime and the lifting of UN sanctions.[7] An Afghan council of Islamic clerics later ruled that under Islamic law the Taliban could 'persuade' Bin Laden to leave Afghanistan but they could not force him to do so.[8] Subsequent offers to surrender bin Laden to a third State, subject to differing conditions, were also made.[9] The US rejected each of these dubious overtures, reiterating that its demands of the Taliban were 'non-negotiable'.[10]

The international reaction to US policy in the wake of the September 11 attacks ranged from ardent support to acquiescence.[11] With very few exceptions,[12] it is difficult to find evidence that States questioned the legitimacy of defensive action against *both* Al-Qaeda and Taliban targets, or doubted the justification upon which it was founded.

Admittedly, some declarations made in relation to Operation Enduring Freedom are ambiguous, broadly endorsing a right of self-defense without expressly referring to the targeting of the Taliban regime or unequivocally accepting the U.S. justification for doing so.[13] But international actors were fully

[6] GK Walker, 'The Lawfulness of Operation Enduring Freedom's Self-defence Response' (2003) 37 *Val UL Rev* 489, 506.

[7] *Ibid*.

[8] T Marshall, 'After the Attack' *LA Times*, 21 September 2001, A3; JF Burns, 'Afghans Coaxing Bin Laden, But US Rejects Clerics' Bid' *New York Times*, 21 September 2001, A1.

[9] See, eg, D Frantz, 'Taliban Say They Want to Negotiate with the US over Bin Laden' *New York Times*, 3 October 2001, B1.

[10] E Bumiller, 'President Rejects Offer by Taliban for Negotiations' *New York Times*, 15 October 2001, A1. The US refusal to negotiate must be viewed in context. The Taliban had repeatedly rejected calls to act against Al-Qaeda, despite the evidence provided by US officials of Al-Qaeda responsibility for the 1998 embassy bombings in East Africa, and despite a series of Security Council resolutions, adopted under Chapter VII of the UN Charter. In addition, there was concern that negotiations would serve as a pretext to allow Al-Qaeda operatives to escape or to launch additional attacks. Given this context, the refusal to engage Taliban overtures can be viewed as reasonable, see MN Schmitt, *Counter–Terrorism and the Use of Force in International Law* (Garmisch-Partenkirchen, George C Marshall European Center for Security Studies, 2002) 37–40. For a more detailed discussion of pre-September 11 efforts by the US to receive Taliban cooperation, see The 9/11 Commission Report, above n 1, pp 121–26, 205–7. But see H Duffy, *The War on Terror and the Framework of International Law* (Cambridge, CUP, 2005) 195 (questioning the legitimacy of the 'no negotiation' position adopted by the US).

[11] For an extensive list of responses and statements issued in the aftermath of September 11, see http://www.yale.edu/lawweb/avalon/sept_11/sept_11.htm; see also Murphy, above n 1.

[12] Only Cuba, Iraq, Iran, Sudan and North Korea are on record as declaring any kind of opposition to the operation, see SR Ratner, 'Jus ad Bellum and Jus in Bello after September 11' (2002) 96 *Am J Intl L* 905, 910.

[13] MG Kohen, 'The Use of Force by the United States After the End of the Cold War and Its Impact on International Law' in M Byers and G Nolte, (eds), *United States Hegemony and the Foundations of International Law* (Cambridge, CUP, 2003) 197, 221–26; see also C Stahn, *Security*

aware of the intentions and rationale of the Bush Administration. Despite this, it seems significant that virtually no State objected to the policy articulated by the U.S. or has publicly offered—either at the time or since—an alternative justification for the targeting of the Taliban. Indeed, as detailed below, in several early statements numerous States explicitly endorsed both the action against the Taliban and the harbouring doctrine on which it was based.[14] Taken together with the support offered for Operation Enduring Freedom once it was underway there is overwhelming evidence of a willingness to tolerate the targeting of the Taliban, if not wholesale acceptance of the US rationale for doing so.

On 12 September, the Security Council adopted resolution 1368 which reaffirmed, in the context of the attacks, the 'inherent right to individual and collective self-defense' and declared, *inter alia*, that 'those responsible for aiding supporting or harboring the perpetrators, organizers and sponsors of these acts will be held accountable'.[15] The reference to the right of self-defense was repeated in resolution 1373 of 28 September.[16] Similarly, the North Atlantic Council invoked the collective self-defense provision of the Washington Treaty,[17] with NATO Secretary General Lord Robertson specifically noting that 'the individuals who carried out these attacks were part of the worldwide terrorist network of al Qaida, headed by Osama bin Laden, and his key lieutenants and protected by the Taliban.'[18] Additional invocations of collective self-defense were made by the Organization of American States (OAS) under the Inter-America Treaty of Reciprocal Assistance,[19] and by Australia pursuant to the Anzus Treaty.[20]

Indeed, both the OAS and the European Union openly aligned themselves with the US position that those harboring the terrorists should be viewed as directly responsible for the attacks. On 19 September, OAS Ministers of Foreign Affairs declared that 'those that aid, abet or harbor terrorist organizations are

Council Resolutions 1368 (2001) and 1373 (2001): What they Say and What they do not Say (2001), available at http://www.ejil.org/forum_WTC ; O Corten and F Dubuisson, 'Operation "Liberte Immuable": Une Extension Abusive de Concept de Legitime Defense' (2002) 106 *RGDIP* 51, 53. See also below section 6.2.1 regarding the attempt to explain the support for Operation Enduring Freedom on the basis of 'extra-legal factors'.

[14] See below notes 21, 22 and 23 and accompanying text.

[15] SC Res 1368, UN SCOR, 56 Sess, 4370 mtg, UN Doc S/RES/1368 (2001). It is worth noting, however, that reference to holding those that harbor or sponsor the terrorists accountable is found in a paragraph on judicial cooperation rather than in the context of self-defense.

[16] SC Res 1373, UN SCOR, 56th Sess, 4385 mtg, UN Doc S/RES/1373 (2001).

[17] Art V, North Atlantic Treaty, 24 August 1959, 34 UNTS 243.

[18] Statement by NATO Secretary General Lord Robertson (2 October 2001) reprinted in (2001) 40 ILM 1268.

[19] Terrorist Threat to the Americas, Resolution 1, Twenty-Fourth Meeting of Consultation of Ministers of Foreign Affairs Acting as an Organ of Consultation in Application of the Inter–American Treaty of Reciprocal Assistance, OEA/Ser.F/II24, RC/24/Res1/01 (2001) reprinted in (2001) 40 ILM 1273. See Art 3.1, Inter–American Treaty of Reciprocal Assistance, 2 September 1947, 21 UNTS 77.

[20] Government Invokes Anzus Treaty, (14 September 2001) available at http://australianpolitics.com.au/foreign/anzus/01–09–12anzusinvoked.shtml; See Art V, Security Treaty (Australia, New Zealand, United States), 1 September 1951, 131 UNTS 83.

responsible for the acts of those terrorists'.[21] Two days later, the OAS adopted another resolution noting that 'those responsible for aiding, supporting or harboring the perpetrators, organizers and sponsors of these acts are equally complicit in these acts'.[22] On the same date, the European Council declared: 'On the basis of Security Council Resolution 1368, a riposte by the US is legitimate. The Member States of the Union are prepared to undertake such actions, each according to its means. The actions must be targeted *and may be directed against States abetting, supporting or harbouring terrorists*.'[23]

Also significant in this regard is the actual support offered for Operation Enduring Freedom while it was underway and actually engaging Taliban targets. As Schmitt notes, while it was clear that the US had both Al-Qaeda and the Taliban in its cross-hairs 'no State or international organization seemed to object' and the support offered in no way distinguished between the two.[24]

From the outset, the United Kingdom directly participated in the air-strikes, having publicly justified its targeting of the Taliban on the basis of its toleration and support for Al-Qaeda.[25] Offers of military support and troops, landing and over-flight rights, as well as logistical and other technical assistance came not only from NATO allies, but from countries as diverse as Albania, Armenia, Azerbaijan, Ethiopia, Georgia, Japan, Jordan, Oman, Pakistan, Qatar, Saudi Arabia, South Korea, Turkey and Uzbekistan.[26] In addition, Egypt,[27] China,[28] and Russia[29] openly supported the operation after the bombing campaign had

[21] OAS, Convocation of the Twenty-Third Meeting of Consultation of Ministers of Foreign Affairs, OEA/Ser.G CP/RES 796 (1293/01) (2001).

[22] Strengthening Hemispheric Cooperation to Prevent Combat and Eliminate Terrorism, OAS Res RC23/RES1/01 (21 September 2001) reprinted in (2001) 40 ILM 1273, 1274.

[23] European Union, Conclusions and Plan of Action of the Extraordinary European Council Meeting (21 September 2001) reprinted in (2001) 40 ILM 1264 (emphasis added).

[24] MN Schmitt, 'Bellum Americanum Revisited: US Security Strategy and the Jus Ad Bellum' (2003) 176 *Mil L Rev* 362, 399.

[25] See Responsibility for the Terrorist Atrocities in the United States, 11 September 2001—An Updated Account, available at http://www.number-10.gov.uk/output/Page3682.asp. (UK government report summarizing the relationship between the Taliban and Al-Qaeda and describing the Taliban as responsible for allowing bin Laden to operate and protecting him from external attack); see also Letter dated 7 October 2001 from the Chargé d'affaires ai of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, UN Doc S/2001/947. ('This military action has been carefully planned, and is directed against Usama Bin Laden's Al-Qaeda terrorist organization and the Taliban regime that is supporting it'). For more information on the UK response, see C Warbrick and D McGoldrick, 'September 11 and the UK Response' (2003) 52 *Intl & Comp L Q* 245.

[26] For a full list see http://www.state.gov/coalition/cr/fs/12753.htm; see also SD Murphy, 'Terrorism and the Concept of "Armed Attack" in Article 51 of the UN Charter' (2002) 43 *Harv Intl L J* 41, 49–50. According to the Washington Post, 36 countries offered the US troops or equipment, 44 offered use of airspace, 33 offered landing rights and 13 permitted the storage of equipment, see 'Inside Afghanistan' *Washington Post* 14 October 2001, A20.

[27] D Williams, 'Mubarak Backs Strikes by US on Afghanistan' *Washington Post*, 10 October 2001, A17.

[28] PP Pan, 'For Bush and Jiang, Question of Risk and Reward' *Washington Post*, 18 October 2001, A26.

[29] S LaFraniere, 'Putin Fives US Attacks A Strong Endorsement' *Washington Post*, 9 October 2001, A16.

begun, while even the OIC avoided direct criticism, calling only for military operations not to extend beyond Afghanistan.[30]

In the Security Council, following a briefing on 8 October by the United States and the United Kingdom regarding military action they were undertaking 'against terrorists and those who harbored them', the Security Council President informed the press that 'members of the Council were appreciative of the presentation'.[31] A week later, the Security Council adopted resolution 1378 on the situation in Afghanistan in which it expressed support for 'international efforts to root out terrorism'.[32] Similar language was also included in subsequent resolutions.[33] On 16 October, the OAS adopted yet another resolution stipulating that the measures taken by the United States 'have the full support of the states parties to the Rio Treaty'.[34] And on 19 October, the European Council declared 'its staunchest support for the military operations which began on 7 October and which are legitimate under the terms of the United Nations Charter and of Resolution 1368'.[35]

The response to the September 11 attacks and, more importantly, the international endorsement of that response cannot easily be reconciled with existing views on State responsibility for private acts of terrorism or with the State practice considered above in section 5.4. It is highly significant that the United States recognized immediately that a defensive response targeting the Taliban, and not just Al-Qaeda, would be permissible only if the direct responsibility of the Taliban for the attacks could be demonstrated. But the use of force directed at the Taliban regime for acts perpetrated by Al-Qaeda was not based on any established theory of State responsibility. As Steven Ratner has noted, 'none of the tests' of State responsibility 'support the harboring theory of the United States'.[36]

Certainly, the 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

[30] D Williams, 'Islamic Group Offers US Mild Rebuke' *Washington Post*, 11 October 2001, A21.

[31] See UN Doc AFG/152–SC/7167 (2001).

[32] SC Res 1378, UN SCOR, 56 Sess, 4415 mtg, UN Doc S/RES/1378 (2001). While, as Stahn notes, the Council did not explicitly affirm that the attacks of September 11 could be attributed to the Taliban, it is difficult to ignore the context in which the expression of support for the 'effort to root out terrorism' is made, see C Stahn, 'Collective Security and Self-defence after the September 11 Attacks' (2002) 10 *Tilburg Foreign L Rev* 10, 15.

[33] See, eg, SC Res 1386, UN SCOR, 56th Sess, 4443rd mtg, UN Doc S/RES/1386 (2001); SC Res 1390, UN SCOR, 57th Sess, 4452nd mtg, UN Doc S/RES/1390 (2002).

[34] Support for the Measures of Individual and Collective Self-Defense Established in Resolution RC24/Res1/01, OAS Res CS/TIAR/Res1/01 (16 October 2001).

[35] Declaration by the Heads of State or Government of the European Union and the President of the Commission: Follow-up to the September 11th Attacks and the Fight Against Terrorism, 19 October 2001, available at http://ue.eu.int/uedocs/cmsUpload/04296-r2.01.pdf.

[36] Ratner, above n 12, p 908; see also Corten and Dubuisson, above n 13, p 66 ('l'argumentation récemment avancée pour justifiee la guerre contre l'Afghanistan ne peut se fonder ni sur les régles spécifiques définissant l'agression, nir sur celles, plus générales, relatives à la responsibilité l'Etat').

agency criteria for the attribution of private acts.[37] Nor was such a position sustainable on the facts. Publicly available materials both before and after the September 11 attacks point to the Taliban's role as providing shelter to Al-Qaeda, but do little to support a claim of direction or control, or even of substantial Taliban involvement in Al-Qaeda activity, as that term has traditionally been understood.

Perhaps the most extensive official information regarding the Taliban—Al-Qaeda relationship can be found in reports prepared by the United Kingdom[38] and the 9/11 Commission.[39] From these materials, as well as earlier sources,[40] it seems clear that it was Al-Qaeda that provided troops, weapons and financing to the Taliban, while the Taliban essentially offered safe haven and a base for Al-Qaeda training camps. In the words of the 9/11 Commission: 'The alliance with the Taliban provided Al-Qaeda a sanctuary in which to train and indoctrinate fighters and terrorists, import weapons, forge ties with other jihad groups and leaders, and plot and staff terrorist schemes.'[41]

The Commision's report includes details regarding the freedom of movement provided to Al-Qaeda members, including the use of official Afghan Ministry of Defense license plates and reliance on the Afghan State-owned Ariana Airlines to courier money.[42] Material released by the United Kingdom also refers to the joint exploitation of the Afghan drugs trade.[43] But despite this alliance, there is simply no evidence that the Taliban controlled Al-Qaeda activities, or operated in any sense as the principal in an agency relationship. This view is reinforced by repeated Security Council resolutions[44] and United States documents preceding September 11th,[45] which treated the relationship by reference only to the shelter provided by the Taliban for the training and planning of Al-Qaeda terrorist attacks.

[37] Duffy, above n 10, p 54, 189.

[38] Responsibility for the Terrorist Atrocities in the United States, 11 September 2001—An Updated Account, available at http://www.number-10.gov.uk/output/Page3682.asp.

[39] The 9/11 Commission Report, above n 1, pp 63–67. Al-Qaeda relocated to Afghanistan in 1996.

[40] See, eg, PL Bergen, *Holy War, Inc: Inside the Secret World of Osama Bin Laden* (New York, NY, Simon & Schuster, 2001); A Rashid, *Taliban: Militant Islam, Oil and Fundamentalism in Central Asia* (New Haven, CT, Yale University Press, 2001) and the sources cited therein.

[41] The 9/11 Commission Report, above n 1, p 66. The Commission also refers to occasional strains in the relationship and intermittent signals from the Taliban of a willingness to consider surrendering bin Laden, *ibid*, p 125; see also D Byman, *Deadly Connections: States that Sponsor Terrorism* (Cambridge, CUP, 2005) 187–218 (detailing the ups and downs of the relationship).

[42] The 9/11 Commission Report, above n 1, p 66

[43] Responsibility for the Terrorist Atrocities in the United States, 11 September 2001—An Updated Account, available at http://www.number-10.gov.uk/output/Page3682.asp.

[44] See SC Res 1193, 52nd Sess, 3921st mtg, UN Doc S/RES/1193 (1998); SC 1214, UN SCOR, 52nd Sess, 3952nd mtg, UN Doc S/RES/1214 (1998); SC Res 1267, UN SCOR, 52nd Sess, 4051st mtg, UN Doc S/RES/1267 (1999); SC Res 1333, UN SCOR, 55th Sess, 4251st mtg, UN Doc S/RES/1333 (2000); see also Stahn, above n 12, p 3.

[45] Before 9/11, the US annual Patterns of Global Terrorism report referred consistently to the Taliban in the context of providing sanctuary to bin Laden and Al-Qaeda only, see, eg, United States Department of State, Patterns of Global Terrorism, available at http://www.stategov/www/global/terrorism/annual_reports.html; see also JJ Paust, 'Use of Armed Force against Terrorists in Iraq, Afghanistan and Beyond' (2002) 35 *Cornell Intl L J* 533, 542.

It is unquestionable that by harboring, tolerating and failing to prevent Al-Qaeda operations the Taliban repeatedly and egregiously violated its counter-terrorism obligations. The Security Council had addressed these violations in a series of Chapter VII resolutions adopted after the 1998 embassy bombings in East Africa, which included the imposition of sanctions.[46] But, as we have seen, such violations have widely been viewed only as a distinct basis for the legal responsibility of the State for its own breaches of international law, not grounds for direct responsibility for the private acts themselves.

And yet, Operation Enduring Freedom was explicitly justified on the contentious claim that the act of harboring terrorists is legally indistinguishable from the actual perpetration of the terrorist acts. It was the act of 'allowing' Al-Qaeda to operate in its territory that rendered the Taliban directly accountable. The challenge to scholars has been to offer a sound legal framework for assessing whether such a justification—which appeared to be widely endorsed in this case—withstands scrutiny, given the prevailing normative perspectives of State responsibility for private action.

The events surrounding September 11 have generated a range of scholarly writings that have sought to address this challenge. Broadly speaking, the academic responses may be placed in three distinct categories. First, there are those who regard the targeting of the Taliban as unlawful precisely because it fails to meet whatever responsibility standard the author considers to be required under international law. Second, there are those who try, however awkwardly, to fit the facts into existing State responsibility categories. Third, there are those that assert that a new rule of State responsibility has emerged allowing for direct responsibility in the case of State toleration or safe harbor of private terrorist operatives.

This new attention to issues of State responsibility for private terrorism is a welcome change from the neglect the subject has endured for far too long. And yet, the academic response to date has arguably been largely unsatisfactory. It is either too loose with the facts or too loose with the law. More significantly, it has failed to provide a coherent and sustainable conceptual foundation for analyzing State responsibility in cases of private acts of terrorism beyond the factual scenario presented by the events of September 11.

The remainder of this chapter will survey the spectrum of academic responses to the State responsibility challenge posed by Operation Enduring Freedom. The following chapter will consider the inadequacies of existing approaches to State responsibility for terrorism in a broader context, in light of emerging State attitudes to the contemporary terrorist threat.

[46] See above n 44; see also above section 5.4.2.

6.2 THE ACADEMIC RESPONSE

6.2.1 The Agency Paradigm and the Illegality of Operation Enduring Freedom

The scholarship on State responsibility for terrorism has, until now, widely rejected the view that a failure to prevent terrorist attacks or even toleration for them justifies direct State responsibility for the attacks themselves.[47] For many of the scholars adopting this position, the relevant legal framework remains the agency paradigm, reflected in their view in the ILC Draft Articles, and expressed in the 'effective control' test elaborated in the *Nicaragua Case*, or the somewhat less rigorous 'overall control' test adopted by the Yugoslavia Tribunal in *Tadic*.

From this perspective, the targeting of the Taliban—and for some even the targeting of Al-Qaeda—could be justified only if an agency relationship was established between Al-Qaeda and the Taliban regime pursuant to ILC standards.[48] As such a relationship was not established on the facts,[49] the legality of Operation Enduring Freedom, in whole or part, has been called into question.

In a recent book, Helen Duffy offers a classical expression of this position. She asserts that: 'The key question in assessing state responsibility for acts such as 9/11 is therefore whether the standards for attribution, which derive principally from international jurisprudence, as recently set out in the International Law Commission's Articles on State Responsibility have been met.'[50]

Finding that the *Nicaragua* test 'remains authoritative',[51] she concludes that that 'a critical distinction exists . . . between a state being responsible for failing to meet its obligations *vis-à-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'.[52] As the case of Taliban control over Al-Qaeda was never made out,[53] Duffy questions the legitimacy of 'allowing for bombardment of states not themselves legally responsible for the attack being defended against'.[54]

Jordan Paust's analysis of the response to September 11th provides another example of this viewpoint. Relying on the *Nicaragua Case*, Paust argues that

[47] See above section 5.2.

[48] As noted in section 5.1.4, most contemporary scholars view direct State responsibility for terrorism as having a clear bearing either on the legitimacy of a defensive response to a terrorist attack or on its scope. However, some scholars have denied that the response to September 11, and terrorism in general, can be examined under the rubric of self-defense as opposed to law enforcement, see, eg, G Abi–Saab, *There is No Need to Reinvent the Law* (2002), available at http://www.crimesofwar.org/sept-mag/sept-abi-printer.html (2001); see also G Abi–Saab, 'The Proper Role of International Law in Combating Terrorism' (2002) 1 *Chinese J Intl L* 305; see also above section 5.1.5.

[49] See above section 6.1.

[50] Duffy, above n 10, p 48.

[51] *Ibid*, p 50.

[52] *Ibid*, p 56.

[53] *Ibid*, p 189.

[54] *Ibid*, p 444; see also *ibid*, p 192.

'knowing assistance to private terrorist groups, much less harboring, tolerating or acquiescing, each of which can lead to state responsibility, may not rise to the level of an armed attack'. For Paust, the agency standard renders the US assaults on Taliban targets 'highly problematic' since from what is publicly known, and from what the US itself asserted, the Taliban regime was responsible, at most, for tolerating Al-Qaeda activity. He concludes as follows:

> The Taliban's provision of safe haven to bin Laden and toleration of his training camps . . . and even knowledge of past and continuing al Qaeda terroristic attacks would not constitute control of, or direct participation in, future al Qaeda attacks like the September 11th attack on the United States, so as to justify the use of military force against the Taliban, especially in view of the International Court of Justice's Nicaragua decision.[55]

Other prominent authorities, particularly from Europe, have reached similar conclusions. Judge Gilbert Guillaume,[56] Nico Schrijver,[57] Antonio Cassese,[58] Giorgio Gaja[59] and others[60] have all relied on an agency paradigm to question the legality of treating the Taliban as directly responsible for the September 11 attacks and to oppose Operation Enduring Freedom either in its entirety or to the extent that it was directed against Taliban rather than Al-Qaeda targets.

The problem with this view is not in its assessment of the Taliban–Al-Qaeda relationship but in its failure to explain the widespread support for targeting the Taliban *despite* the absence of an agency relationship. Marcelo Kohen has tried to explain this contradiction by suggesting that support for US operations was motivated by 'extra-legal' factors.[61] But even if one concedes that political

[55] Paust, above n 45, pp 542–43; see also Schmitt, above n 10, pp 45–46 ('The evidence released to date regarding Taliban ties to Al Qaeda does not suggest that Al Qaeda was under the direction or control of the Taliban in conducting the 9/11 attacks or any other acts of international terrorism').

[56] G Guillame, 'Terrorism and International Law' (2004) 53 *Intl & Comp L Q* 537, 544–47.

[57] N Schrijver, 'Responding to International Terrorism: Moving the Frontiers of International Law for "Enduring Freedom"' (2001) 48 *Neth Intl L Rev* 271, 286.

[58] A Cassese, 'Terrorism is also Disrupting Some Crucial Legal Categories of International Law' (2001) 12 *Eur J Intl L* 993, 999 (unless terrorists can be treated as agents of Afghanistan, the political and military structures of the State cannot be a legitimate target of US military action in self defense).

[59] G Gaja, *In What Sense was there and 'Armed Attack'?* (2001), available at http://www/ejil.orf/forum_WTC/ny-gaja.html (doubting whether ILC Draft Art 8 was satisfied to justify attribution to the Taliban); But see G Gaja, 'Combating Terrorism: Issues of Jus ad Bellum and Jus in Bello—The Case of Afghanistan' in W Benedek and A Yotopoulos–Marangopoulos, (eds), *Anti-terrorist Measures and Human Rights* (Leiden, Nijhoff, 2004) 161, 167 (suggesting that Al-Qaeda and the Taliban could be viewed as 'part of the same structure of Government').

[60] See, eg, EPJ Myjer and ND White, 'The Twin Towers Attack: An Unlimited Right to Self-defence?' (2002) 7 *J Conflict & Sec L* 5 (conflating attribution test of the *Nicaragua Case* with indirect aggression under Art 3(g) of the Definition of Aggression to conclude that targeting of Taliban was unjustified); see also J Quigley, 'The Afghanistan War and Self-defence' (2003) 37 *Val U L Rev* 541, 545; M Sassòli, 'La "guerre contre le terrorisme" le droit international humanitaire et le statut de prisonnier de guerre' (2001) 39 *Canadian YB Intl L* 211, 223.

[61] Kohen, above n 13, pp 224–25 (referring to statements of support for Operation Enduring Freedom as representing 'a desire on the one hand, not to bother the United States at this difficult time, and on the other, an embarrassed desire to find legal support for its action'); see also Duffy, above n 10, p 55.

considerations were influential, this explanation is unconvincing. As Steven Ratner has observed, while objection to a State's conduct may be motivated by either legal or policy considerations, support for such conduct—especially when the conduct is of a 'constitutive nature'—implies *both* political and legal endorsement.[62]Admittedly, the broad international approval of the US response was probably not driven by abstract legal analysis. It is fair to assume that legal considerations were heavily influenced, *inter alia*, by the shock of the attacks, by the sympathy and latitude granted a wounded super-power, and by mounting distaste for the brutally repressive Taliban regime.[63] But none of these factors renders legally insignificant the widespread support for Operation Enduring Freedom or the fact that most States either endorsed the U.S. rationale for the Operation or failed to publicly provide an alternative legal justification for it. Indeed, the fact that legal concerns did not constrain the political reaction of States says a great deal about the normative standards by which such circumstances are to be examined.

For the international lawyer, the future legal implications of September 11th cannot be ignored. Quite apart from the fact that many States expressly affirmed the legality of targeting the Taliban, widespread and express endorsement of State conduct, even if motivated by political considerations, cannot simply be dismissed as extra-legal whenever at odds with perceived customary norms. This is not to suggest necessarily the emergence of new instantaneous custom,[64] but rather to argue that legal assumptions about the way State responsibility issues are actually addressed in practice cannot remain unaffected by the actual conduct of States.

Rather than revealing a change in the law, the events of September 11 may simply expose more about the normative expectations of States in approaching the question of responsibility for terrorism than previous events have allowed us to see. As discussed in section 5.4, most terrorist incidents have been susceptible to legal analysis without an inquiry into the precise operation of State responsibility principles in these cases. The factual circumstances surrounding the September 11 attacks have enabled the question of State responsibility for

[62] Ratner, above n 12, p 909. Ratner himself offers a variety of rationale for the latitude granted to the United States: the fact that customary and not treaty norms were involved, that the *jus ad bellum* regime is generally more difficult to enforce, and that most States felt they would have reacted in a similar way had they been the target. He concludes that 'the orthodox view of state responsibility has vanished, a victim, in part, of its origins in customary law and its seeming inability to address the challenges of transnational terrorist networks', see *ibid*, p 920. But as plausible as these explanations may be, they do not absolve the international lawyer of the responsibility of identifying the legal parameters now regarded as generally applicable to State responsibility for private acts of terrorism.

[63] Some have also alleged that the US decision to target the Taliban was born not just out of legal conviction about its direct culpability but also out of a desire to assure a measure of success by pursuing a fixed and more easily identifiable target, see Woodward, above n 2, p 48 (interpreting comments by Vice-President Cheney to this effect).

[64] Guillame, above n 56, p 547; see also Kohen, above n 13, pp 225–26. But see B Langille, 'It's Instant Custom: How the Bush Doctrine Became Law after the Terrorist Attacks of September 11, 2001' (2003) 26 *Boston C Intl & Comp L Rev* 145; see also below section 9.6.

terrorism to surface more clearly and, in so doing, offered key insights into the way States actually analyze these issues.

It is for this reason that traditional assumptions about State responsibility for terrorism are challenged by the events of September 11. Indeed, in light of the overwhelming support for Operation Enduring Freedom, it is surely more plausible to argue that the failure to apply the agency standard casts doubt not on the legality of the operation, but on the relevance of the standard.

6.2.2 The Agency Paradigm and the Legality of Operation Enduring Freedom

A second group of scholars similarly presupposes the relevance of the agency paradigm, but reaches the opposite conclusion regarding the legality of targeting the Taliban regime. Some of these scholars assume that Al-Qaeda operated under the direction and control of the Taliban regime, thus satisfying the conditions for attribution under ILC Draft Article 8.[65] For example, Carsten Stahn has argued in a series of articles[66] that while the effective control test under *Nicaragua* has now been overturned, the 'overall control' test advanced in the *Tadic Case* would 'suffice to justify the US-led legal action against the Taliban and al Qaeda in 2001'.[67]

As noted above, such a view cannot be sustained on the facts. It will be recalled that in the *Tadic Case* the Tribunal described the overall control test as 'going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations'.[68] At the time of the September 11th attacks, there was simply no evidence of such a

[65] See, eg, ME O'Connell, 'Lawful Self-defence to Terrorism' (2002) 63 *U Pitt L Rev* 889, 901 (conceding that merely harboring is insufficient for attribution, and that an agency relationship is required, but contending that 'Afghanistan's de facto government developed such close links to the known terrorist organization al Qaeda that it became responsible for the acts of al Qaeda'); see also MA Drumbl, 'Victimhood in Our Neighbourhood: Terrorist Crime, Taliban Guilt and the Asymmetries of the International Legal Order' (2002) 81 *N C L Rev* 1 ('. . . the Taliban did have control over al-Qaeda'); MC Bonafede, 'Here, There and Everywhere: Assessing the Proportionality Doctrine and US Uses of Force in Response to Terrorism after the September 11 Attacks' (2002) 88 *Cornell L Rev* 155, 199; Kohen, above n 13, p 206 ('. . . links existing between bin Laden and the Taliban were such that it should not be difficult to establish that the former had become a de facto organ of the State').

[66] C Stahn, 'Terrorist Acts as "Armed Attack": The Right to Self-defence, Art 51(1/2) of the UN Charter and International Terrorism' (2003) 27 *Fletcher F World Aff* 35; C Stahn, '"Nicaragua is Dead, Long Live Nicaragua"—the Right to Self-defence under Art 51 UN Charter and International Terrorism in National and International Law' in C Walter, *et al*, (eds), *Terrorism as a Challenge for National and International Law: Security Versus Liberty?* (Berlin, Springer, 2004) 827; Carsten Stahn, above n 32.

[67] Stahn, 'Terrorist Acts as "Armed Attack"', above n 66, p 47. Elsewhere, Stahn argues that it was 'predominantly a change in fact, not a change in law, which led to the unprecedented support for the military campaign in Afghanistan', see Stahn, 'Nicaragua is Dead, Long Live Nicaragua', above n 66, p 835; see also Corten and Dubuisson, above n 13, p 65 (distinguishing *Tadic* from the September 11 attacks).

[68] Case No IT–94–1–A *Prosecutor v Tadic* (1999) reprinted in (1999) 38 ILM 1518, 1546.

relationship.[69] The US did not present such evidence, and the States and organizations supporting the military campaign gave no indication that this was necessary.[70] While information has subsequently come to light suggesting that the Taliban—Al-Qaeda relationship was perhaps more symbiotic than at first assumed,[71] there is still little, if any, indication that Al-Qaeda operated as *de facto* Taliban agents in any sense or that States were under that impression at the time the September 11 attacks took place.[72]

At the same time, other principles of attribution contained in the ILC Draft Articles have been proposed to explain the direct responsibility of the Taliban regime. Sean Murphy has relied on Article 9 of the Draft Articles to assert Taliban responsibility on the basis that it allowed Al-Qaeda to exercise governmental functions in the form of projecting force abroad.[73] It will be recalled that Article 9 contemplates a situation where private actors function, out of necessity, in the case of State collapse and in circumstances that 'call for' the exercise of governmental functions, 'though not necessarily the conduct in question'.[74] As Rüdiger Wolfrum and Christian Phillip explain, this was not a situation in which Al-Qaeda acted as an agent of necessity in the absence or default of the government.[75] There is little doubt that the Taliban exercised effective control

[69] But see TD Gill, 'The Eleventh of September and the Right of Self-defence' in WP Heere, (ed), *Terrorism and the Military: International Legal Implications* (The Hague, TMC Asser, 2003) 23, 28 (arguing that *Nicaragua* and *Tadic* justify treating the terrorist group as a de facto agent even if it exercises more control and influence than the host State, provided there is a 'close relationship'). It is difficult to see how this conclusion is reached from the decisions in these cases given the insistence on a significant, if not overwhelming, degree of State control.

[70] Ratner, above n 12, pp 913–14.

[71] MJ Glennon, 'The Fog of Law: Self-defence, Inherence and Incoherence in Art 51 of the United Nations Charter' (2002) 25 *Harv J L & Pub Pol'y* 539, 544. One report, from November 2001, points to Al-Qaeda plans and operations being found in a house belonging to the Taliban Ministry of Defense, see D Rhode, 'In 2 Abandoned Kabul Houses, Some Hints of Al Qaeda Presence' *New York Times*, 17 November 2001, A1. Still, the evidence points overwhelmingly to the fact that the Taliban did not direct or control Al-Qaeda operations.

[72] But see AM Slaughter and W Burke-White, 'An International Constitutional Moment' (2002) 43 *Harv Intl L J* 1, 20 (suggesting that the Taliban and Al-Qaeda were so intertwined they were effectively indistinguishable and could thus both be regarded as legitimate targets); see also L Condorelli, 'Les Attentas du 11 Septembre et Leurs Suites: Où va le Droit International?' (2001) 105 *RGDIP* 829, 839. But even if this is a correct description of the relationship—and that is at best unclear—it is not the basis on which Operation Enduring Freedom was justified or supported. The separate treatment of Al-Qaeda and Taliban combatants could also undermine this claim in that it indicates that the two groups were distinguishable in the theatre, see Fact Sheet, Status of Detainees at Guantanamo (7 February 2002), available at http://www.whitehousegov/news/releases/2002/02/20020207–13.html.

[73] Murphy, above n 26, p 50. Art 9 provides that: 'The conduct of a person or a group of persons shall be considered an act of a State under international law if the person or the group of persons is in fact exercising elements of governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.' See above section 3.3.3.

[74] Report of the International Law Commission to the General Assembly, UN GAOR, 56 Sess, Supp No 10, UN Doc A/56/10 (2001) 111.

[75] R Wolfrum and CE Phillip, 'The Status of the Taliban: Their Obligations and Rights Under International Law' (2002) 6 *Max Planck Y B UN L* 559, 594–95.

over parts of Afghanistan where Al-Qaeda operated.[76] And it is equally unpersuasive, to put it mildly, to suggest that the circumstances 'called for' the projection of force abroad by Al-Qaeda in the exercise of governmental functions.

Wolfrum and Phillip themselves suggest that a different provision of the ILC Draft Articles presents a useful basis on which to justify direct Taliban responsibility for the September 11 attacks. Relying on an analogy with Article 16 of the ILC Draft, they suggest that the Taliban could be a legitimate target of self-defense because it offered aid and assistance to Al-Qaeda. Article 16 concerns the responsibility of a State for assisting another State in the commission of an internationally wrongful act. But according to Wolfrum and Phillip:

> If the attack of 11 September had been undertaken by a subject of international law with the assistance of a State there would be no doubt that both subjects could have been made the target of self-defence. The situation cannot be different if the acting side is a non-state entity. The entity rendering assistance being a subject of international law cannot be privileged by the mere fact that the entity which actually has launched the attack was a non-state actor. Therefore a given action of a non-state actor is attributable to that subject of international law if that subject deliberately created a situation which was a necessary precondition for a later event . . . [77]

This theory is attractive, but the easy reliance on the Draft Article 16 requires significant reflection. For one thing, this provision is not, as Wolfrum and Phillip imply, drafted as a rule of attribution.[78] As the ILC Commentary notes, under Article 16 the State will usually be responsible only for wrongfully providing aid or assistance *not* 'for the act of the assisted State'.[79] As Bernhard Graefrath writes, complicity 'constitutes itself an internationally wrongful act of the State . . . [i]t does not create a kind of co-responsibility in another State's responsibility . . . [i]t has its own identity as a separate violation of international law'.[80]

[76] *Ibid*, pp 566–67, 582. The Taliban were widely regarded as effectively controlling large sections of the country. Indeed, repeated Security Council resolutions demanding of the Taliban to enforce their counter-terrorism obligations and other international legal duties implies acknowledgment of such effective control.

[77] *Ibid*, p 595 (emphasis added); see also R Wolfrum, 'The Attack of September 11, 2001, The Wars Against the Taliban and Iraq: Is There a Need to Reconsider International Law on the Recourse to Force and the Rules in Armed Conflict?' (2003) 7 *Max Planck YBUN L* 1, 37.

[78] Art 16 is found not in Chapter II of the Draft Articles concerning attribution, but in Chapter IV entitled 'Responsibility of a State in connection with the act of another State'.

[79] Report of the International Law Commission to the General Assembly, UN GAOR, 56 Sess, Supp No 10, UN Doc A/56/10 (2001) 159. This point is also revealed by comparing Draft Art 16 with Draft Art 17, which concerns the responsibility of a State that directs and controls the conduct of another State. Only in the latter case do the Draft Articles confirm that responsibility is engaged for the act itself. In addition, the assumption by Wolfrum and Phillip that mere assistance justifies self-defense against the assisting State overlooks the possibility that targeting this State may not, in the circumstances, meet the requirements that circumscribe the right to use force in self-defense.

[80] B Graefrath, 'Complicity in the Law of International Responsibility' (1996) 29 *Revue Belge de Droit Intl* 370, 371. According to the ILC Commentary, as well as other sources, even this distinct ground of responsibility is triggered only when the aid or assistance of the State 'contributed significantly' to the wrongful act in circumstances where the State was aware of the wrongful conduct and intended to facilitate it. Mere encouragement, incitement or minimal facilitation is

This objection may be partially overcome by noting that the Commentary proceeds to suggest that 'where the assistance is a necessary element in the wrongful act in absence of which it could not have occurred, the injury suffered can be concurrently attributed to the assisting and the acting State'.[81] However, this language does not directly overcome the more fundamental objection that Article 16 is limited, by its own terms, to cooperation between States.

By attempting draw an analogy to the relationship between the State and the non-State actor, Wolfrum and Phillip need to explain the apparent contradiction with the plain language of Draft Article 8 and the clear division between the private and the public sphere that is widely assumed to underlie the philosophy of the ILC Draft as a whole. An analogy to Article 16 that would allow for direct responsibility in cases of assistance to private actors cannot easily be reconciled with the principle of non-attribution and the separate delict theory, which are commonly understood as intrinsic to the ILC text.[82]

What is appealing in the theory suggested by Wolfrum and Phillip is the recognition that State responsibility for terrorism could be viewed not as a function of agency but as a measure of the State's actual role in facilitating wrongful private conduct. This theory touches upon a causal approach to State responsibility that will be examined in Part III of this study. But in advancing such a theory, Wolfrum and Phillip assume that they are applying a traditionally accepted interpretation of ILC attribution standards to the facts of September 11. In fact, they are rejecting that interpretation in favor of a different conceptual approach.[83]

Yoram Dinstein seems also to accept the relevance of the ILC attribution principles, but justifies the direct responsibility of the Taliban on its subsequent espousal of the September 11 attacks. Taking the *Tehran Hostages Case* as his point of departure, Dinstein asserts that:

> In blatantly and adamantly refusing to take any action against al Qaeda and Bin Laden, and in offering them a sanctuary within the territory under its control, the Taliban regime in Afghanistan espoused the armed attack against the US. From the moment of that espousal, the US could invoke the right of individual self-defense against Taliban-run Afghanistan and use counter-force against it.[84]

insufficient. Report of the International Law Commission to the General Assembly, UN GAOR, 56 Sess, Supp No 10, UN Doc A/56/10 (2001) 155-60; J Quigley, 'Complicity in International Law' (1986) 57 *Brit YB Intl L* 77, 80–81.

[81] Report of the International Law Commission to the General Assembly, UN GAOR, 56 Sess, Supp No 10, UN Doc A/56/10 (2001) 159; see also *ibid*, p 155 ('the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act. Thus in cases where that internationally wrongful act would clearly have occurred in any event, the responsibility of the assisting State will not extend to compensating for the act itself.')

[82] D Jinks, 'State Responsibility for the Acts of Private Armed Groups' (2003) 4 *Chic J Intl L* 83, 90 (suggesting that the Bush Doctrine 'reconfigures the distinction between public and private conduct').

[83] See below section 8.4.3.

[84] Y Dinstein, 'Comments on the Presentations by Nico Krisch and Carsten Stahn' in C Walter, *et al*, (eds), *Terrorism as a Challenge for National and International Law: Security Versus*

This assertion, while certainly plausible, is arguably unpersuasive. It should be recalled that in the *Tehran Hostages Case* the ICJ was at pains to point out that the adoption of the hostage taking by Iran exceeded mere congratulations or approval, but rather took the form of the unequivocal assumption by the State of the private conduct as its own.[85] ILC Draft Article 11, and its associated Commentary, reinforce this view.[86] It is, at best, unclear whether the Taliban regime—despite the gross violations of its own counter-terrorism obligations—openly identified itself with the September 11 attacks. As several scholars have noted, the attempts of the Taliban to disassociate themselves from the attacks, and to discuss the surrender of bin Laden, though opportunistic and unsatisfactory, nevertheless stand in stark contrast to the explicit endorsement proffered by Iran in the *Tehran Hostages Case*.[87] Dinstein's proposition is reminiscent of the condonation theory advocated by early jurists,[88] but it arguably does not describe the exception for espousal as it is currently formulated in international jurisprudence.

Finally, some jurists have assumed that harboring is already a category of wrongful conduct that justifies direct State responsibility under ILC principles. Thomas Franck, for example, has broadly relied on this approach to defend Operation Enduring Freedom by suggesting that the ILC has made 'it clear that a state is responsible for the consequences of permitting its territory to be used to injure another state'.[89] And yet, devoid of explanation, this assertion appears

Liberty? (Berlin, Springer, 2004) 915, 920; see also Murphy, above n 26, p 51. A similar justification is considered in M Byers, 'Terrorism, the Use of Force and International Law After 11 September' (2002) 51 *Intl & Comp L Q* 401, 409; PM Dupuy, 'State Sponsors of Terrorism: Issues of International Responsibility' in A Bianchi, (ed), *Enforcing International Law Norms against Terrorism* (Oxford, Hart Publishing, 2004) 3, 11.

[85] See above section 3.3.2. Note also that on the facts of the *Tehran Hostages Case* attribution was prospective only, even though the ILC did not view this as limiting the scope of the rule, see D Brown, 'Use of Force Against Terrorism After September 11: State Responsibility, Self-defence and Other Responses' (2003) 11 *Cardozo J Intl & Comp L* 1, 11–12 (arguing not only that the Taliban failed to endorse the attack, but that even if espousal were found it would operate prospectively only).

[86] See above section 3.3.2.

[87] Schmitt, above n 10, p 47 ('The level of Taliban support falls far below that of the Iranian government in the Embassy case'); Wolfrum and Phillip, above n 75, p 594; see also R Grote, 'Between Crime Prevention or Prosecution and the Laws of War: Are the Traditional Categories of International Law Adequate for Assessing the Use of Force against International Terrorism?' in C Walter, *et al*, (eds), *Terrorism as a Challenge for National and International Law: Security Versus Liberty?* (Berlin, Springer, 2004) 951, 974; Quigley, above n 60, p 546 ('A failure to extradite a suspect does not render a state responsible for the acts of the individual'); Corten and Dubuisson, above n 13, p 68 (arguing both that Taliban did not endorse attacks and that *Tehran Hostages* is authority only for attribution of acts committed subsequent to the endorsement, without retroactive effect); Sassòli, above n 60, p 221.

[88] See above section 2.6.

[89] TM Franck, 'Terrorism and the Right of Self-defence' (2001) 95 *Am J Intl L* 839, 841. Elsewhere, Franck has referred to the Definition of Aggression and resolution 1368 to argue for 'the right of victim states to treat terrorism as an armed attack *and those that facilitate or harbor terrorists as armed attackers . . .*', TM Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge, CUP, 2002) 54 (emphasis added). In that context, Franck has referred to the ILC Draft as 'very relevant, but not dispositive', while reasserting that 'a state is responsible for the consequences of allowing its territory to be used by forces attacking another state',

to conflict with the actual terms of the ILC text. Responding to Franck's assertion, José Alvarez has pointed out that the ILC Draft allows for the attribution of non-State conduct to a State 'only in carefully delimited circumstances'.[90] Permitting the wrongful use of territory by private actors is clearly a violation of a State's international legal obligations but, as we have seen, it is quite plainly not a basis for direct State responsibility under the prevailing interpretation of the ILC scheme.

If some these explanations come across as a little forced—like an attempt to fit a square peg in a round hole—it is probably because they do not accord with the actual justification offered by the principal protagonists. The targeting of the Taliban was not founded on the *de facto* exercise of governmental authority, on an analogy to Article 16, on espousal or on any other commonly recognized ILC principle. It was based expressly on the assertion that the responsibility of the Taliban for *harboring* Al-Qaeda and the responsibility of Al-Qaeda for perpetrating the attacks were legally indistinguishable. That assertion finds no parallel in the ILC Draft Articles. And yet, neither the States actively engaged in Operation Enduring Freedom, nor those offering it rhetorical support, advanced any other justification. It is this discrepancy that compels one to look beyond the agency approach in seeking a legal explanation for the response to September 11th.

6.2.3 Use of Force Rules as a Justification

Several writers have preferred to analyze the events of September 11 by reference to use of force principles rather than the ILC standards of State responsibility. Barry Feinstein, for example, has relied on the Definition of Aggression to argue that: 'Afghanistan, which specifically had agreed to harbor in its territory bin Laden and al-Qaida whose explicit purpose is to engage in terrorist attacks against the US was . . . without doubt "substantially involved" in the sending of such bands into America.'[91]

Similarly, Jack Beard has suggested that the responsibility of the Taliban for sheltering Al-Qaeda was sufficiently established so as to be tantamount to a

ibid. Interestingly, Franck does not rely on the complicity approach he developed in an earlier article, see TM Franck and D Niedermeyer, 'Accommodating Terrorism: An Offence against the Law of Nations' (1989) 19 *Isr Y B Hum Rts* 75; see also JA Cohan, 'Formulation of a State's Response to Terrorism and State-sponsored Terrorism' (2002) 14 *Pace Intl L Rev* 77, 108 (simply asserting without explanation that state-sponsored terrorism, including toleration or refusal to prevent, makes it 'proper to target the host state's military installations as well as those of the terrorists').

[90] JE Alvarez, 'Hegemonic International Law Revisited' (2003) 97 *Am J Intl L* 873, 880.

[91] BA Feinstein, 'Operation Enduring Freedom: Legal Dimensions of an Infinitely Just Operation' (2002) 11 *J Transnat'l L & Pol'y* 201, 271. He goes on to argue that 'Afghanistan's actions, or inaction constitute an "armed attack" within the narrow meaning of Article 51', *ibid*, p 279.

violation of the prohibition against the use of force under Article 2(4) of the Charter, and an armed attack justifying the resort to self-defense.[92]

It seems doubtful whether the common view of aggression or armed attack warrants these conclusions. As discussed in section 5.3, while some scholars have traditionally supported a lower standard, most legal sources do not support the position that merely harboring private terrorist groups rises to the level of act of aggression or an armed attack, even if it may constitute a violation of Article 2(4). Marcelo Kohen has articulated the standard position in these terms:

> Enlarging the concept of aggression so as to include the harboring of terrorists confuses different internationally wrongful acts and opens the door to increased unilateral uses of force, and thus escalation. Although reprehensible and unlawful, harboring terrorists cannot be likened to aggression, which constitutes the most grave of all the uses of force in international relations. It would be the equivalent, in the field of criminal law, of placing in the same category a killer and the person who gives him or her shelter.[93]

It will be recalled that in the *Nicaragua Case*, the ICJ did not consider the provision of weapons or logistical support, much less mere toleration, as tantamount to an armed attack or as satisfying the 'substantial involvement' test under the Definition of Aggression. According to the available evidence, the Taliban neither 'sent' Al-Qaeda to perpetrate the attacks nor was 'substantially involved' in them, in the way prescribed in Article 3(g) of the Definition of Aggression or applied in *Nicaragua*.[94] Indeed, the United States was not alleging such involvement. As Michael Schmitt has convincingly argued:

> There seems to be little evidence that the Taliban 'sent' Al Qaeda against any particular targets or even that they provided the material and logistic support that the Nicaragua Court found insufficient to amount to an armed attack. In essence, the key contribution made by the Taliban was granting Al Qaeda a relatively secure base of operations. By the classic *Nicaragua* test, or even the lower standard advocated by Judge Schwebel, it would be difficult to argue that the Taliban through complicity with Al Qaeda, launched an armed attack against the United States or any other country. Harboring terrorists is simply insufficient for attribution of an armed attack to the harboring State.[95]

[92] JM Beard, 'America's New War on Terror: The Case for Self-defence Under International Law' (2002) 25 *Harv J L & Pub Pol'y* 559, 578–83 (arguing, *inter alia*, that sponsorship or toleration has been treated as an Art 2(4) violation); see also above n 89, citing Thomas Franck who, on one occasion at least, seems to rely on use of force criteria to explain the response to September 11.

[93] Kohen, above n 13, p 207.

[94] See above section 5.3; see also Quigley, above n 60, p 545.

[95] Schmitt, above n 10, p 51; see also Corten and Dubuisson, above n 13, p 56 ('le simple soutien ou la simple tolérance que son territoire soit utilisé en vue de commettre des actions armées, même s'il constitute indéniablement un acte illicite engageant la responsibilité de l'Etat, ne suffit pas à lui impute un act d'aggresion').

In this sense, constructive use of force criteria provide an equally unsatisfactory explanation for the response to September 11. The publicly available facts do not allow for a conclusion that the Taliban was sufficiently involved in Al-Qaeda operations as to be constructively engaged in an armed attack under the traditional view of that term. Without expanding the notion of armed attack beyond its conventional parameters, it is not clear that use of force principles justify treating the Taliban, as opposed to Al-Qaeda, as a legitimate independent target of a defensive response.

6.2.4 Other Possible Justifications for Operation Enduring Freedom

Other grounds for justifying State responsibility for private conduct offer equally problematic legal rationales for Operation Enduring Freedom. Clearly, absolute responsibility—which is not regarded as a currently applicable standard—does not present a useful alternative justification. The United States and its supporters were not alleging that the Taliban was automatically responsible for Al-Qaeda operations regardless of wrongdoing on its part, but rather that Taliban wrongdoing—in the form of harboring and failure to prevent—was a sufficient basis for triggering direct responsibility.[96]

As for complicity, there has been only minimal consideration of this approach beyond its discussion by Wolfrum and Phillip in the context of the ILC Draft Articles.[97] Some authors have made passing reference to complicity in relation to September 11th,[98] and the term is mentioned in an OAS resolution adopted following the attacks.[99] But, with some rare exceptions,[100] complicity has not featured as a distinct ground of responsibility in contemporary academic literature. This is understandable given its rejection in the early jurisprudence on State responsibility for private acts and the broad endorsement of the principle of non-attribution and the separate delict theory in international practice.[101] Any rationale for Operation Enduring Freedom grounded in a theory of complicity cuts across the prevailing agency standards and would thus present a challenge to existing legal principles rather than an application of them.

This is not to suggest that a complicity analysis would be without merit. Indeed, complicity—in its causal, though not its criminal, undertones—

[96] Ratner, above n 12, p 908.

[97] See above section 6.2.2.

[98] See, eg, Schmitt, above n 24, p 400 (arguing that the support for Operation Enduring Freedom suggests a new approach that is 'an equivalent of criminal law's doctrine of accomplice liability'); Feinstein, above n 91, p 266 (failure of host State to prevent terrorism may result in it 'being considered to be acting in complicity with the perpetrators of the activities . . .'); Gill, above n 69, p 40 (arguing that 'Taliban actions proved a very high degree of complicity with Al Qaeda . . .').

[99] Above n 22 and accompanying text.

[100] See above section 5.2.3.

[101] See above sections 2.5, 2.6 and 2.7.

promises a possible answer to the September 11 dilemma. This possibility will be explored in depth in Part III of this study.

Some other justifications unrelated to State responsibility principles may be briefly addressed. Christopher Greenwood concedes that the evidence makes it 'difficult to conclude' that the *Nicaragua* or *Tadic* tests, as endorsed by the ILC, have been met in this case.[102] He argues, however, that 'because the Taliban regime made it clear throughout that it would vigorously oppose any foreign forces entering its territory to root out Al Qaida bases, it exposed its own forces to lawful attack in exercise of the right of self-defence'.[103]

But it was the Taliban's responsibility for September 11th—not its anticipated opposition to strikes against Al-Qaeda—that was offered as justification by the US and its allies. Moreover, while Greenwood's explanation could account for targeting those Taliban operatives that forcefully interfered with counter-terrorist actions against Al-Qaeda, it does less to vindicate the premeditated decision to engage independent Taliban assets in the very first wave of strikes on 7 October, and continually thereafter.[104]

It might also be suggested that a different standard of responsibility applies given that the vast majority of States did not recognize the Taliban regime as the legitimate government of Afghanistan.[105] If the Taliban could be viewed as a non-State actor acting in tacit partnership with Al-Qaeda, it could be argued that its responsibility for the September 11 attacks is not to be measured by usual State responsibility standards.

This reading, however, does not accord with the actual status accorded the Taliban by the international community. There is little doubt that the Taliban regime, though unrecognized as a legitimate government, was regarded as a *de facto* regime with international legal status, responsible for the actions of Afghanistan in the territory over which it exercised effective control.[106] It was clearly treated as such by the Security Council that repeatedly demanded that the Taliban meet its obligations under international law in the fields of counter-terrorism, drug trafficking and human rights.[107] As Wolfrum and Phillip

[102] C Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al Qaida and Iraq' (2003) 4 *San Diego Intl L J* 7, 24.

[103] *Ibid*, p 25.

[104] Schmitt, above n 10, p 53. See also above section 5.1.4 (discussing the possibility of striking certain State institutions and forces as *incidental* targets of a self-defense operation directed against terrorist targets).

[105] Only Saudi Arabia, Pakistan and the United Arab Emirates officially recognized the Taliban regime.

[106] Greenwood, above n 102, p 24. For a detailed discussion of the status of the Taliban, see Wolfrum and Phillip, above n 75; see also Sassòli, above n 60, p 219.

[107] See, eg, SC Res 1333, UN SCOR, 55 Sess, 4251st mtg, UN Doc S/RES/1333 (2000) (reaffirming 'the responsibility of the Taliban for the well being of the population in the areas of Afghanistan under its control', in addition to its counter-terrorism responsibilities and its duty to meet Afghanistan's legal obligations in relation to narcotic drugs and psychotropic substances). This status could also be inferred from the fact that the US administration treated Taliban forces as covered, in principle, by the Third Geneva Convention since Afghanistan was a High Contracting Party even if the Taliban were not entitled to POW status, see Fact Sheet, Status of Detainees at

conclude, the Taliban constituted 'a stabilized but unrecognized *de facto* regime' with rights and duties under international law that included the right not be the target of unlawful uses of force.[108]

These considerations also influence the examination of Michael Byer's suggestion that coalition forces might have justified their engagement with the Taliban as intervention by invitation of the Northern Alliance in the ongoing internal armed conflict between rival Afghan factions.[109] Of course, the US and its allies did not actually rely on such an argument. Indeed, notwithstanding CIA cooperation with Northern Alliance forces in covert operations,[110] it does not appear that such an invitation was ever extended. More significantly, as Byers himself indicates, there are reasonable doubts as to whether the Northern Alliance would have been legally entitled to issue such an invitation given the uncertainty surrounding its own claims as representative of the legitimate Afghan government.[111]

6.2.5 A New Rule

Faced with the contradiction between the overwhelming support for Operation Enduring Freedom, and its apparent inconsistency with prevailing attitudes to State responsibility, numerous scholars have felt compelled to acknowledge the shift towards a new rule of international law. It should be recalled that even before September 11 some scholars had advanced a lower threshold for engaging direct State responsibility,[112] but the international response to the targeting of the Taliban has clearly increased the relevance of this position.

In its clearest form, the new rule now posited by several scholars suggests that the harboring of private terrorist groups is sufficient, of itself, to justify attribution of the acts of that group to the host State. Alternatively, using a use of force standard, it is argued that such toleration is now sufficient to regard the host State as itself constructively engaged in an armed attack or act of aggression for the purposes of self-defense.

Several of the scholars that present themselves as 'new rule' advocates, do not really stray all that far from traditional academic attitudes. While

Guantanamo (7 February 2002), available at http://www.whitehousegov/news/releases/2002/02/20020207–13.html (stating, *inter alia*, that: 'Although we never recognized the Taliban as the legitimate Afghan government, Afghanistan is a party to the Convention, and the President has determined that the Taliban are covered by the Convention. Under the terms of the Geneva Convention, however, the Taliban detainees do not qualify as POWs.'); see also SD Murphy, 'Contemporary Practice of the United States relating to International Law' (2004) 98 *Am J Intl L* 820, 820–24.

[108] Wolfrum and Phillip, above n 75, p 585. The same conclusion is reached by the Federal Administrative Court of Germany in a decision of 20 February 2001, see BverwG 9 C 20.00 (2001).

[109] Byers, above n 84, p 403.

[110] For some discussion of this co-operation, see The 9/11 Commission Report, above n 1, pp 126–43.

[111] Byers, above n 84, p 403; Sassòli, above n 60, p 225.

[112] See above sections 5.2 and 5.3.

acknowledging a relaxation in attribution standards in the wake of September 11, they caution against the adoption of a 'harboring doctrine' as a basis direct State responsibility. As a result, the 'new approach' they provide may offer a modification in the prevailing standards but it ultimately fails to explain the international endorsement of Operation Enduring Freedom.

A recent article by Greg Travalio and John Altenburg offers a useful example of this position. Travalio and Altenburg acknowledge that the decisions in *Nicaragua* and *Tehran Hostages*, as reflected in the ILC Draft Articles, 'no longer represent the customary and accepted practices of States in the context of transnational terrorism'.[113] They seek to distinguish these cases from situations in which host States incubate serious international rather than 'localized' terrorist threats. In addition, they argue that the ILC principles of attribution should not be treated as decisive in cases of terrorism since they were not drafted with terrorism in mind and cannot in any event supersede the right of self-defense.[114]

But having presented terrorism as a unique case, Travalio and Altenburg maintain that for the State to be directly responsible for the terrorist activities there must still be evidence of 'significant supply or logistical support'.[115] As we have seen, this view has had its adherents long before September 11th—it is hardly new. And while it provides a lower threshold than the direction and control envisaged by the ILC, it stops well short of embracing harboring or toleration as grounds for attribution that might explain the response to September 11th. For Travalio and Altenburg, the 'Bush Doctrine' is 'too broad and too ill-defined', and it fails to provide adequate legal parameters for responding to State sponsored terrorism.[116] Accordingly, they regard military action against Al-Qaeda as fully justified, but they implicitly suggest that targeting the Taliban was legally problematic.

A very similar approach is adopted by Rainer Grote.[117] He argues that the transnational terrorist threat justifies a re-evaluation of the circumstances in which private terrorist activity may be attributed to the State. For Grote as well, such attribution need not be triggered only by situations of effective or overall control, but could include also the provision of weapons, training and financing and logistical support. These forms of support are directly linked to the

[113] G Travalio and J Altenburg, 'State Responsibility for Sponsorship of Terrorist and Insurgent Groups: Terrorism, State Responsibility and the Use of Military Force' (2003) 4 *Chi J Intl L* 97, 102. Note that the authors maintain that there is no justification for the 'reinterpretation or relaxation of these rules in other contexts', *ibid*, p 113; see also M Sassòli, 'State Responsibility for Violations of International Humanitarian Law' (2002) 84 *Intl Rev Red Cross* 401, 409 (arguing that it remains unclear whether the events of September 11 represent the development of a new and broadly applicable legal rule).

[114] Travalio and Altenburg, above n 113, pp 110–11.

[115] *Ibid*, p 112. (Even in these cases only 'those personnel and facilities directly engaged in providing the support should be subject to attack to the extent necessary to eliminate or limit the support').

[116] *Ibid*, p 117.

[117] Grote, above n 87, p 951.

capabilities of the terrorist groups to launch its attacks and thus justify attribution of the terrorist act to the State. However, 'immaterial' forms of involvement, such as political support or mere harboring, still 'do not constitute *per se* a sufficient basis for the attribution of specific terrorist acts' although they may amount to a distinct violation of the State's own counter-terrorism obligations.[118]

A slightly different version of this type of analysis in found in the writing of Carsten Stahn. As noted above, Stahn regards attribution of September 11 to the Taliban as justifiable under an overall control test.[119] However, he acknowledges that 'the trend points clearly towards the establishment of an even further reaching responsibility of the host state based on mere toleration or harbouring of terrorists'.[120] Stahn seems to reject this possibility by arguing that defensive action against a host State would fail to satisfy the necessity test under the right to self-defense. He contends that only if the State obstructs defensive action against terrorist targets or is actually involved in the terrorist attack would the necessity requirement be satisfied.[121] But in adopting this approach, Stahn conflates the primary rules of self-defense with the secondary rules of State responsibility. It is one thing to determine that a terrorist attack is attributable to the State, and another to determine whether, in the circumstances, self-defense against the State itself is justifiable.[122] By rejecting the harboring doctrine on the basis of this analysis, Stahn not only fails to properly explain the response to September 11, he also confuses what are in essence two separate issues.

A second group of 'new rule' advocates have demonstrated far more willingness to embrace the emergence of a 'harboring doctrine'. These scholars have used this 'new rule' to explain the support for Operation Enduring Freedom but, as shall be discussed below, they have failed to seriously assess the implications of this novel standard, or define its limitations.

Michael Schmitt, for example, makes a compelling case that the 'use of force directly against the Taliban is difficult to fit with traditional understandings of attribution of an armed attack'.[123] To account for the endorsement of military action against the Taliban he accepts the emergence of a new legal standard that would allow for direct attribution of an armed attack to the State in cases of harboring, at least where the similarity to the events of September 11 is clear.

Schmitt suggests that the emergence of this new approach is a policy response following the end of the Cold War and the rise of the terrorist threat. In the Cold War world, concern about super-power confrontation justified a higher threshold for attribution and limited the support for defensive counter-terrorism

[118] *Ibid*, p 974.
[119] See above n 67, and accompanying text.
[120] Stahn, 'Terrorist Acts as "Armed Attacks"', above n 66, p 50.
[121] *Ibid*.
[122] See below section 9.2.4 (discussing distinction between responsibility and the right to self-defense); see also below section 9.4.1.
[123] Schmitt, above n 10, p 53.

measures. Today, the threat of terrorism is viewed as especially menacing, while defensive action that is unlikely to escalate into a broader conflagration is increasingly tolerated. In this context, Schmitt concludes that 'normative expectations are clearly in the process of rapid evolution' and that the bar for attribution has been 'measurably lowered'. In an article published in 2002, Schmitt draws directly from the factual circumstances of September 11th to identify several factors that would allow for direct attribution in cases of harboring including, repeated warnings to a State to desist from supporting a terrorist group, the perceived illegitimacy of the State, Security Council involvement, and the severity of the terrorist threat.[124] In a later article, however, Schmitt seems to forgo these qualifying factors and suggests that States will be deemed to have committed an armed attack:

> . . . if they assist or encourage the act [of terrorism], or if they had a duty to stop it and failed to, intending to effectuate it. Indeed 'liability' may well lie when the State facilitates the crime, for example by providing safe haven or supplying weapons, even if it did not intend for the act to be committed but knew that it would be.[125]

Albrecht Randelzohfer has also argued that in light of the events of September 11 legal standards for State responsibility in terrorism cases have changed. Though initially supportive of the ICJ position in *Nicaragua*, Randelzohfer now suggests that that position is 'much too sweeping'. Today, he argues, a lower standard is appropriate in determining whether a State is 'substantially' involved in a terrorist attack so as to be regarded as itself perpetrating an armed attack. What is decisive in his view is the extent to which 'State support has enabled private groups to commit acts of military force'. In this context, private attacks will now be attributable to the State in situations where: '. . . the State has encouraged these acts, has given direct support to them, planned or prepared them at least partly within its territory, or was reluctant to impede these acts. The same is true, if a State gives shelter to terrorists after they have committed an act of terrorism within another State.'[126]

A similar conclusion can be found in the recent work of Michael Byers:

> As a result of the legal strategies adopted by the US, coupled with the already contested character of the rule and heightened concern about terrorism world-wide, the right of self-defence now includes military responses against States which actively

[124] See also C Gray, *International Law and the Use of Force,* 2nd edn, (Oxford, OUP, 2004) 171 (suggesting that Operation Enduring Freedom might only indicate a narrow change in the law where the factual circumstances are more or less identical to those surrounding the September 11 attacks).

[125] Schmitt, above n 24, p 400. As noted above, Schmitt refers to this as analogous to accomplice liability in criminal law but he grounds responsibility on an expanded notion of armed attack rather than a theory of complicity, see above section 6.2.3.

[126] A Randelzohfer, 'Article 51' in B Simma, (ed), *Charter of the United Nations: A Commentary*, 2nd edn, (Oxford, OUP, 2002) 801.

> support or willingly harbour terrorist groups who have already attacked the responding State.[127]

And Michael Glennon adopts an analogous approach:

> . . . it does not make sense to permit defensive force against the wrongdoer but not against the wrongdoer's host if the wrongdoer's capability to inflict harm depends upon the indifference of a host government that can curtail that harm simply by withdrawing its hospitality. Acts of omission in such circumstances shade into acts of commission, and aggrieved states should not be faulted for treating them the same.[128]

These 'new rule' advocates have come under challenge by adherents of the agency paradigm who worry that a 'relaxation of the traditional attribution regime'[129] would unduly encourage an armed-conflict approach to the resolution of terrorism incidents. But even if it is assumed that direct State responsibility is a necessary pre-requisite for forcible responses to terrorism,[130] the resort to military measures is still subject to the conditions that attend the right to self-defense. A finding of direct State responsibility does not itself justify recourse to force in self-defense. Only in those circumstances where the specific conditions applicable to self-defense are satisfied in relation to the State bearing direct responsibility for armed terrorist attacks could the State itself become a potential independent target of defensive action.

In broader terms, the idea that the response to terrorism should basically be confined to a law-enforcement paradigm is out of step with the growing recognition that the scale and intensity of contemporary terrorism sometimes demands a forceful response. Derek Jinks has argued that the armed conflict option would 'symbolically aggrandize' terrorists as State sponsored belligerents rather than common criminals.[131] But it is doubtful whether this concern obliges the victim State to absorb repeated terrorist atrocities that could qualify as armed attacks, while limiting itself to law-enforcement tactics that may be patently inadequate in the circumstances.[132]

[127] Byers, above n 84, p 409;

[128] Glennon, above n 71, p 550. For further examples of scholars considering the possibility of a new rule in the wake of September 11, see J Brunnée and SJ Toope, 'The Use of Force: International Law After Iraq' (2004) 53 *Intl & Comp L Q* 785, 795; F Kirgis, *Israel's Intensified Military Campaign against Terrorism* (2001), available at http://www.asil.org/insights.html ; J Cerone, *Acts of War and State Responsibility in 'Muddy Waters': The Non-State Actor Dilemma* (2001), available at http://www .asil.org/insights/insigh77.html; KM Meesen, 'Current Pressures on International Humanitarian Law: Unilateral Recourse to Military Force against Terrorist Attacks' (2001) 28 *Yale J Intl L* 341, 353. An early formulation of a similar argument can be found in RE Rodes Jr, 'On Clandestine Warfare' (1982) 39 *Wash & Lee L Rev* 333, 357 (arguing that a State that knowingly supports or harbors a 'clandestine force' should be regarded as a 'co-belligerent' with that force).

[129] Jinks, above n 82, p 90.

[130] See above section 5.1.4.

[131] Jinks, above n 82, p 94.

[132] Jinks also argues that relaxed responsibility standards would confer unwarranted privileges and immunities on terrorist groups, *ibid*, p 93. But the legal status of terrorist operatives is not determined by the rules of State responsibility. Even in a case where terrorist attacks justifiably

Another claim raised by Jinks is that a 'harboring doctrine' is problematic because it increases the cost of regime change in rogue States. According to this line of argument, governments would be less willing to support opposition groups operating in such States for fear of attracting responsibility for their unlawful conduct.[133] This claim not only assumes that material support for opposition groups is a lawful and preferred mechanism for promoting change in rogue States, but also that such support is desirable even when the groups resort to terrorist methods to achieve their objectives.

By embracing these assumptions, Jinks does more than challenge a new legal rule of State responsibility. He proposes to overturn existing legal rules that strictly regulate the rights of States to intervene in internal conflicts and that impose explicit duties on all States to prevent and to abstain from supporting terrorist action regardless of cause or grievance. To defend this position is to suggest that counter-terrorism efforts are well served by condoning support for terrorist action when it is directed against one's enemies, while condemning it when directed against one's friends.[134]

It is submitted that the real problem with this 'new rule' has actually very little to do with these kinds of arguments. The primary difficulties stem from the fact that this 'relaxed standard' stretches the notions of attribution or use of force beyond that which their existing conceptual frameworks can logically bear. Attribution under the rules of State responsibility is founded on principles of agency. And yet, it is unclear why a host State that merely tolerates the presence of a terrorist group, without actively controlling its operations, can be treated as the principal in an agency relationship. Similarly, if use of force criteria are regarded as the relevant standard, it seems too artificial to view inaction as equivalent the 'sending'of armed bands or 'substantial involvement' in their activity. Divorced from a conceptual framework these assertions sound contrived—an exercise in ex-post facto rationalization.

Some authors do mention possible policy and legal justifications for such a new rule: the scale of the terrorist threat and the role of toleration in facilitating contemporary terrorist activity feature prominently in this regard. But arguably much more is needed to defend and explain the emergence of a new legal rule,

trigger the application of international humanitarian law, the terrorist operatives will often fail to meet the criteria for legitimate combatancy stipulated in the Third Geneva Convention or Additional Protocol I precisely because they are engaged in terrorist activity.

[133] *Ibid*, p 92.

[134] A further argument raised by Jinks is that that relaxed State responsibility standards would attribute 'radical illegality' to too many States and, in so doing, prevent coalition building with countries such as Yemen, Saudi Arabia and Pakistan who, despite their problematic counter-terrorism records, are key partners in the confrontation against Al-Qaeda, see *ibid*, pp 92–93. This argument confuses the legal responsibility of the State as a matter of principle and the independent decision of the victim State as to whether, and to what extent, to invoke its legal rights in respect of that responsibility. In reality, a victim State may forgo its legal prerogatives and calibrate its response to a wrongdoing State on the basis of political considerations. But this is no reason to deny victim States the option of imposing the full measure of responsibility when they are legally entitled to do so.

and to set out its underlying rationale. This is especially so given entrenched perceptions about the authority of the principle of non-attribution and the separate delict theory. If State responsibility for terrorism represents a *lex specialis* exception to ILC principles, its contours need to be articulated. If, alternatively, it raises broader questions about the general authority of the agency scheme these too need to be explicitly examined. In short, the assertion that harboring is now sufficient for direct responsibility has been left under-theorized and its place in the network of rules that address State responsibility requires illumination.

Without this conceptual anchor, 'new rule' advocates have found it difficult to provide detailed and logical criteria for applying this novel standard. It is not only necessary to answer *why* harboring should now be a sufficient standard for direct responsibility but *how* such a determination is to be made. These questions emerge quite clearly when comparing the US response to the embassy bombings in 1998, and its response to the September 11 attacks. In 1998, there was no suggestion that the Al-Qaeda attacks were attributable to Afghanistan or Sudan, and no attempt made to target facilities of the State itself.[135] But after September 11, the claim of direct responsibility was central to the US case. If legal considerations about State responsibility dictated the scope of the response in each instance, it is necessary to try and identify what those considerations might have been.

Without these legal parameters a 'harboring doctrine' appears somewhat arbitrary or contrived and dangerously open to abuse. A State may harbor one terrorist or a thousand. It may tolerate terrorist financing or provide asylum to cell members after an attack. It may shelter terrorist groups for a year or for a decade. May the host State be treated as the author of the terrorist activity in each case? And what would such direct responsibility justify in terms of remedial action?

Of course, it is tempting to leave the conceptual framework intact. But as shall be argued in Part III, there is more at issue here than a simple change in the threshold for applying use of force or attribution principles. What emerges from the events of September 11 is something more fundamental: States simply do not look at issues of responsibility in the technical way that lawyers have presumed that they do. The frame of reference is not the agency paradigm or some constructive use of force standard. And it is necessary to widen the legal inquiry to consider an alternative frame of reference that may offer State responsibility for terrorism more accurate and sound conceptual foundations.

[135] See above section 5.4.2.

6.3 CONCLUSION: THE DISSONANCE BETWEEN THEORY AND PRACTICE

In chapter 5 we discovered that the prevailing theories of State responsibility for private action have often played an imperceptible role in determining international responses to terrorist activity. Issues of direct State responsibility either did not arise or were often obscured by other considerations that determined whether to denounce or endorse a given counter-terrorism response.

In the wake of September 11, the question of State responsibility for private acts of terrorism emerged in a powerful and noticeable way. Regarding the Taliban as the author of the September 11 attacks was the central legal argument advanced to justify US operations against Afghanistan. And yet, this question was answered without deference to entrenched views on State responsibility for private acts. The United States, by arguing that harboring was the equivalent of perpetration, embraced neither an agency standard nor use of force principles, nor any other familiar responsibility regime. The multitude of States that flocked to support its operations were visibly unperturbed.

The responses of so many States to the events September 11 may not represent 'instantaneous custom' or dictate the precise contours of new legal rules, but they do suggest that it is time to reconsider prevailing attitudes about State responsibility for terrorism. In charting a course towards a sound regime of State responsibility in terrorism cases it is necessary to understand the fundamental shortcomings of conventional legal approaches in contending with the contemporary reality of State involvement in private terrorist activity. The next chapter is devoted to tackling these questions.

7

Inadequacies of Existing Approaches to State Responsibility for Terrorism

7.1 INTRODUCTION

The difficulties that traditional responsibility theories face in explaining the response to September 11th are symptomatic of deeper conceptual and legal inadequacies. Increased concerns about the threat of terrorism and heightened expectations of State compliance in the post-September 11th world have accentuated these inadequacies. But they are problems of principle not just of practice. Even if prevailing conceptions of State responsibility for private conduct are deemed a suitable mechanism for regulating some non-State activity, they are inappropriate, from a theoretical perspective, for the particular problems posed by terrorism.

In rethinking State responsibility for terrorism a combination of issues need to be addressed. Any responsibility theory needs to be firmly grounded in legal principle. It must address the contemporary forms of State involvement in terrorist activity in a way that promotes State compliance with counter-terrorism obligations. It must also be responsive to the potential for abuse and seek to minimize the risks of alleged counter-terrorist activity based on unwarranted claims of responsibility. At a deeper level, it must promote a relationship among States and between State and non-State actors that is consistent with community values.

This chapter uses these standards to question the validity of traditional legal approaches to State responsibility for terrorism. It begins by examining contemporary forms of State involvement in terrorism by non-State actors and the changing nature of the terrorist threat. It then considers whether the principles and assumptions that underlie conventional perspectives to State responsibility for private action respond effectively to these phenomena or are sufficiently sensitive to the relevant legal and policy concerns that they raise. In so doing, this inquiry offers an opportunity to identify the components of a viable responsibility strategy and sets the stage for the examination of an alternative approach to State responsibility for terrorism that is the focus of Part III of this study.

7.2 CONTEMPORARY FORMS OF STATE INVOLVEMENT IN TERRORISM

7.2.1 Forms and Degrees of State Involvement in Terrorism

Several scholars have identified a spectrum of activity by which the State may facilitate, encourage or direct terrorist activity by non-State actors.[1] While formulations differ, the essential categories of activity along that spectrum may be summarized as follows:

(1) The State may direct and control the terrorist activity;
(2) The State may provide the terrorist group with financial, logistical and military support of varying degrees;
(3) The State may provide the terrorist group with safe haven, free movement, and training facilities, or otherwise tolerate its activities;
(4) The State may offer the terrorist group ideological or political support and inspiration;
(5) The State, while not necessarily supportive of the terrorist activity, may be generally unwilling to meet its counter-terrorism obligations to prevent the activity;
(6) The State, despite certain efforts on it part, may fall short of due diligence standards in attempting to prevent the terrorist activity;
(7) The State may meet due diligence standards, but nevertheless fail in actually preventing the terrorist activity;
(8) The State may simply lack the capacity to prevent the terrorist activity.

These categories serve as useful guidelines but the reality of State involvement in terrorism is usually more complicated. Some parts of the State may declare opposition to terrorism and be ostensibly engaged in counter-terrorist activity, while other parts seek clandestinely to foster it. Forms and degrees of support may fluctuate over time and location. Minor terrorist operatives may be arrested, while senior members may be quietly encouraged to continue their campaign. Operational cells may be targeted, while support infrastructure is ignored. The

[1] A recent analysis appears in D Byman, *Deadly Connections: States that Sponsor Terrorism* (Cambridge, CUP, 2005) 15 (dividing States into strong supporters, weak supporters, lukewarm supporters, antagonistic supporters, passive supporters and unwilling hosts). For other examples see, eg, RB Lillich and JM Paxman, 'State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities' 26 *Am U L Rev* 217; JF Murphy, *State Support of International Terrorism: Legal, Political and Economic Dimensions* (Boulder, Westview Press, 1989) 32–33; A Cassese, 'The International Community's "Legal" Response to Terrorism' (1989) 38 *Intl & Comp L Q* 589, 598; C Kress, *Gewaltverbot Und Selbstverteigungrecht Nach Der Satzung Der Vereinten Nationen Bei Staatlicher Verwicklung In Gewaltakte Privater* (Berlin, Duncker & Humblot, 1994) 351; G Travalio, 'Terrorism, International Law, and the Use of Force' (2000) 18 *Wis Intl L J* 145, 150; KK Koufa, 'Terrorism and Human Rights', UN Doc E/CN.4/Sub.2/2001/31 (2001), §53; see also AC Arend and RJ Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (London, Routledge, 1993) 142 (reducing the various formulations into four essential kinds: terrorist action with State direction or control; terrorist action with State support; terrorist action with State toleration and terrorist action without State toleration).

State may also limit its support to terrorist cells already operating independently outside its territory so that it is involved in assisting terrorist activity that it lacks the effective capacity to prevent.

As Daniel Byman has noted, States may support terrorist actors for a variety of motivations that can change over time and can sometimes encourage the State to moderate or restrain its support depending on the circumstances. For example, the State may seek to weaken or destabilize a neighbour, project its power abroad, or export an ideological or political system. It can also use terrorist support to enhance its prestige or legitimacy before certain domestic or international audiences. Support for a terrorist group can also be part of a wider effort to strengthen an insurgent movement that engages in terrorist activity as part of its military struggle. By the same token, a State may decide to tolerate a terrorist organizations's activity because of popular support for the organization's cause, or simply because it does not perceive itself to be threatened by the group and views action against it as more costly than inaction.[2]

Describing the precise nature of a State's involvement is often complicated by the efforts of the State to conceal these activities. Only rarely will the State openly admit to assisting private armed groups, inevitably claiming that the groups are engaged in legitimate conduct. Far more frequent is the attempt to disguise such activity. Indeed, the very attraction of terrorist sponsorship for the State lies in the ability to advance the national interest behind the protective veil of superficially private conduct. As Sara Scheideman notes:

> A transparent relationship between terrorist actors and the state is predictably uncommon. A state's employment of terrorism as a method of affecting change through violence is typically undertaken for the purpose of avoiding detection and evading state responsibility for illegal acts. Given that a state cannot disassociate itself from wrongdoing at any level of government, quiet support of terrorists may be an attractive means for a state to accomplish its international agenda.[3]

States have been accused of using the cover of diplomatic immunity or front organizations to funnel money and logistical aid to terrorist groups, and they have afforded safe haven to operatives in remote portions of the State that are not easily monitored by outside observers.[4] In addition, even States that are simply failing to comply with their duties of prevention may seek to disguise this failure for fear of international opprobrium or intervention.

[2] Byman, above n 1, pp 21–53, 221.

[3] SN Scheideman, 'Standards of Proof in Forcible Responses to Terrorism' (2000) 50 *Syracuse L Rev* 249, 262; see also Koufa, above n 1, §53 ('For States targeted by State-sponsored terrorism, it can often be difficult to find the link that ties terrorists to their sponsors, and thus to bring the sponsoring State to be held responsible.'); AD Sofaer, 'Terrorism, the Law and the National Defence' (1989) 126 *Mil L Rev* 89, 100 ('States that sponsor terrorism have an even greater capacity to evade responsibility than the terrorist groups they support. First, they attempt to keep secret the training and assistance they extend . . . For years States have supplied arms, and sanctuary to known terrorist organizations without being treated as having responsibility for the terrorist actions').

[4] See examples cited below in this section.

Because details of State involvement in terrorism are not generally within the public domain, it is not always easy to assess the veracity of specific claims and counter-claims, even if general evidence of violations of counter-terrorism obligations may emerge over time. But while the claims made cannot always be independently substantiated, they do offer an insight into the different varieties of State involvement in terrorism that are perceived to exist today.[5] Several examples may be cited by way of illustration.

The United States Department of State annual terrorism report provides a useful, though sometimes contested, array of examples.[6] The report currently includes as 'State Sponsors of Terrorism' countries such as Cuba, Iran, Syria and Sudan. According to the report, these are countries on the higher end of the spectrum alleged to be directly involved in supporting, financing or directing terrorist activity by non-State actors.

Iran, for example, is regularly referred to as the leading State sponsor of private terrorism. While it has offered occasional support in apprehending some Al-Qaeda operatives, others are alleged by the US to be receiving assistance from elements of the Iranian government.[7] Iran is also accused of providing significant ideological support, direction and large amounts of funding, training and weapons to the Lebanon-based Hizbollah organization, which is said to maintain ties with Islamic extremists and organizations operating in Central Asia, Europe, Latin America and in various countries in the Middle East.[8]

This has included, for example, charges by Argentina that Iran initiated and directed the Hizbollah bombing of the Israeli Embassy in Buenos Aires in March 1992, and the Jewish Community Center in the same city in July 1994. According to Argentine investigations that have led to the indictments of several Iranian

[5] Naturally, disputes about a specific State's involvement in terrorist conduct are not uncommon in international relations. As Koufa argues, there may be political and economic considerations that lead some States to quickly identify others as engaged in terrorist activity despite the absence of solid evidence, while leading others to be equally slow in doing so even where an abundance of evidence exists, see Koufa, above n 1, §58. The examples cited below are brought with that qualification in mind.

[6] United States Department of State, Country Reports on Terrorism 2004 (2005) [hereinafter State Department Terrorism Report]. In previous years, the report was entitled the Patterns of Global Terrorism Report. See also Byman, above n 1, p 303–304 (arguing for a reform of the process of designating state sponsors and criticizing the current list).

[7] State Department Terrorism Report, above n 6, pp 88–89; see also The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States (New York, NY, W.W. Norton, 2004) 2401–41 [hereinafter, The 9/11 Commission Report] (citing evidence of assistance to Al-Qaeda from Iran and Hizbollah).

[8] See Byman, above n1, pp 79–115; State Department Terrorism Report, above n 6, pp 99–100; D Byman, 'Should Hezbollah be Next', (2003) 82 *Foreign Affairs* 54; see also E Karmon, 'Why Tehran Starts and Stops Terrorism' (1998) 5 *Middle East Quarterly*, available at http://www.meforum.org/article/427. K Katzman, Congressional Research Service, Terrorism: Near Eastern Groups and State Sponsors (2001) 4–6; see also R Gunaratna, *Inside Al Qaeda: Global Network of Terror* (New York, NY, Columbia University Press, 2002) 146–49 (on links between Hezbollah, a Shiite organization, and Al-Qaeda and its predominantly Sunni affiliates, as well as on its links with Palestinian groups).

officials,[9] these attacks were perpetrated with the direct assistance of Iranian intelligence agents. With the benefit of diplomatic immunity, these agents are said to have transferred instructions and trained personnel, using Hizbollah operatives from Lebanon and recruits from Lebanese communities in the tri-border region of Argentina, Brazil and Paraguay to carry out the bombings.[10]

Similarly, members of the Iranian Revolutionary Guard have been charged with direct involvement in training Palestinian terrorist organizations, such as Hamas, PFLP and Islamic Jihad, providing them with financing and weapons and even helping select targets for attack.[11] Countries such as France, Germany, Algeria, Egypt and Saudi Arabia have at various times accused Tehran of sponsoring terrorist activity,[12] and in 1995 the G–7 and Russia, meeting at a summit in Halifax, expressly called on Iran to end its involvement in terrorism.[13] Unsurprisingly, Iran has denied many of these allegations, while defending its 'moral, humanitarian and political' support for Palestinian groups and Hizbollah engaged in what it regards as legitimate resistance.[14]

[9] L Rohter, 'Argentine Judge Indicts 4 Iranian Officials in 1994 Bombing of Jewish Center' *New York Times*, 10 March 2003, A3. For updated information about the investigation made available by the Argentine Ministry of Justice see http://www.jus.gov.ar/minjus/Amia/default2.htm.

[10] According to the State Department Terrorism Report, the triborder area has long been a hub for Hizbollah and Hamas fundraising and other support activities, see State Department Terrorism Report, above n 6, pp 84–85; see also J Goldberg, 'In the Party Of God' *The New Yorker*, 22 July 2002, available at http://www.newyorker.com/fact/content.?021028fa_fact2 (describing in detail allegations of Hizbollah operations in the tri-border area and in the United States).

[11] See, eg, Intelligence and Terrorism Information Center, Iran as a State Sponsoring and Operating Terror (2003); M Levitt, *Targeting Terror: US Policy Toward Middle Eastern State Sponsors And Terrorist Organizations Post-September 11th* (Washington DC, Washington Institute for Near East Policy, 2002) 62–69. One well-publicized incident involved the alleged transfer from Iran of a cache of sophisticated weapons destined for Palestinian terrorist organizations on the Karine A ship see, eg, Letter dated 2 January 2002 from the Permanent Representative of Israel to the United Nations, UN Doc A/56/766-S/2002/25 (2002). The allegation was denied by Iran, see Letter dated 11 January 2002 from the Permanent Representative of the Islamic Republic of Iran to the United Nations, UN Doc A/56/772-S/2002/57 (2002). These links have been reported for some time, see, eg, J Kifner, 'Alms and Arms: Tactics in a Holy War' *New York Times*, 15 March 1996, A1 (citing, *inter alia*, western intelligence sources regarding financing and coordination meetings held at the Iranian Embassy in Damascus with leaders of Hamas and Islamic Jihad).

[12] See generally Karmon, above n 8; Katzman, above n 8, p 26. This includes, for example, the Mykonos Affair where a German Court found in 1997 that Iran was behind a series of killings of Kurdish opposition leaders in Berlin. Iran was also implicated in a case where a Hizbollah operative was indicted by the US for his role in the Khobar Towers attack in Saudi Arabia in 1996, see FBI Press Release (21 June 2001) available at http://www.fbi.gov/pressrel/pressrel01/khobar.htm. Most recently, in December 2004, Egypt has tried an Iranian diplomat in absentia for his involvement in recruiting operatives for attacks in Egypt and Saudi Arabia, *Reuters*, 'Egypt to Try Iranian and Egyptian on Spy Charges', 7 December 2004, available at http://www.alertnet.org/thenews/newsdesk/L07711070.htm.

[13] See Chairman's Statement, available at http://www.g8.utoronto.ca/summit/1995halifax/chairman.html.

[14] See, eg, BBC, 'Iran Denies Argentina Blast Role', available at http://news.bbc.co.uk/2/hi/americas/2832169.htm; See also Letter dated 2 August 2002 from the Charge d'affaires a.i. of the Permanent Mission of the Islamic Republic of Iran to the United Nations addressed to the Secretary–General, UN Doc A/56/1019–S/2002/867 ('contrary to the allegations . . . the Islamic Republic of Iran provides only humanitarian, political and moral support to those who have mounted legitimate and internationally recognized resistance . . .'); see also Letter dated 10 January

Comparable claims have regularly been made with respect to Syria[15] regarding the safe haven and ongoing support it provides to Palestinian rejectionist groups based in Damascus, its facilitation of armed elements operating in Iraq,[16] and the extensive logistical assistance and direction offered to Hizbollah in Lebanon.[17] Most recently, an independent commission established by the Security Council has directly implicated Syria in the bombing that killed former Lebanese President Rafik Hariri, and some 19 other individuals on 14 February 2005. These events have greatly intensified the international pressure on Damascus to end its interference in Lebanon and refrain from any involvement or support in terrorist activity.[18]

The case of the Janjaweed militia in Sudan offers another current example of direct State involvement in terrorist action.[19] The term Janjaweed (meaning, 'a man or devil on a horse') is generally used to refer private Arab militia who have operated against the African tribes throughout Darfur in Western Sudan with

1997 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, UN Doc A/52/58–S/1997/30. In the words of a former Iranian president Rafsanjani in 2002, 'we support those people who are defending their rights. In Islamic countries, we stand behind the struggling and combatant Muslims. In other places, such as Palestine, we do not recognize the legitimacy of Israel', cited in AW Samii, 'Teheran, Washington and Terror: No Agreement to Differ' (2002) 6 *Middle East Rev Intl Aff*, available at http://meria.idc.ac.il/journal/2002/issue3/jv6n3 a5.html.

[15] Byman, above n 1, pp 117-153; State Department Terrorism Report, above n 6, pp 90–91. Though Syria is said to have provided some support in actions against Al-Qaeda suspects, see *ibid*, p 91; Levitt, above n 11, p 48.

[16] J Brinkley, 'Rice Says Syria is at Least Indirectly Responsible for the Blast' *New York Times*, 17 February 2005, A12.

[17] For an interesting exchange from both the Syrian and Israeli perspectives, see, eg, Identical letters dated 17 December 2002 from the Permanent Representative of the Syrian Arab Republic to the United Nations, UN Doc A/57/669–S/2002/1383 (2002) (claiming, *inter alia*, that the office of Islamic Jihad and other Palestinian factions in Syria were 'only information offices'); Letter Dated 14 January 2002 from the Chargé d'affaires ai of the Permanent Mission of Israel to the United Nations, UN Doc A/57/706–S/2003/46 (2003) (detailing accusations of Syrian involvement in terrorist activity); see also Note Verbale dated 7 March 2005 from the Permanent Mission of the Syrian Arab Republic to the United Nations addressed to the Secretary-General, UN Doc A/59/726–S/2005/143 (2005); Quartet (EU, UN, Russia, US) Statement, 28 October 2005, available at http://www.un.org/news/dh/infocus/middle_east/quartet-28oct2005.htm (urging Syria to 'take immediate action to close the offices of Palestinian Islamic Jihad and to prevent the use of its territory by armed groups engaged in terrorist acts').

[18] Report of the International Independent Investigation Commission established pursuant to Security Council resolution 1595 (2005), available at http://www.un.org/News/dh/docs/mehlis report/; SC Res 1636, UN SCOR, 60th Sess, 5297th mtg, UN Doc S/RES/1636 (2005); see also Report of the Fact-Finding Mission to Lebanon inquiring into the causes, circumstances and consequences of the assassination of former Prime Minister Rafik Hariri, UN Doc S/2005/203 (2005), pp 2–3 (stating, *inter alia*, that 'the Government of the Syrian Arab Republic bears primary responsibility for the political tension that preceded the assassination' and that, together with the Lebanese security services, it bears 'the primary responsibility for the lack of security, protection, and law and order in Lebanon'); see also Second semi-annual report of the Secretary–General to the Security Council on the implementation of resolution 1559 (2004), UN Doc S/2005/673 (2005) p 9 (referring, *inter alia*, to reports of an increase in the influx of weapons and personnel from Syria to Palestinian armed groups in Lebanon).

[19] According to the State Department Terrorism Report Sudan has, however, significantly reduced its involvement in international terrorist activity that was far more prevalent during the 1990s, see State Department Terrorism Report, above n 6, p 90.

varying degrees of support from Sudanese State authorities.[20] While perhaps not a case of terrorism in the classical sense, it is clear that the Janjaweed are engaged in conduct designed to target the civilian non-Arab population of Darfur in a way that meets the definition of terrorism suggested in chapter 4 of this study. Recent reports have indicated that the attacks in Darfur have led to the deaths of hundreds of thousands of people, as well as human rights and humanitarian law abuses on a massive scale, including torture, rape, looting, and the displacement of over 1.8 million residents.[21]

According to the Commission of Inquiry on Darfur, established pursuant to Security Council resolution 1564, the Sudanese government's involvement in these atrocities has taken several forms. First, the armed forces of the State and its paramilitary agents, known as Popular Defense Forces, have themselves been involved in gross violations of international human rights and humanitarian law.[22] Second, the Commission has identified different degrees of State involvement in the attacks perpetrated by the Janjaweed militia. Thus, the State's armed forces have engaged in military attacks jointly with the Janjaweed; [23] the government has been involved in recruiting, arming and training the militia; [24] and it has acquiesced in independent Janjaweed actions that have taken 'advantage of the general climate of chaos and impunity to attack, loot, burn, destroy, rape and kill'.[25]

Various reports suggest that the government's assistance to the Janjaweed is designed, at least in part, to target the local civilian population so as to deny

[20] Attacks of this kind occurred in 2001 and 2002, but they began in earnest in early 2003. For a detailed discussion of the term Janjaweed, see Report of the International Commission of Inquiry on Darfur to the Secretary-General, UN Doc S/2005/60 (2005) 34–36 [hereinafter Commission of Inquiry Report]; see also Human Rights Watch Report, Human Rights Watch, Darfur Documents Confirm Government Policy of Militia Support (2004) 2 available at http://www.hrw.org/english/docs/2004/07/19/darfur9096.htm (regarding the ambiguous and controversial nature of the term).

[21] Commission of Inquiry Report, above n 20; see also Report of the Secretary General pursuant to paras 6 and 13 to 16 of Security Council resolution 1556 (2004), UN Doc S/2004/703 (2004). [hereinafter Secretary General Report on Sudan]; For updated information on the humanitarian crisis, see United Nations System in the Sudan, available at http://www.unsudanig.org/Emergencies/Darfur/sitreps/index.jsp.

[22] Commission of Inquiry Report, above n 20, p 3. While there is general agreement that the breaches include war crimes, crimes against humanity and human rights violations, there are differences over whether the crimes in Darfur constitute genocide. The Commission has concluded that the Government of Sudan has 'not pursued a policy of genocide' owing to the absence of genocidal intent, though it recognizes that certain individuals could be determined by a competent court to have acted with the requisite *mens rea*, *ibid*, pp 172–73; *cf* Colin Powell, Testimony Before the Senate Foreign Relations Committee, 9 September 2004, available at http://www.state.gov/secretary/former/powell/remarks/36042.htm (stating 'that genocide has been committed in Darfur and that the Government of Sudan and the Jingaweit bear responsibility'); see also US Department of State, Documenting Atrocities in Darfur (2004), available at http://www.state.gov/g/drl/rls/36028.htm.

[23] Commission of Inquiry Report, above n 20, pp 34, 38–39 (this included air and reconnaissance support, as well as the use of ground forces).

[24] *Ibid*.

[25] *Ibid*, p 38.

popular support and recruits for the insurgent groups of the Sudanese Liberation Army/Movement (SLA/M) and the Justice and Equality Movement (JEM).[26] In the words of the UN High Commissioner for Human Rights, 'the Government's strategy appears to have been, in effect, to seek to fight a guerrilla war by establishing its own guerrilla force'.[27]

Sudan has continued to reject many of these allegations, denying any link between the State and the Janjaweed and arguing that it has little control or influence over their conduct.[28] While the government has officially recognized its obligations to prevent militia atrocities and disarm, apprehend and bring to justice Janjaweed members, only limited steps have been taken thus far.[29] Indeed, numerous reports[30] and Security Council resolutions[31] point to continued attacks by the Janjaweed militia in 2005 with the tacit or explicit support of Sudanese authorities. The gravity of the crisis has led to the deployment of African Union monitors,[32] the imposition of sanctions,[33] and the referral of the situation to the International Criminal Court.[34]

As discussed in section 6.1, the case of the Taliban regime's relationship with Al-Qaeda provides a somewhat different model. Here, despite Security Council sanctions, the Taliban provided Al-Qaeda with ongoing and virtually unfettered freedom, even if it did not grant them substantial material assistance. The

[26] See, eg, *ibid*, p 4; Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights, Situation of Human Rights in the Darfur Region of Sudan, UN Commission of Human Rights, UN Doc E/CN.4/2005/3 (2004); S Power, 'Dying in Darfur: Can the Ethnic Cleansing in Sudan be Stopped?' *The New Yorker*, 30 August 2004, 56, 71 (referring also to the argument that the arming and funding of the Janjaweed is part of a broader campaign of ethnic cleansing designed to 'Arabize' Sudan).

[27] Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights, Situation of Human Rights in the Darfur Region of Sudan, UN Commission of Human Rights, UN Doc E/CN.4/2005/3 (2004) 16.

[28] As the Commission of Inquiry notes, however, the statements made by Sudanese officials have sometimes been contradictory, see Commission of Inquiry Report, above n 20, pp 37–38; see also Secretary General Report on Sudan, above n 21, p 5. For a more detailed description of Sudan's account of the conflict in Darfur, see Commission of Inquiry Report, above n 20, pp 61–64.

[29] See generally Report of the Secretary General on the Sudan pursuant to paras 6, 13 and 16 of Security Council resolution 1556 (2004), para 15 of Security Council resolution 1564 (2004) and para 17 of Security Council resolution 1574 (2004), UN Doc S/2005/140 (2005).

[30] See, eg, *ibid*, pp 2–4; Commission of Inquiry Report, above n 20, p 26; see also Report of the Secretary General on the Sudan pursuant to paras 6, 13 and 16 of Security Council resolution 1556 (2004), para 15 of Security Council resolution 1564 (2004) and para 17 of Security Council resolution 1574 (2004), UN Doc S/2005/140 (2005) 1 ('one thing is clear: the Government has not stopped these groups from attacking civilians'); Monthly Report of the Secretary–General on Darfur, UN Doc S/2005/240 (2005) 10 ('reports continue to be received that Government forces operate jointly with armed tribal militia or, at least, both operate in the same area at the same time and towards the same general goals'); Monthly Report of the Secretary-General on Darfur, UN Doc S/2005/719 (2005).

[31] SC Res 1564, UN SCOR, 58th Sess, 5040th mtg, UN Doc S/RES/1564 (2004); SC Res 1574, UN SCOR, 59th Sess, 5082nd mtg, UN Doc S/RES/1574 (2004); SC Res 1590, UN SCOR, 59th Sess, 5151st mtg, UN Doc S/RES/1590 (2005); SC Res 1591, UN SCOR, 59th Sess, 5153rd mtg, UN Doc S/RES/1591 (2005).

[32] SC Res 1556, UN SCOR, 58th Sess, 5015th mtg, UN Doc S/RES/1556 (2004).

[33] SC Res 1591, UN SCOR, 59th Sess, 5153rd mtg, UN Doc S/RES/1591 (2005).

[34] SC Res 1593, UN SCOR, 59th Sess, 5158th mtg, UN Doc S/RES/1593 (2005).

underlying sympathy and ideological compatibility between the regime and Al-Qaeda, as well as a degree of dependence on Osama bin Laden, produced what may be regarded as persistent and willing acquiescence in terrorist activity on the part of the regime. Little or no attempts were made to comply with any counter-terrorism obligations, safe harbor was provided, and the activity of the terrorist group was consistently facilitated and tolerated, if not always openly approved.

State involvement in terrorism is rarely as extensive as is alleged in the cases of Iran, Syria, Sudan or Afghanistan. In the case of Lebanon, for example, a more complex picture emerges. The State Department's Terrorism Report claims that Lebanon has operated against some extremist groups such as Asbat al-Ansar and Al-Qaeda, but it has long refused to take measures against other groups such as Hizbollah and the PFLP that maintain an active presence in the country.[35] Indeed, even after the adoption of Security Council resolution 1559 in 2004 which calls, *inter alia*, for the 'disbanding and disarmament of all Lebanese and non-Lebanese militias' only limited steps have been taken against some Palestinian militant groups, while the operational status and capabilities of Hizbollah have thus far remained unchanged.[36] This ongoing toleration and safe haven is explained, in part, by the Lebanese view that these groups are engaged in legitimate resistance activity.[37] But it has also been argued that Syrian and Iranian intervention in Lebanese affairs have prevented Lebanon from acting to meet its counter-terrorism obligations even if, when left to its own devices, it might seek to do so.[38]

Similarly complex scenarios emerge with countries such as Pakistan and Saudi Arabia that present a mixed case of compliance and toleration. On the one hand, an alliance with the United States and concerns about maintaining both public order and personal power, have encouraged the leadership in these countries to support active engagement in counter-terrorist activity. On the

[35] State Department Terrorism Report, above n 6, 64-65. Asbat al Ansar is a Sunni group regarded as associated with Al-Qaeda, *ibid* p 95.

[36] See Second semi-annual report of the Secretary–General to the Security Council on the implementation of resolution 1559 (2004), UN Doc S/2005/673 (2005) 9-12.

[37] See, eg, Address by the Deputy Prime Minister of Lebanon at the 59th Session of the General Assembly, 22 September 2004, available at http//:www.un.org/webcast/ga/59/statements/lebend 040922.pdf. ('It is also the policy of Lebanon to support the National Resistance Movement'); see also Letter dated 6 December 2004 from the Permanent Representative of Lebanon to the United Nations addressed to the Secretary General, UN Doc A/59/595–S/2004/956 (2004). ('The Lebanese resistance . . . enjoys the support of the Lebanese Government and people which are engaged in an ongoing struggle to regain possession of the portions of national territory that are still under Israeli occupation').

[38] For example, Security Council resolution 1559 implies quite strongly that foreign intervention is to blame for the continuing presence of 'militia' in Lebanese territory, and for the failure to ensure Lebanese control throughout its territory, SC Res 1559, UN SCOR, 58th Sess, 5028th mtg, UN Doc S/RES/1559 (2004); see also Statement by the Permanent Representative of France, UN DOC S/PV.5028; Statement by the Permanent Representative of the United States, *ibid*. See also Report of the Secretary–General pursuant to Security Council resolution 1559 (2004), UN Doc S/2004/777 (2004); First semi-annual report of the Secretary–General to the Security Council on the implementation of resolution 1559 (2004), UN Doc S/2005/272 (2005).

other hand, both States have been accused of turning a blind eye to some extremist elements operating in their territory, and have been reluctant to target their support infrastructure for fear of generating civil unrest amongst sympathetic sectors of the public. In these cases, the prospect of full compliance with counter-terrorism obligations presents serious political challenges, and reflects tensions within the ruling establishment, as well as underlying political instability.

Thus, according to the 9/11 Commission, in the first two years after the September 11th attacks Pakistan 'tried to walk the fence, helping against al Qaeda while seeking to avoid a larger confrontation with Taliban remnants and other Islamic extremists'.[39] In Saudi Arabia's case, specific actions against Al-Qaeda and other Islamic extremists,[40] have been accompanied by allegations of funding and political support for terrorist groups such as Hamas and Islamic Jihad,[41] and an unwillingness to confront the broader and deeply rooted support structure for terrorist activity operating within the country.[42]

Towards the other end of spectrum, countries such as Kenya, Jordan, Cambodia and Nepal are regarded as committed to meeting their counter-terrorism obligations, but their efforts have been hampered by a lack of resources and institutional weaknesses, and their counter-terrorist activity has occasionally been criticized for human rights violations.[43] Similar assessments have been made of countries such as Ecuador, Laos, Colombia, Albania and the Philippines.[44] Other States such as Chad, Niger and Mongolia have swaths of uninhabited territory that are largely inaccessible to their security personnel and may serve as a sanctuary for terrorist groups. While Somalia—a country still lacking the rudiments of a functioning central government—is widely regarded as an example of a failed State that is simply unable to prevent terrorism emanating from its territory.[45]

Finally, mention can be made of developed countries with both the capacity and the general will to comply with their counter-terrorism obligations throughout their territory, that have nevertheless faced difficulties in penetrating

[39] The Commission also suggests that Pakistan's 'vast un-policed regions' are an attractive base for refuge and recruiting, see The 9/11 Commission Report, above n 7, p 368. As for Pakistan's involvement and ongoing support for Kashmiri militant groups see Byman above n 1, pp 155–185.

[40] See The 9/11 Commission Report, above n 7, pp 371–74 (describing Saudi cooperation but also calling the country 'a problematic ally in combating Islamic extremism').

[41] Levitt, above n 11, pp 76–87.

[42] See generally Byman, above n 1, pp 224-238; MS Doran 'The Saudi Paradox' (2004) 83 *Foreign Affairs* 35. For more detailed allegations of Saudi involvement, see D Gold, *Hatred's Kingdom: How Saudi Arabia Supports the New Global Terrorism* (Washington DC, Regnery Publishing Inc, 2003). But see State Department Terrorism Report, above n 6, pp 67–68.

[43] State Department Terrorism Report, above n 6, p 30 (Kenya); *ibid*, pp 64–65 (Jordan); *ibid*, pp 35–36 (Cambodia); *ibid*, p 74 (Nepal).

[44] *Ibid*, p 81 (Ecuador); *ibid*, pp 79–81 (Colombia); *ibid*, p 38 (Laos); *ibid*, p 54 (Albania); *ibid*, pp 38–39 (Philippines).

[45] The country is alleged to serve as a haven for terrorist groups such as the al-Ittihad al-Islami and may potentially serve as a convenient host to other organizations, see State Department Terrorism Report, above n 6, p 31.

terrorist cells or preventing the planning and execution of terrorist operations. These failures may occur despite best efforts at prevention or because of loopholes in security arrangements.[46] But some of these States have occasionally been accused of a calculated reluctance in apprehending and prosecuting certain terrorist offenders as a result of political considerations or out fear that such conduct would invite reprisal action by the terrorist organization in question. Indeed, these kinds of charges have been made, at different times, against certain European countries and against the United States.[47]

As these situations demonstrate, the power relationship between the State and a terrorist group can differ markedly and the thread connecting the two may be loosely or tightly spun. Still, in most of the cases considered thus far, the terrorist group exists independently of the State that facilitates or supports its activity. Hizbollah, Hamas, Al-Qaeda and others have all benefited from varying degrees of State support or toleration, but it would wrong to characterize them as mere auxiliaries of the State. Even where significant State sponsorship is involved, relationships take the form of complex partnerships and mutual exploitation rather than reflecting any strict hierarchical association between superior and subordinate. Any analysis of State responsibility to terrorism must be responsive to these different, and often subtle, forms of interaction. Simplistic assessments that assume a uniform or transparent relationship will produce similarly simplistic, and unhelpful, legal solutions.

7.2.2 The Changing Nature of the Terrorist Threat

Any realistic examination of State responsibility for terrorism is affected not only by the form of State involvement in terrorist activity, but also by the changing nature of the terrorist threat itself. An effective State responsibility regime must take account of the nature and scale of the threat posed today by non-State terrorist activity, and appreciate the way such actors may benefit from the assistance of the State or the weaknesses in its counter-terrorism response.

[46] It is in this context that the 9/11 Commission identified numerous shortcomings in United States counter-terrorism activity that undermined its ability to avert the September 11th attacks, see generally The 9/11 Commission Report, above n 7, pp 339–53. To take another example, according to the 9/11 Commission, four core members of the September 11th conspiracy, Mohammed Atta, Ramzi Binalshibh, Marwan al Shehhi, and Ziad Jarrah, formed a cell in the German city of Hamburg, while avoiding detection by German authorities due to a 'lax security environment', see *ibid*, pp 160–68, 366; see also M Sageman, *Understanding Terror Networks* (Philadelphia, PA, University of Pennsylvania Press, 2004) 103–7.

[47] For examples of these kinds of accusations against European States see, eg, Byman, above n 1, pp 220, 238-244, 276–277; AM Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven, CT, Yale University Press, 2002) 35–85. Another example is found in the criticism directed against the United States for failing to prevent private fundraising activities within its territory that has allegedly reached the Irish Republican Army, see Byman above n 1, pp 244–254.

The nature of private terrorist activity, the degree of its reliance on the State, and the magnitude of the threat it poses have changed significantly over time. Throughout the nineteenth and early 20th century, terrorism often took the form of localized political violence by anarchists, social revolutionaries and national separatists, often with limited or no State sponsorship.[48] At other times and in other places it has been the tactic of extreme neo-facists, nationalists and right-wing underground groups similarly unconnected to any particular State patron and similarly limited in its reach.[49]

It was during the Cold War, in particular, that terrorism came to be viewed as an especially dangerous phenomenon used by States to conduct 'war on the cheap'. This did not always mean that the State directed the activities of the group, but transnational acts of terrorism often originated in an alliance of interests that prompted the State to exploit and facilitate the terrorist activity.[50] When the State stood behind the terrorist group, financing, encouraging or directing its activities, the results could be far-reaching and the risk of escalating confrontation ominous. Guy Roberts, writing in 1987, provided an assessment of State involvement in terrorism typical for this period:

> The terrorist is now the spearhead of a developing theory and practice of surrogate warfare. Primarily the support of various states has caused terrorism to become a world problem of such magnitude . . . . With state support, terrorist groups can be much more lethal and have far greater operational reach.[51]

Neil Livingstone, in an earlier work, made similar assertions:

> It can be stated flatly and unequivocally that, without the support of powerful patrons and ideologically allied movements, terrorism would be only a minor annoyance instead of a global problem of expanding dimensions . . . the fact remains that terrorism is, in large measure, the product of a handful of nations that provide the arms, financing, training, safe havens, and other support apparatus to revolutionary and violence prone non-State actors. This is a marked departure from previous years,

[48] W Laqueur, 'Left, Right and Beyond: The Changing Face of Terror' in JF Hoge and G Rose, (eds), *How did this Happen: Terrorism and the New War* (New York, NY, Public Affairs, 2001) 70, 70.

[49] *Ibid*, p 72.

[50] An example of this kind of activity is found with respect of the Abu Nidal organization, responsible for attacks in some 20 countries primarily during the 1980s when it received considerable support, including safe haven, training and financial aid from Iraq, Libya and Syria, see State Department Terrorism Report, above n 6, p 93; see also NC Livingstone, *The War Against Terrorism* (Lexington, Lexington Books, 1982) 12–17 (referring to patronage by the USSR and Libya for various organizations during the Cold War).

[51] GB Roberts, 'Self-help in Combating State Sponsored Terrorism: Self-defence and Peacetime Reprisals' (1987) 19 *Case W Res J Intl L* 243, 253–54; see also Vice President's Task Force on Combating Terrorism, Public Report (1986) 2 ('terrorism has become another means of conducting foreign affairs. Use of terrorism by the country entails few risks, and constitutes strong-arm, low-budget foreign policy').

> when revolutionary movements were self-sufficient and confined their activities to the country that was the target of their activities.[52]

While specific claims of this kind of State sponsorship have sometimes been overstated or politically motivated,[53] there is little denying the significance of the union between the State and the terrorist during this period. Without the State playing a dominant role in facilitating or harnessing terrorist activity, non-State actors could not operate easily on the international stage. Without the private terrorist group doing its bidding, the State could not easily pursue its foreign policy objectives with this degree of efficiency and anonymity.

Weak states unable to prevail over their adversaries in more conventional ways could be particularly drawn to this method of warfare. Through terrorism, painful blows could be inflicted on one's opponent, while retaining the possibility of denial and enjoying relative insulation from the risks of direct retaliation.[54] More powerful victim States reacting to ostensibly private attacks would face an uphill battle in tracing the terrorism back to the State sponsor or in garnering international sympathy for a State-to-State confrontation in which it held the advantage. Particularly during the Cold War, the fear of confrontation between nuclear powers made this kind of proxy warfare an attractive proposition, while simultaneously dampening international enthusiasm for any efforts to expose and target the State sponsor.[55]

Not everything has changed. Terrorism does not occur in a vacuum. It is still invariably sustained, nourished or tolerated by States. Terrorist operatives still need weapons and financial support, a place to hide, train and organize without interference, and they often seek a base of popular support for pursuing their agenda. But one of the key changes is the degree of reliance on active, as opposed to passive, State support necessary to pose a serious threat. In the words of Daniel Byman:

> For many terrorist groups, a state's tolerance of or passivity toward their activities is often as important to their success as any deliberate assistance they receive. Open and

[52] Livingstone, above n 50, p 11. For a more nuanced analysis from this period, see Walter Laqueur, *Terrorism* (Boston, MA, Little, 1977); But see Koufa, above n 1, §52, 55:

> State-sponsored terrorism is not a novel phenomenon nor a unique feature of the contemporary international landscape . . . Nonetheless, it is only since the mid-1970s that this form of State terrorism has received increased international attention, when United States analysts first classed it as 'surrogate warfare' and suggested that such sponsorship was a coherent programme undertaken by various Communist bloc and Arab States.

She goes on to criticize the label of surrogate warfare as leading to 'military analyses and military solutions and, thence, to accompanying excessive use of force and interventionism, which may contribute to further destabilization and terrorism', *ibid*, §57.

[53] Koufa, above n 1, §57.

[54] PL Griset and S Mahan, *Terrorism in Perspective* (Thousand Oaks, CA, Sage, 2003) 47; see also Y Alexander, 'Democracy and Terrorism: Threats and Responses' (1996) 26 *Isr YB Hum Rts* 253, 259.

[55] See below section 7.3.

> active state sponsorship is blessedly rare, and it has decreased since the end of the Cold War. Yet this lack of open support does not necessarily diminish the important role that states play in fostering or hindering terrorism. At times the greatest contribution a state can make to a terrorist's cause is simply not to act against it. A border not policed, a blind eye turned to fundraising, or even the toleration of recruitment all help terrorists build their organizations, conduct operations, and survive.[56]

In earlier decades the concern may have been that States would control private terrorist groups, transforming them into a threat of international dimension. Today, the concern is that these groups operate outside State control: that they endganger human security on a global scale, but offer no fixed global address towards which principles of legal accountability, reciprocity or deterrence can be directed.

Today's non-State actors can easily cross territorial and cultural lines and plan devastating terrorist attacks with the benefit of State toleration or inaction but with little or no direct and active State involvement. Instructions may be sent over the Internet and funds transferred at the click of a button. Weapons may take the form of a single vial of biological toxin and terrorist cells may operate independently of any hierarchical structure. As the UN Secretary-General has recently stated, 'transnational networks of terrorist groups have global reach and make common cause to pose a universal threat'.[57]

Today's terrorist operatives can be formally unattached not only from the State but also from one another. Private individuals may be connected ideologically to a given cause, but they can operate in virtual isolation engaging in local initiatives without belonging to a terrorist organization in the way that terrorism experts have traditionally assumed. As Bruce Hoffman argues:

> The traditional way of understanding terrorism and looking at terrorists based on organizational definitions and attributes in some cases is no longer relevant. Increasingly, lone individuals with no connection or formal ties to established or identifiable terrorist organizations are rising up to engage in violence. These individuals are often inspired or motivated by some larger political movement that they are not actually a part of, but nonetheless draw spiritual and emotional sustenance and support from.[58]

[56] Byman, above n 1, p 219; see also Levitt, above n 11, p 43 (referring to the 'shift away from state sponsorship as the primary force behind international terrorism'); see also J Brunnée and SJ Toope, 'The Use of Force: International Law After Iraq' (2004) 53 *Intl & Comp L Q* 785, 786.

[57] Report of the Secretary–General, In Larger Freedom: Towards Development, Security and Human Rights for All, UN Doc A/59/2005 (2005) 26.

[58] B Hoffman, *Al Qaeda, Trends in Terrorism and Future Potentialities: An Assessment* (Santa Monica, CA, Rand, 2003) 16–17; see also S Reeve, *The New Jackals* (Boston, MA, Northeastern University Press, 1999) 263 ('The new breed of terrorist is even more dangerous, because the groups are less structured and hierarchical: the terrorists are more like members of a cult, receiving religious motivation and broad instructions via radio broadcasts, satellite television or, increasingly, via the Internet').

In addition, the strategic objectives of some terrorists groups are becoming far less connected to the resolution of particular political or territorial grievances that can attract the sympathy and substantial support of certain States. The goals of Al-Qaeda and its affiliates, for example, 'are formulated in such a way as to preclude the possibility of dialogue'.[59] Their acts seem designed more to mobilize and attract Muslims to a particular transnational Islamic agenda, than to extract specific political concessions from the States they target. The readiness of these groups to engage in catastrophic violence without fear of reprisal is arguably generated by the desire to provoke widespread confrontation, rather than realize a defined and negotiable result.[60]

It is in this environment that organizations like Al-Qaeda and its affiliates operate.[61] Indeed, it may be mistaken to think of these groups as discrete organizations at all. An increasing number of terrorism experts argue that unlike the terrorist groups of previous decades with an understandable structure, limited membership, defined political goals and identifiable State sponsors, modern terrorist groups tend to function more as movements or social networks, than as hierarchical organizations.[62]

Disparate terrorist cells can be linked to one another by complex webs of social interaction without necessarily adopting a coordinated strategy or unified command structure. These decentralized movements can attract disaffected individuals, from a variety of countries and backgrounds, who deeply identify with an ideological agenda or seek a social or religious identity in a broader

[59] A Kurz, '"New Terrorism": New Challenges, Old Dilemmas' (2003) 6 *Strategic Assessment* 3, available at http://www.tau.ac.il/jcss/sa/v6n2p3Kur.html; see also PA Long, 'In the Name of God: Religious Terrorism in the Millennium' (2000) 24 *Suffolk Transnatl L Rev* 51. But see M Mahamedou, 'Time to talk to Al Qaeda', *Boston Globe*, 14 September 2005, available at http://www.boston.com/news/globe/editorial_opinion/oped/articles/2005/09/14

[60] Kurz, above n 59:

> the willingness of Islamic terrorist organizations to cross the lines in their showcase attacks reflects not only there intention of escalating the conflict, but also an awareness of the difficulty of striking at the infrastructure of an organization that has minimal dependence on a defined territory . . . [t]he term 'new terrorism' is therefore largely linked to distinctive characteristics shared by the extremist fringes of terrorist elements, especially those belonging to militant Islam. These characteristics include: a wide geographical dispersal of infrastructure for attacks, which facilitates a borderless range of operation, ill-defined organizational boundaries, minimal commitment to the welfare of a specific community, and no need for a primary sponsoring state.

See also F Schorkopf, 'Behavioral and Social Science Perspectives on Political Violence' in C Walter, et al, (eds), *Terrorism as a Challenge for National and International Law: Security Versus Liberty?* (Berlin, Springer, 2004) 3, 17–20 (discussing the features of the 'new terrorism'); Alexander, above n 54, pp 260–64.

[61] The sanctions committee established pursuant to Security Council resolution 1267 of 1999 has established a useful list of entities associated with Al-Qaeda and the Taliban, see The New Consolidated List of Individuals and Entities Belonging to or Associated with the Taliban and Al-Qaida Organizations as Established and Maintained by the 1267 Committee, available at http://www.un.org/ Docs/sc/committees/1267/1267ListEng.htm; see also Gunaratna, above n 8.

[62] See generally, Sageman, above n 46, (viewing contemporary terrorism as the result of 'self-generated social networks'); L Wright, 'The Terror Web', *The New Yorker*, 2 August 2004, 40 (discussing in particular the use of the Internet as a way to unite Islamic terrorists and their sympathizers, and creating was has been termed a 'virtual Ummah').

society in which they feel alienated. As the 9/11 Commission suggested, 'the problem is that Al-Qaeda represents an ideological movement, not a finite group of people. It initiates and inspires even if it no longer directs'.[63]

This change in the nature of private terrorist activity is not absolute. Sub-state terrorist groups such as ETA in the Basque country,[64] the Tamil Tigers in Sri Lanka,[65] or the Sendero Luminoso in Peru[66] continue to pursue more familiar and localized violent activity with little or no State involvement. Others, such as Hizbollah, who have broader territorial reach, still benefit more directly from extensive State sponsorship and direction. But, on the whole, the threat posed internationally by private terrorist activity has increased dramatically, while the need for significant and active State involvement to facilitate that activity has decreased in similar proportions.

This threat is not necessarily limited to radical Islamic networks epitomized by Al-Qaeda. Conceivably, a handful of extremists motivated by any social, religious or ideological cause may now be able to resort to terrorism with catastrophic effect. In the past, terrorist acts carried out by small groups or individuals without considerable degrees of State sponsorship had limited destructive potential—today that potential may be limitless.[67] As the High-Level Panel on Threats, Challenges and Change has argued, 'smaller and smaller numbers of people are able to inflict greater and greater amounts of damage, without the support of any state'.[68]

[63] The 9/11 Commission Report, above n 7, 16 (Executive Summary).

[64] Euzkadi Ta Askatasuna (ETA), established in 1959 with the aim of establishing an independent Basque homeland, operates in Spain and France. While some of its operatives are said to have received training in the past in Libya, Lebanon and Nicaragua, State involvement in ETA activity is minimal, see State Department Terrorism Report, above n 6, pp 96–97.

[65] The Liberation Tigers of Tamil Eelam (LTTE), founded in 1976, seeks the establishment of an independent Tamil State and has engaged in terrorist tactics to this end. While it seeks financial aid from sympathetic Tamil communities in North America, Europe and Asia, it is has not in recent years been tied to a State sponsor, see *ibid*, p 104.

[66] The Sendero Luminoso (Shining Path) has engaged in bombing campaigns and assassinations in Peru with the aim of destroying existing Peruvian institutions and creating a communist regime in its place, see *ibid*, p 110. Other examples could include, Abu Sayyaf Group, a radical separatist organization operating in the southern Philippines; the Revolutionary Nuclei (RN) one of a number of anti-establishment leftist group in Greece; and the Aum Shnirikyo in Japan, a cult group that is responsible for the sarin gas attacks in several Tokyo subway trains in March 1995.

[67] W Laqueur, *No End to War: Terrorism in the Twenty First Century* (New York, NY, Continuum, 2003) 194 (referring, *inter alia*, to the risk of terrorism by radicals seeking to protect the environment, undermine globalization, or advance a racist or fundamentalist religious agenda); see also Reeve, above n 58, pp 257–67 (noting, *inter alia,* that white supremacist and militia groups in America are among a number of terrorist organizations suspected to be interested in obtaining chemical, biological, and nuclear agents for terrorist use').

[68] Report of the High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, UN Doc A/59/565 (2004) 19 [hereinafter, High-Level Panel Report]; see also Report of the Secretary–General, In Larger Freedom: Towards Development, Security and Human Rights for All, UN Doc A/59/2005 (2005) 4 ('Small networks of non-State actors—terrorists—have since the horrendous attacks of 11 September 2001, made even the most powerful States feel vulnerable').

In this altered international environment, even minimal assistance or acquiescence by the State can be highly significant. A State's provision of travel documents to individual operatives, its toleration of planning or financing activities, or its failure to apprehend terrorist offenders in transit to their ultimate destination may be all that is required to guarantee the success of a massive terrorist attack. In a globalized world in which the power to project substantial force abroad is no longer concentrated in the hands of the State, private terrorists do not need the active sponsorship of a State that shares their ideology or interests in order to produce large-scale terrorism. They may not even need formal ties, directions and material support from a structured terrorist organization. They just need to be left alone.

In the wake of the September 11th attacks, many have commented on this 'dark side' of globalization. Thomas Friedman, for example, has written in the following way of the benefits and dangers of a world in which individuals, and not just States, may be 'super-empowered':

> Because globalization has brought down many of the walls that limited the movement and reach of people, and because it has simultaneously wired the world into networks, it gives more power to *individuals* to influence both markets and nation-states than at any other time in history. Whether by enabling people to use the Internet to communicate instantly at almost no cost over vast distances, or by enabling them to use the Web to transfer money or obtain weapons designs that normally would have been controlled by states, or by enabling them to go into a hardware store now and buy a 500$ global positioning device, connected to a satellite, that can direct a hijacked airplane—globalization can be an incredible force-multiplier for individuals. Individuals can increasingly act on the world stage directly, unmediated by a state. So you have today not only a superpower, not only Supermarkets, but also what I call 'super-empowered individuals.' Some of these super-empowered individuals are quite angry, some of them quite wonderful—but all of them are now able to act much more directly and much more powerfully on the world stage.[69]

In a similar way, UN Secretary-General Kofi Annan has referred to the challenges posed by 'problems without passports' with States, both developed and developing, struggling to protect their citizens from the threat of private violence:

> Weak States in the developing world—especially in Africa—find that they are no longer able to monopolize and control the flow of weapons in their societies, because groups within those societies are able to bypass the State, financing weapons purchases on the global market through sales, on the same global market, of illicit crops or illicitly mined natural resources . . . the same phenomena, or related ones, are also

[69] TL Friedman, *Longitudes and Attitudes: Exploring the World after September 11* (New York, NY, Farrar, Straus and Giroux, 2002) 5 (emphasis in original); see also R Wedgwood, 'Countering Catastrophic Terrorism: An American View' in A Bianchi, (ed), *Enforcing International Law Norms Against Terrorism* (Oxford, Hart Publishing, 2004) 103, 104.

> undermining security in developed countries. Neither crime nor terrorism is a new problem. But, increasingly, they are global problems, from which no country can feel safe.[70]

The implications of these changes are profound. If States are no longer necessary to actively sustain terrorist groups they may also be less capable of detecting and controlling their activity. If the State's monopoly on the use of force is threatened, so is its capacity to protect either its own citizens or those of other States. By the same token, if even minimal violations of counter-terrorism obligations can create the environment for devastating terrorist acts, then the importance of the State compliance and accountability is intensified.

Conceivably, in a world in which non-State actors may engage in terrorist activity with increasing independence the focus must shift to the ways in which the private actors themselves can be held accountable under international and domestic law. The discourse following September 11th has included calls for enhanced judicial cooperation; for the development of international humanitarian law to better address non-State violence; for nation building in failed or failing States where terrorism can flourish; and for tackling the 'root causes' of terrorism whether they may be found in regional political conflicts, oppression and exploitation, or religious extremism and the lack of democracy.[71] These are all legitimate concerns and part of the myriad of strategies that should be considered in grappling with the terrorist threat. But they do not diminish the need to define how to assign responsibility to the State for private terrorist activity that its wrongful conduct facilitates, tolerates or encourages.

As much as non-State actors may be freer today to independently engage in transnational terrorist activity, they still rely, at the least, on the tolerance, weakness or neglect of States to succeed in their objectives. And citizens still rely on their own State and on other States to protect them from the harmful consequences of this private violence. As the High-Level Panel has put it, 'States are still the frontline responders to today's threats'.[72] They are, in the words of the UN Secretary-General: '. . . the basic and indispensable building blocks of the international system. It is their job to guarantee the rights of their citizens, to protect them from crime violence and aggression, and to provide the framework of freedom under law in which individuals can prosper and society develop.'[73]

[70] Address of Secretary General Kofi Annan to the Conference on Globalization and International Relations in the Twenty First Century, 7 June 2002, UN Doc SG/SM/8264 (2002), available at http://www.un.org/News/Press/docs/2002/sgsm8264.Dochtm; see also The 9/11 Commission Report, above n 7, pp 361–63.

[71] In the words of the High-Level Panel, terrorist recruitment is 'aided by grievances nurtured by poverty, foreign occupation, the absence of human rights and democracy, and civil violence . . .', High-level Panel Report, above n 68, p 20.

[72] *Ibid*, p 22.

[73] Report of the Secretary–General, In Larger Freedom: Towards Development, Security and Human Rights for All, UN Doc A/59/2005 (2005) 6.

For as long as the international community is organized as a system of sovereign States, it is only natural to look to States to confront the threat posed by terrorism, and to hold them accountable when they fail to meet their obligations to do so. States may be less important players in directly perpetrating terrorism, but they are no less important players in the fight against it. Indeed, in an interconnected world in which one State's failure to control terrorist activity poses a direct threat to the security of citizens in other States, enhancing State compliance with counter-terrorism obligations is more, not less, important.

The alarming surge in private terrorist activity poses a clear challenge to the State's monopoly on the use of force on which the international system is founded. If, in the face of this new terrorist threat, the international legal order is unable to realistically address the responsibility of States for failing to live up to their counter-terrorism obligations, it is the viability of the system that is in jeopardy.

For the purposes of this study, therefore, the question is not what other measures need to be taken to confront the contemporary terrorist phenomenon. The question is whether existing constructs of State responsibility enable the international community to deal appropriately with the State's current role in perpetuating and facilitating that illegal phenomenon, even where it is not directing and controlling the terrorist activity.

7.3 THE INADEQUACIES OF THE AGENCY PARADIGM

The common assumption in so many juridical works that notions of agency provide the legal framework for regulating State responsibility for terrorism can be challenged on several grounds. We have already seen that the events of September 11th cannot be adequately explained by the agency paradigm, and that while earlier practice has not generally been inconsistent with agency principles they have hardly provided the central rationale for international reactions to terrorist incidents. But the problems with an agency-based analysis run far deeper. This section examines some of the essential weaknesses associated with the assumption that the agency paradigm applies to State responsibility in cases of private terrorism.

7.3.1 Conceptual, Policy and Evidentiary Problems

At a fundamental level, an agency analysis of State responsibility for terrorism is flawed. As a legal concept, agency involves the delegation of authority: it concerns the actions of an agent as the representative of the dominant actor.[74]

[74] For some further discussion of agency as a theory of responsibility, see also below section 8.1. For standard texts of agency see, eg, FMB Reynolds, (ed), *Bowstead and Reynolds on Agency*, 17th edn, (London, Sweet & Maxwell, 2001); GHL Fridman, *The Law of Agency*, 6th edn, (London, Butterworths, 1990); A Barak, *Hok Ha-Shelichut* (Jerusalem, Nevo, 1996).

In its standard form, agency suggests a joint endeavor knowingly initiated by the principal and faithfully executed with the consent of the obedient agent. Responsibility is engaged because of an express or implied agreement between the principal and the agent, creating a direct relationship between the agent's actions and the principal's direction and control.

This model is wholly inadequate as a mechanism for describing and regulating State responsibility for most forms of contemporary terrorist activity. As noted above, the power relationship between the State and the non-State terrorist varies widely and rarely places the State in the position of principal or the non-State actor in the position of subordinate agent. State involvement in terrorism is not a case of marionette and puppeteer. It is more about acquiescence than direction and control, more about facilitation by quiet encouragement than specific instructions, more about omission than commission. There may be financing of ostensibly charitable organizations; there may be a consistent reluctance to exert best efforts in apprehending terrorist operatives; or there may simply be general ideological support that effectively legitimizes any terrorist action against 'the enemy'.

In all these cases, the State plays a crucial, sometimes indispensable, role in ensuring the success of the private terrorist activity but the language of agency does not properly describe its contribution. More often than not it is the private actor—not the State—that is the driving force behind the terrorist activity. Through complex acts and omissions the State may be a key facilitator of the terrorist activity and even harness that activity to its political advantage. But it does so more by failing to obstruct non-State ambitions than by acquiring the title of principal in an agency relationship.

As a theoretical matter, it is difficult to understand why a State should be spared direct responsibility for the consequences of wrongful private conduct that it has knowingly helped bring about, simply because its conduct does not fit tidily into an agency construct. [75] Limiting the State's responsibility to a failure to prevent or abstain in cases where its breaches have been essential to the terrorists' success seems to unfairly absolve the State of its full measure of responsibility.

Under an agency paradigm, State responsibility for private terrorist activity appears as a binary choice between direct responsibility as principal or a more marginal responsibility for parallel violations of the duty to prevent and to abstain. But in reality the State's actual contribution to the terrorist act oscillates between these extremes. By failing to take account of the complex interactions between the State and non-State actors that make terrorism possible, the agency paradigm ignores the reality of contemporary terrorism. In an era in which non-State actors can operate with devastating effect on the world stage, and even

[75] See, in a related context, AJJ de Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, The Tadić Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia' (2001) 72 *Brit Y B Intl L* 255, 291.

minor violations of counter-terrorist obligations can make a decisive contribution to the terrorist's success, this approach is simply unworkable.

The agency paradigm not only neglects the subtle relationships between the private and public sphere in the perpetration of acts of terrorism, it encourages them. In the words of Abraham Sofaer, writing two decades ago, this kind of approach to State responsibility has 'the effect of reducing the costs imposed on States for supporting aggression and for assisting groups they know intend to engage in unlawful acts'.[76] If direct responsibility is engaged only when a formal relationship of agency is established, the State can pursue more indirect and clandestine methods to achieve the same objectives. In a similar way, if unambiguous ratification is required for post-hoc direct responsibility, the State can simply avoid that degree of endorsement. By using agency as the standard for direct State responsibility, the law thus adopts a principle that is not just impractical but also self-defeating.

This criticism of the agency paradigm is less susceptible to challenge today than it was in previous decades. During the Cold War period, a reluctance to expose a State's role in terrorism for fear of direct confrontation between the super-powers may have justified treating terrorism as a lesser evil. Strict rules of attribution created the illusion that the State was not contributing decisively to private acts of terrorism unless convincing, and almost always unavailable, evidence of direction and control could be presented. An artificial and near impenetrable veil was thus constructed between the private terrorist group and the State that tolerated or secretly supported its activities. The result may have served as a dangerous license for proxy warfare but, at least in the eyes of some observers, it reduced the risks of nuclear catastrophe. As Michael Schmitt argues:

> The geopolitical and normative appeal of proxy wars was that they tended to facilitate the avoidance of a direct superpower clash. Thus, as demonstrated in Nicaragua, a very high threshold was set for attributing rebel acts to their State sponsors . . . This was a very practical approach. The bipolar superpowers were surely going to engage in such activity regardless of the normative limits thereon, so a legal scheme that avoided justifying a forceful response by the other side contributed to the shared community value of minimizing higher order violence. The result was the creation of a legal fiction that States that were clearly party to a conflict . . . weren't.[77]

[76] Sofaer, above n 3, p 101; see also WM Reisman, 'No Man's Land: International Legal Regulation of Coercive Responses to Protracted and Low Level Conflict' (1989) 11 *Hous J Intl L* 317. For a more recent formulation, see E Stephenson, 'Does United Nations War Prevention Encourage State-Sponsorship of International Terrorism' (2004) 44 *Va J Intl L* 1197. See also GA Christenson, 'Attributing Acts of Omission to the State' (1991) 12 *Mich J Intl L* 312, 338 (stating, in a related context, that a strict standard of attribution 'invites a State to exercise insidious control over private or non-governmental actors by subtle indirection').

[77] MN Schmitt, *Counter-Terrorism and the Use of Force in International Law* (Garmisch-Partenkirchen, George C Marshall European Center for Security Studies, 2002) 32–33; see also G Travalio and J Altenburg, 'State Responsibility for Sponsorship of Terrorist and Insurgent Groups: Terrorism, State Responsibility and the Use of Military Force' (2003) 4 *Chi J Intl L* 97, 105 (arguing that during the Cold war 'to hold that the United States and the Soviet Union had engaged in armed attacks whenever the groups that they supported did so would have obviously created a more dangerous world').

Today, many argue that the fear of the un-deterrable terrorist has eclipsed the fear of State-to-State confrontation. It is the private actor that may be the primary source of nuclear catastrophe. If the State's actual role in facilitating this form of private violence is blurred or de-emphasized that catastrophe is made more, not less, likely.

These problems are greatly exacerbated by the evidentiary challenges posed by the agency paradigm. Under the general approach adopted towards State responsibility for private acts, it would be for the victim to prove the agency relationship.[78] But by placing the burden of proof on the foreign victim, it becomes exceedingly difficult for the State to be found directly responsible for private acts of terrorism.[79] This position appears unrealistic given the clandestine nature of State toleration or support for private terrorist activity. While any responsibility regime needs to adopt evidentiary safeguards to prevent abuse, it is surely no less dangerous to apply rules of evidence that make the prospect of direct State responsibility illusory.[80]

All these difficulties with the agency paradigm come into sharper relief when examples are considered. Under the tests adopted in *Nicaragua*, and even in *Tadic*, it would be inappropriate to hold the State directly responsible for terrorist conduct if it 'merely' supplied the terrorists with weapons or logistical support. Under this standard even if the Taliban had provided Al-Qaeda operatives with airline tickets, funds for flight lessons or anthrax spores, that would still have been insufficient to engage direct responsibility.[81] Similarly, if one State knows of plans by terrorists operating in its territory to engage in a non-conventional chemical attack but finds it politically convenient to facilitate their training and travel it would, under an agency standard, be responsible only of a lesser violation of the duty to prevent and to abstain. And yet, it is hard to imagine that this kind of wrongdoing would be so perceived by the international community in a post-September 11th world.

Given the reality of State involvement in terrorism, and in particular the growing concern about non-conventional attacks by private actors, it is inappropriate to limit direct State responsibility to the largely artificial, and rarely provable, scenarios envisaged by the agency paradigm. To do so, would be to sustain a legal regime that serves the interests of States that violate counter-terrorism obligations rather than those seeking to uphold them.

It is not possible to answer these criticisms by simply lowering the threshold for agency. Agency may be implied but it cannot be invented. To presume such a relationship when there is no direction and control by the State—no express or implied relationship of principal and agent—is to minimize the dominant role

[78] See above section 4.4.5.

[79] See above section 3.2.1 discussing the weakness of this strict evidentiary standard in the context of the Iran–US Claims Tribunal.

[80] For a discussion of a suggested approach to burden of proof issues in terrorism cases, see below section 9.3.

[81] MJ Glennon, 'The Fog of Law: Self-defence, Inherence and Incoherence in Article 51 of the United Nations Charter' (2002) 25 *Harv J L & Pub Pol'y* 539, 543.

of the non-State actor in perpetrating the terrorist attack and to empty the notion of agency of its core meaning. To suggest, for example, that toleration necessarily produces agency is to adopt an anachronistic world-view that assumes that States are the only real actors on the world stage.

In reality, the State—whether by design or blunder—will almost always play a role in the success of private terrorist activity. But that role comes in the form of a contribution to the conduct of an actor that already inhabits the international plane. The State does not transform the terrorist act into an international one, and it rarely dictates the conduct of the private actor. It may be a partner in the terrorist atrocity, but it is not necessarily, or often, the sole power broker in the relationship.

In sum, agency is an awkward legal formulation that fails to account for the true nature of the relationship between the State and the non-State terrorist actor. In light of what is known about the relationship between the Taliban and Al-Qaeda, or about other modern manifestations of State involvement in terrorism, the answer cannot come in the form of contrived legal rules that treat complex associations as neat hierarchical relationships. To deter States from tolerating or supporting private terrorist activity a viable, realistic and conceptually coherent framework must be identified. The agency paradigm does not provide it.

7.3.2 From Injury to Aliens to Terrorism: Questioning the Universal Application of ILC Principles

Beyond these deeper policy problems with the agency paradigm, lies a basic question about its claim to universal or trans-substantive application. This entails two separate issues. The first is whether the ILC's assertion that the Draft covers all forms of State responsibility for private conduct is warranted. The second is the extent to which—regardless of the legal authority enjoyed by the Draft itself—the case law and legal sources upon which it relies can be properly treated as applicable to terrorism cases. These issues will be dealt with in turn.

Later, this study will question whether the agency paradigm of responsibility is really as entrenched in the provisions of the ILC Draft as many writers seem to presume.[82] But for now, we will assume the validity of this agency-based interpretation and instead ask the question whether the Draft Articles themselves must necessarily apply to cases of State responsibility for terrorism.

The first point to appreciate is that the Draft Articles are not, at least formally speaking, a source of international law.[83] Their authority and value are a function

[82] See below section 8.4.3.

[83] DD Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority' (2002) 96 *Am J Intl L* 857, 867 (suggesting that the Draft might be equated with the writings of highly qualified publicists as a subsidiary means for determining the rules of law, consistently with Art 38(1) of the ICJ Statute).

of the quality of the legal sources from which they are derived, as well as the respect they are accorded in practice by the international community. Certainly, the Draft Articles and their associated Commentary represent an invaluable resource in the field of State responsibility, not least because they reflect the contributions of leading international legal scholars over several decades, prepared in consultation with government experts. But this is not the same as saying that the Draft, in all its aspects, is an expression of customary international law.

Recent debates about the ILC Draft in the Sixth Committee have generally confirmed this view. Delegates expressed broad support for much of the Draft, and noted that judicial bodies and governments have relied upon several of its articles. At the same time, they voiced objections about certain key provisions and generally opposed the adoption of the text in the form of an international convention.[84] States have tended to welcome the ILC text and Commentary as useful guides, without necessarily embracing them, in all their parts, as an accurate expression of binding international law. It follows that while the Draft deserves deference, the mere fact that it claims universal application does not necessarily make it so.

From an academic perspective, this claim has been the subject of some debate. Many scholars, including James Crawford, have forcefully defended the ILC scheme arguing that '[i]n theory and practice, the international law of responsibility is applied across the field of international obligations'.[85] But others have questioned this assertion. John Crook and Daniel Bodansky, for example, have conceded that the abstract treatment of responsibility may have been a shrewd political tactic to avoid drawn out debates about primary rules, but they contend that it may also inhibit 'the elaboration of more variegated international norms'.[86] In a similar way, Christine Gray has suggested that the distinction between primary and secondary rules may be illusory in practice.[87] While Richard Baxter argued, as early as 1965, that 'the circumstances under which responsibility attaches and the remedies to be provided for violations of the rules of law cannot be divorced from the substantive rules of conduct themselves'.[88]

[84] GA Res 59/35, UN GAOR, 59th Sess, UN Doc A/RES/59/35 (2004) (commending the Draft Articles to governments without prejudice as to future action. The Sixth Committee will reconsider the Draft Articles at the General Assembly's 62nd session in 2007). For a summary of the latest discussions in the Sixth Committee on this topic during the 59th session, see UN GAOR, 59th Sess, 6th Comm, 15th mtg, UN Doc A/C.6/59/SR.15 (2004) 8–17; UN GAOR, 59th Sess, 6th Comm, 16th mtg, UN Doc A/C.6/59/SR.16 (2004) 1–6.

[85] J Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 *Am J Intl L* 874, 878. This view, of course, has wide support, see, eg, R Rosenstock, 'The ILC and State Responsibility' (2002) 96 *Am J Intl L* 792, 793.

[86] D Bodansky and JR Crook, 'Symposium: The ILC's State Responsibility Articles—Introduction and Overview' (2002) 96 *Am J Intl L* 773, 781.

[87] C Gray, 'Is There and International Law of Remedies?' (1985) 56 *Brit Y B Intl L* 25, 27 ('it is not possible completely to separate general principles from substantive rules . . . the idea that Part I or II of the Draft can provide general principles is an illusion').

[88] RR Baxter, 'Reflections on Codification in Light of the International Law of State Responsibility for Injuries to Aliens' (1964–65) 16 *Syracuse L Rev* 745, 748; see also generally AP Allott, 'State Responsibility and the Unmaking of International Law' (1988) 29 *Harv J Intl L* 1.

Whatever the appeal of the ILC's position, it is one upon which reasonable jurists have differed.

But even if one accepts the general wisdom of a system of trans-substantive rules of responsibility, there is room to question whether these rules necessarily encompass the specific field of State responsibility for terrorism. It is important to recall that the principles of State responsibility for private action that were embodied in the ILC Draft Articles were not crafted with transnational terrorism in mind. The rules of attribution of private acts are essentially distilled from arbitral awards and codification efforts focused on State responsibility for injuries to aliens arising from sporadic criminal attacks within the State's territory. As we have seen, they have since been applied in various legal fields, including human rights and environmental law, but these too may be regarded as qualitatively distinct from contemporary cases of terrorism. One might thus concede the application of ILC rules for private acts that are similar in kind to the original injury to aliens cases, while excluding such application when a fundamentally different form of private action is involved.

There are at least three ways in which cases of terrorism may be distinguished from the kinds of private acts with which the drafters of the ILC text were primarily preoccupied. First, unlike many of the acts that formed the basis for the ILC's examination of this issue, terrorism does not operate purely on the private plane. Non-state actors engaged in terrorism pursue a public, not a private, agenda. Terrorists are motivated by political or ideological designs rather than criminal ones, and they are capable of wreaking the kind of death and devastation which was conventionally associated only with State conduct. Since they seek to operate together with States on the international stage, it is far from obvious that a strict division between the public and private sphere inherent in the agency paradigm is warranted. As shall be argued below, it may be more appropriate to view States and private terrorist actors as operating on the same plane and thus more amenable to classification as tacit collaborators, even in the absence of an agency relationship.[89]

Second, in terms of its threat potential, contemporary terrorism differs markedly from the kind of criminal episodes that provided much of the raw material for the ILC Draft. In the case of ordinary incidents of private crime against foreign nationals it may be appropriate to adopt strict rules of attribution that minimize the circumstances in which such incidents are elevated to the diplomatic arena, becoming the basis for disputes between States and allegations of direct State responsibility. But this rationale is not necessarily relevant in terrorism cases, especially where the terrorist activity is ongoing, facilitated by persistent State violations, and includes the possibility of non-conventional attacks. The threat to international peace and security posed by this kind of terrorist activity could arguably justify a more flexible standard so as to deter and limit the destructive potential of wrongful State conduct.

[89] See discussion below section 7.6.2 regarding the crime/war distinction.

Interestingly, some of the older jurisprudence supported a differentiation in responsibility standards depending on the nature of the private conduct or its duration. Thus, for example, some early jurists argued that xenophobic mob violence that was specifically directed against the nationals of a particular State should not be treated as a common incident of injury to aliens, but rather as an attack on the State itself, justifying a higher, and possibly absolute, standard of State responsibility.[90] Similarly, in the famous *Janes Case*, the tribunal argued that repeated acts of non-repression and non-punishment could justify treating the State as a party to the private wrong, even though individual violations of that kind should be regarded solely as distinct violations.[91] And in the *Texas Cattle Claims* arbitration, the Commission took the view that Mexican responsibility was directly affected by the fact that its officials had failed 'over many years' to take steps to prevent the raids into US territory.[92]

The ILC Draft Articles do not address these possible grounds for adjusting the responsibility calculus. Instead, they adopt a single standard regardless of the form of private activity or the duration of the State's legal violations that have made that activity possible. The point here is not that the agency paradigm is invalid as a matter of principle, but rather that it may not be prudent to assume that this standard be rigidly applied in every circumstance of State responsibility for private conduct, especially when ongoing acts of terrorism are involved.

Finally, the relevance of ILC principles to cases of terrorism has been questioned in light of the different remedies that are at issue. The ILC Draft addresses remedies in the form of reparations and non-forcible countermeasures. It is not concerned with actions taken in self-defense.[93] In this context, some authors have doubted whether ILC rules on attribution and responsibility should apply when self-defense is an option.[94] With different remedies, they

[90] See, eg, J Goebel, 'The International Responsibility of States for Injuries Sustained by Aliens on Account of Mob Violence, Insurrections and Civil Wars' (1914) 8 *Am J Intl L* 802; JW Garner, 'Responsibility of States for Injuries Suffered by Foreigners within their Territories on account of Mob Violence, Riots and Insurrections' (1927) 21 *Am Soc Intl L Proc* 27. For more recent use of this argument, see RL Cove, 'State Responsibility for Constructive Wrongful Expulsion of Foreign Nationals' (1988) 11 *Fordham Intl L J* 802. For criticism of this view, see R Ago, 'Fourth Report on State Responsibility' (1972) 2 *YB Intl L Comm'n* 71, UN Doc A/CN.4/264 and Add.1, p 121.

[91] *Laura MB Janes (USA) v United Mexican States* (1925) 4 R Intl Arb Awards 82, 89–90 ; see also above section 2.5.

[92] General Memorandum Opinion of the Commission on the *Texas Cattle Claims*, 30 December 1944, reprinted in (1967) 8 *Whiteman Digest* 753 (noting, *inter alia*, that 'each raid was not an isolated raid but was part of a general lawless condition which, throughout said period, was permanent and, as noted, was made possible by the action of the Mexican authorities. It follows, therefore . . . that, if a claimant proves that his losses were caused by a raid or raids from Mexico during the period in question he will thereby have established liability on the part of the Mexican government for the same').

[93] Self-defense is addressed only in the context of Draft Art 21 (as a circumstance precluding wrongfulness) and indirectly in Draft Art 59 (providing that the ILC Draft is without prejudice to the UN Charter).

[94] See, eg, C Stahn, 'Collective Security and Self-defence after the September 11 Attacks' (2002) 10 *Tilburg Foreign L Rev* 10, 30; MN Schmitt, 'Bellum Americanum Revisited: US Security Strategy and the Jus Ad Bellum' (2003) 176 *Mil L Rev* 362, 397–98.

argue, should come different rules of responsibility. Admittedly, the availability of self-defense as a possible remedy does not in itself dictate whether a higher or lower threshold of State responsibility is warranted. But it might suggest that the automatic application of ILC standards would be open to question in these circumstances.

It may seem tempting to follow James Crawford's lead and respond to these observations by invoking the provision in the ILC Draft on *lex specialis*, which acknowledges that specific primary rules may impose rules of State responsibility that diverge from standard ILC principles.[95] According to Article 55: 'These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law'.

Under this construction, State responsibility for terrorism presents no challenge to the ILC claim to universal application since this particular field may be subject to *lex specialis* rules. But even if the general authority of the ILC scheme is accepted, the *lex specialis* exception offers no obvious answer, at least at present, to the problem presented by terrorism cases. As the ILC Commentary explains, Article 55 envisages circumstances where an exception to State responsibility rules is evident from the express provisions contained in a specific treaty or a self-contained regime.[96] No such black letter primary rules about direct State responsibility for private acts of terrorism, or even self-defense more generally, can presently be identified, at least not in a manner that would attract widespread agreement.[97]

Under the ILC framework, as it is generally interpreted, this would suggest the application of the agency paradigm as a default rule. Indeed, it is precisely the absence of a clear *lex specialis* that has drawn so many scholars to presume that the principle of non-attribution and the separate delict theory represent the relevant standard by which to assess State responsibility in cases of terrorism. And yet, these doctrines have not been applied to private terrorist activity in recent practice nor is it, as has been argued, appropriate to do so.

State responsibility for terrorism thus presents an anomaly in that it seems not to be regulated either by the ILC agency paradigm or by an easily identifiable *lex specialis* that would satisfy the terms of Draft Article 55. In due course, it will be necessary to respond to these problems either by clearly articulating a *lex specialis* regime for terrorism, or by revisiting how the ILC scheme of State responsibility for private conduct in general is conceived and applied.[98]

[95] J Crawford, 'Revising the Draft Articles on State Responsibility' (1999) 10 *Eur J Intl L* 435, 439–40 (suggesting, *inter alia*, that '[i]f international law is not responsive enough to problems in the private sector, the answer lies in the further development of the primary rules. . .').

[96] Report of the International Law Commission to the General Assembly, UN GAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) 356–59.

[97] See below section 9.6.

[98] See below sections 8.4.3 and 9.6.

7.3.3 The Nicaragua Problem: Weaknesses with the Standard Case Law Analogies

Even if the ILC Draft is not treated as authoritative, it is still necessary to consider in more specific terms whether the legal sources upon which the separate delict theory is founded should dictate the responsibility analysis in terrorism cases.

As we have seen, many of the cases in which the separate delict theory was apparently invoked need not necessarily have application in the terrorism field. Both the cases that preceded and followed the adoption of the ILC Draft have involved State responsibility with respect to private wrongdoing that is often distinguishable from private acts of terrorism. Moreover, as noted in section 3.2.5, several of these cases have not specifically ruled out the possibility that the State may in some circumstances be held directly responsible for unattributable private acts. It has simply not made a material difference in these instances whether the State is held responsible for its own wrongdoing only or for the private act itself.

Still, while these observations may be persuasive in general terms it is necessary to consider some of the leading agency cases in more detail. In analyzing State responsibility for terrorism, several scholars have avoided any discussion of the ILC Draft or the more general separate delict cases, and focused instead on more recent landmark decisions such as *Nicaragua*, *Tadic* and *Tehran Hostages*. Admittedly, the reliance on *Tadic* in this context may be somewhat questioned as it involved the distinct issue of determining which regime of humanitarian law applied in the circumstances.[99] But broadly speaking, all three cases concerned the extensive use of force by private actors, and the exclusive authority of agency criteria in establishing State responsibility for private acts was embraced in clear terms.[100] On this basis, several jurists have presumed that the dictum in the *Nicaragua*, *Tadic* and *Tehran Hostages* provides the relevant legal rules for determining State responsibility in cases of contemporary terrorism.[101]

There are several ways to challenge this presumption. The first is to dispute the legal conclusions in these cases. As noted in chapter 3, both *Nicaragua* and *Tadic* have been subjected to criticism for their reliance on agency criteria in

[99] See above section 3.3.1.

[100] While not directly examined through the lens of terrorist activity, these cases nevertheless involved conduct that might arguably be characterized as terrorism. In *Nicaragua*, this involved, *inter alia*, the dissemination of a CIA manual regarding illicit guerilla operations and general violations of humanitarian law, while in *Tehran Hostages* it concerned the hostage taking itself. Similarly, in the *Tadic Case*, violations of international humanitarian law, including the deliberate targeting of civilians, was at issue. The application of agency criteria in these cases may thus be viewed as providing more authoritative guidance in cases of State responsibility for terrorism.

[101] See authorities cited above section 6.2.1 and 6.2.2.

arguably inappropriate circumstances.[102] Likewise, in the *Tehran Hostages Case*, it might be argued that Iran's abject failure of prevention, coupled with the encouragement of anti-American activity, should have justified direct State responsibility for the hostage-taking even before it was officially ratified by the regime.[103] These criticisms are certainly plausible, and perhaps even compelling, but they may be unattractive to some since they involve direct disagreement with rulings that follow a long line of jurisprudence and enjoy a considerable measure of support.

A somewhat less forthright approach would be to argue that these cases may have been properly decided at the time but they have since been overturned, at least in so far as transnational acts of terrorism are concerned. As noted in section 6.2.5, several jurists have argued that in the wake of September 11th, direct State responsibility for private acts of terrorism may not be limited to cases of effective or overall control, or subsequent State adoption of the private activity. These jurists implicitly accept that agency was once the only appropriate standard to apply to State responsibility for terrorism that has since evolved in light of State practice and the previously unimagined dimensions of the new terrorism.

Under this line of argument, the principles followed in *Nicaragua*, *Tadic* and *Tehran Hostages* are simply inadequate given the reach, power and potential of terrorist actors in today's world, and the minimal reliance on the State needed to present a catastrophic threat. This view has been criticized by some as advocating the emergence of instantaneous custom,[104] but it has the merit of offering some explanation for the overwhelming support for the response to the September 11th attacks in the face of ostensibly contradictory jurisprudence.[105]

Indeed, even when adopted these decisions could be distinguished on their facts from cases of transnational terrorist activity. As Travalio and Altenburg have argued, *Nicaragua* and *Tehran Hostages* are 'far from factually analogous to states harboring transnational terrorists and actively assisting terrorist groups'.[106] They see differences in the fact that both these cases concerned

[102] See above section 3.3.1; see also Sofaer, above n 3, pp 100–1 (noting, *inter alia*, that the US did not claim that it was not responsible for the *contras* action, but rather that its support of the *contras* was legitimate); Glennon, above n 81, pp 543–44; de Hoogh, above n 85, p 291.

[103] This would resemble the reasoning of Judge Brower in *Short v Iran* who argued that the deliberate anti-American policy of the Khomenei regime and the total failure 'to quell the expulsive fervor . . . should permit attribution to him [Khomenei] of responsibility for the consequences', *Short v Islamic Republic of Iran* (1987) 16 Iran–US Cl Trib Rep 76, 94–95; see also below section 8.4.1.

[104] G Guillame, 'Terrorism and International Law' (2004) 53 *Intl & Comp L Q* 537, 547. But see B Langille, 'It's Instant Custom: How the Bush Doctrine Became Law after the Terrorist Attacks of September 11, 2001' (2003) 26 *Boston C Intl & Comp L Rev* 145. It is perhaps better to conceive of the shift as a collective re-interpretation of the relevant legal rules rather than to speak of instant or rapidly-crystallized custom. I am grateful to Craig Scott for this observation.

[105] As noted above section 6.2.5, the problem with this view lies not in its rejection of the traditional case law as applicable to contemporary terrorism, but in the nature and foundations of the 'new rule' it seeks to advance.

[106] Travalio and Altenburg, above n 77, p 105.

localized and limited threats, and neither involved the use of the territory of the State for safe harbor and assistance in the perpetration of acts of transnational terrorism.[107] They also note that 'there was no consensus in the years following Nicaragua and Iran Hostages that these cases represented the law as applied to transnational terrorist groups'.[108] And they conclude that these cases 'should be confined to their facts' and rejected as 'controlling authority for the fight against nonstate terrorist entities that threaten peace'.[109] Similarly, Ruth Wedgwood points out that, unlike the *Nicaragua Case*, Afghanistan was hosting international terrorists not 'insurgents carrying out low-level border violations', and that the focus was on US conduct as a victim of transnational terrorist attack, rather than as a 'volunteer in collective action'.[110]

There are indeed considerable factual discrepancies between terrorism, especially in its contemporary form, and these leading cases in which agency-type criteria have been adopted. To be sure, these kind of factual discrepancies justify the non-application of the existing case law only if they generate different legal and policy considerations. But the concerns raised in previous subsections regarding the inappropriateness of agency criteria in light of today's potentially catastrophic terrorist threat arguably provide that justification.

When the various grounds for challenging the relevance of *Nicaragua*, *Tadic* and *Tehran Hostages* and similar cases are considered together, their authority as far as State responsibility for terrorism is concerned is justifiably questioned. Whether the decisions themselves were misplaced, are distinguishable or have since been overturned, there is a sufficient legal basis—not just a policy imperative—that warrants exploring other legal standards for the determination of State responsibility for private terrorist activity.

7.4 THE INADEQUACIES OF USE OF FORCE STANDARDS

The key problems with reliance on constructive use of force standards were addressed above in section 5.3, and they may therefore be treated briefly here. As noted above, constructive formulations of the use of force are closely tied to the

[107] Travalio and Altenburg, above n 77, p 105. This latter distinction is somewhat less convincing with respect to the *Nicaragua Case* given that that according to the Court some *contras* were trained and hosted on US soil.

[108] *Ibid*, p 106.

[109] *Ibid*, p 105.

[110] R Wedgwood, 'Responding to Terrorism: The Strikes against Bin Laden' (1999) 24 *Yale J Intl L* 559, 566. In a somewhat different way, Jack Beard has suggested that the September 11th attacks are distinguishable from previous incidents of terrorism. The magnitude of the attacks, the fact that they formed part of a sustained campaign of transnational terrorism, and the availability of incriminating evidence, warrants in his view a more flexible approach to State responsibility. The implication of this assertion may be that while the existing case law still offers authority for more limited acts of terrorism, terrorist attacks that resemble September 11th deserve different treatment, see JM Beard, 'America's New War on Terror: The Case for Self-defence under International Law' (2002) 25 *Harv J L & Pub Pol'y* 559, 573–78.

Cold War era and notions of proxy warfare. They are less popular and less justified today given the changes in contemporary terrorist activity and the reduced reliance of terrorists on the State.

A number of difficulties with this approach are immediately apparent. The use of force standard is not a theory of State responsibility for private conduct. It is about defining armed attack under primary rules, not the secondary principles that govern the conditions for attribution and responsibility in relation to terrorist action perpetrated by non-State actors. The question whether the State has itself engaged in an armed attack, on the one hand, and whether it may be treated as directly responsible for private terrorist conduct, on the other, are conceptually distinct, and use of force standards address only one of these issues.

By treating the problem of State involvement in terrorism as one of the definition of armed attack, this approach over-emphasizes questions of self-defense. Adopting use of force principles as the dominant standard, risks treating every case of State involvement in terrorism solely within a *jus ad bellum* context—in effect conflating rules of responsibility with the definition of armed attack. The result may be to grant undue latitude for coercive action without appropriate considerations for other non-forcible options, and without distinction between the circumstances in which the State itself, as opposed to the non-State terrorist actor, may be a suitable target for a defensive response.

Moreover, as the rule is traditionally constructed, the toleration of private terrorist activity, and the provision of safe harbor or general support would not be viewed as an armed attack by the State justifying resort to self-defense. As such, present standards offer little explanation for the response to September 11th, and are irrelevant for the vast majority of contemporary cases concerning a State's contribution to private terrorist activity.

But the idea of lowering the standard to embrace these forms of State action is also unattractive. Claiming that toleration, logistical support or financing constitutes an armed attack introduces a legal fiction that obscures the role of the non-State actor as the immediate perpetrator and almost intuitively fails to appeal to reason. It is not the toleration or the support or the financing that is the armed attack. If direct State responsibility is engaged it is because the State has wrongfully allowed or encouraged the non-State actor to achieve its objectives, not because the State is actually perpetrating the attack or is itself substantially involved in such an attack in any traditional sense. In an international legal order that has distanced itself from a State-centric, Cold War perspective, this artificial and under-theorized formulation is both unnecessary and unwarranted.

7.5 THE INADEQUACIES OF ABSOLUTE OR STRICT RESPONSIBILITY

Given the inadequacies of agency or use of force criteria, and the magnitude of the contemporary terrorist threat, it may be tempting for some to leap to the

other extreme and argue that State responsibility for terrorism should be subject to absolute standards. As noted above, absolute responsibility has been advocated by a handful of scholars who consider it a corollary of sovereignty and an appropriate tool for ensuring international peace and security.[111]

It may be admitted that a theory of absolute responsibility overcomes some of the problems so far identified with other approaches and ensures the most exacting standard of accountability. But it is a case of the cure being worse than the disease.

The policy implications of this approach are severe. Quite apart from the absence of any support for it in international practice, absolute responsibility is an invitation to abuse and unjustifiable interference in the private sphere and in the affairs of other States. The State, aware that its direct responsibility would be engaged for any act of terrorism emanating from its territory would be driven to strictly monitor private conduct, limit freedom of expression, privacy and association and penetrate virtually every arena of private enterprise.[112] At the same time, the victim State would feel entitled to engage in remedial action directly against the foreign State regardless of its actual culpability. Automatically applied rules create avenues for exploitation and interference under the guise of confronting terrorism. The result would be to encourage the kind of State, and the kind of system, that the international legal order, and the international human rights regime in particular, has long fought against.

A less extreme, and somewhat less theoretical, version of this approach could be suggested. As opposed to absolute responsibility, a strict responsibility standard could be introduced that would impose direct *prima facie* responsibility on the host State for a terrorist attack unless it could show that it had met its counter-terrorism obligations.[113] This form of strict responsibility would thus address the problem by utilizing rebuttable presumptions and shifting burdens of proof.

As noted in section 4.4.5, this approach has not traditionally been applied in terrorism cases and, somewhat surprisingly, it receives almost no attention in the terrorism literature—even if analogies to it may be found in other fields of international law. It is also not without significant difficulties. Admittedly, shifting the burden of proof can operate as an important incentive for State compliance and may deserve consideration for the purposes of the liability to compensate in terrorism cases.[114] But as a general rule of responsibility for

[111] See above section 5.2.2

[112] On the link between combating terrorism and infringement upon private rights see, eg, H Krieger, 'Limitations on Privacy, Freedom of Press, Opinion and Assembly as a Means of Fighting Terrorism' in C Walter, *et al*, (eds), *Terrorism as a Challenge for National and International Law: Security Versus Liberty?* (Berlin, Springer, 2004) 51.

[113] The term strict responsibility is used in the sense adopted by Brownlie as *prima facie* responsibility subject to various modes of exculpation, see I Brownlie, *System of the Law of Nations: State Responsibility Part I* (Oxford, Clarendon Press, 1983) 44.

[114] See, eg, TS Renoux and A Roux, 'The Rights of Victims and Liability of the State' in R Higgins and M Flory, (eds), *Terrorism and International Law* (London, Routledge, 1997) 251.

terrorism it continues to pose problems in terms of abuse and unwarranted intervention. Under this system, States may be quick to act forcibly against alleged, but difficult to prove, failures and slow to tolerate free enterprise in the private sphere.

Moreover, by treating every failure to prevent as a basis for direct responsibility, this approach does not provide a meaningful way of differentiating between degrees of State responsibility. Conceivably, a State that is unable to show that it has exercised due diligence to prevent an isolated attack would risk being as responsible as a State that had demonstrated an ongoing and grave pattern of terrorist sponsorship. If certain failures of prevention on the part of the United States contributed to the execution of the September 11th attacks, this approach would lead to the nonsensical result that both the United States and the Taliban were equally responsible for the attacks.

Evidentiary tools do have a role to play in determining State responsibility for terrorism. Chapter 9 will attempt to sketch out their elements. But they are not a substitute for a responsibility regime. It is necessary to first establish the principles by which direct State responsibility might be engaged, and only then to consider how presumptions and shifting burdens of proof might properly be utilized in making that determination in specific instances.

While neither absolute nor strict responsibility offers a promising alternative for State responsibility in terrorism cases, they do reveal some important things about the search for that alternative. The principles that guide State responsibility for terrorism are more than technical legal rules. They have a direct impact not only on how the interaction between the public and the private sphere is perceived and regulated, but on the kind of public/private relationship the international system seeks to advance. This is because the greater the degree of potential responsibility, the greater the incentive for State interference in the private domain. As Gordon Christenson has argued, 'the policy basis for attribution is at the conceptual line preventing the State's entrance into every private sphere under the guise of responsibility'.[115]

In a similar way, the approach to responsibility for terrorism also dictates what one State can legitimately demand of other States in protecting its nationals from harm. This generates an inherent tension between powerful and weaker States. Powerful States are more capable of controlling their territory and responding to violations. Because of their developed infrastructure they can also be more vulnerable to private terrorist attack. They may seek to maximize State responsibility for terrorism so as to validate broad counter-terrorism measures. Weak States, on the other hand, may fear unjustified expectations and foreign intervention on the pretext of counter-terrorism action. They will be

[115] GA Christenson, 'The Doctrine of Attribution in State Responsibility' in RB Lillich, (ed), *International Law of State Responsibility for Injuries to Aliens* (Charlottesville, VA, University of Virginia Press, 1983) 320, 333.

drawn to restrictive responsibility models that take due account of these concerns.[116]

In this context, agency criteria impose artificial distinctions between the public and private domain in a way that offers relative freedom to the private sphere but unduly absolves the State for its role in making illicit private action possible. At the other end of the spectrum, absolute or strict responsibility imposes exacting standards on the State for non-State action in ways that do not necessarily correspond to its wrongdoing and, as a result, invite undue interference in the private sphere and impose heavy burdens and risks, especially on weaker States.

A viable responsibility strategy must strike the right balance between these extremes, seeking to avoid abuses while at the same time working to suppress terrorist activity and enhance compliance with counter-terrorism obligations. It is here that the search for a workable approach to State responsibility for terrorism must begin.

7.6 TOWARDS A MODEL OF STATE RESPONSIBILITY FOR TERRORISM: THE INTER-PENETRATION OF THE PUBLIC AND PRIVATE SPHERE

The central conceptual weakness of the traditional responsibility theories considered in this section lies in their failure to account for the complex nature of the interaction between the State and non-State terrorist actor. The agency paradigm, in particular, advances a clinical division between the State and the private terrorist group where none is evident in practice. As suggested in section 7.2, contemporary terrorism often places the wrongdoing State and the non-State terrorist actor in the position of tacit, and sometimes unintended, collaborators rather than in any kind of hierarchical relationship. The State may be intimately involved in private terrorist acts not because it functions as the principal in an agency relationship, but rather because its wrongful acts and omissions have created the climate in which terrorism is possible.

A viable regime of State responsibility for terrorism cannot maintain a rigid partition between the public and the private sphere. To properly regulate the responsibility of the State for private acts of terrorism it is necessary to craft a model that accounts for the way State and non-State actors actually penetrate and influence one another in terrorism cases. This section takes a deeper look at the implications of the inter-penetration of the public and private sphere for a workable model of State responsibility for terrorism.

[116] Interestingly, powerful and weaker States may stake out the opposite position when it comes to responsibility for transnational economic activity by private firms. In these cases, developed States may seek to avoid responsibility for the acts of private corporations in developing countries. By contrast, developing States may demand greater accountability for the detrimental acts of these private enterprises by arguing that responsibility should be traced to the State from which the enterprise originates, see B Graefrath, 'Responsibility for Damages Caused: Relationship between Responsibility and Damages' (1984) 185(2) *Hague Recueil Des Cours* 13, 41.

7.6.1 The Public/Private Distinction and the Role of the State in the Private Sphere

As noted above, prevailing conceptions about State responsibility for private conduct are grounded in a fundamental distinction between the individual and the State. The State is responsible for its own actions not for purely private conduct. Direct responsibility for private acts arises only when those acts are elevated, by agency or espousal, to the public domain. A sharp distinction is thus drawn between the public and private realm in conventional views of State responsibility and the principle of attribution essentially 'governs the demarcation of the private sphere'.[117]

This public/private distinction is founded on a particular model of the State. It conceives of the relationship between the public and the private sphere in essentially negative terms.[118] It promotes a narrow Western notion of the liberal state that views individual freedom in terms of non-interference by the State in private action.[119] The result is a system that encourages the State to avoid intruding into the private arena by absolving or minimizing its responsibility for private wrongs.

A conception of responsibility founded on a strict public/private dichotomy rests on weak foundations. Most states do not operate according to the neat division of public and private imagined in the 'idyllic' liberal State. As Christine Chinkin has argued, the 'claim to universal applicability' of a State responsibility regime founded on the public/private distinction:

> . . . assumes a commonly accepted rationale for distinguishing between the conduct of State organs and that of other entities which in fact depends upon philosophical convictions about the proper role of government and government intervention. The location of any line between public and private activity is culturally specific and the appropriateness of using Western analytical tools to understand the global regime is questionable.[120]

[117] Christenson, above n 115, p 322. He goes on to say, '[f]rom Grotius to Ago and the work of the International Law Commission, the central theme of separating private from public acts by international law has been unquestioned', *ibid*, p 327; see also DD Caron, 'The Basis of Responsibility: Attribution and Other Trans-substantive Rules' in RB Lillich and DB Magraw, (eds), *The Iran–United States Claims Tribunal: Its Contribution to State Responsibility* (Irvington-on-Hudson, NY, Transnational Publishers, 1998) 109, 126–27 (stating that rules of attribution exist to 'establish a cleavage between public and private acts in our conception of society').

[118] MH Kramer, *In the Realm of Legal and Moral Philosophy: Critical Encounters* (New York, St. Martin's Press, 1998) 112–13.

[119] M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki, Finnish Lawyer's Cooperative, 1989) 65; C Romany, 'Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' (1993) 6 *Harv Hum Rts J* 87, 89–90.

[120] C Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10 *Eur J Intl L* 387, 390.

The actual division between the public and private domain varies widely among States reflecting different political preferences and configurations of power.[121] In an oppressive totalitarian State, for example, the distinction between public and private may be blurred or non-existent. A private terrorist group, even if not a *de facto* agent, could not possibly function unless acting in a manner that the State considered to be in furtherance of its own objectives.[122] In other cases, the official organs of the State may seek or feel compelled to appease local tribesmen, religious leaders and other influential private actors through a calculated policy of non-interference in non-State terrorist violence emanating from its territory. In each instance, a preconceived notion of the State's structure obscures more than it reveals about the government's actual contribution to private terrorist conduct.

In real terms, the State's influence in the private sphere can be manifested not only in acts of commission, where the State directs private conduct or interferes in private activity, but also in acts of omission. Persistent State failure to prevent wrongs within the private domain can be as much a form of State policy as direct governmental action. But by conceiving of responsibility through the prism of the public/private distinction this method of State action can be concealed. The result is to shield the functioning State from direct responsibility when its wrongful conduct was a direct cause of the private harm.

This kind of critique of the public/private distinction has perhaps appeared most forcefully in feminist writings. Feminist legal scholars have argued that the public/private dichotomy wrongly presumes that the private realm is composed of autonomous individuals interacting freely and equally.[123] By advancing this false premise of initial social equality, the public/private distinction actually perpetuates the subordination of women in the domestic sphere. Because current rules generally trigger responsibility only for the State's own actions, they can ignore persisting injustice in the private sphere that is caused by the State's failure to correct that injustice. Instead, some feminist writers argue that the State should be held *directly* responsible for wrongful private harm if its action *or* inaction creates the climate where such harm can occur. As Celina Romany has observed: 'State failure to prevent crimes of violence against women can be viewed as the conspiracy between the private actor and the state law enforcement agencies. This tacit agreement in the continuing violence can also be characterized as a "policy" or "custom" of the state.'[124]

[121] Committee on Science and Technology for Countering Terrorism, *Terrorism: Perspectives from the Behavioral and Social Sciences* (Washington, DC, National Academies Press, 2002) 29.

[122] Christenson, above n 115, p 368.

[123] K O'Donovan, *Sexual Divisions in the Law* (London, Weidenfeld, 1985) 7–8.

[124] Romany, above n 119, p 88; see also CA Mackinnon, *Toward a Feminist Theory of the State* (Cambridge, MA, Harvard University Press, 1989); K Roth, 'Domestic Violence as an International Human Rights Issue' in R Cook, (ed), *Human Rights of Women: National and International Perspectives* (Philadelphia, PA, University of Pennsylvania Press, 1994) 326; H Charlesworth, 'Worlds Apart: Public/Private Distinctions in International Law' in M Thornton, (ed), *Public and Private: Feminist Legal Debates* (New York, NY, OUP, 1995) 243; K Walker, 'An Exploration of Art 2(7) of

This argument can be harnessed persuasively in the context of private terrorist activity. While terrorism's immediate perpetrator is a private actor, the State can often play a direct role by allowing the terrorism to occur. Repeated acts and omissions of a functioning State that violate its duty to prevent and abstain are thus more than breaches of a distinct obligation. They are acts that have the potential to transform the State into a silent partner in the private wrongdoing.

The theoretical implications of this argument are highly significant. Under this conception, the State is not perceived in the narrow 'liberal' terms advanced by the public/private distinction. Instead, this critique acknowledges that the State is an engaged actor in the private realm because its acts and omissions create the reality in which private action takes place.[125] Since the potential for harmful individual action is shaped by choices made in the public domain it may be appropriate to view the public actor as sharing responsibility for the private harm itself.

The reality of public penetration of the private realm acquires juridical significance when the law demands that the State protect private rights or prevent certain kinds of private action. In these cases the responsibility calculus is fundamentally altered. Without such specific duties the State may be justified or even obligated to retreat from the private domain. It is fitting, therefore, for the State to be free in these circumstances of attribution and responsibility for private action in the absence of *de facto* agency or espousal that converts non-State conduct into State action.

However, when such duties of control are imposed it makes little sense to limit the State's responsibility to its own acts. These duties create not only a separate legal obligation, but also a normative expectation that the State will influence conduct in the private sphere in a way that best ensures that certain rights are effectively exercised and protected, as well as balanced against one another.[126] It follows that the State's responsibility should not be limited to its own acts but encompass also the *consequences* of its wrongdoing in terms of their contribution to illicit private action that it is charged to forestall.

Because the State's wrongful acts and omissions create the environment in which private harm can occur, it is necessary to craft a model of responsibility

the United Nations Charter as an Embodiment of the Public/Private Distinction in International Law' (1994) 26 *NYU J Intl L & Pol* 173; see also below section 8.4.2 (discussing developments in refugee law in cases of State toleration of domestic violence against women).

[125] See MD Evans, 'State Responsibility and the European Convention on Human Rights: Role and Realm' in M Fitzmaurice and D Sarooshi, (eds), *Issues of State Responsibility before International Judicial Institutions* (Oxford, Hart Publishing, 2004) 139, 159 (making the argument, in the human rights context, that the 'private sphere is only the private sphere *because* the State has not yet intruded into it').

[126] Kramer, above n 118, p 113; see also Mackinnon, above n 124, p 191 ('Freedom from public intervention coexists uneasily with any right that requires social preconditions to be meaningfully delivered. For example, if inequality is socially pervasive and enforced, equality will require intervention, not abdication, to be meaningful').

that can implicate the State directly in the private wrong. To this end, a restrictive responsibility model that is limited to the State's own acts and omissions must be abandoned. Instead, preference should be given to a responsibility regime that is able to account for the illicit contribution of the State to the private harm so as to hold it directly responsible when that contribution is decisive.

Admittedly, the idea that certain State failures of omission or commission justify direct responsibility for private conduct may lack practical significance in some cases. As has been noted, in the human rights field for example there may be no substantial difference between a finding that a State is responsible for failing to prevent an act and the finding that the State is responsible for the act itself.[127] Given that many States are now willing to view the State as responsible for failing to prevent private human rights infringements, it may add little practical benefit to promote an approach whereby some failures to prevent would justify viewing the State itself as a direct participant in the private wrong.[128]

But, as demonstrated in section 5.1, the distinction between responsibility for the failure to prevent, on the one hand, and direct responsibility, on the other, has specific relevance with respect to terrorism, especially given the possibility of forcible defensive action. In the context of State responsibility for terrorism, therefore, there are significant implications to the adoption of a system that grounds direct State responsibility not in conceptions of agency, but rather in the actual impact of a State's wrongdoing on the successful execution of private terrorist activity.

[127] Indeed, some feminist critique of the public/private distinction has been focused on advocating a State duty to prevent private infringements of the human rights of women, rather than making an argument for direct responsibility, see, eg, D Sullivan, 'The Public/Private Distinction in International Human Rights Law' in J Peters and A Wolper, (eds), *Women's Rights Human Rights: International Feminist Perspectives* (1995) 126; Chinkin, above n 120, p 394; but see below section 10 (on the potential benefits of imposing direct responsibility on the State in certain cases of private human rights infringements).

[128] See above section 3.2.2 discussing how regional European and Latin American courts have recognized that State inaction in preventing the private infringements of rights can at least be a ground for State responsibility for the failure to prevent. Interestingly, this development has not been mirrored in domestic US courts. In US constitutional law, for example, the notion of State action has on occasion been so narrowly defined that the State is rarely held to have a duty to prevent private harm and, as a result, the question of government accountability for private conduct has been largely neglected, compare *Deshaney v Winnebago County Department of Social Services* 489 US 189 (1989) with *Ross v United States* 910 F 2d 1422 (7th Cir, 1990); see also GS Buchanan, 'A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility' (1997) 34 *Houston L Rev* 665, 733–56; see also Christenson, above n 115, pp 341–45. In the *Deshaney Case*, for example, local county officials were held not to be liable for any wrongdoing in the severe abuse inflicted over a four-year period by the father of a young child, Joshua Deshaney, even though they were acutely aware of the repeated abuse and had failed to take any meaningful measures to ensure the child's protection. The Court reasoned that responsibility could not be engaged since the protective services were not constitutionally mandated. Justice Brennan, in a strong dissent, criticized the court for not realizing that by 'monopolizing' the avenues of preventive action the State was responsible for protecting the child from abuse. He went on to admonish the Court for 'its failure to see that inaction can be every bit as abusive of power as action, that oppression can result when a State undertakes a vital duty and then ignores it', see Deshaney, *ibid*, p 212.

7.6.2 The Crime/War Distinction and the Role of the Non-State Actor in the Public Sphere

The public/private distinction that informs conventional approaches to State responsibility for terrorism is challenged not only by State penetration of the private sphere, but also by the penetration of the public sphere on the part of non-State actors. Traditional attitudes towards terrorism have often treated it simply as a criminal phenomenon, taking place on the private plane. These views have been reinforced by the prosecute or extradite regime adopted in counter-terrorism conventions and, to some extent, by the Security Council's emphasis on capacity building in the wake of September 11th.[129] Viewed in isolation, these trends can create the misleading impression that terrorism is purely a law enforcement problem in relation to which States—the only true actors on the international plane—need to ensure that they have the necessary capabilities of prevention and punishment.

When perceived exclusively from this criminal perspective, the division between public and private in an agency model of responsibility is more easily understandable. But while terrorism unquestionably entails a private criminal dimension, there is broad recognition today that it is also an *international* phenomenon that operates on the *international* plane. Many contemporary terrorists are global players engaged in illicit violent activity on a scale usually associated with sovereign States and for which a police action model seems poorly suited.

The independence, power and reach of today's non-State terrorist actors, and the risk that they may engage in prolonged or non-conventional attacks, has systematically undermined the authority of a purely criminal approach, and encouraged the view that non-State actors engaged in terrorist activity are subjects of international law. In the words of Ruth Wedgwood, '[t]he lesson of September 11 is that control of catastrophic terrorism may require measures beyond criminal law . . . and a new standard of State responsibility for controlling private activity within national territory'.[130]

As we have seen, States have demonstrated that they are ready to view some acts of terrorism not just as crimes but also as acts of war conducted on the global stage.[131] After September 11th, the Security Council itself, while focusing on capacity-building initiatives, has repeatedly affirmed that terrorism

[129] See above section 4.3.

[130] Wedgwood, above n 69, p 117.

[131] See generally, N Feldman, 'Choices of Law, Choices of War' (2002) 25 *Harv J Law and Pub Pol'y* 457; Note, 'Responding to Terrorism: Crime, Punishment and War' (2002) 115 *Harv L Rev* 1217; V Lowe, 'Clear and Present Danger: Responses to Terrorism' (2005) 54 *Intl & Comp L Q* 185; see also SD Murphy, 'Terrorism and the Concept of Armed Attack in Article 51 of the UN Charter' 43 (2002) *Harv Intl L J* 41, 45–46. But see G Abi–Saab, *There is No Need to Reinvent the Law* (2002), available at http://www.crimesofwar.org/sept-mag/sept-abi-printer.html; see also G Abi–Saab, 'The Proper Role of International Law in Combating Terrorism' (2002) 1 *Chinese J Intl L* 305.

constitutes a grave threat to international peace and security and has invoked the right of self-defense in connection with terrorist attacks by non-State actors.[132] Indeed, the international community has shown greater willingness to countenance a forceful response to terrorist attacks, examining some acts of terrorism and the response to them through the lens of *jus ad bellum* and *jus in bello* principles rather than a criminal law paradigm.[133]

The idea that the confrontation with terrorism may sometimes be subject to the laws of war does more than elevate terrorism above a common criminal, and private, phenomenon. As Noah Feldman has pointed out 'our intuition tells us that states make wars and individuals commit crimes'.[134] If terrorist organizations are capable of engaging in an armed conflict with a foreign State these intuitive distinctions begin to break down.

George Fletcher has recently recalled that wars are by definition a collective enterprise.[135] They evoke Romantic notions of collective action rather than a liberal conception that limits responsibility to individual action. If a State may be engaged in an armed conflict with a terrorist organization, it follows that the law will countenance a perception of the terrorist group as a distinct collective entity, not merely the sum of individual terrorist operatives.[136]

To speak of an armed conflict against Al-Qaeda, for example, is to claim that Al-Qaeda can have a separate personality as a subject of international law. It offers the possibility of treating non-State terrorist organizations as public entities whose individual agents engage the responsibility of the organization as a whole. In this sense, terrorist organizations take on State-like characteristics. Without that, it is doubtful that would have been permissible to engage individual Al-Qaeda operatives in Afghanistan in the absence of detailed evidence tying them personally to the September 11th attacks or to other terrorist action.

Admittedly, the contours of the crime/war relationship in terrorism cases remain hotly contested, not least because of the difficulty in identifying individual operatives as members of a given terrorist collective.[137] But the use of an

[132] For example, see SC Res 1368, UN SCOR, 56th Sess, 4370th mtg, UN Doc S/RES/1368 (2001); SC Res 1373, UN SCOR, 56th Sess, 4385th mtg, UN Doc S/RES/1373 (2001); SC Res 1566, UN SCOR, 59th Sess, 5053rd mtg, UN Doc S/RES/1566 (2004); see also PM Dupuy, 'State Sponsors of Terrorism: Issues of International Responsibility' in A Bianchi, (ed), *Enforcing International Law Norms Against Terrorism* (Oxford, Hart Publishing, 2004) 3, 7.

[133] See generally D Jinks, 'September 11 and the Laws of War' (2003) 28 *Yale J Intl L* 1; see also above section 5.4.

[134] Feldman, above n 131, p 459.

[135] GP Fletcher, 'Liberals and Romantics at War: The Problem of Collective Guilt' (2002) 111 *Yale L J* 1499; see also GP Fletcher, *Romantics at War: Glory and Guilt in the Age of Terrorism* (Princeton, Princeton University Press, 2002).

[136] Lowe, above n 131, p 189; but see H Duffy, *The War on Terror and the Framework of International Law* (Cambridge, CUP, 2005) 252–54.

[137] The argument concerning the relationship between criminal law and the law of armed conflict has been especially contested with respect to the legal regime applicable in cases involving the detention of suspected terrorist operatives, see, eg, FL Borch, 'A Response to Why Military Commissions are the Proper Forum and Why Terrorists will have "Full and Fair" Trials', *The Army Lawyer*

armed conflict paradigm in the treatment of some terrorist activity makes it far easier to see the State and the non-State terrorist actor as potential associates on the international plane, despite the distinctions between the inherent illegitimacy of the latter and the sovereign status of the former. It at least suggests that States and global terrorists do not inhabit completely different legal worlds, even if they may be subject to different rights and obligations.[138]

This trend is more broadly reflected in the growing recognition that non-State actors are subjects of international law, and in what Anne-Marie Slaughter and William Burke-White have referred to as the 'individualization of international law'.[139] If non-State actors can be regulated by international law, then private and public acts are less polar opposites than points on a spectrum. When coupled with the recognition that States play a role in sponsoring and facilitating terrorism, not just in policing it, any clinical division between the public and private realm becomes both misleading and dangerous.

What does this perceived shift in the status of non-State actors imply for the rules of State responsibility? Arguably, if non-State terrorist actors can operate as subjects of international law on the international plane then they should also be viewed as capable of operating together with States in overt and covert partnerships without requiring an agency relationship. Roberto Ago's argument that complicity between the State and the private actor is 'inconceivable' since they function on different legal planes becomes untenable given the reality of the relationship between these actors in terrorism cases and modern developments in international law.[140] Instead, a suitable model of State responsibility must be able to assess and account for the contribution of each actor to the terrorist activity, treating them, where appropriate, as co-contributors rather than principal and agent.

(November 2003) 17; GP Fletcher, 'On Justice and War: Contradictions in the Proposed Military Tribunals' (2002) 25 *Harv J L & Pub Pol'y* 635 ; K Anderson, 'What to do with Bin Laden and Al Qaeda Terrorists: A Qualified Defence of Military Commissions and United States Policy on Detainees at Guantanamo Naval Base' (2002) 25 *Harv J L & Pub Pol'y* 591; DF Orentlicher and RK Goldman, 'When Justice Goes to War: Prosecuting Terrorist before Military Commissions' (2002) 25 *Harv J L & Pub Pol'y* 653; see also Lowe, above n 131.

[138] See generally, R Schondorf, 'Extra-territorial Armed Conflicts between States and Non-state Actors: Is There a Need for a New Legal Regime?' (forthcoming, 2005) 37 *NYU J Intl L & P*.

[139] AM Slaughter and W Burke-White, 'An International Constitutional Moment' (2002) 43 *Harv Intl L J* 1, 14 (describing a shift in international law to encompass liability on individuals as indicative of a system were governments and peoples function on the same legal plane).

[140] R Ago, 'Fourth Report on State Responsibility' (1972) 2 *YB Intl L Comm'n* 71, UN Doc A/CN.4/264 and Add 1, p 96.

7.6.3 Towards a Model of State Responsibility for Terrorism: Complicity and Causation

Writing in 1938, the distinguished jurist Wolfgang Friedman observed:

> Rules of international law in the matter of state responsibility are based on the separation of the state from the individuals and associations of which it is composed. But there is nothing sacred in these established rules, especially if their basis, the separation of the state and individual, has disappeared, and it is better to play havoc with them than to maintain an old rule completely out of contact with political reality . . . As long as the state is the recognized organ of international intercourse, it must bear that measure of international responsibility which corresponds to its real control, regardless of the names which are chosen for it.[141]

As this critical insight suggests, the relevant principles of responsibility for terrorism cannot be driven by legal fiction. In order to respond to the political reality of State involvement in terrorism, rules of responsibility need to be based on an honest account of the nature of the interaction between the State and the non-State terrorist actor that makes today's terrorism possible. The model of responsibility that would represent the most accurate reflection of this inter-penetration of the public and private sphere is one that treats both the wrong-doing State and the non-State terrorist actor as combined contributors to successful terrorist activity.

Determining responsibility on the basis of a State's wrongful contribution to the terrorist activity also allows account to be taken of the concerns of weaker States by correlating responsibility with capacity. A State that through no fault of its own is basically incapable of forestalling terrorist activity should not be regarded, in legal terms, as responsible for making that activity possible. By the same token, if that State has the capacity to prevent a terrorist atrocity its responsibility for enabling the atrocity to take place should not necessarily be cut short by operation of artificial agency criteria.

Of all the responsibility theories traditionally suggested, complicity comes closest to approximating this model. In general terms, complicity suggests a common enterprise in which the State and the private terrorist group can be seen as operating together to achieve a given result. But in several respects complicity remains problematic, and it would be a mistake to simply resurrect the theory of complicity that was discarded as an organizing principle for responsibility so many decades ago.

For one thing, complicity often implies a common intent between the State and the non-State actor, when responsibility under international law is concerned not with the subjective motivation of the State but with the objective

[141] W Friedmann, 'The Growth of State Control Over the Individual and its Effect upon the Rules of International State Responsibility' (1938) 19 *Brit Y B Intl L* 118, 144.

effects of its wrongful acts or omissions.[142] For another, complicity is a term loaded with criminal connotations that do not sit comfortably with present conceptions of State conduct that reject the idea of State crimes.[143] Perhaps more importantly, complicity does not, of itself, present a mechanism for distinguishing between those circumstances in which the State should be held responsible only for its own wrongdoing and those in which direct responsibility for the private terrorist activity itself is justified.

It is in its connection with the principles of causation that complicity retains an intuitive attraction as a modern theory for regulating State responsibility for terrorism.[144] Ultimately, it is because of the causal link between the State's wrongdoing and the private terrorist activity that it makes sense to treat the State, in certain circumstances, as responsible for the private act even though it is not its immediate perpetrator. Indeed, it is in the shift from an agency to a causal paradigm of responsibility that it becomes possible to hold the State accountable for its real contribution to the success of specific terrorist activity.

7.7 CONCLUSION

Choosing a regime of State responsibility for terrorism involves making a choice about expectations of the State in its relations with other States and with its own citizens. In a sense, the normative framework for controlling terrorism in the international system, embodied in the duty to prevent and to abstain, should dictate the parameters of that choice. The primary rules determine, albeit implicitly, the relevant secondary rules of responsibility.

Because the State is subject to a detailed duty to prevent terrorism, its failure to regulate terrorist conduct in the private domain, when it has the capacity to do so, can be a form of State participation in the private wrong. This is not because the State necessarily controls the private conduct as principal in an agency relationship or because it is complicitous in the criminal sense, but rather because it is the State's unlawful failures that have made possible the very private terrorist activity that it is charged to forestall.

In an international system in which only the State enjoys widespread monopoly on the legitimate use of force, it cannot be indifferent to the illicit use of force by private actors which it is obligated to prevent and then claim that its

[142] See TM Franck and D Niedermeyer, 'Accommodating Terrorism: An Offence against the Law of Nations' (1989) 19 *Isr Y B Hum Rts* 75, 79 (examining the doctrine of complicity under different municipal legal systems).

[143] See above section 5.2.3. Note that ILC Draft Art 16 refers to responsibility of a State for aiding or assisting another State in the commission of an internationally wrongful act, but steers clear of the word complicity, see B Graefrath, 'Complicity in the Law of International Responsibility' (1996) 29 *Revue Belge de Droit Intl* 370, 370; see also above section 6.2.2. (discussing the notion of complicity in the context of Operation Enduring Freedom).

[144] See below section 8.3.5 (discussing the complex connection between complicity and causation under various municipal legal systems).

responsibility is limited to the conduct of its own agents. The very monopoly over force in international affairs makes the State, at least potentially, a direct participant in the private violence that its acts or omissions wrongfully allow.

Traditional theories of State responsibility for terrorism have not accounted for the intricacies of the public/private relationship that facilitate the kind of terrorist atrocities witnessed on September 11th. They have preferred legal fictions that do not, to use Wolfgang Friedman's phrase, correspond to the 'real control' of the State. These theories either minimize or maximize State responsibility for terrorism without testing its actual contribution to the success of private terrorist action. In so doing, they reveal that the problem of State involvement in terrorism may be better confronted by re-evaluating State responsibility in causal terms.

In one sense at least, the transition from an agency paradigm to a causal one in assessing State responsibility for terrorism is not some novel legal solution to the conceptual problems and practical imperatives described in this chapter. As shall be argued below, to use causal principles to determine responsibility is to revert to *the* primary legal solution to responsibility questions. The task to be embarked upon in the coming chapters is less about inventing a new legal regime of State responsibility, than it is about recognizing the central place assumed by causal principles in the law's treatment of responsibility and applying those principles to the particular problem of State involvement in private terrorist action. Part III of this study embarks on this course of inquiry.

PART III

State Responsibility for Terrorism: A Causal Analysis

8

Causation-based Responsibility

8.1 INTRODUCTION: AGENCY AND CAUSATION

In its legal structure, the problem of State responsibility for terrorism under international law is not different from issues of responsibility faced in other legal systems. At its core, it concerns the possible responsibility of one actor arising out of conduct perpetrated by another.

In general legal theory, responsibility for harm caused by another can be triggered in at least two ways. The first is agency, where a principal is held directly responsible for the acts actually perpetrated by his or her agent.[1] In municipal law, this form of responsibility can be applied, for example, with respect to the discharge of contracts, the disposition of property, and the regulation of employer–employee relationships. As we have seen, notions of agency are frequently invoked in international law to explain and circumscribe the direct responsibility of the State for private conduct.

A second and broader basis of responsibility for the acts of another is derived from principles of causation. In these instances, responsibility is engaged because the harm is viewed, at least in part, as the consequence of the act or omission of the original actor. As shall be discussed below, responsibility in cases involving multiple actors in numerous legal fields and across varied legal systems are often analyzed in this way.[2]

The relationship between agency and causation as grounds for responsibility for the acts of another is not well understood and receives minimal attention in the academic literature.[3] At one level, they may be regarded as conceptually distinct. In agency it is the principal, operating behind the scenes that is the

[1] For general works on agency in municipal law see, eg, FMB Reynolds, (ed), *Bowstead and Reynolds on Agency*, 17th edn, (London, Sweet & Maxwell, 2001); GHL Fridman, *The Law of Agency*, 6th edn, (1990); A Barak, *Hok Ha-Shelichut* (Jerusalem, Nevo, 1996) (Hebrew).

[2] See below section 8.3.5. For a general survey of the role of causation in third-party responsibility under municipal law see, eg, HLA Hart and T Honoré, *Causation in the Law*, 2nd edn, (Oxford, Clarendon Press, 1985) 377–89; GP Fletcher, *Rethinking Criminal Law* (reprint) (New York, NY, OUP, 2000) 581–682.

[3] For a brief discussion, see KJM Smith, *A Modern Treatise on the Law of Criminal Complicity* (Oxford, Clarendon Press, 1991) 74–76; see also FB Sayre, 'Criminal Responsibility for the Acts of Another' (1930) 43 *Harv L Rev* 689, 695 (referring to the 'fundamental difference in conception and in terminology that 'has served to insulate the two fields of thought; developments in one field have not easily penetrated the other').

primary actor. In causation, it is invariably the immediate perpetrator that is viewed as the dominant party.[4] Agency usually requires express or implied agreement between principal and agent, while causation-based responsibility can involve independent actors without any apparent relationship.[5]

More importantly, responsibility is triggered in agency because the agent is seen as the representative of the principal, as an extension of his or her will.[6] In causation-based responsibility, however, responsibility is engaged not because of some metaphysical identity between the actors, but rather because the original actor's *own* conduct is seen as a cause of the ensuing harm. As discussed below, the degree of responsibility imposed on the original actor in such cases will depend on a variety of non-causal or policy factors.[7] But, in principle, responsibility is often framed in terms of the causal connection between the act or omission of the original actor and the harm that is subsequently inflicted.

At the same time, it is possible to see agency and causation as related concepts, and conceive of agency-based responsibility in causal terms. Under this perspective, the responsibility of the principal is engaged because his or her conduct has brought about the agent's actions. The principal has created a relationship of authority and control over the agent to such an extent that the latter's action may be viewed, in legal terms, as the product of the principal's direction. In the words of Smith, the 'notion of control as a feature of agency is the bridge between agency generally and causation'.[8] Agency thus becomes merely one category of responsibility for the acts of another that is causally based.

When the problem of State responsibility for terrorism is understood in this way, it becomes possible to consider alternative responsibility regimes that need not be tied to agency conceptions. If agency is merely one form of responsibility for another's act, or a sub-category of causation-based responsibility, then it becomes possible to consider whether State responsibility for terrorism might not be more firmly grounded in the operation of causal principles. The next two chapters are devoted to this task.

The present chapter seeks to isolate some essential causal notions that help to explain the circumstances in which responsibility may be engaged for harm inflicted by another actor. It then looks for echoes of this causation-based approach in international law. The following chapter will consider how a doctrine of causation-based responsibility might operate in practice to establish direct State responsibility for private acts of terrorism.

[4] Fletcher, above n 2, p 656.

[5] Smith, above n 3, p 75.

[6] See Reynolds, above n 1, pp 3–4 (emphasizing that the basic justification for the agent's power to engage the responsibility of the principal lies in the 'unilateral manifestation by the principal of willingness to have his legal position changed by the agent'); Fletcher, above n 2, p 649 (referring to the 'metaphysical identity of principal and agent'); see also Barak, above n 1, pp 62–69.

[7] See below section 8.3.6.

[8] Smith, above n 3, p 75.

8.2 A WORD ABOUT PRIVATE LAW ANALOGIES

Students of international law are occasionally cautioned against drawing analogies from private law. The two legal systems are sometimes viewed as too dissimilar to allow for useful comparison. The line of inquiry proposed in this chapter is thus susceptible to the charge that causation-based responsibility is a creature of municipal law which offers little insight into State responsibility in international law. But dogmatic prescriptions are inappropriate in this context. While some analogies may be unfounded others may prove valuable and relevant, with or without modification. Each case should be judged on its merits.

Several considerations suggest that an assessment of domestic principles of causation can be relevant to establishing responsibility in the international sphere. In the first place, seeking inspiration from municipal legal principles is hardly foreign to international law. As Hersch Lauterpacht demonstrated in his study on 'Private Law Sources and Analogies of International Law':

> A critical examination shows that the use of private law exercised in the great majority of cases a beneficial influence upon the development of international law; that in other cases international law ultimately adopts solutions suggested by private law, without paying regard to the so-called special character of international relations; that it adopts, even now, notions of private law whenever exigencies of international life seem to demand such as solution . . .[9]

More specifically, as Lauterpacht and more contemporary scholars have noted, the principles of private law have had particular influence in the field of State responsibility.[10] Indeed, State responsibility for private conduct on the basis of *de facto* agency and post-hoc ratification arguably finds its roots in municipal law doctrines.[11] It is certainly legitimate to consider whether causal notions that animate the discourse on responsibility in municipal law at least as extensively as agency conceptions might also have a role to play in this context.

In any event, the present inquiry relates not to a distinct rule of law that is applied in domestic settings but to a basic legal notion whose core elements are

[9] H Lauterpacht, *Private Law Sources and Analogies of International Law* (London, Longmans, Green & Co, 1927); see also W Friedmann, 'The Uses of "General Principles" in the Development of International Law' (1963) 57 *Am J Intl L* 279, 281; *International Status of South West Africa* [1950] ICJ Rep 128, 148 (Advisory Opinion of 11 July) (Separate Opinion of Judge McNair) ('International law has recruited and continues to recruit many of its rules and institutions from private systems of law').

[10] See, eg, DD Caron, 'The Basis of Responsibility: Attribution and Other Trans-substantive Rules' in RB Lillich and DB Magraw, (eds), *The Iran–United States Claims Tribunal: Its Contribution to State Responsibility* (Irvington-on-Hudson, NY, Transnational Publishers, 1998) 109, p 160; Lauterpacht, above n 9, pp 134–35.

[11] See, eg, G Arangio–Ruiz, 'State Fault and the Forms and Degrees of International Responsibility: Questions of Attribution and Relevance' in D Bowett, (ed), *Le Droit International au Service de la Paix, de la Justice at du Développement: Mélanges Michel Virally* (Paris, Pedone, 1991) 25, 30; see also above section 3.3.2.

arguably relevant regardless of the nature of the actor or the legal regime in question. Causation is not analogous to some specific legal rule peculiar to one or more municipal legal systems. It is a universal mechanism by which the law, as a philosophy and a science, determines accountability. It is the law's quintessential solution to responsibility problems.

In this sense, causation represents the archetypal 'general principle of law' recognized by the Statute of the International Court of Justice as a potential source of international law.[12] This is so not only because causation is widely applied in municipal law in determining responsibility but also because causal principles are intrinsic to the very idea of law.[13] This study is concerned, then, less with private law analogies in the strict sense than with the application of a principle of general jurisprudence to a particular field of international legal inquiry.

There is another important way in which the 'problem' of private law analogies is inapposite to this inquiry. Notions of causation and responsibility are not the provinces of lawyers alone. They are common-sense principles that are part of every-day human interaction. Decision-makers within a State apparatus, and members of international civil society, do not come at questions of State responsibility in a vacuum. Indeed, it is likely, or at least possible, that when these actors are compelled to make policy decisions about a State's responsibility they are informed, consciously or sub-consciously, as much by the ordinary meanings of this concept ingrained in the societies in which they live as they are by the technical rules of responsibility embodied in the ILC Draft.

Since causation is a core principle by which responsibility is discussed and determined in popular discourse, it is not inconceivable that it influences the attitude of politicians and governmental officials when questions of responsibility arise in the international domain. If we are to attempt to understand the principles by which States *actually* determine the responsibility of other States for acts of terrorism, we must allow for the possibility that ordinary concepts of causation and responsibility play a more significant role in State practice than international lawyers have thus far been willing to concede.

For all these reasons, the reluctance to investigate the relevance of causal principles in the assessment of State responsibility seems unwarranted. Admittedly, the differences between the international and municipal legal systems justify caution about the automatic transferal of doctrines from one regime to the other, and encourage consideration as to whether some adaptation

[12] Art 38(1)(c), Statute of the International Court of Justice, reprinted in S Rosenne, (ed), *Documents on the International Court Of Justice* (Dordrecht, M. Nijhoff Publishers, 1991) 59.

[13] For a discussion of the concept of applying certain fundamental legal ideas to international law, see O Schachter, *International Law in Theory and Practice* (Dordrecht, Nijhoff, 1991) 53–55; see also B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London, Stevens, 1953) 390. This view can be traced to earlier writers such as Jellinek who was opposed to private law analogies but nevertheless conceded that there were certain 'universal conceptions of law' which were common to any legal system, see G Jellinek, *Die Rechtliche Natur Der Staatenverträge* (Vienna, A Holder, 1880) 51.

or abstraction of the underlying principles is warranted. But they should not serve as a prohibition against the inquiry itself.

8.3 COMMON SENSE CAUSATION: SOME BASIC PRINCIPLES

8.3.1 Methodology

The literature on causation is a rich tapestry of philosophical and legal inquiry that spans generations and encompasses numerous and variegated strands of thought.[14] It is a discourse that international law has largely neglected, and the discipline is the poorer for it. But it is neither possible nor necessary in the context of this limited study to engage in an extensive analysis of the philosophy of causation as a theory of responsibility and its international legal implications. It is necessary, however, to appreciate some basic principles of causation so as to consider how international lawyers might reimagine their approach to State responsibility for terrorism in causal terms.

For the purposes of this work, a variety of studies on causation will be consulted but the focus will be on principles of 'common-sense causation' as developed in the seminal work on the subject by HLA Hart and Tony Honoré.[15] This work, perhaps more than any other, has presented causation not in the context of a particular legal regime, but rather as a 'meta-concept' whose underlying principles are arguably as relevant to responsibility analysis in international law as they are to the various branches of municipal law.[16]

Hart and Honoré have also approached this notion from the perspective of its common or popular usage in the way suggested in the previous section. They have argued that:

> [C]ourts have continually claimed that it is the ordinary man's conception of cause that is used by the law and enters into various forms of legal responsibility. Though in legal contexts that conception has to be refined and modified in various ways, the clarification of the structure of ordinary causal statements is an indispensable first step towards understanding the use of causal notions in the law.[17]

[14] For a useful survey of a variety of theories of causation, see AM Honoré, 'Causation and Remoteness of Damage' in A Tunc, (ed), 11 *International Encyclopedia of Comparative Law* (The Hague, Mouton, 1971) 23.

[15] Hart and Honoré, above n 2.

[16] See Honoré, above n 14, pp 21–22 (arguing that causation has the same core meaning in different branches of municipal law and that, as a result, scholarly works on causation in one field may be applicable across legal regimes).

[17] Hart and Honoré, above n 2, p xxxiv; see also, eg, *Leyland Shipping Co v Norwich Union Fire Insurance Society* [1918] AC 350, 363 ('I think the case turns on a pure question of fact to be determined by common-sense principles. What is the cause of the loss?', per Lord Dunedin); *Haber v Walker* [1963] VR 339, 37–58 ('concepts relating to causation are latent in ordinary thought'); *Lewis v Timco Inc* 716 F 2d 1425, 1439 (5th Cir, 1983); RFV Heuston and RA Buckley, *Salmond and Heuston on the Law of Torts*, 19th edn, (London, Sweet & Maxwell, 1987) 599–602 (referring to common-sense principles of causation upon which 'courts have consistently said that causal

In both these ways, Hart and Honoré offer a useful basis for the present analysis. Through their conceptualization of causation, and their emphasis on how decisions about causal responsibility are made in practice, they make it possible to see how a system of causation-based responsibility might operate in any legal regime.[18]

Naturally, while Hart and Honoré's work has achieved wide scholarly acclaim,[19] the literature contains numerous alternatives to, and criticisms of, the thesis they have advanced.[20] But this study makes no pretense at completeness. The goal in the framework of this analysis is not to produce a definitive schema of causation-based responsibility. Rather, it is an attempt to escape the confines of the agency paradigm and (re)introduce the international lawyer to the potential relevance of the vocabulary of causation in the analysis of State responsibility for private conduct.

This study offers but one possible method for reconceiving State responsibility for terrorism in causal terms. But in so doing, it argues that causal principles may promise a system of State responsibility for terrorism that is more in tune with the way States actually approach these issues, and more compatible with the policy concerns generated by the contemporary terrorist threat.

questions must be decided'); see also Honoré, above n 14, p 25 (citing, *inter alia*, the Spanish Supreme Court as saying that the court should limit its examination to those 'conditions and circumstances which common sense in each case may mark as indicative of responsibility within the infinite chain of causes and effects').

[18] Hart and Honoré's detractors have sometimes argued that the popular use of causal principles, even if it can be ascertained, has no bearing on legal doctrine. The response to this criticism has been to note that domestic courts often claim to invoke 'common-sense' criteria in their causal analysis and to argue that imposed legal doctrines lose touch with reality. But whatever the merit of this critique, it is arguably less relevant to international law than to municipal law because of the emphasis placed in the development of international law on the actual practice of States.

[19] For an example of scholars who have praised, endorsed or applied their approach, see, eg, J Hall, *General Principles of Criminal Law*, 2nd edn, (Indianapolis, IN, Bobbs-Merrill, 1960) 247–96; A Peczenik, *Causes and Damages* (Lund, Juridiska Foreningen, 1979) 186–87; E Bodenheimer, *Philosophy of Responsibility* (Boulder, CO, Rothman, 1979) 23; T Weir, 'Book Review' (1985) 4 *Cam L J* 447; H Beynon, 'Causation, Omissions and Complicity' (1987) *Crim L Rev* 539; HD Gabriel, 'Book Review' (1988) 34 *Loy L Rev* 463; Fletcher, above n 2, p 593; Heuston and Buckley, above n 17, pp 599–603; P Cane, *Responsibility in Law and Morality* (Oxford, Hart Publishing, 2002) 117–18; W Lafave, *Criminal Law*, 4th edn, (St Paul, Thomson/West, 2003) 350; see also Hart and Honoré, above n 2, at lvi (referring to studies in France, Ireland, Sweden, Belgium and Holland that have adopted the substance of their analysis).

[20] See, eg, L Katz, *et al*, (eds), *Foundations of Criminal Law* (New York, NY, OUP, 1999) 177–79 (citing ten different theories of causation); MS Moore, 'Causation and Responsibility' in E Frankel, *et al*, (eds), *Responsibility* (Cambridge, CUP, 1999) 1, 2–6 (citing scholars who argue that causation plays a minimal role in determining responsibility). For jurists who directly dispute all or part of Hart and Honoré's approach, see, eg, G Williams, 'Causation in the Law' (1961) *Cam L J* 62; L Green, 'The Causal Relation Issue in Negligence Law' (1962) 60 *Mich L R* 543; D Howarth, 'Book Review' (1987) 96 *Yale L J* 1389, 1402; J Stapleton, 'Unpacking Causation' in P Cane and J Gardner, (eds), *Relating to Responsibility: Essays for Tony Honoré on his Eightieth Birthday* (Oxford, Hart Publishing, 2001) 145.

8.3.2 Beyond the 'But For' Test

Hart and Honoré's thesis was, to some extent, a reaction to a body of legal theory that they termed 'causal minimalism'. Under this view, causation's role in determining legal responsibility is limited essentially to a 'but for' or *sine qua non* test. The causal issue addressed is only whether the harm would have occurred were it not for the conduct in question. Often this analysis of the 'cause in fact' is supplemented by an additional inquiry as to whether the act was the 'proximate cause' of the harm or, put another way, whether the harm was 'reasonably foreseeable'. Other legal systems ask whether the condition *sine qua non* was also the 'efficient', the 'adequate' or the 'direct' cause of the harm.[21] But according to Hart and Honoré's account these additional questions are, for causal minimalists, issues of policy 'in disguise'.[22] Once the 'but for' test is satisfied the degree of responsibility is determined on the basis of legal policy rather than any additional causal criteria.[23]

Conceivably, the examination of causation-based State responsibility for terrorism could end at the application of the 'but for' test. According to such a system, a State would be said to have caused a terrorist attack if 'but for' its act or omission the attack would not have occurred. In this sense, a State's failure to prevent—if shown to be a *sine qua non* of the subsequent terrorist attack—could be treated as causing that attack. Direct State responsibility for a terrorist atrocity would then turn on questions of legal policy, such as whether the atrocity was a reasonably foreseeable consequence of the State's action or inaction, or on the importance of enhancing State accountability in light of the contemporary terrorist threat.

There is an attractive simplicity to this approach. It immediately demonstrates that the use of causation as a basis of State responsibility for terrorism opens new avenues for international legal analysis. Formulated in this way, this test challenges the traditional agency-based assessments that discount facilitation or State omissions as possible grounds for direct State responsibility for private terrorist acts.

But in important ways the 'but for' test obscures the true role played by causal principles in assessing legal responsibility. The work of Hart, Honoré and others seeks to demonstrate that the impulse to ground responsibility in causal criteria is far more profound than this test assumes. It suggests that whatever policy doctrine practitioners may purport to apply, they are 'likely in practice to give a large place to common-sense causal criteria since these are deeply ingrained in the thought of both ordinary people and lawyers'.[24] Indeed, it is in appreciating

[21] Honoré, above n 14, pp 10, 24–25.
[22] Hart and Honoré, above n 2, p xxxiv.
[23] *Ibid*.
[24] *Ibid*, p lxvi; see also *ibid*, p 130 ('an impartial consideration of the way in which courts have decided these cases does not confirm the modern view that in using the language of causation they

these deeper structures of causation-based responsibility that a more advanced model of State responsibility for terrorism can be presented.

Several weaknesses with the 'but for' test demand attention. As numerous scholars have pointed out, one problem with the test is that it confuses necessary conditions with causes.[25] If a fire breaks out, oxygen is not usually spoken of as the 'cause' of the fire even if 'but for' the existence of oxygen in the air there would have been no fire.[26] As shall be discussed in greater detail below, the term cause is intuitively understood in a more sophisticated way, and differentiated from conditions that are necessary but not sufficient to produce an unexplained event.[27]

A related problem with limiting causal analysis to the 'but for' test is that it is potentially limitless in scope. Under this test, the failure of all passers-by to come to the aid of the victim of an assault is as much the cause of the assault as the violent conduct of the assailant since 'but for' their indifference the assault would not have occurred. And yet, the causal significance of acts and omissions are not usually collapsed in this way.[28] The 'but for' test does not offer a meaningful way to rank relevant and less relevant factors. It is for this reason that new concepts such as foreseeability are introduced to 'eliminate far-flung effects from the range of potential liability'.[29] But the result is that the 'but for' test does not expose the essence of what is meant when events are examined by reference to causal notions.

At deeper level, the 'but for' test is disconcerting because it introduces a false moral equivalence into causal analysis. The victim can be as much a cause of the harm as the assailant since 'but for' the victim's presence the harm would not have occurred.[30] In this context, George Fletcher has argued that the 'but for' test is 'atomistic' since it takes human acts and omissions 'as isolated events' that are susceptible to independent causal analysis.[31] The alternative is to adopt a 'relational' approach that perceives of causation as a cluster of principles that enable an examination of the interaction between associated acts and omissions and assess the impact of expected and unexpected conduct on other human beings and their interests. It is precisely this kind of interaction that concerns us when examining how a State's wrongful conduct has contributed to the success of private terrorist activity.

In sum, the 'but for' test fails to correspond to the way causal concepts are commonly utilized in society. It treats causation as a technical test that is

have merely given effect to their conceptions of justice, expediency or chosen policy. Over a great area of the law they have, in using causal language, sought to apply a group of causal notions embedded in common sense . . .').

[25] See, eg, Fletcher, above n 2, p 589.
[26] Hart and Honoré, above n 2, p 11.
[27] See below section 8.3.3.
[28] Fletcher, above n 2, p 590; see also Moore, above n 20, pp 8–9.
[29] Fletcher, above n 2, p 590.
[30] *Ibid*, p 593; Cane, above n 19, p 133.
[31] Fletcher, above n 2, pp 590–91.

removed from the actual motivation for attributing responsibility to a specific actor. In practice, however, the advocates of common sense causation argue that causal principles are far more prominent in the assessments of responsibility made by elites, lawyers and ordinary people, even if their precise role is not usually made explicit. To conceive of a system of responsibility that is grounded in these causal criteria, it is therefore necessary to demystify the way they operate in ordinary thought.

8.3.3 The Essence of Common Sense Causation

The center of gravity of Hart and Honoré's thesis is a distinction between conditions and causes. Their approach may be contrasted to the doctrine advanced by John Stuart Mill that a cause is 'the sum total of the conditions' that produced a given event. It is on the basis of this assertion that Mill argued that 'we have philosophically speaking no right to give the name of cause to one [condition] exclusively of the others'.[32]

For Hart and Honoré, the authority of this formulation is limited to the field of scientific inquiry. The scientist may properly regard every element necessary for the occurrence of an event as its cause.[33] But the term 'cause' is not used in this way either in the law or in popular discourse.[34] Instead, a distinction is generally made between conditions, 'which are present as part of the usual state or mode of operation of the thing under inquiry',[35] and causes, which represent interventions in the existing or expected state of affairs.[36]

For the lawyer, conditions refer to those factors that are present whether or not the harm occurs. By contrast, the term cause refers to the element or elements that 'made the difference': abnormal or unexpected factors that produced a particular harm on a particular occasion.[37] Conditions may be *necessary* for the harm to have occurred, but they are discounted as causes because they are not *sufficient* to produce the specific result that is the subject of legal investigation.

In the case of criminal homicide, for example, death may be ascribed narrowly to the lack of oxygen in the victim's blood or traced broadly to the manufacture of the gun that killed the victim. But the law is not generally interested in either of these factors. Both the manufacture of guns and death by

[32] JS Mill, *A System of Logic Ratiocinative and Inductive*, 8th edn, (London, Longmans, 1886) Book III, Ch V, Sec 3.

[33] Moore, above n 20, p 9.

[34] Hart and Honoré, above n 2, p 12.

[35] *Ibid*, p 35

[36] *Ibid*, p 29.

[37] Hall, above n 19, p 250 ('common sense is apt to focus on what is interesting, eg, novelty or, in a social context, what evokes evaluation and these are reflected in everyday meanings of cause. The legal perspective is largely the inclusive common sense perspective, modified and guided by certain rules of liability').

absence of oxygen in the blood cells describe a state of affairs that are expected to exist. What is of principal concern is how this particularly victim died and the inquiry into the cause of death leads the legal investigation to the abnormal event—the firing of the gun—which 'made the difference' in this case.

In this sense, causation in law and in ordinary thought is a relative notion that is deeply connected to the context in which the inquiry takes place.[38] What is a cause, as opposed to a condition, is a function of human habit, custom, convention or normative expectation.[39] In the developed world, for example, it is generally expected that homes will have regular running water. If, on a given day, these basic services are not provided we will search for a 'cause' and may ultimately blame the municipality for failing to hire engineers to regularly check the city's infrastructure. But in other parts of the world, there may be no expectation of regular running water. In these contexts, the intermittent supply of water will be taken to be a standard condition, part of the normal state of affairs. It is the reliable supply of water—contrary to expectations—that would prompt the search for a cause.

For Hart and Honoré, this critical distinction between causes and conditions is 'an inseparable feature of all causal thinking'.[40] By so exposing the anatomy of causal language, they make it possible to see what is meant when something is described as the cause of a given event. In legal theory and in ordinary thought, that designation is reserved for conduct that is both necessary to produce the event *and* that which constitutes an abnormal intervention in the existing or expected State of affairs.[41]

For the purposes of this study, however, it is not sufficient to describe this core insight and advance immediately to its application in terrorism cases. State involvement in terrorism is characterized by two factors that considerably complicate any causal analysis. The first relates to the fact that the most common, but hardest to measure, forms of State participation in terrorism involve acts of omission, such as the failure to prevent or the toleration of terrorist activity. The second relates to the fact that it is the non-State terrorist operative rather than the State itself that is the actual perpetrator of the terrorist attack. It is necessary, therefore to ask how a theory of common sense causation accounts for both these features in determining responsibility on causal grounds.

8.3.4 Omissions

If a cause is regarded as an abnormal intervention in the ordinary course of affairs, there need be no substantive distinction between acts and omissions. Just

[38] Hart and Honoré, above n 2, p 19.
[39] *Ibid*, p 37.
[40] *Ibid*.
[41] Some refer to Hart and Honoré's test of cause as the search for the 'necessary element in a sufficient set' or "NESS" test, see, eg, Cane, above n 19, p 130; Stapleton, above n 20, p 146.

as an act can be treated as a cause when there is an expectation of inaction, so an omission can be a cause when there is an expectation of positive conduct.[42]

Writing in 1999, Tony Honoré expressed this idea in the following way:

> A non-action or failure to act can be treated as an intervention in the world and so as a cause whenever a positive act is expected or required but the agent does not perform it. The change thus brought about is a change not in the existing but in the expected state of affairs. If there is a norm requiring positive action the non-performance of the act is treated as an omission and brings in its train responsibility.[43]

Two aspects of causation by omission bear emphasis. The first is that an omission can only be a cause of harm when there is an affirmative duty to act. Omissions are only 'those not-doings that violate norms'.[44] While there is considerable debate as to the legal and moral significance of omissions in the absence of a special duty of care, there is broad agreement that omissive failures in the face of a specific obligation can be properly regarded as the cause of the ensuing harm.[45]

Thus, if a child starves to death while under parental care, both the parents and the wider population have theoretically produced the death by their non-action in failing to feed the child. 'But for' their failure to act, the child would have survived. But only the parents can be said to have caused the death, since only they are subject to a distinct positive duty that they have neglected. The failure of the wider population to feed the child is thus treated as an expected *negative* condition, whereas the parent's failure constitutes a deviation from normative expectation and is, consequently, a direct cause of the harm.

Though scholars often articulate the above principle in broad terms, it warrants some refinement. Not all duties to avert harm produce equivalence between commission and omission. Much depends on the precise scope and purpose of the obligation and the expectation for affirmative action that it generates in the circumstances. A broad statutory duty imposed on the general

[42] This equivalence between action and inaction is occasionally expressed by use of the term 'commission by omission', see, eg, Hall, above n 19, pp 198–99.

[43] AM Honoré, *Responsibility and Fault* (Oxford, Hart Publishing, 1999) 12. Liability for omissions in breach of duty is well accepted in tort law, for example, and widely applied, see Honoré, above n 14, p 13 (citing examples from Argentina, Austria, Brazil, Ethiopia, France, Germany, Panama and South Africa); see also J Limpens, R Kruithof and AM Limpens, 'Liability for One's Own Act' in A Tunc, (ed), 11 *International Encyclopedia of Comparative Law* (The Hague, Mouton, 1979) 36 (examining liability for omission in tort law under French, German, Common Law, Islamic and Arabic law and concluding that 'the continual extension of liability for mere omission is an established fact'); see discussion below in this section regarding the application of similar notions in criminal law.

[44] Honoré, above n 43, p 43.

[45] The issue evokes the philosophical debate as to the moral difference between killing and letting die. While views differ significantly in the cases of omissions by the general population, there is broad agreement that culpability between act and omission may be equivalent when a special duty to prevent is imposed, see generally 'Symposium: Act and Crime' (1994) 142 *U Penn L Rev* 1443; B Steinbock and A Norcross (eds), *Killing and Letting Die* (New York, NY, Fordham University Press, 1994); Honoré, above n 43; Fletcher, above n 2, p 606.

population to render aid to those in peril is not the same as the obligation to avert serious harm implicit in the role of parent, policeman or lifeguard with respect to those in their charge.[46]

In the former case, the expectation for intervention may be minimal, especially in hazardous circumstances.[47] There may also be an unwillingness to unduly restrict individual freedom and a concern about establishing too broad a set of potential defendants, all of which result in a dilution of responsibility on policy grounds.[48] By contrast, where a special duty to prevent is involved, the very purpose of the rule is to forestall the harm in question, and the expectation for positive action on the part of those entrusted with the duty is particularly high.

As a result, the law is comfortable regarding these wrongful omissions as a cause of the ensuing harm and the basis, at least potentially, for full legal responsibility. Thus, for example, the conduct of the prison guard who voluntary omits to supply an inmate with food or a nurse who decides not to rescue an infant in her care who is drowning in the bath, fall quite easily within the ambit of criminal homicide.[49] It is in these more serious situations, where the normative expectation is clear and onerous, that there is an inclination to conclude that 'the failure to avert harm is as egregious a wrong as causing the particular harm'.[50]

The second requirement that must usually be fulfilled for an omission to be treated as a cause is that the affirmative act required must be capable of averting the harm. A firefighter may be under a duty to extinguish the fire in a burning building, but if the fire will consume the building regardless of the firefighter's conduct, a refusal to act will not be treated as a cause of the blaze. This is so because, despite the obligation to act, the harm in this instance occurs regardless of the firefighter's action or inaction and, as a result, the omission cannot be described as a necessary condition of the fire.

[46] Fletcher, above n 2, p 621 (comparing the statutory duty imposed on a landlord to take safety precautions, which might carry a mild penalty in order to encourage compliance, and a specific duty to avert death where failure may be regarded as 'equivalent to killing').

[47] Indeed, in those jurisdictions where a general 'duty to rescue' is imposed, it is more common to treat a violation as a 'failure to rescue' rather than as a ground for responsibility for the victim's injury. Nevertheless, even in these 'Good Samaritan' cases, it could be argued that if the failure to rescue was committed with the direct intention of causing the victim's death, the case would be examined within the framework of criminal homicide, see generally FJM Feldbrugge, 'Good and Bad Samaritans: A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue' (1966) 14 *Am J Comp L* 630, 651.

[48] For a discussion of the factors influencing the approach to responsibility in these cases, see generally A Ashworth, 'The Scope of Criminal Liability for Omissions' (1989) 105 *L Q Rev* 424; M Gur Arye, 'A Failure to Prevent Crime—Should it be Criminal?' (2001) 20 *Criml Just Ethics* 3; Feldbrugge, above n 47; see also below section 8.3.6.

[49] For a early formulation of this position in criminal law, see Indian Law Commission, 'A Penal Code' (1838), reprinted in J Michael and H Wechsler, *Criminal Law and its Administration: Cases, Law and Commentaries* (Chicago, Foundation Press, 1940) 120 (citing the examples mentioned in the accompanying text and concluding, *inter alia*, that acts of omission which have been made punishable on the grounds that they are likely to produce a certain unwanted result should be treated as equivalent to the commission of that result).

[50] Fletcher, above n 2, p 611.

This proposition too warrants a degree of refinement. In general terms, the notion of capacity needs to be understood in a broad sense. The lack of capacity will not necessarily preclude responsibility if it stems from an actor's own failure to take his or her responsibility seriously. The firefighter cannot escape responsibility by arguing that she lacked the proper equipment to extinguish the blaze if that deficiency is the result of her own egregious wrongdoing. In these kinds of cases, the inability to prevent the harm may be as much a cause of the harm as in the regular case of omission in the face of duty.

Bearing these refinements in mind, the dual features of distinct duty and capacity to prevent are central to what justifies treating only certain kinds of inaction as causes. Only in these cases is there no significant difference between acts or omissions and, only in these cases, will the law characterize both as a cause of the resulting harm, generating the potential of direct legal responsibility for the harm itself.[51]

8.3.5 Occasioning Harm and the 'Problem' of the Intervening Actor

The paradigmatic cases in which causal language is used involve instances where no subsequent human action or abnormal occurrence is required to produce the result that is under inquiry.[52] In general terms, a subsequent voluntary act or abnormal occurrence may be viewed as 'breaking the chain of causation' and prevent tracing responsibility for the harm back to an earlier actor. In these cases, the subsequent event has a prior claim to be selected as the cause[53] and, relatively speaking, the earlier conduct will be reduced to the level of a background circumstance or condition that is merely exploited by the immediate perpetrator of the harm.[54]

This idea of intervening causes may generate a temptation to question whether the act or omission of one actor can ever be treated as a cause of harm that is actually inflicted by subsequent and independent conduct. The problem may be regarded as especially acute in terrorism cases since while the State may provide the opportunity for terrorist acts to occur, it is the non-State actor that deliberately takes advantage of that opportunity to perpetrate the terrorist attack.

[51] Thus, for example, both the mother that fails to feed the child and the mother that poisons the child has caused the death and, potentially at least, one is no less culpable than the other, see P Foot, 'Killing and Letting Die' in B Steinbock and A Norcross, (eds), *Killing and Letting Die* (New York, NY, Fordham University Press, 1994) 280, 286; Honoré, above n 14, p 62; GP Fletcher, 'On the Moral Irrelevance of Bodily Movements' (1994) 142 *U Penn L Rev* 1443, 1448.

[52] Hart and Honoré, above n 2, p 73.

[53] Honoré, above n 43, p 6; see also Hart and Honoré, above n 2, p 136 (describing as a general principle that the 'free, deliberate and informed act or omission of a human being, intended to exploit the situation created by defendant, negatives causal connection').

[54] Hart and Honoré, above n 2, p 74.

This is a false problem. In general causation theory, the concept of intervening actors relates to circumstances quite different from those that are the immediate concern of this inquiry. In fact, there are numerous situations recognized in the law where a cause is traced to the earlier actor who created the occasion for wrong to be done, irrespective of intervening action.

One such situation concerns conduct that is designed or likely to elicit a certain response.[55] Where the subsequent act is foreseeable it will not usually break the causal chain. Instead, it is treated as the 'means' by which the earlier actor brings about a given result.[56] In municipal law, typical examples could involve leaving a highly inflammable substance unprotected in a public area or placing a gun in the hands of an insanely enraged spouse. In these instances, since the ultimate harm is an expected consequence of the original act or omission, the earlier actor is not relieved of responsibility for the harm that ensues. Instead, as Michael Moore explains, the 'opportunity-providing acts' are treated as the cause of the harm 'despite intentional acts of those who seize the opportunity'.[57]

These situations are sometimes described as cases of 'occasioning' as opposed to 'causing' harm, though they invoke similar causal calculations and, in tort law for example, these expressions are often treated as synonymous.[58] As discussed below, non-causal considerations sometimes justify holding an actor accountable for more or less than that which they have caused.[59] This does not, however, deprive the earlier conduct of its designation as a cause of the ensuing harm and assessments of responsibility for the act of another regularly turn on the causal link between the earlier conduct and the wrong that it has facilitated.

A more severe version of occasioning harm—which is directly relevant to this inquiry—involves a situation where one actor is under a specific duty to prevent precisely the kind of harm that the intervening conduct produced. The security guard that leaves a bank safe open, knowing that its contents will be stolen or the policeman that offers his baton to an assailant engaged in assault are two examples that come to mind. As Richard Epstein argues, 'the early instinctive response that T's deliberate infliction of harm severs causal connection to D is dead in this case'.[60] There is little difficulty in treating this conduct as a cause of

[55] Honoré, above n 14, p 17.

[56] This idea is occasionally expressed by the general maxim that intended consequences can never be too remote.

[57] Moore, above n 20, p 21; see also Hart and Honoré, above n 2, p 195 ('the neglect of a 'precaution ordinarily taken against harm is the cause of that harm when it comes about')

[58] See Honoré, above n 14, p 12 (citing Argentina, Spain and Thailand as examples of countries who make no distinction in causal language between the two cases); see also Hart and Honoré, above n 2, p 133 (noting that the same causal terminology is often used in both instances).

[59] Moore, above n 20, p 23; Hart and Honoré, above n 2, pp 196–97; see also below section 8.3.6.

[60] RA Epstein, *Torts* (New York, NY, Aspen Law & Business, 1999) 299; see also *Smith v Leurs* (1945) 70 CLR 256, 261–62 (Justice Dixon referring to the principle that 'special relations' that impose a duty to control another's actions can generate responsibility for the harm caused when that duty is violated).

the wrong and, all things being equal, little reason to mitigate responsibility on non-causal grounds.[61]

Hart and Honoré have explained this set of cases in the following terms:

> Where it is clear that the ground for regarding conduct as negligent, or the reason for prohibiting it by rule, is the very fact that it provides an opportunity, commonly exploited by others, for deliberate wrongdoing, it would obviously be senseless to treat [the perpetrator's] voluntary intervention as a ground for relieving the person who has provided the opportunity for it of the responsibility for the harm which they have done. So much is in accord with ordinary thought, which so often treats the omission of a common precaution against harm as the cause of the harm when it materializes. But the law has gone much further in holding persons responsible for harm, where their breach of a legal rule has provided an opportunity for others to do harm or an occasion for it to occur. Where a legal rule has been violated and harm has occurred which may be regarded as 'within the risk' in the sense that the harm is of a kind which the rule was designed to prevent, the courts may consider it enough that the defendant, by his breach of the rule, has done something without which the harm would not have occurred and so provided an occasion for it. They then hold him responsible for the harm, whatever the way in which it has eventuated from the occasion which he has provided, even if it was by a most unusual intervention or coincidence.[62]

In practice (and certainly in the case of terrorism) a special duty to prevent is usually imposed *in order* to foster an environment in which certain kinds of harm are minimized or eradicated. Those especially charged to protect against that harm derive no benefit from the claim that the harm itself was inflicted by another actor. In causal terms, such harm may be regarded as the expected consequence of the failure to comply with the duties of prevention. It is this failure that is treated as the abnormal occurrence that causes the harm, and the fact that the subsequent conduct was voluntary does nothing to sever the causal connection.[63]

This does not mean, of course, that the immediate perpetrators will be unaccountable for the harm that they have inflicted. But this subsequent conduct in no way prevents a characterization of that harm as a *consequence* of the original actor's wrongdoing. No fiction is introduced into the law by recognizing multiple actors as responsible for harm which they each, in their own way, have caused.[64]

[61] See below section 8.3.6.

[62] Hart and Honoré, above n 2, pp 6, 195.

[63] Cane, above n 19, p 135.

[64] Thus, in criminal law multiple actors may be viewed as co-perpetrators of the same offense, and in tort law numerous tortfeasors can be held liable, at least vis-à-vis the victim, for the totality of the harm caused, see, eg, Hart and Honoré, above n 2, p 207, 351 (referring to the general principle that in the case of contributory causes 'each wrongdoer is responsible for the whole damage'); JA Weir, 'Complex Liabilities' in A Tunc, (ed), 11 *International Encyclopedia of Comparative Law* (The Hague, Mouton, 1983) 41; see also Honoré above n 14, p 90 (stating that most legal system treat a tortfeasor liable *in solidum* despite the existence of other causes and referring in this context to the law in Austria, Brazil, Panama, Poland, Spain and Venezuela). This principle is also reflected in

One need not accept Hart and Honoré's thesis of common-sense causation to recognize that this idea is well entrenched in municipal law. This principle penetrates legal systems around the world and various branches of the law within those systems, regardless of the precise contours of the causal test applied by the courts. Naturally, each jurisdiction and legal field has its peculiar characteristics and policy considerations can extend or limit the degree of responsibility that is ultimately imposed.[65] There is, however, remarkable consistency in the application of the basic notion that the original act can be treated in these cases as a cause of the ensuing harm and a ground for responsibility for the act of another. Put another way, occasioning harm may serve as an explanation as to *why* a wrongdoer is held responsible but it is not necessarily a limit as to *what* they are held responsible for.

An extensive examination of the application of these causal principles in various legal systems is beyond the scope of this study, but some general observations are warranted. In the case of tort law, for example Hart and Honoré have concluded that 'courts frequently hold a wrongdoer liable for eventual harm, even if this would not have materialized had not a voluntary intervention . . . combined with the wrongdoer's action to produce it'.[66] Similarly, in contract law economic loss occasioned by a breach of contract may be traced through intervening actors, provided the loss is regarded as foreseeable or within the contemplation of the parties.[67] In both these cases, responsibility is not limited

international law, see JE Noyes and BD Smith, 'State Responsibility and the Principle of Joint and Several Liability' (1988) 13 *Yale J Intl L* 225; see also ILC Draft Art 47, Report of the International Law Commission, UN GAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) 55 (dealing with cases where a plurality of States are each held responsible for the same internationally wrongful act). The Commentary adds that 'such a result should follow *a fortiori* where the concurrent cause is not the act of another State (which might be held separately responsible) but of private individuals or some natural event such as a flood', *ibid*, p 230; see also below section 9.4.2 (discussing responsibility in cases where multiple States have combined to occasion the terrorist act).

[65] See below section 8.3.6.

[66] Hart and Honoré, above n 2, p 389; see also generally, J Spier, (ed), *Unification of Tort Law: Causation* (The Hague, Kluwer Law International, 2000), (describing approach to occasioning harm in Austria, *ibid*, p 17; Germany, *ibid*, p 70, Italy, *ibid*, p 85; Switzerland, *ibid*, p 115; and the United States, *ibid*, p 124); Honoré above n 14, p 137 (citing as examples authorities in South Africa, Hungary and France). Consider also the following cases: *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (prison authorities in the United Kingdom held liable in tort for the foreseeable harm caused by individuals under protective custody who escaped due to poor supervision and caused damaged to nearby property. Lord Reid stated in that context 'there are many cases where, although one of the connecting links is deliberate human action, the law has no difficulty in holding that the defendant's conduct caused the plaintiff's loss', *ibid*, p 1030); *Government of Papua New Guinea v Moini* (1979) 53 ALJ 19 (driver held responsible for the death of his passenger, who was killed when an angry mob reacted to the running down of a child by the driver); *State v Walden* 293 SE 2d 780 (1982) (mother held liable for failing to intervene to prevent an elder son's assault on his younger brother); see generally Honoré, above n 14, pp 135–44.

[67] See generally Hart and Honoré, above n 2, pp 308–24. See, eg, *Stansbie v Troman* [1948] 2 KB 48 (CA) (decorator held liable for the loss of goods stolen by a thief when, in breach of contract, the defendant had left the house where he was employed without locking the front door); *Monarch Steamship Co v Karlshamns Oljefabriker* [1949] AC 196 (defendants, in breach of contract, failed to provide a seaworthy ship to the plaintiff were held liable to compensate for losses resulting from the fact that by the time the ship arrived in port it was diverted by the British Admiralty due to the

to the original conduct but is framed in terms of those consequences that are linked to the original conduct in causal sequence.

In criminal law, the role of causation in responsibility for the act of another can be more difficult to discern. While some causal connection between the original conduct and the subsequent crime is required to justify liability for the crime itself, it would be misleading to suggest that cause, in the sense developed above, is always a necessary element.[68]

For example, many jurisdictions follow Anglo-American and French law by treating an accomplice as a perpetrator even when their conduct is not strictly speaking the cause of the crime.[69] This elevated liability is typically justified on a variety of non-causal grounds, such as participatory intent, implied consent or other policy concerns related to the administration of criminal justice.[70] This approach has largely been inherited in the application of accessorial liability under international criminal law[71] and, to a lesser extent, in the doctrine command responsibility, where the role of causation in establishing the responsibility of a superior for crimes of a subordinate is somewhat contested.[72]

outbreak of World War II); see also SH Amin, *Remedies for Breach of Contract in Islamic and Iranian Law* (Glasgow, Royston, 1984) 42 (referring to consequential damages for indirect losses under Islamic law); SN Jain, (ed), *Contractual Remedies in Asian Countries* (New Delhi, The Indian Law Institute, 1975) (referring, *inter alia*, to remedies for breach of contract in India, Indonesia, Japan, Sri Lanka and Thailand and allowing recovery for indirect loss as long as it was a foreseeable consequence of the breach). Similar principles are sometimes applied in other legal fields. For example, US courts have used causal concepts to hold 'secondary actors' such as lawyers and accountants primarily liable for securities fraud committed by the companies they advise, see MM Wynne, 'Primary Liability amongst Secondary Actors' (2000) 44 *St Louis U L J* 1607.

[68] Hart and Honoré, above n 2, p 388.

[69] See TM Franck and D Niedermeyer, 'Accommodating Terrorism: An Offence Against the Law of Nations' (1989) 19 *Isr Y B Hum Rts* 75, 79–99 (surveying the doctrine of complicity in numerous legal systems).

[70] In general terms, the rationales offered for these approaches vary, and causation is sometimes discounted or treated as only one factor in the equation. Some theorists, for example, emphasize intent or common purpose, while others invoke policy factors, see, eg, C Kutz, *Complicity: Ethics and Law for a Collective Age* (Cambridge, CUP, 2000) 220–22 (focusing on the importance of participatory intent); Smith, above n 3, pp 55–93 (emphasizing the role of causation); see also SH Kadish, 'Complicity, Cause and Blame: A Study in the Interpretation of a Doctrine' (1985) 73 *Cal L Rev* 323 (referring, *inter alia*, to the implicit consent of the accomplice in the crime).

[71] In general, for an accomplice to be treated as a perpetrator, tribunals have required, in addition to the requisite intent, that the assistance has a substantial effect on the commission of the offense—but it need not be indispensable in causal terms, see, eg, Case No IT–94–1–T *Prosecutor v Tadic* (1998) 112 ILR 1, paras 288-292; Case No IT–96–21–T *Prosecutor v Delalic*, 16 November 1998, paras 325-329, available at http://www.un.org/icty/celebeci/trialc2/judgement/cel-tj981116e.pdf; Case No IT–95–17/1–T *Prosecutor v Anto Furundzija*, 10 December 1998, paras 190–249, available at http://www.un.org/icty/furundzija/trialc2/judgement/fur-tj981210e.pdf; Case No ICTR–95–IA–T *Prosecutor v Bagilishema*, 7 June 2001, para 33, available at http://www.ictr.or/deafult.htm; see also Art 25, Rome Statute of the International Criminal Court, 17 July 1998, UN Doc A/CONF183/9 (in force, 1 July 2002).

[72] Command responsibility can often be explained in causal terms. Thus, where the commander knew of the commission of the crime and had the capacity to prevent it but failed to do so, the imposition of responsibility for the crime itself is consistent with causal principles. However, the doctrine has not usually been rationalized on causal grounds and has been read as a broader concept encompassing responsibility in cases where the omission, by operation of causal criteria alone, would only justify responsibility for a distinct offense, see generally M Damaška, 'The Shadow Side

There are circumstances, however, where causal notions clearly play a more prominent role in establishing criminal responsibility for the act of another. This is the case, for example, with 'perpetration by means' where the accused intentionally uses the innocent, involuntary or anticipated act of another to commit the offense.[73]

More significantly, causal principles can be of central importance in those jurisdictions that generally distinguish between the liability of the accomplice and that of the perpetrator.[74] In these systems, the elevation of the accomplice to the status of perpetrator will often be justified in causal terms in cases where the wrongful accessorial conduct is indispensable to the commission of the crime, or where the accomplice assumes a position of authority and is required in the circumstances to prevent its execution.[75] In these instances, the act or omission of the accomplice may be regarded as a cause of the crime and, assuming the requisite *mens rea*, will generate individual responsibility for the crime itself. Indeed, even in those legal systems that do not generally admit of a distinction between accomplice and perpetrator, liability for the crime itself in these kinds of cases can be rationalized on causal grounds.[76]

of Command Responsibility' (2001) 49 *Am J Comp L* 455 (criticizing the imputation of responsibility in these cases on a variety of grounds); I Bantekas, *Principles of Direct and Superior Responsibility in International Humanitarian Law* (Manchester, Manchester University Press, 2002) 121; but see MC Bassiouni, *The Law of The International Criminal Tribunal for the Former Yugoslavia* (Irvington, NY, Transnational Publishers, 1996) 350 (arguing that causation is the 'essential element' in command responsibility); see also Case No IT–96–21–T *Prosecutor v Delalic*, 16 November 1998, para 398, available at http://www.un.org/icty/celebeci/trialc2/judgement/celtj981116e.pdf (stating that 'causation has not traditionally been postulated as a *conditio sine qua non*' for the doctrine of command responsibility. However, at para 399, the Trial Chamber asserts that in the case of a failure to prevent 'a necessary causal nexus may be considered inherent' since but for the failure to act, the crime would not have been committed.); see also Art 28, Rome Statute of the International Criminal Court, 17 July 1998, UN Doc A/CONF183/9 (in force, 1 July 2002).

[73] See generally Hart and Honoré, above n 2, pp 325–40; Fletcher, above n 2, pp 639–40.

[74] Legal systems operating under the influence of German, Russian and Chinese law are more inclined to distinguish between the accessory and the perpetrator and punish different grades of complicity differently. But they do not exclude the possibility that the accomplice may in appropriate cases be charged with the same offense as the perpetrator. The criminal law of India, Pakistan and Sudan make a somewhat different distinction between 'joint liability' (where an actor shares in the commission of the offense) and liability for 'abetment' (arising from procurement or instigation of the crime), which is treated as a lesser offense, see Franck and Niedermeyer, above n 69, pp 79–99; see also Fletcher, above n 2, pp 634–77; below section 8.4.3 (discussing ILC Draft Art 16).

[75] In German legal theory, for example, perpetration is defined in terms of *Tatherrschaftselhre* or 'hegemony over the act'. The accessory is not generally equated with the perpetrator because she lacks control over the execution of the crime. In other words, there is no direct causal link between the aid and the commission of the crime. However, in circumstances where the accessory exercises control over the crime a finding of co-perpetration will be justified on causal grounds, see Fletcher, above n 2, pp 655–56. Consider the following examples: BGH St 7, 268 (1954) (father convicted of negligent killing for failing to inform the authorities that his wife intended to kill their child); R Ranchhoddas and DK Thakore, (eds), *The Law of Crimes Pakistan Penal Code* (Lahore, Popular Law House, 1976) 211 (citing case whereby a Magistrate was held guilty of extortion when he failed to intervene while police extracted a confession through coercion in his presence); Section 65, The Turkish Criminal Code (1964) (providing that where commission of the offense is not possible without the participation of the abettor it is not subject to a reduction in punishment).

[76] See, eg, *Palmer v State* 164 Atl 2d 467 (1960) (mother held liable for failing to remove her baby

The point here is not to suggest a one to one correlation with State responsibility for terrorism or to argue that different legal systems adopt a uniform solution to causal problems. The case law is concededly diverse and assessments of individual responsibility for the act of another, especially where the mental element plays a key role, do not provide direct parallels to cases of State responsibility. Nevertheless, an overarching principle unifying these cases seems clear. In a system of legal responsibility that is grounded in principles of causation, acts of occasioning harm can be a basis for engaging legal responsibility for the conduct of voluntary intervening actors that are the immediate perpetrators of the harm.

This is especially the case where an actor is subject to an obligation to protect against precisely the kind of harm that their wrongful conduct has occasioned. In these instances, the fact that the harm itself is inflicted by the voluntary conduct of a subsequent actor will not necessarily limit the scope of the original actor's responsibility. As shall be seen in section 8.4 below, it is this that separates causation-based responsibility from the agency approach to responsibility advocated by the separate delict theory.

8.3.6 Causation and Responsibility

The final piece in this puzzle is to understand the relationship between common-sense causation and responsibility. If it is accepted that an act or omission, despite the existence of an intervening actor, will sometimes be treated as the cause of ensuing harm, it becomes necessary to determine what degree of responsibility is appropriately assigned to such conduct.

In general terms, it may be said that an actor who causes harm is legally responsible for it. That much 'makes an immediate appeal to common moral sensibility'[77] and is a familiar feature of all legal systems.[78] Causation represents 'not only the most usual but the primary type of ground for holding persons responsible'.[79] A natural corollary of this intuitive position is that actors are not usually held responsible for harm that they do not cause. In the standard case,

from danger with result that her partner beat and killed the child); R Merle and A Vitu, *Traité De Droit Criminel, Tome I: Problèmes Généraux De La Science Criminelle*, 4th edn, (Paris, Editions Cujas, 1981) 623 (citing case where French police officer was held liable for merely standing by as his colleague committed a theft); Smith, above n 3, pp 39–47, 78 (examining cases of complicity through the omission to exercise control in British law and noting that in these cases 'complicity runs contrary to general rules governing the effects of a *novus actus* in causal attribution'). Compare with W Lo, *The 1997 Criminal Code of the People's Republic of China* (New York, NY, WS Hein & Co, 1998) (creating a distinct offense and separate punishment for public officials whose failure to comply with a duty leads to a crime being committed by others, eg, Art 411 on smuggling assisted by customs official).

[77] Hart and Honoré, above n 2, p xxv.
[78] *Ibid*, p 63.
[79] *Ibid*, p 65.

therefore, causal criteria both justify and delimit the scope of responsibility.[80] They determine which actors may and may not be called upon to answer for the legal consequences that attach to the production of a given event.

But these are general principles from which there are variations. An actor may sometime be held responsible for more or less than that which they have caused. In municipal law, for example, someone who caused harm may be held only partially responsible or not responsible at all depending, for example, on their mental state or on any number of other policy considerations.[81] A child that innocently causes harm is rightly absolved of responsibility, and the fundamental distinction between negligent and intentional causing is of equal significance in this context.

By the same token, the law may impose a degree of responsibility that exceeds causal contribution. In cases of criminal complicity, for example, the law may be designed to deter any participation in criminal ventures by imposing full legal responsibility for even minimal collusion.[82] Similarly, in instances of strict or vicarious liability, full responsibility can be imposed on the basis of economic or social considerations despite the absence or near absence of causal connection.[83]

The important point that emerges from these examples is that causation-based responsibility really involves two separate assessments.[84] One assessment involves determining the causal link between the offender and the outcome that is under inquiry. The other concerns an examination of those non-causal factors that might justify diminishing or enhancing the offender's accountability. It is here that policy considerations operate to influence the assignment of legal responsibility and the consequences of that responsibility in terms of the range and intensity of available remedial measures.

The first aspect of causation-based responsibility involves, according to this account, the application of criteria that are common to all legal systems.[85] This is a factual test. It will ask whether the act or omission constitutes a deviation from the existing or expected state of affairs necessary to produce the outcome in question. Naturally, what constitutes a deviation from the norm is itself context dependent. But the underlying causal principles that are applied remain the same.

It is as part of the second assessment that considerations unique to the subject matter under investigation come to the fore. These considerations may include, for example, legal factors stemming from the construction of the rule that is

[80] Honoré, above n 14, p 23; Cane, above n 19, p 113.

[81] Cane, above n 19, p 116.

[82] See above section 8.3.5.

[83] Even cases of strict or vicariously liability are not always entirely divorced from causal notions. Responsibility is not imposed arbitrarily. It will often fall on the party that has in some way contributed the harm, see H Lauterpacht, 'Delictual Relationships between States: State Responsibility' reprinted in E Lauterpacht, (ed), 1 *The Collected Papers of Hersch Lauterpacht* (Cambridge, Grotius, 1970) 251, 399.

[84] Hart and Honoré, above n 2, p 307.

[85] *Ibid*, p 132.

violated, the status of the actors involved or policy concerns that take into account social and economic considerations implicated by the specific legal regime in question.

It follows that in assessing State responsibility for terrorism on causal grounds, it is not enough to conclude that the State has caused the terrorist act. It is also necessary to consider whether non-causal factors peculiar to the international legal system justify holding the State accountable for more or less than that which it has caused. The non-causal concerns that influence this determination may differ significantly from the kinds of considerations that apply in municipal law. Notions of *mens rea* or foreseeability, for example, may not translate easily into the field of State responsibility. It will therefore be necessary in the context of the consideration of causation-based State responsibility for terrorism to examine whether particular non-causal grounds influence the responsibility of the State once the necessary causal link to the terrorist act has been established.

That being said, there is a basic assumption inherent in causation-based responsibility that arguably applies regardless of legal regime. Absent countervailing considerations, the general principle cited above will pertain: the party that causes an event is legally responsible for it. The rationale for this elementary proposition is deeply rooted in both legal and moral thought. It is legitimate to hold the subjects of a legal system responsible only for what they do or do not do that produces harm—not for things beyond their control.[86] Only in this way is it possible to create a system that appeals to its subjects to control their conduct and conform to normative expectations. It is this also that gives individual actors in a legal system a sense of separate identity, a sense of responsibility and a vested interest in acquiring a reputation that is a function, not of arbitrary criteria, but of their own performance.

Alternative approaches risk one of two outcomes. Either they will maximize responsibility such that an actor is held accountable even if helpless to alter the situation. Or they will minimize it such that an actor is able to escape with relative impunity for circumstances their own conduct has produced.[87] As noted above, there will of course be circumstances where maximizing or minimizing responsibility in this way is both justified and necessary. And yet, the intimate connection between causation and responsibility remains the baseline for legal analysis. Departures from this fundamental precept must be justified, not merely asserted, in a system of responsibility that is grounded in common-sense causal principles.

If a system of causation-based responsibility were applied to terrorism cases, analogous principles would apply. Unless non-causal factors justify altering the responsibility calculus, the State should be treated as legally responsible for those acts of terrorism that are the *consequences*, in causal terms, of its

[86] *Ibid*, p lxxx.
[87] See above section 7.7.

wrongful acts or omissions. Chapter 9 will be devoted to examining how the principles of causation might operate in terrorism cases, and what peculiar non-causal factors might be relevant in the assignment of legal responsibility to the State. Before proceeding to this analysis, however, it is important to get a sense of whether these causal concepts have found any resonance in the international case law on State responsibility and to consider how such a causal analysis might be reconciled with the ILC Draft Articles.

8.4 ECHOES OF CAUSATION-BASED RESPONSIBILITY IN INTERNATIONAL LAW

8.4.1 Understanding the Relationship between Attribution, Causation and State Responsibility

The survey of international theory and practice in the field of State responsibility for private acts conducted earlier in this study established the dominance of what we have termed the separate delict theory.[88] Under this approach, as encapsulated by Roberto Ago, the State is only ever responsible for its own acts and omissions. This has been interpreted to mean that unless private actors operate as *de facto* State agents, or have their conduct ratified by the State, the State can only be responsible for its own conduct and not for the private acts that its wrongful conduct has occasioned.

Proponents of the separate delict theory adopt a critical assumption about the function of the principles of attribution that is only occasionally made explicit. Under the separate delict theory, the principles of attribution serve to restrict the scope of a State's responsibility so as to exclude—in all circumstances—the conduct of intervening actors that are not in an agency relationship with the State. The State is responsible for the acts that can be attributed to it and nothing more. The result, as David Caron has suggested, is the use of attribution to limit State responsibility to 'less than responsibility for the proximate and natural consequences of a State's acts'.[89]

This view of attribution as a limitative principle certainly seems to be the most plausible reading of much of the case law. It explains why courts and tribunals have so often been at pains to hold the State accountable only for the failure to prevent privately inflicted harm, and not for the harm itself. It explains why human rights violations by private actors who are not *de facto* agents seem only to be treated as a potential basis for a distinct violation of the State. It explains why the ICJ in *Nicaragua* and *Tehran Hostages*, for example, had such

[88] See above Chapters 2 and 3.

[89] Caron, above n 10, p 154. He goes on to ask: 'does the rule which provides that the act of a private person is not attributable to the State mean that the State *cannot* be responsible for the consequences of that private act, even if that act was a foreseeable consequence of other actions of the State?', *ibid*. (emphasis added).

difficulty holding the State accountable for the wrongful private conduct they had encouraged absent an agency relationship or post-hoc State ratification. And it explains the awkwardness with which many academics have approached the targeting of the Taliban in the wake of the September 11th attacks, given the difficulties in attributing Al-Qaeda's conduct to Afghanistan.

Indeed, the restrictive function of the principles of attribution seems to be assumed by many of the jurists surveyed in chapter 2.7 and is implicit in some parts of the ILC Draft and its Commentary.[90] Draft Articles 8 and 11 suggest, at least indirectly, that State responsibility for the effects of private conduct cannot be engaged without agency or subsequent ratification. The title of Draft Article 1 speaks of a State's responsibility 'for its internationally wrongful acts' in a way that might be taken to preclude responsibility for the subsequent consequences of those acts. And the ILC Commentary itself declares that the chapter on attribution: '. . . is cumulative but also limitative. In the absence of a specific undertaking or guarantee (which would be a *lex specialis*), a State is not responsible for the conduct of persons or entities in circumstances not covered by this chapter.'[91]

On this view of the relationship between attribution and responsibility, the role of causation in State responsibility analysis is carefully circumscribed. The sources that have been examined seem to suggest that, unlike municipal law, international law does not allow responsibility to be traced back through independent actors to the party that can be said, in causal terms, to have occasioned the harm. Attribution, explains David Bederman, serves as a 'surrogate for causation'.[92] In other words, the function of causation in determining State responsibility is cut short by agency criteria. Subsequent acts that are not committed by the State or its agents constitute intervening factors that fix the end limits of the State's responsibility.

This is not to say that causation plays no role in State responsibility assessments. The State, after all, can only be responsible for those violations of international law that it causes. The principles of causation therefore help determine whether the State's conduct has produced an internationally wrongful act.[93] But the restrictive reading of attribution principles implied by the separate delict theory suggests that private actors, operating in that capacity, will always break the chain of causation. The State is responsible for its own acts, not for the results of private conduct that its own acts have facilitated.

If this understanding of State responsibility for non-State action were to be uniformly applied, one would expect to find no support in the case law for the proposition that a State may be held responsible for harm caused by intervening

[90] See below section 8.4.3.

[91] Report of the International Law Commission to the General Assembly, UN GAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) 83; J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge, CUP, 2002) 5.

[92] DJ Bederman, 'Contributory Fault and State Responsibility' (1990) 30 *Va J Intl L* 335, 347.

[93] Caron, above n 10, p 153; see also below section 8.4.3.

non-State actors in the absence of an agency relationship. But international law rarely offers up so uncomplicated a jurisprudence. Despite the apparent support for the separate delict theory, a considerable number of international cases seem to originate from a different legal lineage.

These cases cast doubt on the authority of the separate delict theory as the exclusive organizing principle of State responsibility for private conduct. They grant causal principles a far more significant role in determining the scope of State responsibility and thus suggest that causation-based responsibility may have some pedigree in international law.

The following section surveys some of the cases that seem to diverge from the restrictive view of attribution principles implicit in the separate delict theory. This examination offers the possibility for causal principles to claim a more prominent place in the scheme of State responsibility for private acts. In so doing, it allows the consideration of a causal approach to responsibility in terrorism cases to proceed on firmer international legal foundations.

8.4.2 Causation-based State Responsibility in International Law

Arbitral Awards

While the weight of arbitral awards offer considerable support for the separate delict theory,[94] there are some important exceptions. In these cases, causal language has been used to justify holding the State directly responsible for the conduct of unattributable non-State actors when the State's wrongful act or omission is regarded as providing the opportunity for that conduct to take place.

In the academic literature, these awards are sometimes cited to illustrate the different approaches of tribunals to the assessment of compensation as direct or proximate, as opposed to indirect or remote.[95] But for the purposes of this study, their relevance lies more particularly in illustrating that intervening unattributable acts are not always treated as grounds for relieving a State of legal responsibility for the consequences that flow, by the operation of normal causal principles, from its own wrongdoing.

The *Samoan Claims Award* of 1904 offers an early example. In this case, the arbitral commissioners were required to determine the extent of liability for losses sustained by German nationals as a result of British and French military activities on the island of Samoa in 1899.[96] While noting 'a striking absence of international precedent or authority', the commissioners held that there was no reason to assume that causal principles would not apply equally in international law as in municipal law. Accordingly, they concluded that:

[94] See above sections 2.7.2, 3.2 and 3.3.

[95] See, eg, M Whiteman, 3 *Damages in International Law* (Washington DC, US Government Printing Office, 1943) 1767–1836.

[96] Joint Report No II of 12 August, 1904, reprinted in Whiteman, above n 95, pp 1778–81.

> . . . where the occupants of a house were obliged to flee for refuge when the bombardment began, and were unable, from fear of personal injury or other causes to return to protect their property, and it was looted by natives in their absence, the damage thus resulting may be said to be approximately caused by the military operations.[97]

Similar reasoning was invoked in the *Portuguese Colonies Damages Case* of 1928. The case involved damage to Portuguese colonial possessions arising out of a civil revolt by indigenous Angolans. Portugal argued that Germany should be held responsible for the damage since the Angolan uprising was an expected consequence of military incursions in the country by German forces. The tribunal eschewed agency criteria and held Germany responsible 'for the consequences' of its military action on the basis of the following causal rationale:

> [I]t would not be equitable to let the victim bear those losses that the author of the initial illicit act foresaw and perhaps even intended, under the sole pretext that in the chain of causation there are intermediate links. But, on the other hand, every one agrees that if one abandons the principle that only direct damages come with the rights of reparation, it is nonetheless necessary to exclude some damages so that one does not extend responsibility to damages not connected to the initial act except by an unexpected series of exceptional circumstances in which the perpetrator did not collaborate and which the perpetrator could not have foreseen.[98]

An analogous approach is evident in *Administrative Decision II* adopted by the German–United States Mixed Claims Commission of 1923. In that context, the Commission referred to proximate cause as 'a rule of general application both in private and public law' and emphasized that:

[97] *Ibid*, p 1780; see also *D Earnshaw (Great Britain) v United States* (1925) 6 R Intl Arb Awards 160 (where similar principles may have been applied to hold the United States liable for looting by the Chinese crew of the US merchant vessel Zafiro, acting together with Filipino insurgents).

[98] *Responsabilité de l'Allemagne a Raison de Dommages Causés dans les Colonies Portugaises du Sude de l'Afrique* (*Portugal v Germany*) 2 R Intl Arb Awards 1011 (1928) 1031 (translation from French). The case may be compared to the *Alabama Claims Arbitration* where the US sought compensation, *inter alia*, for the additional costs of suppressing the rebellion and extra payments of maritime insurance arising out of Great Britain's failure to prevent the fitting out, arming or equipping of rebel forces within its jurisdiction during the Civil War. The tribunal found that in the circumstances this was 'indirect loss' for which there could be no recovery, see *The Alabama Claims*, (*United States v Great Britain*) (1871) reprinted in JB Moore, 1 *History and Digest of International Arbitrations to which the United States has been a Party* (1898) 653–59; see Whiteman, above n 95, pp 1772–75. It has been suggested, however, that this finding is of 'little judicial value' since the claims were dismissed for political reasons owing to the fact that Great Britain had threatened to withdraw from the arbitral process if they were pursued, see C Eagleton, 'Measure of Damages in International Law' (1929–30) 39 *Yale L J* 52, 67; see also HE Yntema, 'The Treaties with Germany and Compensation for War Damage' (1924) 24 *Col L Rev* 135, 149–51 (arguing that the *Alabama* decision was limited to its facts and included in practice the award for some damages which were indirect in nature. According to Yntema, the case serves only as authority for the proposition that if on the facts the 'indirect loss' is too remote there will be no recovery).

> It matters not whether the loss be directly or indirectly sustained so long as there is a clear, unbroken connection between Germany's act and the loss complained of. It matters not how many links there may be in the chain of causation connecting Germany's act with the loss sustained, provided there is no break in the chain and the loss can be clearly, unmistakably, and definitely traced, link by link, to Germany's act.[99]

These kinds of views were developed more recently in several opinions issued by judges of the Iran–US Claims Tribunal. While strict adherence to the separate delict theory dominates much of the Tribunal's jurisprudence, rival theories of State responsibility, grounded in causal criteria, have occasionally been presented. Reference has already been made, in section 3.2.1, to the dissenting opinion of Judge Brower in *Short v Iran*. In that instance, Judge Brower invoked classical causal notions to argue that Khomeini's failure to 'quell the expulsive fervor . . . should permit attribution to him of responsibility for the consequences. The fire brigade commander who studiously looks the other way while the arsonist is at work in his midst is no less guilty of the wrong'.[100]

But this is not the only instance in which causal terminology is used in the Tribunal's case law. In *Queens Office Tower Associates v Iran National Airlines Corp*, a New York landlord sought compensation for losses connected to the alleged breach of a lease by Iran Air, Iran's national and government owned airline. Iran Air had effectively ceased its operations in the United States, and the payment of rent on the lease, as a result of sanctions imposed by the US administration in the wake of hostage crisis. It defended its default of the lease by arguing that performance was frustrated by acts of the United States itself.

In assessing the validity of this claim, both the majority and the dissenting opinion relied on causal criteria. The majority argued that US sanctions were a 'free exercise by a State of one of its options in the international sphere'. As a result, the United States countermeasures constituted 'an independent cause of the events which ensue therefrom, regardless of the acts of another State which may have triggered such a response'.[101] By contrast, Judge Holtzmann in his dissent maintained that a 'state which violates international law and breaches its treaty obligations must foresee the likelihood that the injured state will take permissible counter-measures and must accept responsibility for the consequences of those counter-measures'.[102] He denied that a legitimate US response to the illegal hostage taking by Iran could serve as supervening event that would 'break the chain of causation' and excuse the default of the lease.

[99] *Administrative Decision No II*, Mixed Claims Commission (*United States v Germany*) (1923) 7 R Intl Arb Awards 23, 29–30.

[100] *Short v Islamic Republic of Iran* (1987) 16 Iran–US Cl Trib Rep 76, 94–95. He states also that 'there was a cause and effect relationship' between the policies of the Khomeini regime and the 'events that befell Americans', *ibid*, p 93. Note also that even the majority, which grounded its decision in agency terms, referred to the need for evidence that the anti-American statements were the 'cause of the claimant's decision to leave Iran', *ibid*, p 86.

[101] *Queens Office Tower Associates v Iran National Airlines Corp*, (1983) 2 Iran–US Cl. Trib Rep 247, 253–54.

[102] *Ibid*, p 258.

Similar causal language has appeared in other Tribunal awards. For example, in *Lillian Byrdine Grimm v Islamic Republic of Iran*, Judge Holtzmann contended that Iran could be held responsible not only for the acts of members of the insurgency but also for 'acts in furtherance of the achievement of the goals of the Islamic Revolution'.[103] In the *Rankin Case* too, the Tribunal hinted at the relevance of causal criteria in cases involving multiple actors. It conceded that statements of the regime could have 'reasonably been expected to initiate or prompt violence'[104] and recognized that 'the question of causation cannot be ignored' since Iran might be held liable if the 'wrongful actions attributable to it were a substantial factor in causing the damage'.[105] In the particular circumstances, however, the Tribunal held that Rankin had failed to show that his departure was the product of the regime's anti-American policy.

None of these pronouncements appear fully reconcilable with an agency paradigm of State responsibility. Admittedly, the cases primarily concern the payment of compensation rather than more intrusive remedial action.[106] But the use of causal notions to establish responsibility seems unrelated to this fact. The privately inflicted harm does not just serve as a convenient yardstick by which to measure the damage the State owes for its own conduct, as was the case in some of the early arbitral awards examined in chapter 2.[107] Rather the private conduct is viewed as the consequence, in causal terms, of the State's wrongful conduct and the State itself is, at least potentially, required to answer for its effects.[108]

The Corfu Channel Case

Perhaps the most prominent judgment that falls outside the confines of the agency paradigm is the ICJ's decision in the *Corfu Channel Case*. Decided in 1949, at a time when the separate delict theory was theoretically well settled, the Court might have been expected to adopt this approach in its reasoning. It elected not to do so.

It will be recalled that on the facts presented to it the ICJ was unable to establish that Albanian agents laid the mines that had damaged the British ships patrolling the Channel. It concluded, however, that the mine laying 'could not

[103] *Lillian Byrdine Grimm v Islamic Republic of Iran* (1983) 2 Iran–US Cl Trib Rep 78, 88. The claimant sought compensation for loss of financial support arguing that her husband's death in Iran was the result of the government's failure to provide him with adequate protection. The majority dismissed the case for lack of jurisdiction. David Caron has argued that in Judge Holzmann's view of this case even if Iranian agents did not pull the trigger, they 'encouraged and thereby caused' the pulling of the trigger and direct Iranian responsibility was justified on that basis, see Caron, above n 10, pp 155–56.

[104] *Rankin v Islamic Republic of Iran* (1987) 17 Iran–US Cl Trib Rep 135, 147; see also above section 3.2.2.

[105] *Ibid*, p 149.

[106] See below section 8.4.3 (discussing whether these cases can be discounted because of this fact).

[107] See above section 2.6.

[108] See D Shelton, *Remedies in International Human Rights Law*, 2nd edn, (Oxford, OUP, 2005) 109–110 .

have been accomplished without the knowledge of the Albanian government'.[109] Despite that knowledge, 'nothing was attempted by the Albanian authorities to prevent the disaster' and it was these 'grave omissions' that triggered the responsibility of the State.[110]

And yet, when the Court came to define the scope of Albania's responsibility it did not limit itself to a finding of responsibility for the failure to prevent, as might be expected under the separate delict theory. Instead, the Court adopted the following language: 'Albania is responsible under international law *for the explosions* which occurred on October 22nd, 1946, in Albanian waters, and for the damages and loss of human life which resulted from them . . .'[111]

That this formulation was not considered exceptional is revealed by the fact that the parties themselves had asked the Court to determine whether Albania was 'responsible for the explosions', without suggesting that in the alternative Albania might be held responsible only for the failure to prevent.[112]

It is exceedingly difficult to reconcile this broad finding of responsibility with the separate delict theory. Had the Court strictly adhered to the view that attribution restricts the scope of responsibility, it would have been compelled to conclude that there was insufficient evidence to attribute the minelaying to Albania. As a result, Albania could, at the most, be held responsible for its own omissions. On the separate delict theory, the Court would have answered the question put to it in the negative. In fact, it did the opposite.

Even the dissenting opinions in the judgment demonstrate a remarkable lack of interest in examining the scope of Albania's responsibility by reference to agency criteria. Judge Winiarski stated that in international law responsibility is engaged for an international act if the State: '. . . failed to take the necessary steps to prevent an unlawful act, or has omitted to take the necessary steps to detect and punish the authors of an unlawful act. Each of these omissions involves a State's responsibility in international law *just like the commission of the act itself*.'[113]

Judge Badawi Pashi asserted that Albania's responsibility requires proof that it had failed to carry out an international obligation and that the failure had 'caused the explosion'.[114] And Judge Azevedo held that 'a State which is informed of a prejudicial act committed by another and does nothing to prevent it *incurs the same responsibility on the ground of the unlawful act*.'[115]

How can this judgment be explained? It seems plausible to suggest a causal analysis. Albania was held responsible for the explosions themselves, because its omissions were their cause. Having clearly established that Albania was subject to a distinct duty of prevention, and capable of forestalling the harm, its inaction

[109] *Corfu Channel Case (UK v Albania)* [1949] ICJ Rep 4 (9 April) 22.
[110] *Ibid*, p 23.
[111] *Ibid* (emphasis added).
[112] The terms of the Special Agreement appear in *ibid*, p 6.
[113] *Ibid*, p 52 (dissenting opinion of Judge Winiarski) (emphasis added).
[114] *Ibid*, p 65 (dissenting opinion of Judge Bidawi Pasha).
[115] *Ibid*, p 90 (dissenting opinion of Judge Azevedo) (emphasis added).

represented a deviation from normative expectations that was properly regarded as a necessary cause of the explosions. The fact that separate actors were responsible for the minelaying did nothing to relieve Albania of its responsibility for the consequences of its own wrongdoing. The finding that Albania was responsible not just for failing to prevent the harm, but for the harm itself was thus a relatively straightforward application of causal principles.[116]

One wonders how the *Corfu* bench would have approached the issues presented in the *Tehran Hostages* or *Nicaragua Case*. Presumably, the judges would have found Iran directly responsible for the hostage taking as a consequence of its gross failures of prevention, and regardless of any subsequent endorsement. Similarly, in *Nicaragua*, they might have asked whether the United States had breached any duties to prevent and abstain in its assistance to the *contras* to the extent that *contra* violations of international humanitarian law might properly be regarded as a direct consequence of any United States' illicit conduct. Whatever the case, it seems clear that the *Corfu Channel* judgment belongs to a legal tradition different from the Court's subsequent jurisprudence.[117] Its privileged place in international case law is incompatible with a regime of State responsibility for unattributable acts confined to the separate delict theory.

The Kahan Commission Report

The approach of the Kahan Commission to the question of Israeli responsibility for the 1982 Sabra and Shatila massacre by Lebanese Phalangist militias represents a peculiar application of the principles of responsibility for the acts of another.

Following the massacre, the Israeli government established a Commission of Inquiry, comprising two Supreme Court justices and a retired Major General, to determine responsibility for the massacre and to make recommendations.[118] The

[116] The fact that the Court found that subsequent British minesweeping operations violated Albania's sovereignty in no way vitiates this conclusion. Albania's direct responsibility for the explosion did not entitle the victim to adopt remedial measures that, in the circumstances, were impermissible under international law.

[117] See D Brown, 'Use of Force Against Terrorism After September 11th: State Responsibility, Self-defence and other Responses' (2003) 11 *Cardozo J Intl & Comp L* 1, 13–17 (rightly noting that the *Corfu Channel Case* presents a theory of responsibility that fundamentally differs from the *Nicaragua* and *Tehran Hostages* decisions, but wrongly describing it as a case of 'vicarious responsibility').

[118] Final Report of the Commission of Inquiry into the Events at the Refugee camps in Beirut, reprinted in (1983) 22 ILM 473, 491 [hereinafter Kahan Commission Report]. There are, of course, other accounts of the massacre, with some arguing that the relationship between Israel and the Phalangist militia was one of *de facto* agency similar to the *Nicaragua Case*, see, eg, Y Shany and KR Michaeli, 'The Case Against Ariel Sharon: Revisiting the Doctrine of Command Responsibility' (2002) 34 *NYU J Intl L & Pol* 797, 870. From this perspective, the analysis of the massacres does not shed light on the application of State responsibility principles when no such relationship exists. It seems clear, however, that the Kahan Commission did not consider there to be an agency relationship.

Commission held that 'direct responsibility' rested on the Phalangist forces. Israel bore no 'direct responsibility' for the massacre, was not involved in its perpetration and had no actual prior knowledge that it would take place. Nevertheless, it determined that 'indirect responsibility for what ultimately occurred'[119] derived from the decision to allow the Phalangists to enter the Palestinian refugee camps 'without consideration of the danger—which the makers and executors of the decision were obligated to foresee as probable . . . and without an examination of the means for preventing this danger'.[120] In addition, the Commission found that the correct conclusions were not drawn when reports began to arrive about Phalangist activity, and that 'no energetic and immediate actions where taken to restrain the Phalangists and put a stop to their actions'.[121]

While noting that others, including the Lebanese Army, might also bear indirect responsibility for the massacre,[122] and that many States in similar circumstances had failed to investigate their own culpability for private atrocities, the Commission determined that Israel could not shirk its measure of responsibility. It reasoned that Israel had an affirmative duty to protect the civilian population from acts of non-State entities as well State officials, which derived either from the general responsibilities of a belligerent occupant under international humanitarian law or from 'obligations applying to every civilized nation and the ethical rules accepted by civilized people'.[123]

The nature of the Commission's reasoning differs in some respects from an agency-based analysis of State responsibility for private conduct. Admittedly, its finding is unique in that it while it addresses issues of State responsibility, its focus is on the varying degrees of individual responsibility to be attributed to political and military officials. In addition, its use of the phrase 'indirect responsibility' is somewhat ambiguous and the Commission itself stipulates that it was not its task 'to lay a precise legal foundation for such indirect responsibility'.[124] From the overall approach of the Commission, however, it seems clear that violations of the duty to prevent were used as a basis for establishing some measure of State responsibility for the massacre itself.[125] In this sense, the Commission seems to have strayed from the application of the principle of non-

[119] Kahan Commission Report, above n 118, p 496.
[120] *Ibid*, p 499
[121] *Ibid*.
[122] By a 1991 law, Lebanon conferred amnesty for all crimes committed during the war, see Shany and Michaeli, above n 118, p 798.
[123] Kahan Commission Report, above n 118, p 496.
[124] *Ibid*, p 496.
[125] The Commission, in explaining the issue of indirect responsibility refers to violence against Jewish communities in the diaspora. In that context, it establishes that 'responsibility for such deeds falls not only on those who rioted and committed the atrocities but also on those who were responsible for safety and public order, who could have prevented the disturbances and did not fulfill their obligations in this respect', *ibid*.

attribution and the separate delict theory, adopting an approach that more closely approximates a causal analysis.[126]

The United Nations Compensation Commission

The United Nations Compensation Commission (UNCC) was established by the Security Council at the end of the first Gulf War to collect, verify and provide compensation for claims against Iraq for losses arising from the invasion and occupation of Kuwait.[127] The scope of claims that may be submitted to the Commission was defined in paragraph 16 of Security Council resolution 687, which provides that Iraq: '. . . is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait.'[128]

Pursuant to this resolution, the Governing Council of the UNCC provided detailed criteria for the submission of claims by Governments on behalf of their nationals. It specifically provided that these claims could cover, *inter alia*, any loss suffered as a result of:

(a) military operations or threat of military action by either side during the period 2 August 1990 to 2 March 1991;
(b) departure from or inability to leave Iraq or Kuwait (or a decision not to return) during that period; . . .
(d) the breakdown of civil order in Kuwait or Iraq during that period.[129]

Several aspects of these headings of loss are worth highlighting for present purposes. As far as the first head is concerned, it is clear that losses resulting from military operations by coalition forces are treated as a direct consequence of Iraq's invasion for which Iraq is held responsible. In other words, the Governing Council has decided to treat Iraq as responsible to compensate for loss despite the fact that intervening independent actors—in this case coalition forces—were the immediate perpetrators of the harm in question. In this respect, the UNCC follows a line of international claims procedures in which a

[126] But see GA Christenson, 'Attributing Acts of Omission to the State' (1991) 12 *Mich J Intl L* 312, 350–51.

[127] See generally JR Crook, 'The United Nations Compensation Commission—A New Structure to Enforce State Responsibility' (1993) 87 *Am J Intl L* 144.

[128] SC Res 687, UN SCOR, 45th Sess, 2981st mtg, UN Doc S/RES/687 (1991).

[129] United Nations Compensation Commission, Criteria for Expedited Processing of Urgent Claims, UN Doc S/AC.26/1991/1 (1991), reprinted in (1991) 30 ILM 1712. This decision covers category A, B and C claims. The same criteria were spelled out for categories D, E and F, see United Nations Compensation Commission, Criteria for Additional Categories of Claims, UN Doc S/AC.26/1991/7.Rev.1 (1992); see generally N Wühler, 'Causation and Directness of Loss as Elements of Compensability before the United Nations Compensation Commission' in RB Lillich, (ed), *The United Nations Compensation Commission* (Irvington, NY, Transnational Publishers, 1995) 207.

wrongdoing or aggressor State has been held liable for the foreseeable harm inflicted by other actors as a consequence of its illicit conduct.[130]

With respect to losses arising from the departure or inability to leave, the breakdown of civil order, and other grounds of loss, the decisions of the Governing Council and determinations by the Panel of Commissioners have occasionally had to address the impact of intervening acts on Iraq's responsibility. In these cases, the UNCC has made clear that Iraq can be held responsible, on the basis of causal criteria, for harm occasioned by its wrongful conduct but actually inflicted by other actors.

For example, in response to Iraqi attacks on Israeli territory during the Gulf War, Israeli authorities imposed numerous security measures including the imposition of curfews and the closing down of facilities such as chemical plants, factories and schools. The question thus arose whether losses sustained by these security measures could be regarded as engaging Iraq's responsibility. The Panel showed little difficulty in answering this question:

> Under generally accepted principles of law, intervening acts of a third person that are a reasonable and foreseeable consequence of the original act do not break the chain of causation, and hence do not relieve the original wrongdoers of liability for losses which his acts have caused. Thus, in the present context, if it can be said that an intervening act was a reasonable and foreseeable response to Iraq's unlawful invasion and occupation of Kuwait, the resulting loss, despite such intervening act, will remain directly attributable to Iraq.[131]

In the specific claims presented on behalf of corporations in Israel, the Panel found that in most cases the actions taken by the government were reasonably

[130] See generally P D'argent, *Les Reparations de Guerre en Droit International Public: La Responsabilité Internationale des États a L'épreuve de la Guerre* (Brussels, Bruylant, 2002) 622–59; DJ Bederman, 'Historic Analogous of the UN Compensation Commission' in RB Lillich, (ed), *The United Nations Compensation Commission* (Irvington, NY, Transnational Publishers, 1995) 257. While the *compromis* establishing many international claims commissions provide little guidance on the assessment of damages, the examples cited in this section show that actual decisions of international arbitrators have regularly relied on causal principles. It should also be noted that some lump-sum settlement agreements have expressly provided remedies for private violence, and these may have been motivated by causal assessments, see Claims Convention, United States–Panama, 26 January 1950, 132 UNTS 233 (in force 11 October 1950) (regarding civil disturbances that injured US soldiers in Panama in 1915); Exchange of Notes, United Kingdom–Indonesia, 1 December 1966, 606 UNTS 125 (in force, 1 December 1966) (settling claims of British nationals in respect of 'loss or damage suffered, directly and indirectly, during or as a consequence of' riots in Indonesia in 1963); see also Report of the Commission on Indemnities, reprinted in Whiteman, above n 95, p 1781 (requiring that China compensate for losses caused as a result of the 1900 Boxer uprising including, *inter alia*, the destruction of property and the loss of rent, and regardless of whether the immediate perpetrators of the harm were Chinese State agents).

[131] United Nations Compensation Commission, Report and Recommendations made by the Panel of Commissioners Concerning the Second Installment of 'E2' Claims, UN Doc S/AC.26/1999/6 (1999) 16 (citing Honoré, among others, in support of the proposition); see also United Nations Compensation Commission, Report and Recommendations made by the Panel of Commissioners Concerning the First Installment of "F2" Claims, UN Doc S/AC.26/1999/23 (1999) para 38 (noting that while intervening acts may break the chain of causation they will not do so when the act is a 'direct and foreseeable consequence' of the invasion and occupation of Kuwait).

foreseeable since they were 'implemented as part of a government's duty to protect its citizens' in response to the conflict and thus did not 'sever the connection between the invasion and occupation of Kuwait and the losses'.[132]

If the UNCC could hold Iraq responsible despite the intervening acts of sovereign States that could potentially be the subject of separate responsibility under international law, it is not surprising that it applied the same reasoning in relation to harm inflicted by purely private actors. Thus, for example, the Panel concluded that, depending on their date and location, traffic accidents might be compensable as a loss resulting from the breakdown of civil order caused by the Iraqi invasion.[133] Likewise, where business property was lost or damaged because of the absence of company personnel to protect it, it has been held that Iraqi responsibility would be engaged.[134]

The approach of the UNCC contrasts sharply with much of the jurisprudence of the Iran–US Claims Tribunal.[135] Instead of investigating whether the immediate perpetrator of the harm is a *de jure* or *de facto* State agent, the UNCC has asked whether the harm may be traced, by operation of causal principles, to the initial wrongful act of Iraq. Depending on the circumstances, as well as appropriate policy considerations, such responsibility may or may not be engaged.[136] But causation, not restrictive applications of attribution principles, dictates the analysis.

The UNCC's willingness to view Iraq as liable for losses despite the presence of intervening actors is all the more noteworthy given that resolution 687, which establishes its mandate, refers to liability 'under international law' for 'direct

[132] United Nations Compensation Commission, Report and Recommendations made by the Panel of Commissioners Concerning the Second Installment of 'E2' Claims, UN Doc S/AC.26/1999/6 (1999) 22. The report was adopted by the Governing Council in United Nations Compensation Commission, Decision Concerning the Second Installment of 'E2' Claims or Death (Category 'B' Claims), UN Doc S/AC.26/Dec.65 (1999).

[133] United Nations Compensation Commission, Recommendations made by the Panel of Commissioners Concerning Individual Claims for Serious Personal Injury or Death (Category 'B' Claims), UN Doc S/AC.26/1994/1 (1994) 24–25. The Panel similarly recommended compensation by Iraq for injuries resulting from the poor conditions in refugee camps to which large numbers of people fled in the wake of the war, *ibid*, p 28. The Panel's recommendations were subsequently approved by the Governing Council, see United Nations Compensation Commission, Decision Concerning the First Installment of Claims for Serious Personal Injury or Death (Category 'B' Claims), UN Doc S/AC.26/Dec.20 (1994); see also G Townsend, 'State Responsibility for Acts of De Facto Agents' (1997) 14 *Ariz J Intl & Comp L* 635, 660 (citing UNCC Deputy Chief that damage and looting in Iraq during the conflict committed by individuals, whether Iraqi or non-Iraqi, is attributable to Iraq).

[134] United Nations Compensation Commission, Propositions and Conclusions on Compensation for Business Losses: Types of Damages and their Valuation, UN Doc S/AC.26/1992/9 (1992) 4.

[135] This especially evident with respect to Iraqi responsibility for departure, where a presumption of liability applies without any need to prove attribution to Iraq, see Wühler, above n 129, p 222; Townsend, above n 133, p 660.

[136] The UNCC has held, especially in complex cases, that the dictates of fairness and equity have a role in determining the scope of Iraq's responsibility, see, eg, United Nations Compensation Commission, Report and Recommendations made by the Panel Of Commissioners concerning the First Installment of Individual Claims for Damages up to US$100,000 (Category 'C' Claims), UN Doc S/AC.26/1994/3 (1994) at 22 (stating that considerations of 'logic, fairness and equity' must enter into the determination).

losses'. The Governing Council and the Panel of Commissioners view themselves as applying general legal principles regulating responsibility for loss under international law, rather than operating under a uniquely self-contained legal regime. As Arthur Rovine and Grant Hannessian have noted, the UNCC has preferred generally accepted causal criteria rather than adhering strictly to the distinction between 'direct' and 'indirect' loss which tribunals have found notoriously difficult to apply.[137] As such, the jurisprudence of the UNCC offers a compelling example of causation-based responsibility in international law despite its unique origins.

Refugee Law

Some recent municipal decisions concerning violence against women by non-State actors have addressed questions of State action under the 1951 Convention Relating to the Status of Refugees.[138] The case of *Minister of Immigration and Multicultural Affairs v Khawar*[139] before the High Court of Australia represents a prominent example. The case concerned a Pakistani woman who sought a 'protection visa' in Australia on the grounds that she had been a victim of severe domestic violence by her husband and his family and that the State had offered her no protection despite repeated pleas for assistance.

The High Court of Australia found that in principle the State's wrongful omissions in failing to prevent private harm could be regarded as persecution under the Refugee Convention if it was discriminatory in nature. On the facts, the majority concluded that Pakistan's tolerance of the infliction of serious harm against Mrs. Khawar could have amounted to an instance of persecution by the State by reason of membership of a particular social group, and referred this question back to the Refugee Review Tribunal for examination.[140]

Some of the reasoning in this case appears to recognize that even though the harm itself was purely private in nature, the State's failure of protection could be regarded as producing the harm since it created the environment in which the harm could occur.[141] In the words of Gleeson CJ, for example, 'a relevant form of state conduct may be tolerance or condonation of the inflicting of serious

[137] AW Rovine and G Hanessian, 'Towards a Forseeability Approach to Causation Questions at the United Nations Compensation Commission' in RB Lillich, (ed), *The United Nations Compensation Commission* (Irvington, NY, Transnational Publishers, 1995) 235, 248; see also Eagleton, above n 98, p 73; Cheng, above n 13, p 243; Whiteman, above n 95, p 1781; G Arangio–Ruiz, 'Second Report on State Responsibility' (1989) 2 (1) *YB Intl L Comm'n* 1, 12 UN Doc A/CN.4/425 (1989).

[138] Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 150 (in force, 22 April 1954).

[139] *Minister of Immigration and Multicultural Affairs v Khawar* (2002) 187 ALR 574.

[140] *Ibid*, p 581.

[141] These cases should be distinguished from those in which the private harm itself is a form of persecution against a social group, see W Kälin, 'Non-state Persecution and the Inability of the State to Protect' (2001) 15 *Georgetown Imm L J* 415; see also *In re Fauziya Kasinga* 21 I & N Dec 357 (1996) (finding female genital mutilation by private actors uncontrolled by the State as a form of persecution justifying refugee status).

harm in circumstances where the state has a duty to provide protection against such harm'.[142] Similar decisions have been reached, for example, in cases in the United Kingdom,[143] France[144] and New Zealand.[145]

Strictly speaking, the decisions in these instances need not be understood as holding the State directly responsible for the private harm.[146] The finding of persecution is grounded upon State inaction in the face of private wrongdoing, not in an extension of responsibility beyond the State's own acts. Nevertheless, the approach adopted demonstrates a willingness to cast the inaction of the State in broader terms. In so doing, the decisions recognize the State's role in the infliction of private harm and 'break down the conceptual barriers created by the public/private dichotomy'.[147]

The Report of the International Commission of Inquiry on Darfur

In February 2005, an International Commission of Inquiry established pursuant to Security Council resolution 1564 submitted a report on its investigations into human rights and humanitarian law violations against the civilian population of Darfur in Western Sudan.[148] While the focus of the report is on the individual criminal responsibility of governmental officials and militiamen, it has also addressed the question of Sudan's international responsibility for the atrocities. The Commission's findings in this regard stray from a strict agency analysis and may rely, at least in part, on a more causal approach.

In addressing responsibility for attacks by the Janjaweed militia perpetrated in the absence of direct State control, the Commission found that:

> . . . whenever it can be proved that it was the Government that instigated those militias to attack certain tribes, or that the Government provided them with weapons and financial and logistical support, it may be held that . . . the Government incurs international responsibility (vis-à-vis all other States of the international community) for any violation of international human rights law committed by the militias.[149]

[142] *Minister of Immigration and Multicultural Affairs v Khawar* (2002) 187 ALR 574, 581.

[143] See, eg, *Islam v Secretary for the Home Department*; *R v Immigration Appeal Tribunal, Ex parte Shah* [1999] 2 WLR 1015.

[144] F Tiberghien, *La Protection Des Réfugiés En France,* 2nd edn, (Aix-en-Provence, Presses universitaires d'Aix-Marseille, 1988) 95–96.

[145] See, eg, Refugee Status Appeals Authority, Reference 71427/99, reprinted in R Haines and L Tremewan, *New Zealand Refugee Status Appeals Authority* (2000).

[146] GS Goodwin–Gill, *The Refugee in International Law,* 2nd edn, (Oxford, Clarendon Press, 1996) 73.

[147] R Bacon and K Booth, 'Persecution by Omission: Violence by Non-state Actors and the Role of the State under the Refugee Convention in Minister for Immigration and Multicultural Affairs v Khawar' (2002) 24 *Sydney L Rev* 584, 598.

[148] Report of the International Commission of Inquiry on Darfur to the Secretary–General, UN Doc S/2005/60 (2005).

[149] *Ibid*, p 39.

This conclusion is somewhat perplexing when examined from the perspective of the agency paradigm.[150] On a strict agency analysis, especially if interpreted on *Nicaragua* standards, Sudan would be responsible in such cases for its own violations of the duty to prevent and to abstain, not for the acts committed by the Janjaweed militia. Instigation or operational support is not generally considered sufficient under the agency paradigm as a basis for direct State responsibility.

The Commission of Inquiry provides no legal justification for its conclusion, but it may be that it regards instigation and the provision of support as a ground for direct State responsibility on the basis of causal criteria. If this were the case, however, there would arguably be no reason why direct Sudanese responsibility for Janjaweed attacks could not be potentially engaged by the 'mere' failure to prevent as well. As the Commission itself has found, the systematic and illegal acts and omissions of the Sudanese Government created a 'general climate of chaos and impunity to attack, loot, burn, destroy, rape and kill'.[151] On this basis, and quite apart from its own direct participation in the atrocities, Sudan may be said to have caused the Janjaweed violence and be held directly accountable for it.

The Commission's report does not demonstrate any definitive support for a causation-based approach, but it does not fall neatly into the category of agency-based responsibility either. Indeed, the response of the Security Council to Sudanese violations in resolutions 1590, 1591 and 1593 is arguably indicative of a general recognition that Sudan's responsibility for the atrocities in Darfur goes beyond violations of the duty to prevent and abstain alone.[152]

Codification Efforts

A number of codification efforts in the field of injury to aliens can be interpreted, at least implicitly, as supporting a causal approach to the assessment of the scope of State responsibility for private acts. As noted in section 2.7.3 a number of these codification efforts suffer from a degree of ambiguity, but the

[150] This finding seems to differ from the position adopted by the Secretary-General in his 2004 Report on the Sudan, which implies a stricter adherence to the separate delict theory, see Report of the Secretary General pursuant to paras 6 and 13 to 16 of Security Council resolution 1556 (2004), UN Doc S/2004/703 (2004) 5:

> To the extent that the militias who carried out these attacks were under the influence of the Government, the wanton destruction of the villages and the killing of a large number of civilians constitutes a serious breach of the Governments commitments. Even if the militias were outside the influence of the Government, it was the Government's responsibility to intervene to ensure the protection of the civilian population in this area.

[151] Report of the International Commission of Inquiry on Darfur to the Secretary–General, UN Doc S/2005/60 (2005) 38; see also *ibid*, p 39 (referring, in the criminal context, to the foreseeability that 'creating a climate of total impunity, would lead to the perpetration of serious crimes').

[152] See above section 7.2.1; see also SC Res 1590, UN SCOR, 59th Sess, 5151st mtg, UN Doc S/RES/1590 (2005); SC Res 1591, UN SCOR, 59th Sess, 5153rd mtg, UN Doc S/RES/1591 (2005); SC Res 1593, UN SCOR, 59th Sess, 5158th mtg, UN Doc S/RES/1593 (2005).

tendency in some of these texts to refer to State responsibility for private damage could potentially be explained in causal terms.

Thus, for example, the somewhat confusing treatment of 'responsibility for damage' at the Hague Codification Conference, considered in section 2.7.3, may have partly concerned issues of causation. A plausible interpretation of the proposals formulated at the Conference suggests that delegates agreed that State responsibility could derive only from the State's own wrongdoing but, once engaged, that responsibility could extend to cover privately inflicted harm that was a natural consequence of the State's violation.[153]

Similarly, the Draft Articles on this subject adopted by the Institute of International Law at Lausanne in 1927, provided in Article III that the State 'is not responsible for injurious acts committed by individuals except when the injury results from the fact that it has omitted to take the measures to which, under the circumstances, it was proper normally to resort in order to prevent or check the actions'. Article X also clarified that the State is to pay reparations for injuries 'in so far as they are consequences of a failure to observe an international obligation'.[154]

Finally, in 1961, the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens included a rare reference to causation. Article 14 of the Draft asserted that a State would be responsible if the loss or detriment suffered by an alien was the 'direct consequence' of the State's wrongful act or omission, referring in that context to a 'reasonable relation' between the wrongful conduct and the harm.[155]

The Opinions of Jurists

Remarkably few scholars have expressly addressed the role causation in State responsibility assessments, but some notable references bear mention. Grotius himself wrote that 'the one who is liable for an act is at the same time liable for the consequences resulting from the force of the act'.[156] Bin Cheng, writing in 1953, has regarded the principle of causality as 'valid both in municipal and international law' and concluded that 'if a loss is a normal consequence of an act, it is attributable to the act as a proximate cause'[157]

[153] Similarly ambiguous references in other codification efforts and diplomatic incidents could conceivably be explained in the same way, see above section 2.7.3 and 2.7.4.

[154] Institute of International Law, Draft on 'International Responsibility of States for Injuries on their Territory to the Person or Property of Foreigners' (1927), reprinted in FV García Amador, 'First Report on State Responsibility' (1956) 2 *YB Intl L Comm'n* 173, UN Doc A/CN.4/96.

[155] Harvard Law School, Draft Convention on the International Responsibility of States for Injuries to Aliens (1961), reprinted in FV García Amador, *et al*, (eds), *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (Dobbs Ferry, NY, Oceana Publications, 1974) 133, 241–46.

[156] H Grotius, Carnegie Endowment for Intl Peace, (tran), *De Jure Belli Ac Pacis*, (1646) Bk II, Ch XVII, sec XII.

[157] Cheng, above n 13, pp 246, 253; see also J Personnaz, *La Réparation Du Préjudice En Droit International Public* (Paris, Librairie du Recueil Sirey, 1938) 136; B Graefrath, 'Responsibility for

More recently, Michael Straus addressed the role of causation in assessing one State's responsibility for the acts of another State in the following terms:

> . . . a complete theory of State responsibility should embrace an analysis of the circumstances in which events set in motion by the acts of one State become the subject of action taken by a second or successive States. Any such analysis should consider the theory of proximate, or legal cause, as a means of determining whether or not the intervening acts of a second State break the chain of causation set in motion by the first State.[158]

Finally, David Caron has noted that 'causation as an aspect of State Responsibility is, relative to municipal law developments, an undeveloped area of international law'.[159] He nevertheless argues that: 'Just as the municipal law of responsibility has come to recognize that the presence of another person in the chain of causation does not necessarily relieve the actor originating the chains of events of responsibility, so also should State Responsibility.'[160]

8.4.3 Causation-based Responsibility and the Separate Delict Theory

Even without an exhaustive analysis of the case law, the examples cited in the previous section raise questions about the interaction between attribution, causation and responsibility that are not adequately answered by the separate delict theory. If there are circumstances in which the State is held responsible for a result despite the intervention of acts that are unattributable to it, then the assumption about the restrictive role of attribution principles needs to be re-examined.

For the purposes of this study, it is not strictly necessary to address the inherent tension between these examples of causation-based responsibility and the separate delict theory. A causal approach to State responsibility for terrorism may be proposed as a *lex specialis* that can be excluded from the agency paradigm by operation of ILC Draft Article 55.[161] As argued in chapter 7, given the unique nature of the contemporary terrorist threat and the complexity that characterizes State involvement in terrorist activity a departure from the separate delict theory in favor of causal notions may be advanced on both theoretical and practical grounds.

And yet, if the examples cited represent more than a mere anomaly, they offer the opportunity to develop a more ambitious claim. If causation-based

Damages Caused: Relationship between Responsibility and Damages' (1984) 185(2) *Hague Recueil Des Cours* 13, 95.

[158] M Straus, 'Causation as an Element of State Responsibility' (1984) 16 *Law & Pol'y Intl Bus* 893, 923.

[159] Caron, above n 10, p 153.

[160] *Ibid*, p 160.

[161] See below section 9.6.

responsibility can be reconciled with general trans-substantive rules of State responsibility, then the adoption of a causal approach in terrorism cases may be regarded as a creature of international law, rather than a peculiar interloper from the domestic realm. The discussion of causation-based State responsibility for terrorism can then be situated in the context of causation's central role is assessing responsibility regardless of actor or legal regime.

The main obstacle to the advancement of such a claim is the prevalence of the idea that under international law a State is to be held responsible only for its own wrongful conduct. There is nothing objectionable in this proposition if it is merely raised to suggest that without a State's own wrongful act there can be no legal responsibility. Formulated in this way, the proposition comes only to counter earlier approaches that grounded State responsibility for private acts in notions of collective wrongdoing. But, as noted above, advocates of the separate delict theory seem to use this proposition to argue that a State can never be held accountable for the conduct of unattributable actors. In this sense, the separate delict theory is clearly incompatible with the idea that State responsibility may be engaged for the acts of another by operation of causal principles.

Proponents of the separate delict theory may seek to address this tension by marginalizing the significance of the causation-based cases that have been cited. It would clearly be disingenuous to simply dismiss these cases on the basis that the privately inflicted harm is just a convenient means by which to calculate the reparation owed by the State for its own illicit act.[162] It is evident that in the examples cited the State is held responsible *for that very harm* and its duty to compensate for the harm is a corollary of that responsibility.

But it might nevertheless be argued that the use of causal principles to justify State responsibility for unattributable acts is relevant only for the purposes of compensation. Indeed, the typical cases in which State responsibility is traced through intervening acts involve the payment for damages. The fact that causal criteria are used to determine the extent of the State's financial liability may not be regarded as evidence that State responsibility for private conduct can, in more general terms, be causally based. In other words, intervening acts may not limit the State's *financial* responsibility but the principles of attribution will fulfill a restrictive function when more aggressive remedial action is at issue.

This is an artificial argument that cannot be sustained. When speaking of State responsibility for an internationally wrongful act, we are concerned with defining the conduct or results for which a State is called upon by law to answer. Once the scope of the State's responsibility is determined it becomes the appropriate target of whatever remedial action the law entitles in the circumstances. While much of the case law, like the ILC Draft itself, is concerned primarily with compensation, other circumstances may justify more forceful action such as the imposition of sanctions, countermeasures or the use of force in self-defense. The payment of compensation is merely one type of legal consequence that flows

[162] *Cf* above section 2.6.

from responsibility.[163] The legitimacy of recourse to other measures will of course depend on the specific rules and conditions that govern their application.[164] But if a State is legally responsible for a given outcome, it follows that it is subject to the full range of responses that the law permits in the circumstances.[165]

If these cases of causation-based responsibility cannot be so easily discounted, perhaps it is necessary to re-evaluate the presumed exclusive authority of the agency paradigm itself. As noted above, advocates of agency seem to presume that the principles of attribution fulfill a restrictive function. States can only be responsible for the failure to prevent an unattributable private act not for the act itself. Attribution and responsibility are effectively conflated into one. Indeed, this view of State responsibility in relation to private conduct has become so insidious in the contemporary literature that it may be difficult to conceive of the attribution principles in any other manner. But this is not the only or even the most sensible way to comprehend their purpose.

The principles of attribution are better understood as a mechanism for defining an act of State only, without limiting the *scope* of responsibility that that act may generate. As Gaetano Arangio-Ruiz has explained, the rules of attribution are not legal rules at all but a 'register of factual situations' with the limited function of describing those circumstances in which conduct can be said to 'emanate *in fact* from the State'.[166] Once a wrongful act or omission has been attributed to the State, however, the scope of responsibility can be determined on causal grounds and, where appropriate, supplemented by policy considerations.

Under this view, it is incorrect to say that a State is responsible *only* for the failure to prevent, if what is implied by that assertion is that responsibility cannot also be engaged, on the basis of causal criteria, for the conduct that that failure has engendered in others. It is incorrect to say that Iran cannot be directly responsible for the hostage taking by students unless it ratifies their conduct; incorrect to say that a State will never itself be responsible for violating the very substantive human right that its wrongful conduct has allowed private actors to contravene; and incorrect to say that the 'mere' failure to prevent or the toleration of terrorist activity can never be a basis of State responsibility for the terrorist acts themselves.

Naturally, in all these cases the State can only be responsible if it has acted and if that act is wrongful. But a State's responsibility *can* extend beyond its own acts or omissions to encompass purely private acts that are the product of its wrongful conduct. This is not because the principles of attribution transform the private act into an act of the State. It is because the principles of causation

[163] Graefrath, above n 157, p 62; see also below section 9.2.4.
[164] See below section 9.2.4.
[165] Brown, above n 117, p 17.
[166] Arangio-Ruiz, above n 11, p 32 (emphasis in original).

can trigger a State's responsibility for unattributable activity that its *own* illicit act or omission has occasioned.

On this reading, the separate delict theory expresses the valid notion that responsibility can only be generated by a State's own act. But it has undermined, or at least obscured, the equally valid notion that such responsibility, once engaged, can cover unattributable acts causally linked to the State's wrongdoing.

By so unburdening the regime of State responsibility for private conduct from the artificial limitations imposed by the agency paradigm and the public/private distinction, it can be brought into greater harmony with determinations of responsibility that are familiar in municipal law. The assessment of State responsibility for private action could thus be expressed as a four-step process:

(1) A factual test as to whether an act or omission can be regarded as State conduct, by operation of attribution principles.
(2) A legal test as to whether the attributed act or omission constitutes a violation of an international legal obligation of the State.
(3) A causal test to determine the scope of responsibility that potentially arises from the wrongful act or omission of the State.
(4) A policy test to determine whether non-causal considerations justify enhancing or diminishing the responsibility of the State.

There is, it will be argued, little doubt that this four-step process offers an attractive alternative in theoretical terms to the separate delict theory. But for causation-based responsibility to be advanced as a general rule, it is necessary to consider whether it can be reconciled with the ILC Draft and with the reliance on the agency paradigm in much of the jurisprudence.

The first of these challenges appears surmountable. The ILC Draft Articles and Commentary certainly do not go out of their way to demonstrate that State responsibility for private conduct can be analyzed on a causal basis. But they do not necessarily contradict such a reading either. Notwithstanding their origins in Roberto Ago's analysis of non-attribution and the separate delict theory, there are some clear indications that the ILC Draft Articles are, at the least, not inconsistent with the causation-based approach described above.

Mention has already been made of those portions of the ILC Draft and Commentary that seem to bolster the separate delict theory. But other aspects of the ILC text tend demonstrably in the opposite direction. Thus, in introducing the concept of attribution the ILC Commentary limits the role of attribution to establishing 'that there is an act of the State for the purposes of responsibility'.[167] It asserts that the rules of attribution 'have a cumulative effect, such that a State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects'.[168] Other portions

[167] Report of the International Law Commission to the General Assembly, UN GAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) 81.

[168] *Ibid*. See also (1975) 1 *YB Intl L Comm'n* 31, 36 UN Doc A/CN.4/Ser.A/1975 (1975) (comments by Reuter and Ushakov regarding the 'causal link between the attitude of the State and

of the Commentary unfortunately undermine the full force of these formulations,[169] but they nevertheless indicate some appreciation for the role of causation in determining the scope of a State's legal responsibility.

Similar indications emerge from other aspects of the Draft. Draft Article 16 articulates the general rule that a State that aids or assists another State in the commission of a wrongful act is responsible for its wrongful assistance, though not for the act of the assisted State. But, as noted in section 6.2.2, the Commentary to this provision stipulates that a State may be held responsible for harm inflicted by another State if its aid or assistance was a 'necessary element' in the commission of the wrongful act.[170] While no mention is made in this context of responsibility for private action, it seems clear that the Commentary is invoking notions of causation to justify holding the assisting State responsible not only for its own act, but for the act of the wrongdoing State to which it provided indispensable assistance.[171]

In the Draft's treatment of reparation the notion of causation merits little discussion. Draft Article 31 merely provides that the 'responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act'.[172] Draft Article 34, on the forms of reparation, Draft Article 36, on compensation, and Draft Article 37 on satisfaction, refer to cause in the same limited way. But the Commentary explains that the Articles have abandoned any distinction between direct and indirect loss in favor of a general formulation that expresses the view that the State can be held responsible 'for *all the consequences*, not being too remote, of its wrongful conduct'.[173] Admittedly, no

the attitude of the individual, in so far as it was the State's failure to act which enable the individual to cause damage').

[169] For example, the Commentary cites the *Tehran Hostages Case* as an example of responsibility for the effects of the conduct of private parties when in fact responsibility was engaged for the hostage taking itself only on the basis of State ratification. Moreover, as noted above, the Commentary contends that the attribution principles are 'limitative' in the sense that a 'State is not responsible for the conduct of person or entities in circumstances not covered in this chapter', Report of the International Law Commission to the General Assembly, UN GAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) 83.

[170] *Ibid*, p 159; see also J Quigley, 'Complicity in International Law' (1986) 57 *Brit YB Intl L* 77, 128–29 (arguing that a State which aids another state can be held liable for all the harm if 'it facilitated that very harm').

[171] If a crude analogy is made to complicity in criminal law, it appears that the ILC Draft embraces an approach more akin to German law. It rejects the identity made between accomplices and perpetrators in Anglo-American, French and international criminal law even in the absence of causal connection, see above section 8.3.5.

[172] Interestingly, Draft Art 31 slightly amends the proposal made for this provision by the Special Rapporteur James Crawford who suggested stipulating that full reparation is owed 'for the consequences flowing from that act', see J Crawford, 'Third Report on State Responsibility', UN Doc A/CN.4/507 (2000) 54.

[173] Report of the International Law Commission to the General Assembly, UN GAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) 230 (emphasis added); see also Crawford, above n 91, p 31. An earlier Commentary referred to the criterion of 'the presence of a clear and unbroken causal link between the unlawful act and the injury for which damages are being claimed . . . a relationship of cause and effect', see (1993) 2 (2) *YB Intl L Comm'n* 53, UN Doc A/CN.4/SER.A/1993/Add.1 (1993).

reference is made to intervening unattributable acts, but the language used is compatible with the idea that direct State responsibility for private conduct may be engaged in these circumstances.

Mention may also be made of Draft Article 28 on the legal consequences of wrongful action. This provision contains the basic principle that the 'international responsibility of a State which is entailed by an internationally wrongful act . . . involves legal consequences'. The formulation used in the Draft Article is noteworthy because rather than suggesting that responsibility is engaged *for* an internationally wrongful act, it suggests that the wrongful act *triggers* responsibility but does not necessarily delimit the scope of that responsibility. Finally, Draft Article 56 provides, by way of a savings clause, that to the extent that State responsibility is not governed by the ILC text, the applicable rules of international law continue to apply. It follows that if the ILC Draft does not specifically exclude causation-based responsibility—and arguably it does not—then causal principles retain their validity to the extent that they are recognized in international law.[174]

The fact that only limited direct attention is paid to these issues in the ILC Draft is regrettable. To better entrench causal principles in the regime of State responsibility for private conduct it would be helpful to consider amending the Draft or the Commentary in a way that would clarify the function of attribution, and specify that a State may sometimes be held responsible for the consequences, in causal terms, of its own conduct despite the presence of independent intervening actors. Indeed, such proposals might usefully be considered in 2007 when the General Assembly's Sixth Committee next reviews the ILC Draft Articles.[175] Nevertheless, even in its present form, the text is arguably consistent with a causal approach, and offers it at least some measure of support.

A more difficult problem is presented when trying to reconcile the cases of causation-based responsibility discussed in section 8.4.2 with the abundant jurisprudence in which the separate delict theory has been expressly or implicitly embraced.

In some cases, such reconciliation may theoretically be possible. For one thing, it is worth recalling that a number of the earlier sources surveyed in section 2.7 that are regularly cited as support for the separate delict theory do not necessarily preclude a causal analysis. While all assert that State responsibility can only originate in the State's wrongdoing, not all rule out the possibility that once such responsibility is triggered it can also encompass the subsequent consequences of the State's illicit conduct. Statements by jurists, governments and tribunals that State responsibility is only involved as a result of the State's wrongdoing are not necessarily the same as an assertion that the State

[174] J Crawford, 'The ILC's Articles on Responsibility for Internationally Wrongful Acts: A Retrospect' (2002) 96 *Am J Intl L* 874, 879 (citing Art 56 to affirm that 'the articles are not intended to constitute a code of the secondary rules' of State responsibility).

[175] GA Res 59/35, UN GAOR, 59th Sess, UN Doc A/RES/59/35 (2004).

can never be responsible for privately inflicted harm absent an agency relationship.

Admittedly, this possible consistency with a causal paradigm does not apply where the adoption of the separate delict theory is made explicit.[176] Moreover, it does not necessarily imply positive support for a causal theory of responsibility. It does, however, help to erode the aura of exclusive authority that tends to hover over the separate delict theory.

In a similar vein, numerous cases where State responsibility for a private act was withheld can be explained consistently with a causal approach. Even if a causation-based approach is generally accepted in international law, not all (or even most) wrongdoing by the State triggers responsibility for subsequent consequences. Causal criteria may well limit the State's responsibility to its own act or omission when the wrongdoing cannot properly be regarded as a cause of the subsequent private act. In addition, non-causal factors may justify limiting the degree of responsibility in appropriate cases.

Thus, as will be discussed in chapter 9, the failure to prevent a single or sporadic incident may rightly be treated as a basis for responsibility for the failure to prevent alone and not for the incident itself. This is because, on causal grounds, the necessary link between the failure and the incident cannot be established. In these cases, responsibility is limited to the State's own act and compensation or other remedial action will usually be grounded in the failure of the State and not the eventual harm that is inflicted. A number of the cases considered in chapters 2 and 3 may thus be consistent with causal notions notwithstanding the fact that they were sometimes rationalized on the basis of the separate delict theory.

Several other cases, however, do not admit of such an explanation. In situations such as those considered in the *Tehran Hostages Case* and by the Iran–US Claims Tribunal, the persistent and egregious failure of the State to prevent the private action would, by application of causal principles, arguably justify responsibility for the private action regardless of the absence of an agency relationship. In these instances, State acts and omissions deviate from clear and onerous normative expectations and create the opportunity necessary for the private action to occur. The fact that responsibility for private conduct has still required an agency relationship, despite the evident causal link, provides clear support for the separate delict theory and poses some unresolved questions about the place of causation in the general scheme of State responsibility for private acts.[177]

[176] See generally above sections 2.4 and 2.7.
[177] See below section 9.5.

8.5 CONCLUSION

Contrary to popular perceptions, State responsibility for private conduct is not governed by a coherent jurisprudence. For all the support that the separate delict theory enjoys, causal principles that regulate responsibility for the acts of another in other branches of the law reverberate in the international law of State responsibility as well. It is not possible, or necessary, in the context of this study to advance a causation-based theory for responsibility in all cases of unattributable private action. But the fact that causation has occasionally penetrated the general jurisprudence of State responsibility for private conduct at least presents a broader legal platform for examining State responsibility for terrorism in causal terms.

The role of causation in justifying and delimiting the scope of responsibility is deeply embedded in legal and ordinary thought. It is the separate delict theory—so prevalent in the literature of international law—that presents something of an anomaly. Understood as a reaction to theories collective responsibility, condonation or complicity in the case of injury to aliens, as a State-centric expression of the public/private distinction, or as a way of minimizing State-to-State confrontation during the Cold War, the separate delict theory acquires contextual coherence. But as a general legal principle it lacks sound conceptual foundations.

It is of course right to affirm that, as a general rule, State responsibility can only be engaged as a result of the State's own wrongdoing. Responsibility turns on culpability. But the separate delict theory goes too far if it is taken to mean that responsibility is, as a matter of principle, restricted by an agency paradigm to those acts attributable to the State. By suppressing, or at least concealing, the role of causation in the calculus of responsibility, the separate delict theory has lowered a protective veil over the State, shielding it from the full measure of accountability for the consequences of its own wrongdoing. Modern adherents of the separate delict theory have lost touch with the historical context in which this rule was formulated. In so doing, they propound a rule that ignores the inherent role of causation in determining legal responsibility and absolves States of responsibility for the results of their illegal actions.

Such a grant of impunity is not easy to defend. The law relies on causation as the primary tool for defining the scope of responsibility because, even as a matter of common-sense, it is right to hold actors accountable for the consequences of their wrongful interference with the existing or expected state of affairs—nothing more and nothing less. Non-causal or policy factors can influence the degree of responsibility that is ultimately imposed, but the existence of an inherent link between causation and accountability is well established. When international law imposes duties on States in relation to private conduct, it is difficult to see why different legal concepts should prevail. Indeed, one might argue that given the disparity of status between sovereign

States and private actors that still characterizes international law and relations, there is all the more reason to reject the idea that private actors might break the chain of causation between the State and the harm that its wrongful conduct has occasioned.

Whatever the validity of causation-based responsibility in the general law of State responsibility for private acts, its application in the field of terrorism is of special importance. Chapter 7 exposed the practical, conceptual and legal inadequacies of an agency paradigm in terrorism cases. It suggested that a causal paradigm can overcome many of these weaknesses and best responds to the actual interaction between State and non-State actors that makes terrorism possible in a post-September 11th world. This chapter has considered the core principles of causation-based responsibility, and argued that they find some echo in international law. It remains to consider how such principles might operate in practice to actually regulate State responsibility for private acts of terrorism.

9

Causation-based State Responsibility for Terrorism

9.1 INTRODUCTION

At least until the attacks of September 11th, the agency paradigm of State responsibility enjoyed an unrivalled position in the academic discourse of international lawyers. While causation itself is well-established in general legal theory, its specific application to State responsibility for private acts of terrorism is largely absent from the literature. It has been argued here that causal principles may well underlie the way States actually approach questions of responsibility.[1] But from an academic perspective, one enters uncharted legal waters.

This fact dictates a measure of modesty in advancing a theory of causation-based State responsibility for terrorism. The goal must be to begin a discussion about the role of causation in terrorism cases, not to propose its end results.

It is important, however, to demarcate the limits of this discussion. By examining cases of terrorism through a causal prism we are not concerned with all kinds of causes. As noted in chapter 4, terrorism has been alleged to derive from a wide variety of 'root causes', many of which are traced to the conduct and policy of States. Among these, poverty, religious extremism, oppression, and the lack of democratic entitlement are commonly, if not always accurately, invoked.[2] Causation-based State responsibility is concerned, however, with the principle of causation in its legal sense not in its political, religious or sociological dimensions.

There is nothing new in this observation. Criminal activity, for example, can be partially explained by a variety of sociological or economic factors. But the law will not say that the cause of a particular theft was the lack of equal opportunity in society. In the same way that these non-legal causes are irrelevant to a juridical inquiry about individual criminal responsibility, they are irrelevant to an assessment of State responsibility for private terrorist activity under international law.

Naturally, understanding and confronting these broader kinds of causes is a critical component of any attempt to deal with the contemporary terrorist

[1] See above section 8.2.
[2] See above section 4.2.2.

phenomenon in all its aspects. But these factors do not play a role in an examination of a State's *legal* responsibility for the private acts of terrorism that its wrongful conduct may have occasioned. It is with the neglect of the role of causation in the context of this legal discussion that this study is primarily concerned.

Within this framework, the present chapter pursues three main objectives. The first is to offer a possible model of causation-based State responsibility for terrorism. The second is to consider the role of burden of proof issues in actually determining State responsibility under this model. And the third is to test the viability of this model against the contemporary reality of terrorist activity and the policy concerns it has generated.

9.2 A CAUSAL MODEL OF STATE RESPONSIBILITY FOR TERRORISM: APPLYING A FOUR-STEP PROCESS

In section 8.4.3, it was argued that a causal approach to State responsibility for private acts could be envisaged as a four-step process:

(1) A factual test as to whether an act or omission can be regarded as State conduct, by operation of attribution principles.
(2) A legal test as to whether the attributed act or omission constitutes a violation of an international legal obligation of the State.
(3) A causal test to determine the scope of responsibility that potentially arises from the wrongful act or omission of the State.
(4) A policy test to determine whether non-causal considerations justify enhancing or diminishing the responsibility of the State.

Without necessarily committing to any specific causal model, this chapter will use this four-step approach to facilitate a discussion about the potential role of causation in determining State responsibility for private terrorist action.

9.2.1 The Role of Attribution

Both an agency and a causal paradigm recognize that responsibility can be generated only by the State's own act. The difference between these paradigms, as discussed in section 8.4.1, relates primarily to whether that responsibility, once triggered, can extend to cover conduct that is unattributable to the State but causally linked to its wrongdoing.

Two salient points emerge from this observation. First, it will always be necessary to determine whether an alleged failure to comply with counter-terrorism obligations is attributable to the State. The fact that an individual private citizen, acting in that capacity, aided or failed to prevent terrorist activity has no bearing on the State's responsibility. Only once it is established that the

act or omission constitutes State conduct can the scope of legal responsibility engaged by that conduct be considered. In making that factual assessment, the ILC principles of attribution continue to represent the relevant touchstone even under a causal approach.

Second, it is plain that a causal approach presents a basis for State responsibility that comes to supplement, not replace, the agency paradigm. If private actors engage in terrorist activity as *de facto* State agents, or have their conduct subsequently ratified by the State, there is no question that direct State responsibility for the terrorist activity will be engaged under standard ILC principles. Causation-based responsibility comes only to suggest that there may be *other* circumstances where even unattributable and intervening private conduct may engage the direct responsibility of the State.

9.2.2 The Role of Illegality

Ever since the theory collective responsibility was discarded, State responsibility has been predicated on culpability. In the absence of a special legal regime, acts or omissions that are lawful cannot generate State responsibility. In this sense too, there is no difference between the agency and the causal paradigm. In order to establish State responsibility for terrorism it will always be necessary to determine, as specified under Draft Article 1 of the ILC text, whether the act or omission attributed to the State constitutes a breach of its international counter-terrorism obligations.

Sections 4.3 and 4.4 examined in detail the content of these counter-terrorism obligations and the manner in which their violation may be determined. It is not necessary to repeat that analysis here, only to recall that international law imposes clear and onerous duties on the State to prevent and to abstain in connection with private terrorist activity. For these duties to be violated various conditions must be satisfied and each case must be examined on its facts. But it is incontrovertible that without such a finding of wrongdoing, no State responsibility will be generated.

9.2.3 The Role of Causation

While the first two stages in a responsibility assessment are common to both the agency and the causal approach, the next stage is unique to causation-based analysis. Under an agency paradigm, the assessment of responsibility essentially ends at the second stage. The State will be responsible for its own wrongful act and nothing more. There is no question of expanding that responsibility to unattributable conduct that the State's illicit act or omission can be said to have caused.

In a system of causation-based responsibility, however, the finding of State wrongdoing is the basis on which an examination of the scope of State

responsibility can proceed. It is by the use of causal principles that an assessment can be made as to whether a State's responsibility should be limited to its own violation of the duty to prevent or abstain, or whether it may encompass the private terrorist action itself.

This point is best illustrated by example. Suppose a State that has the capacity to prevent terrorist activity neglects this responsibility and fails to deploy its security forces effectively for this purpose. In principle, this may be a violation of the general duty to exercise due diligence in preventing terrorist action. It is a wrongful omission for which State responsibility may be engaged. But it does not necessarily follow that this omission is the cause of a specific terrorist attack.

In section 8.3.4, it was discovered that for an omission to be described as a cause of subsequent conduct that produces harm it was necessary to demonstrate both a distinct duty of prevention and a specific capacity to prevent the harm in the circumstances. In the case of terrorism, the existence of a clear and onerous obligation on the State to prevent private terrorist activity is unquestionable. Indeed, in light of the September 11th attacks and growing concerns about the threat of catastrophic terrorism the expectation of compliance with this obligation has only intensified.[3]

The question of capacity, however, will depend on the particular factual circumstances. In each case, it will be necessary to establish that the fulfillment of the State's due diligence obligations would have prevented the terrorist activity.[4] Without such a showing, the unlawful omission is not a condition *sine qua non* of the subsequent terrorist attack and cannot, therefore, generate responsibility for it on causal grounds.

If it can be demonstrated that the State had actual or constructive knowledge of an impending attack, as well as the opportunity to prevent it, it is appropriate to speak of its wrongful omission in causal terms. Where, for example, the State was notified of the location and operation of a terrorist cell within its territory and, being equipped to act against it, chose not to do so, its illicit inaction is necessarily a cause of the subsequent terrorist activity and a ground for broader State responsibility.

This is so whether one adopts a 'but for' approach to causation, the common sense causal principles advocated by Hart and Honoré or some other causal criteria commonly applied in municipal legal systems. Under the 'but for' approach, for example, it is plain that in such an instance the terrorist activity could not have occurred were it not for the State's failure to comply with its duty to prevent. In this instance, the State's failure is both the condition *sine qua non* and the proximate or foreseeable cause of the subsequent terrorist activity. Its wrongdoing can therefore generate legal responsibility for the terrorist action itself, notwithstanding the absence of any agency relationship.

[3] See above section 4.3.3.
[4] See below section 9.3.

Similarly, under common-sense causation the wrongful omission is in this case a clear deviation from normative expectations that is both necessary to produce the terrorist attack and the factor that 'made the difference' in enabling the terrorist act to take place. The State's omissive failure is the cause of the harm—it explains why the terrorist activity occurred. The fact that independent actors perpetrated the terrorist act itself is immaterial to this finding. Using Hart and Honoré's approach, the State was obligated to prevent precisely that kind of harm and it is therefore held to account for the terrorist activity that its wrongful conduct has occasioned.[5] As discussed below, any remedial measures available against a State bearing direct responsibility will always be subject to the legal conditions that govern their application. But the causal approach avoids the automatic rejection of direct State responsibility merely because of the absence of an agency relationship. As a result, it potentially exposes the wrongdoing State to a greater range and intensity of remedies, as well as a higher degree of international attention and opprobrium for its contribution to the private terrorist activity.

Theoretically, applying causal principles to impose direct State responsibility appears relatively uncomplicated. But in practice it will often be difficult to prove after a single terrorist incident that there has been a violation of counter-terrorism obligations, much less a causal link between the incident and the State's own violation. Active State support for a terrorist group is often difficult to demonstrate, and due diligence is, by its nature, a flexible criterion that is not easily applied to isolated events.

When the terrorist activity is ongoing, however, causation-based responsibility for private terrorism is more easily generated. As noted in section 4.4.5, a State's claim that it lacked the knowledge or capacity to prevent terrorist activity becomes increasingly less plausible as attacks multiply and opportunities for improving its counter-terrorism capabilities and operations present themselves. Violations of the duty to prevent and State acquiescence in terrorist activity are established with greater certainty and may in turn generate State responsibility not only for breaches of counter-terrorism obligations but for the terrorist conduct itself.

Suppose, for example, that a functioning State is host to a terrorist group that has launched numerous attacks against neighboring countries. It does not exercise effective control over the group or ratify its actions, but it gives it freedom to operate. Despite repeated pleas for preventive action, the host State refuses to comply with its counter-terrorism obligations, turning a blind eye to the continuing terrorist activity within its jurisdiction. In both ordinary and legal thought, this persistent wrongful conduct on behalf of the State creates the opportunity for the terrorist activity to take place. While a direct link between the State's violations and an individual terrorist incident may not be immediately evident, the ongoing terrorist violence can be traced to the general

[5] See above section 8.3.5.

environment of lawlessness that the State has knowingly tolerated. In this case, the terrorist action is rightly regarded as the consequence of the State's illicit acts and omissions and it would be bizarre, in a system grounded in causal principles, to impose a division between the State's unlawful conduct and the terrorist activity it made possible.

Admittedly, the examples cited represent a considerable simplification of the cases that arise in practice. Sections 9.3 and 9.4 will turn to consider issues of burden of proof and more intricate factual scenarios that will help situate the discussion in a more practical context. Nevertheless, these examples serve to illustrate that causal principles can operate to engage direct State responsibility for private terrorist action even if that action is not attributable to the State. In so doing, they highlight the fundamental difference between an agency and a causal paradigm of responsibility.

The oft-repeated assertion that the failure to prevent or the 'mere toleration' of terrorist activity can never be a basis for direct State responsibility has no place in this setting. This is not because the threshold for an agency relationship between the State and the private terrorist actor has been lowered after September 11th, as some jurists have argued.[6] It is because causal principles do not recognize the contrived limitations of the public/private distinction. Despite the absence of an agency relationship, these principles will hold the State responsible for private terrorist atrocities if its own wrongdoing has occasioned their perpetration.

9.2.4 The Role of Non-causal Considerations

As discussed in section 8.3.6, the general assumption in a causation-based system of responsibility is that an actor should be held to account not only for wrongful conduct but also for its causal effects. It follows that if unlawful acts or omissions of the State are a cause of private terrorist activity they should trigger *prima facie* legal responsibility for the terrorist activity itself. Nevertheless, in various branches of the law non-causal factors influence responsibility assessments and it is important to consider their possible role in terrorism cases.

In addressing this question, it is helpful to disentangle two separate issues. The first concerns the *scope* of responsibility: whether non-causal considerations play a role in determining if the responsibility of the State should be limited to its own wrongful acts or extended to cover the private terrorist activity. The second concerns the *consequences* of responsibility: whether non-causal considerations play a role in determining the range of measures available against the wrongdoing State. This kind of distinction is reflected in the ILC Draft,

[6] See above section 6.2.5.

which separates the treatment of responsibility from the legal consequences that may flow from it.[7]

With respect to the question of scope, this study has presented a strictly causal approach that respects the intimate connection between causation and responsibility that is well established in both legal and popular thought. Section 7.5 rejected the idea that the State should be responsible for more than that which it has caused, by operation of principles of absolute or strict responsibility. It was contended that such a system would invite abuse in inter-State relations and encourage undue interference in the private sphere. By the same token, it has been argued that it is unjustifiable to use an agency paradigm to restrict responsibility for terrorism to less than that which the State has wrongfully caused.[8]

One possible non-causal consideration that has thus far been overlooked involves the degree of fault accompanying the State's violation of its counter-terrorism obligations. In municipal law, individual responsibility is often affected by the state of mind of the wrongdoer. Intention, recklessness or negligence can influence both the scope of responsibility and the range and intensity of available remedial options. It might be argued that the scope of State responsibility should depend on whether its violation stemmed, for example, from deliberate government policy or simple neglect. In the former, full responsibility for the private terrorist activity would be warranted. In the latter, some partial measure of responsibility would be more appropriate.

These subjective notions do not translate easily into the assessment of the responsibility of an abstract and nebulous entity such as the sovereign State. Traditional views of the law of State responsibility do not accept a principle of fault.[9] Nor do they embrace the taxonomy of civil and criminal wrongdoing. Responsibility is said to be objective. It turns on the fact that the State's acts or omissions are contrary to its legal obligations. It is not a matter of degree: the State is either responsible or it is not.

Admittedly, there are exceptions to this general approach,[10] and a minority of jurists who dispute it.[11] It is submitted, however, that the *scope* of a State's responsibility for private acts of terrorism should not be influenced by these kinds of subjective considerations. What is relevant is whether the State has violated its duty to prevent or to abstain, rather than a search for its motivation in doing so.

[7] See Part I and Part II of the ILC Draft, Responsibility of States for internationally wrongful acts, GA Res 56/83, UN GAOR, 56th Sess, Supp No 49, UN Doc A/RES/56/83 (2001) 499.

[8] See above section 7.3.

[9] See above section 4.4.2.

[10] Thus, a particular rule of international law may stipulate a subjective component, although this is not the case with counter-terrorism obligations, see above section 4.4.2.

[11] See, eg, G Arangio-Ruiz, 'State Fault and the Forms and Degrees of International Responsibility: Questions of Attribution and Relevance' in D Bowett, (ed), *Le Droit International au Service de la Paix, de la Justice at du Développement: Mélanges Michel Virally* (Paris, Pedone, 1991) 25; H Lauterpacht, (ed), 1 *Oppenheim's International Law*, 8th edn, (London, Longmans, Green & Co, 1955) 343; see also G Arangio-Ruiz, 'Second Report on State Responsibility' (1989) 2 (1) *YB Intl L Comm'n* 1, 47–55 UN Doc A/CN.4/425 (1989).

Indeed, it is hard to conceive of any justification for mitigating the scope of a State's responsibility on non-causal grounds. The State is a sovereign entity with a general monopoly on the legitimate use of force, a fundamental obligation to respect the rights of other States and its own citizens, and clear duties to suppress terrorist activity. It should be required to answer in law for those outcomes that are the consequences, in causal terms, of its illicit conduct, regardless of the circumstances that brought that conduct about. Once wrongdoing is established on objective standards, the primary concern must be to encourage State compliance with its counter-terrorism obligations and to enhance State accountability to that end. Basing State responsibility for terrorism exclusively on causal criteria appears to offer the best incentive for States to take the necessary action to control their conduct and comply with their legal obligations.

At the same time, non-causal factors do have an important role to play in determining the *consequences* that flow from the imposition of State responsibility. A finding of State responsibility for a private act of terrorism on the basis of causal criteria is not an automatic license for the victim State to engage in any form of retaliatory response. As explained in section 8.4.3, when a State is held responsible for a particular event it becomes the appropriate address only for those remedial measures that the law permits in the circumstances. Usually, this will involve the right to seek reparation for the terrorist act itself, not merely for the failure to prevent or to abstain. But each measure imposed on the wrongdoing State will be subject to the specific rules that govern its application and non-causal considerations may well influence the legitimacy of resorting to such measures and the intensity with which they may be pursued.

This observation is particularly important with respect to the right of self-defense. If a State is held directly responsible for a terrorist attack it may, potentially, become a legitimate target for a coercive response. But self-defense is subject to its own specific conditions that must be satisfied for defensive action against the State to be permissible. It is here that considerations of a non-causal character may come into play.

The nature of a State's contribution to private terrorist activity and its declared or actual policy with respect to that activity have a direct bearing, for example, on necessity and proportionality assessments in the context of the right to self-defense. If a State's support for a terrorist group engaged in armed attacks is extensive and ongoing, self-defense measures directed against its facilities may be a valid option. Similarly, if the State's inaction in the face of persistent terrorist violence is the product of an orchestrated policy of tacit support that is indispensable to the success of the private terrorist activity then the use of proportional force against the State may eventually become a legitimate measure so as to enforce compliance and thus bring an end to the terrorist threat.

The quality of a State's involvement in terrorism is also relevant to the legitimacy of recourse to other remedial action, such as non-forcible countermeasures or the imposition of sanctions. Here too, while the scope of State

responsibility for private terrorist activity is grounded solely in causal criteria, the kind of action that may be taken in response will often turn on the precise nature of the State's investment in the terrorist enterprise, as well as the magnitude of the threat posed by its continued wrongdoing.[12]

By the same token, even where a State is responsible only for violating the duty to prevent or to abstain, the assessment of damages might take account of various non-causal factors such as the gravity of the breach, the wrongdoing State's policy, or the degree of harm caused by the terrorist activity.[13] In such a case, the State may be required to compensate for the injuries sustained by the private terrorist action even though its responsibility is limited, in causal terms, to a failure to comply with its own counter-terrorism obligations.

There is a sense in the literature that the strong aversion to viewing the failure to prevent or the toleration of terrorist activity as a ground for direct responsibility stems not only from a predisposition towards agency analysis, but also from an inability to recognize the distinction made here between responsibility and its legal consequences. In the case of self-defense, this failure has produced a tendency to confuse an analysis of the lawfulness of forcible defensive measures with the assignment of State responsibility.[14]

It is generally assumed that the State, as opposed to the terrorist group, may not be a principal target of forcible defensive action unless it is viewed as directly responsible for the terrorist activity.[15] But it does not follow that each case of State responsibility for private acts of terrorism generates a right to direct coercive measures against the responsible State.[16] In every case, the conditions for the exercise of self-defense must be independently satisfied. These include, for example, the requirement that the recourse to force be a necessary response to the terrorist attacks, that it be proportionate to the threat posed, and that it may only be exercised until the Security Council has taken the measures necessary to maintain international peace and security. If, for example, targeting the State by force is not necessary to repel the terrorist threat or is disproportionate in the circumstances, it is an impermissible option regardless of the scope of the State's responsibility.

[12] In the case of countermeasures, for example, the ILC Draft requires that the response of the injured State be 'commensurate with the injury suffered', while taking account of the 'gravity' of the wrongful acts and the 'rights in question'. It follows that even under a causal approach, non-causal considerations will influence the permissible range and intensity of a State's countermeasures, see Draft Art 51, GA Res 56/83, UN GAOR, 56th Sess, Supp No 49, UN Doc A/RES/56/83 (2001) 499. On the principle of proportionality in countermeasures, see, eg, *Air Services Agreement of 27 March 1946 (United States v France)* (1978) 18 R Intl Arb Awards 417, 444; *Case Concerning the Gabçikovo–Nagymaros Project (Hungary v Slovakia)* [1997] ICJ 7, 56 (25 September).

[13] SM Malzahn, 'State Sponsorship and Support of International Terrorism in the Customary Norms of State Responsibility' (2002) 26 *Hastings Intl & Comp L Rev* 83, 102–10 (arguing for a sliding scale to assess the damages owed by a State that violates its counter-terrorism obligations which takes account of the egregiousness of the State's conduct and its nexus to the terrorist act).

[14] See above section 6.2.5.

[15] See above section 5.1.4.

[16] J Brunnée and SJ Toope, 'The Use of Force: International Law After Iraq' (2004) 53 *Intl & Comp L Q* 785, 795.

9.3 RETURNING TO THE PROBLEM OF BURDEN OF PROOF

Two aspects of State responsibility for terrorism have been explored in this study. Chapter 4 considered the content of counter-terrorism obligations and the standard by which compliance with these obligations is measured. The present and preceding chapters have advanced a causal model of responsibility that would operate to determine whether a State's violation of its own counter-terrorism obligations justifies the assignment of State responsibility for the private terrorist activity itself. And yet, both these fields of inquiry risk remaining in the realm of the theoretical, if they are not supplemented by guidelines for satisfying the burden of proof.

It is true of course that most cases of State responsibility for terrorism do not come before courts of law. But they do come before courts of public opinion. The legitimacy afforded to a counter-terrorism response will often depend on the degree to which the claimant State is able to produce convincing evidence to satisfy it own public, as well as the governments and institutions whose support it seeks, that its response is appropriately directed against the State responsible for the wrong. This is not to say that the failure to meet these standards necessarily renders these acts illegal in some objective sense. There may be circumstances that compel the State to withhold sensitive intelligence information that serves as justification for its counter-terrorist response.[17] But the State that fails to make compelling evidence of wrongdoing publicly available risks, at the least, public disapproval for the measures it undertakes. One need only recall the controversy surrounding the targeting of Libyan facilities in response to the Berlin discothèque bombing in 1986 to appreciate the point.[18]

Assessments about State responsibility for terrorism made inside and outside a judicial setting are naturally not the same. The burden of proof and the evidentiary standard to be satisfied will depend, *inter alia*, on the gravity of the terrorist attack, the nature of the counter-terrorist response and the attitude of the audience whose approval is being sought. Justice may be blind, but the latitude given to States in the political arena, whether in the role of accuser or accused, is regularly tainted by non-legal considerations.

That being said, the closer a claimant comes to meeting legal expectations of proof, the more their case should merit international support. A victim State that satisfies its legal burden in terrorism cases can at least hope to attract the backing of fair-minded observers and persuade its own constituency that it proceeds on firm ground. Setting guidelines for the burden of proof in terrorism cases is thus important not only because it establishes a more objective legal standard for measuring State responsibility for terrorism before judicial bodies.

[17] R Wedgwood, 'Responding to Terrorism: The Strikes against Bin Laden' (1999) 24 *Yale J Intl L* 559, 568–74; but see J Lobel, 'The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan' (1999) 24 *Yale J Intl L* 537, 547–52.

[18] See above section 5.4.2.

These guidelines also promote a fairer assessment of claims and counter-claims in the political arena. They can, at the least, help the international observer determine whether the appraisals of a State's responsibility for terrorism, and the legitimacy of a counter-terrorism response, are motivated more by legal or by political concerns.

To craft such guidelines, even in the tentative terms proposed here, it is necessary to address the confusion surrounding burden of proof issues revealed in section 4.4.5. The judgments of courts and tribunals on this question present an inconsistent jurisprudence. Often a heavy, if not oppressive, burden of proof is placed on the claimant, while in other cases judges have exhibited a willingness to resort to inferences and circumstantial evidence so as to ease the path to a finding of State responsibility. The former tendency is exemplified in the decisions of the Iran–US Claims Tribunal and the attitude of the majority of the ICJ in the recent *Oil Platforms Case*.[19] The latter trend has been demonstrated in the decisions of the Inter-American Court of Human Rights and by the majority of the ICJ in the *Corfu Channel Case*.[20]

Presumptions and burdens of proof can always be manipulated so as to make a claim's prospects of success rise or fall. What is important is whether these evidentiary standards reflect a basic sense of fairness by corresponding, *inter alia*, to the relative power of the parties and the circumstances of the case. These standards cannot be formulated in the abstract; they must be responsive to the particular context in which they are applied. But it is possible to offer some general guidelines both as concerns the establishment of a violation of the duty to prevent or to abstain and with respect to proving a causal link between the private terrorist attack and the State's wrongdoing.

Establishing a Violation of the Duty to Prevent

In establishing a violation of the duty to prevent, it should not generally be necessary for the victim State to definitively prove every relevant element of wrongdoing. These instances most closely resemble the factual scenario in the *Corfu Channel Case* where the fact of territorial control justified 'more liberal recourse to inferences of fact and circumstantial evidence'.[21]

Admittedly, in some cases the victim State may have access to sophisticated technology or possess advanced intelligence capabilities that enable it to produce more specific information about events in the host State. But given the lack of access, and the clandestine nature of a State's security activities, the victim invariably lacks such detailed evidence and it is patently unreasonable to compel it to supply information about the absence of specific counter-terrorism measures in an attempt to demonstrate a breach of the due diligence obligation.

[19] See above sections 3.2.1 and 4.4.5.

[20] See above sections 3.2.2 and 4.4.5.

[21] *Corfu Channel Case (UK v Albania)* [1949] ICJ Rep 4, 18 (9 April) [hereinafter *Corfu Channel Case*].

Such an approach to the burden of proof would be an invitation to impunity for counter-terrorism violations.

What, then, must the claimant State show in this instance? In the first place, it should be obliged to demonstrate that it was the victim of a terrorist attack emanating from the territory of the accused State. Establishing this territorial link may be straightforward or complicated. In some cases, the terrorist group may claim responsibility for the attack and its base of operations in a host State may be a matter of common knowledge. In other cases, however, a shroud of secrecy will surround the terrorist activity. In these instances, it should not be enough for the victim State to simply assert that it knows the identity and origin of the assailants. If it wishes to attract support for its position it must adduce reasonable direct or indirect evidence that the terrorist attack is linked to planning, operations, instructions or support that originated in the territory of a particular State.

Following the reasoning of the *Corfu Channel Case*, the approach of the Inter-American Court of Human Rights, and similar jurisprudence,[22] the victim State should also produce evidence that the alleged wrongdoing State was aware or should have been aware of the risk of terrorist activity in its territory. In doing so, however, reliance on indirect or circumstantial evidence may well be adequate. Indeed, given the heightened concern and focus on terrorism after September 11th, it may be sufficient, for example, for the claimant State simply to draw attention to independent reports that the State was a possible host to private terrorist operatives. If the terrorist activity in the host State is a matter of public notoriety or if evidence of a previous attack emanating from the host State is available this would also obviously be sufficient.[23]

Having established this much, it is arguably unnecessary for the claimant to show that the host State had the administrative and executive capacity to comply, in principle, with its counter-terrorism obligations. It is submitted that international law recognizes a presumption of capacity, which would be for the host State to refute.

[22] See above sections 3.2.2 and 4.4.5; see also *The Wipperman Case* (*United States of America v Venezuela*) (1887), reprinted in JB Moore, 3 *History and Digest of International Arbitrations to which the United States has been a Party* (1898) 3039, 3041 (finding that 'where the act complained of is only one in a series of similar acts, the repetition, as well as the open and notorious character, of which raises a presumption in favor [of it] being [available] to the authorities and with it a corresponding accountability'); *Mexico City Bombardment Claims (Great Britain)* v *United Mexican States* (1930) 5 R Intl Arb Awards 76, 80, finding that

> in a great many cases it will be extremely difficult to establish beyond any doubt the omission or the absence of suppressive or punitive measures . . . But a strong prima facie evidence can be assumed to exist in these cases in which *first* the British Agent will be able to make it acceptable that the facts were known to the competent authorities, either because they were of public notoriety or because they were brought to their knowledge in due time, and *second* the Mexican agent does not show any evidence as to action taken by the authorities.

[23] Note, in this connection, the assertion made by Samuel Pufendorf as early as 1688 that 'it is presumed that the heads of a State know what is openly and frequently done by their subjects', see S Pufendorf, CH Oldfather and WA Oldfather, (trs), 8 *De Jure Naturae et Gentium Libri Octo* (1688) Ch VI, sec 12.

Such a presumption may be justified on several grounds. First, a State which claims the rights associated with sovereignty should be presumed to bear its burdens. Under Article 4(1) of the United Nations Charter, membership in the United Nations requires formal acceptance of the obligations under the Charter and is, in principle at least, available only to States that are '*able* and willing' to carry them out.[24] If this provision is not a dead letter, it could be read to impose a rebuttable presumption of capacity on member States. Indeed, several scholarly works, including early ILC documents, have supported this presumption[25] and it receives some favorable attention in the case law.[26]

This case is reinforced in the specific context of counter-terrorism obligations. Under Security Council resolution 1373, and the CTC reporting mechanism, every State has documented the measures it has taken to comply with the resolution and was encouraged to identify those areas where its counter-terrorism capacity needs to be enhanced.[27] Where a State has declared its ability to meet the requirements of resolution 1373, it is only reasonable that other States be entitled to rely on such a declaration as supporting a presumption of counter-terrorism capacity.

It follows that once the victim State has demonstrated the necessary link between the terrorist attack and the host State, the latter State should be required to provide an explanation of the events that led to the attack.[28] Following the approach in the *Corfu Channel Case*: '. . . the [host] State cannot evade such a request by limiting itself to a reply that it is ignorant of the

[24] Emphasis added. Pursuant to UN admission procedures, States are required to submit a formal declaration by which they accept the obligations contained in the Charter. In practice, of course, membership has not been denied on this basis, see K Ginther, 'Article 4' in B Simma, (ed), 1 *Charter of the United Nations: A Commentary* (Oxford, OUP, 2002) 177.

[25] See, eg, Pufendorf, above n 23 ('the power to prevent is always presumed, unless its lack be clearly established'); R Ago, 'Second Report on State Responsibility' (1970) 2 *YB Intl L Comm'n* 177, pp 195–97 UN Doc A/CN.4/SER.A/1970/Add.1; R Ago, 'Third Report on State Responsibility' (1971) 2 *YB Intl L Comm'n* 199, 224 UN Doc A/CN.4/226 and Add.1–3 (referring to the assumption that every State possesses 'delictual capacity'); see also B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London, Stevens, 1953) 305–6.

[26] See, eg, *Mexico City Bombardment Claims (Great Britain) v United Mexican States* (1930) 5 R Intl Arb Awards 76; *Corfu Channel Case*, above n 21, p 44 (separate opinion of Judge Alvarez). Interestingly, at the Hague Codification Conference of 1930, several States argued that in the case of mob violence against a particular minority a rebuttable presumption of State wrongdoing should be upheld, see Observations of Finland, Great Britain, India, New Zealand, Norway and South Africa on Basis of Discussion 22(c), Preparatory Committee of the Conference for the Codification of International Law, Bases of Discussion (1929), League of Nations publication, V Legal, 1929.V3 (document C.75.M.69.1929.V), reprinted in S Rosenne, (ed), 2 *League of Nations Conference for the Codification of International Law* (Dobbs Ferry, NY, Oceana Publications, 1975) 540–42; see also EJ de Aréchaga, 'International Responsibility' in M Sørensen, (ed), *Manual of Public International Law* (New York, NY, St Martin's Press, 1968) 531, 562.

[27] See above section 4.3.2.

[28] H Lauterpacht, 'Revolutionary Activities by Private Persons against Foreign States' in E Lauterpacht, (ed), 3 *The Collected Papers of Hersch Lauterpacht* (Cambridge, CUP, 1970) 251, 276 ('hostile acts having been committed, it is for the State to establish that no guilt can be attributed to it'); see also I Brownlie, *System of the Law of Nations: State Responsibility Part I* (Oxford, Clarendon Press, 1983) 164–65; *Corfu Channel Case*, above n 21, p 86 (dissenting opinion of Judge Azevedo).

circumstances of the act and of its authors. The State may, up to a certain point, be bound to supply particulars of the use made by it of the means of information and inquiry at its disposal . . .'[29]

Technically speaking the ICJ did not regard this duty as shifting the burden of proof.[30] However, the actual distinction between the two standards may be questioned since a host State that fails to adequately account for the events or cast doubt on the victim State's case, risks a finding against it in either instance.

Assuming the claimant's allegations are well established, the host State essentially has two options at its disposal. First, it can claim that it is a weak State lacking the basic security apparatus to fulfill its legal duties. As noted in section 4.4.4, the duty to prevent incorporates the obligation on the State to pursue and acquire, through reasonably available opportunities, the means and degree of control necessary to comply with its counter-terrorism obligations. To support a lack of capacity claim, the host State should therefore demonstrate that it has exercised reasonable diligence in attempting to acquire such capabilities and is not merely ignoring its obligations.[31] Naturally, evidence of relevant economic hardship or internal turmoil, and specific reference to capacity problems in correspondence with the CTC, would strengthen such an explanation.[32]

It is important to note that this line of argument is not without consequences. Depending on the circumstances, a State that advances a claim of incapacity should be required to accept genuine offers of assistance and could arguably be compelled to accept reasonable counter-terrorism measures undertaken on its territory in its stead.

The second option available to the host State in refuting an allegation of failing to prevent would be to demonstrate that the terrorist attack occurred despite its due diligence. In the case of an isolated attack, it may be sufficient for the State in question to show that it has generally exerted reasonable counter-terrorism efforts and that it is actively engaged in apprehending the perpetrators and facilitators of the attack.

Much will depend on the circumstances, since the degree of diligence required is in part a function of the scale and magnitude of the terrorist threat. Given the extensive obligations imposed, and the vigilance expected in the post-September 11th era, minimal counter-terrorism action may often be unjustifiable. At the same time, unless the victim State has produced evidence that the host State had

[29] *Corfu Channel Case*, above n 21, p 18.

[30] *Ibid*. But see *Case Concerning Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*) (19 December 2005), Separate Opinion of Judge Tomka, para 4 available at http://www.icj-cij.org/icjwww/idocket/ico/ico_judgments/ico_judgment_20051219.pdf (arguing that the occurrence of harm 'creates a presumption that the obligation of vigilance has not been complied with' requiring the host State 'to demonstrate that it exerted all good efforts to prevent its territory for being misused from launching attacks against its neighbour in order to rebut such a presumption').

[31] See above section 4.4.4.

[32] By the same token, a State that has turned down offers of assistance or presented itself as capable of complying with its obligations may be prevented from claiming a general lack of capacity in the event of a terrorist attack.

or should have had knowledge of the specific impending attack, the perpetration of the terrorist attack in question is not itself evidence of a violation.

As terrorist activity of this kind persists, however, the burden will shift considerably in the direction of the host State. The claim that the State was unaware of the terrorist threat or exercised general diligence in preventing it will become increasingly untenable.[33] Accordingly, the need to demonstrate compliance with the duty to prevent will require ever more convincing evidence of specific counter-terrorism action, in the absence of which a violation of the duty may be reasonably deduced.

From the foregoing analysis, it is clear that establishing a violation of the duty to prevent is governed by flexible criteria. This is a natural consequence of the flexible character of the obligation itself that demands sensitivity to the circumstances of each case. But the guidelines themselves are not without value. Building on the less formalistic jurisprudence of the ICJ and other judicial bodies, they seek to establish general parameters by which the legitimacy of claims and counterclaims can be measured in cases of wrongful omission within the territory of a State. In so doing, they promote a dynamic approach that places evidentiary burdens on both the accuser and the accused, which are adjusted in a way that corresponds to the frequency and magnitude of the terrorist activity under investigation.

Establishing a Violation of the Duty to Abstain

As discussed in section 4.4.1, the duty to abstain from involvement in terrorist activity is violated whenever a State, through its organs or officials, knowingly adopts measures or policies that result in support, facilitation or toleration of private terrorist activities. Unlike the duty to prevent, this obligation is not circumscribed by a due diligence standard and, as a result, the approach to burden of proof requires some adaptation.

Generally speaking, the violation of the duty to abstain takes the form of positive State conduct. The only exception to this is in the case of acquiescence or toleration of terrorist activity. It is appropriate to consider these two forms of violation separately.

With respect to positive acts, the victim State should demonstrate that the alleged violating State provided assistance to the terrorist group in circumstances where it knew or should have known that this assistance furthered terrorist activity. It is inappropriate to presume that such assistance has been provided merely from the fact that an isolated attack has emanated from the territory of a particular State. At the same time, it should be stressed that in this case too, liberal recourse to inference or circumstantial evidence, along the lines suggested in the *Corfu Channel Case*, would be justified. Moreover, satisfying the knowledge requirement will become easier if the terrorist activity of the

[33] See above section 9.2.3.

group in question is extensive. If positive aid has been accorded to an organization that is notorious for its involvement in terrorist activity, actual or constructive knowledge can be presumed. Obviously, where the State is notified of suspicious activity by a recognized terrorist group or where public statements reveal a link between the State and the terrorist group the knowledge requirement will in most cases be discharged.

Establishing toleration or acquiescence of terrorist activity involves State inaction and thus more closely resembles the approach suggested with respect to the duty to prevent. As argued in section 4.4.6, violations of the duty to prevent will shade into toleration of terrorist activity the longer these violations persist. Sympathy for the terrorist group expressed by political leaders, or justifications advanced for their conduct will offer additional evidence of acquiescence. And naturally, evidence of positive assistance in violation of the duty to abstain, will necessarily sustain the charge that the host State has tolerated the terrorist activity and violated its duties of prevention.[34]

Establishing the Causal Link between the Counter-terrorism Violation and the Private Terrorist Activity

The method of establishing that a counter-terrorism violation was the cause of private terrorist activity has already been addressed in general terms, and it is sufficient to supplement that discussion with a few observations.

As noted in section 9.2.3, in the case of an isolated attack the victim would be required to show that the host State had actual or constructive knowledge of the specific impending attack such that its failure to meet its due diligence obligation in this specific case was a condition *sine qua non* of the harm. By contrast, where terrorist activity is notorious and ongoing, knowledge is effectively presumed and it is easier to conclude that the State's wrongdoing provided the opportunity for the terrorist activity to occur.

This general observation simplifies an aspect of the relationship between causal analysis and burden of proof that should be made explicit. In both these cases of violation of the duty to prevent, a causal link is established by the operation of a hypothetical inquiry as to whether compliance with the law would have averted the terrorist activity.[35]

It is of course impossible to prove definitively that had a State complied with its counter-terrorism obligations the terrorist attack would have been prevented. Even assuming absolute diligence on the part of the State it is possible that the

[34] RB Lillich and JM Paxman, 'State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities' 26 *Am U L Rev* 217, 237; see also C Eagleton, *The Responsibility of States in International Law* (New York, NY, NYU Press, 1928) 92 ('the participation of the state is conclusive proof of failure of the state to use the means at its disposal for preventing the injury').

[35] HLA Hart and T Honoré, *Causation in the Law*, 2nd edn, (Oxford, Clarendon Press, 1985) 413; see also F Rigaux, 'International Responsibility and the Principle of Causality' in M Ragazzi, (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Leiden, Brill, 2005) 81, 91.

terrorist operatives would somehow have managed to launch their attack. What is really at issue in these cases is whether it is reasonable to presume that the diligent efforts of the host State would have succeeded in preventing the terrorist action. In cases where the State has actual or constructive knowledge of the terrorist activity, together with the capacity to prevent it, it is arguably appropriate to view the State's wrongful conduct as the *prima facie* cause of the private violence, especially since the duty to prevent is designed to avert precisely the type of activity that occurred.

This kind of analysis bears resemblance to the common law doctrine of *res ipsa loquitor*, which was actually invoked by the United Kingdom in its pleadings in the *Corfu Channel Case*.[36] This maxim is generally applied in cases where evidence of wrongdoing is not easily available to the plaintiff because the source of the harm is under the control of another party. The doctrine provides that where harm is of a kind that does not normally occur unless the defendant has been negligent, then it may be assumed that the defendant's negligence is the cause of the harm.[37] As a result, a stricter form of liability is applied so as to shift the burden of proof to the defendant once the harm itself has been established.

A causal approach to State responsibility for terrorism can be viewed, to some extent, as an adaptation of this doctrine.[38] If the victim can show that known or knowable terrorist activity emanated from territory under a State's control, then it may be reasonable to presume that the State's wrongdoing was a cause of the terrorist activity. It would fall to the host State to refute the causal link by explaining how compliance with its counter-terrorism obligations would not have prevented the attack.[39]

A separate problem arises in the case where a State actively supports terrorist activity which it lacks the capacity to prevent. This may be the case, for example, when funds are provided by a State to an independent terrorist organization that operates wholly within the territory of another State. In this instance, the State clearly violates its duty to abstain and, in one sense, violates its duty to prevent as well since its support demonstrates a failure to exercise due diligence in forestalling terrorist activity. But in these circumstances, it may be difficult to establish that the State's counter-terrorism violations are a condition *sine qua non* of the terrorist operations.

[36] The *Corfu Channel Case*, 4 Pleadings, Oral Arguments, Documents (1949) 480–81 (arguing that *res ipsa loquitor* was a general principle recognized by all civilized nations which the Court should apply to presume Albanian wrongdoing).

[37] Hart and Honoré, above n 35, p 419. For the origins of the doctrine see *Byrne v Boadle* (1863) 159 ER 299.

[38] Arguably, this was the approach effectively adopted by the ICJ in the *Corfu Channel Case*.

[39] Even if direct State responsibility is established on this basis it may be necessary to adduce additional evidence before a specific counter-terrorism measure directed against the host State is regarded as legitimate. As we have argued, different counter-terrorism measures will be subject to their own conditions and these may include more demanding evidentiary requirements.

Unless the assistance provided is indispensable to the terrorist activity it is arguably difficult to treat these kinds of violations as a basis for direct State responsibility by operation of causal criteria. This may be a case, however, where a greater degree of State responsibility should be justified on non-causal grounds, particularly where the aid is substantial in nature and specifically designed to further the terrorist operations of the group.[40]

9.4 TESTING THE PRACTICAL VIABILITY OF A CAUSAL MODEL

9.4.1 Explaining the Response to September 11th

At least one advantage of a causal approach to State responsibility for terrorism, is that it provides a more plausible legal explanation for international reactions to the September 11th attacks. Leading contemporary jurists have grappled with the justification for assigning direct responsibility for these attacks on the Taliban. Many have attempted, in awkward fashion, to squeeze the facts of the Taliban–Al-Qaeda alliance into the pigeonhole of a principal–agent relationship.[41] But the available evidence about the Taliban's role in facilitating Al-Qaeda activity defies simple categorization within the confines of the agency paradigm.[42] As argued in chapter 6, some other conceptual model is needed to explain the ease with which States embraced the idea that the Taliban was responsible for Al-Qaeda's terrorist activity.

When examined in causal terms, the Taliban's responsibility for September 11th emerges as a relatively uncomplicated proposition. Since 1996, Al-Qaeda's leadership, operations, training and planning were based in Afghanistan.[43] These activities were well known to the Taliban regime and according to intelligence reports the Taliban leader Mullah Omar himself 'invited' Bin Laden to set up operations in Kandahar.[44]

Following the US embassy bombings in Kenya and Tanzania of 1998, the Taliban became the subject of repeated Chapter VII Security Council resolutions, which included the imposition of sanctions and expressly called for compliance with counter-terrorism obligations.[45] These resolutions serve as

[40] Theoretically, an analogy could be drawn with accomplice liability in international criminal law and in Anglo-American and French law, see above section 8.3.5. In fact, it could be argued that since the State is under a specific duty of prevention, elevating its responsibility in these cases is especially justified.

[41] See above section 6.2.1.

[42] See above section 6.1.

[43] The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States (New York, NY, W.W. Norton, 2004) 63.

[44] *Ibid*. (The 9/11 Commission suggests that this invitation was partly motivated by the desire to keep Bin Laden 'under control'. This information is said to be based on the interrogation of the top Al-Qaeda operative in US custody, Khalid Sheikh Mohammed).

[45] SC Res 1193, 52nd Sess, 3921st mtg, UN Doc S/RES/1193 (1998); SC Res 1214, UN SCOR, 52nd Sess, 3952nd mtg, UN Doc S/RES/1214 (1998); SC Res 1267, UN SCOR, 52nd Sess, 4051st mtg, UN Doc S/RES/1267 (1999); SC Res 1333, UN SCOR, 55th Sess, 4251st mtg, UN Doc S/RES/1333 (2000).

conclusive evidence that the Taliban was made fully aware of ongoing Al-Qaeda activity in its territory and was presumed by the international community to have the capacity to operate against it.[46]

Despite these explicit legal obligations, and the recognized control exercised by the Taliban in Afghanistan,[47] the regime opted to continue its support for Al-Qaeda. As detailed in section 6.1, public materials point to the ongoing facilitation of Al-Qaeda terrorist operations, including freedom of movement, the ability to freely import weapons, the recruitment and training of operatives without impediment, and additional ideological and logistical support. Indeed, even after the September 11th attacks, the Taliban regime was, at best, reluctant to co-operate in apprehending Al-Qaeda operatives in accordance with its legal obligations notwithstanding specific appeals to this effect.

Given this factual record, it appears incontrovertible that the Taliban's persistent violations of its legal duties created the environment in which the planning and execution of Al-Qaeda's terrorist activity became possible. The regime may not have directed or controlled Al-Qaeda attacks, or even overtly ratified them, but there is little doubt that the attacks were the consequence, in causal terms, of its wrongdoing. The Taliban represented the proverbial firefighter who is obligated to extinguish a 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.

Arguably, this causal explanation of the Taliban's responsibility is reflected in the way States actually formulated their policy in the immediate aftermath of the attacks. The US charge of Taliban responsibility was probably not engineered by industrious government lawyers rifling through the pages of the ILC Draft and its Commentary. When President Bush equated the terrorists with 'those who harbored them'[48] on the evening of September 11th, and when the United States informed the Security Council that the attacks had been 'made possible by the decision of the Taliban regime to allow' Al-Qaeda to operate in its territory,[49] an appeal was arguably being made to common sense causal notions.[50]

[46] Malzahn, above n 13, p 112.

[47] See above section 6.2.4 (discussing the effective control of the Taliban throughout much of Afghanistan).

[48] Presidential Address to the Nation (11 September 2001), available at http://www.whitehouse gov/news/releases/2001/09/20010911–16.html.

[49] Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc S/2001/946 (2001).

[50] Other US Statements can be read as invoking similar causal intuitions, see, eg, Presidential Address to a Joint Session of Congress and the American People (20 September 2001), available at http://www.whitehousegov/news/releases/2001/09/20010920–8.html; ('By aiding and abetting murder, the Taliban regime is committing murder'); Address to the Nation Announcing Strikes Against Al Qaeda Training Camps and Taliban Military Installations, 37 Weekly Comp Pres Docs 1432, 1432 (7 October 2001). ('If any government sponsors the outlaws and killers of innocents, they have become outlaws and murderers themselves'); Remarks by President to Troops and Families at Fort Campbell, Kentucky (21 November 2001) available at http://www.whitehousegov/news/releases/2001/11/20011121–3.html. ('If you harbor terrorists, you are terrorists. If you train or arm a

That the overwhelming majority of States rallied to America's side when this claim was advanced can be partially explained by the fact that the connection between causation and responsibility is as ingrained in the minds of world leaders as it in those of average citizens. Obviously, non-legal considerations played a key role in this decision. But it seems reasonable to posit that the broad resonance of the argument had something to do with the fact that a causal approach to responsibility is deeply rooted in both popular and legal discourse.[51] After being warned time and again to end its toleration and support of Al-Qaeda, there simply came a point when it could be widely appreciated that the Taliban had crossed the threshold that separates the responsibility of a State for its own wrongdoing from the responsibility of a State for the private acts that its wrongdoing facilitates.[52]

If assessments about the customary law of State responsibility are to accurately reflect how States *actually* make decisions, it is worth considering how the intuitions of decision-makers about what the law is influences government policy. In this case, once evidence of Al-Qaeda involvement began to surface, the case for direct Taliban responsibility seemed to require no legal creativity. The rationalizations and analyses of lawyers came afterwards, while the intuitive response of both decision-makers and ordinary people was arguably the result of the common-sense notion that the Taliban regime should be held accountable for that which it had caused.

As noted above, the fact that the Taliban could be held directly responsible for the armed attacks of September 11th did not, in itself, provide the justification for targeting Taliban assets as part of Operation Enduring Freedom.[53] This responsibility rendered the Taliban a potential target, but self-defense has its own legal pre-requisites that must be satisfied. Judging by the reactions of States to Operation Enduring Freedom it would appear that they considered that these conditions were met.[54] It is important to appreciate, however, that the assessment of responsibility and the legitimacy of a forcible response are distinct, if inter-related, considerations.

terrorist, you are a terrorist. If you feed a terrorist or fund a terrorist, you're a terrorist and you will be held accountable . . .'); Presidential Address at the National Endowment for Democracy (6 October 2005) available at http://www.whitehouse.gov/news/releases/2005/10/20051006-3.html ('The United States makes no distinction between those who commit acts of terror and those who support and harbor them, because they're equally as guilty of murder').

[51] As noted in section 6.2.1, there is little doubt that considerations of a strictly non-legal nature played a key role in determining international reactions to the September 11th attacks. Nevertheless, the fact that legal factors did not constrain the response of such a wide range of States suggests that a claim of direct Taliban responsibility was viewed as a legally defensible proposition.

[52] See, eg, OAS, Convocation Of The Twenty-Third Meeting Of Consultation Of Ministers Of Foreign Affairs, OEA/Ser.G CP/RES 796 (1293/01) (2001) ('those that aid, abet or harbor terrorist organizations are responsible for the acts of those terrorists').

[53] See above section 9.2.4.

[54] But see H Duffy, The War on Terror and the Framework of International Law (Cambridge, CUP, 2005) 192–97.

It is, of course, one thing to argue that causal principles explain reactions to an international incident and another to advance them as a legal regime of general application.[55] At the same time, a causal account of the response to September 11th gives practical expression to a theory of causation-based State responsibility. To some extent at least, this incident exposes normative expectations in relation to contemporary acts of terrorism and suggests that the deep roots of causal principles in general jurisprudence can affect the practice of States in such cases.

9.4.2 More Problematic Factual Scenarios

While the facts of September 11th pose relatively little difficulty when approached from a causal perspective, numerous factual scenarios may prove more challenging. Obviously the various hypothetical cases of terrorist action are limited only by the imagination. Like any legal model, a causation-based regime can present only the broad parameters within which the specific circumstances of a case are to be examined.

There is something to be gained, however, from investigating a range of hypothetical scenarios that are drawn from the contemporary reality of private terrorist activity. This kind of inquiry will help expose the differences between the causal and the agency paradigm in terrorism cases. It also gives some sense of the cases that fall outside the ambit of a causal analysis and in so doing tests the practical limits of a causation-based system of State responsibility for terrorism. In this section, a number of examples are briefly considered.

The Responsibility of the 'Victim' State and the Question of Multiple State Responsibility

A State that is itself the 'victim' of a terrorist attack could theoretically bear a measure of responsibility for its perpetration. As observed in section 4.4.3, the State may violate its due diligence obligations in preventing terrorist activity in its territory such that a terrorist cell that launches an attack against that State's own citizens remains undetected.

Under a causal approach, one could also envisage more extreme situations in which the 'targeted' State is itself held responsible not only for the failure to prevent but for the terrorist attack itself. Where a functioning State is aware of the location of terrorist operatives in its territory but neglects its obligations to safeguard the lives of its citizens it may be considered responsible on causal grounds for occasioning the terrorist attack. In contrast to an agency-based

[55] But see WM Reisman, 'International Incidents: Introduction to a New Genre in the Study of International Law' (1984) 10 *Yale J Intl L* 1 (arguing that specific international incidents are a key guide to normative expectations in international law); see also below section 9.6.

approach, a causal assessment of responsibly could offer the victims of the attack in these circumstances the legal right to seek compensation from their own State for the full extent of the injuries sustained.

There may also be situations where a State deliberately facilitates the conduct of a local terrorist organization against a resident ethnic minority. The government may find it convenient to pursue a policy of targeting a marginalized group by denying them protection in the face of terrorist attacks launched by non-State actors ideologically opposed to the ethnic minority. In this way, the State may hope to clandestinely achieve its own objectives while claiming that the terrorism was the product of private initiative unconnected to the State.[56]

Under an agency paradigm, evidence of direction and control by the State would be necessary to trigger responsibility for more than the failure to prevent and to abstain. Using causal criteria, however, direct State responsibility for the private violence is engaged without difficulty. In these instances, the State would be directly responsible for the private terrorist activity that its omissions have facilitated and it would be exposed to the full range of diplomatic and legal remedies available in the circumstances.

In either of these cases, the fact that other States may also be responsible for supporting or tolerating the terrorist organization will not necessarily preclude or diminish the responsibility of the 'victim' State. While the analogy may not be seamless, international law, like municipal law, has no principled difficulty in holding multiple actors responsible *in solidum* for injury which each, in its own way, has inflicted. Indeed, Draft Article 47(1) of the ILC text provides that where 'several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act',[57] and the principle receives comparable support in the case law.[58]

In all cases where a terrorist attack has involved the unlawful conduct of multiple States similar principles will arguably apply to determine the *scope* of responsibility, with the attendant possibility that a plurality of States may be jointly and severally liable for the private terrorist action. By the same token, when it comes to the consequences flowing from that responsibility, it is not

[56] The present collaboration between Sudan and the Janjaweed militia in the Darfur approximates this situation, though in this case *de jure* and *de facto* Sudanese agents have also directly participated in the ethnic cleansing of the non-Arab Darfurian population, see above section 7.2.1.

[57] While this provision refers to a situation were a plurality of States are responsible for the *same* internationally wrongful act, the ILC Commentary provides that similar principles apply where the *separate* wrongful acts of numerous States combine to produce the same harm, see Report of the International Law Commission to the General Assembly, UN GAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) 313–18; see also ILC Draft Art 19.

[58] See, eg, *Case Concerning Certain Phosphate Lands in Nauru (Nauru v Australia)*, Preliminary Objections, [1992] ICJ Rep, 240, 258–59 (June 26) (holding that Australia's responsibility could be examined independently of the responsibility of the other two States, New Zealand and the United Kingdom, who were also charged with administering Nauru while it was a trust territory); *Corfu Channel Case*, above n 21 (where Albania's responsibility for the explosions was not reduced by the fact that another actor, most probably a State, was responsible for laying the mines in the Channel); see generally JE Noyes and BD Smith, 'State Responsibility and the Principle of Joint and Several Liability' (1988) 13 *Yale J Intl L* 225.

inconceivable that in some situations one wrongdoing State will have a claim against another to participate in the payment of compensation[59] or that the contribution of the 'victim' State to the injury may serve to reduce the amount of compensation owed by other wrongdoing States.[60]

Responsibility in Cases of the Subsequent Failure to Prosecute or Extradite

Suppose a State has no obvious involvement in the execution of a terrorist attack, but offers its perpetrators safe haven after the fact. There is no question that this conduct violates the duty to prosecute or extradite that is a well-recognized component of a State's counter-terrorism obligations. But it will be rare, especially in the case of an isolated attack, for such a State to be seen as causing the terrorist atrocity. Theoretically, if it were established that a guarantee of safe haven was provided before the attack and that the terrorists would not have acted in the absence of such a guarantee, a broader degree of responsibility may be imposed on the wrongdoing State. It is, however, difficult to imagine that this kind of evidence would be commonly available in practice.

Direct State responsibility may become more plausible in these cases if the terrorist operatives are engaged in multiple attacks over a period time. Even if these attacks are not planned or directed from the territory of the protecting State, the safe haven and free transit that it unlawfully provides between terrorist operations, makes the terrorist activity possible and could arguably justify direct responsibility by operation of causal criteria. In these cases, though, State responsibility is engaged as much for the failure to prevent subsequent attacks as it is for the failure to apprehend the terrorists on account of those attacks that they have already perpetrated.

The Failed State

As noted above, State responsibility for the failure to prevent is a due diligence obligation that is measured relative to the actual capacity of the State.[61] This study has suggested that this obligation incorporates a duty upon the State to exercise diligence in the pursuit of the requisite degree of territorial control, as well as the acquisition of the necessary apparatus to fulfill its counter-terrorism duties.[62]

[59] See ILC Draft Art 47(2) (noting that the principle of multiple State responsibility is 'without prejudice to any right of recourse against the other responsible States' and also that the injured State may not recover in these circumstances 'more than the damage that it has suffered').

[60] See ILC Draft Art 39 (stipulating that 'in the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought); see also DJ Bederman, 'Contributory Fault and State Responsibility' (1990) 30 *Va J Intl L* 335; see also Noyes and Smith, above n 58, p 231.

[61] See above section 4.4.4.

[62] *Ibid*.

The dual feature of the duty to prevent cannot obscure the fact that some States will be incapable of properly confronting terrorist activity through no fault of their own. Despite the increased international emphasis on enhancing counter-terrorism capacity, it remains difficult, if not impossible, for numerous developing countries to locate and devote the necessary resources to the field of counter-terrorism when they face so many pressing needs. The problem is only exacerbated by the fact that it is precisely this lack of capacity that makes weak or failing states such attractive havens for terrorist organizations.[63]

A causal approach to State responsibility does nothing to alleviate the dilemmas posed by these situations. This is not so much a shortcoming of the approach itself as it is an illustration of the complexities raised for international law in general by the phenomenon of the failed or failing State.[64] These cases highlight the importance of capacity building initiatives and the need for those States faced with such problems to accept genuine offers of counter-terrorism assistance. In broader terms, situations of failed or failing States serve to demonstrate the inherent link between development and global security, most recently identified in the High Level Panel Report on Threats, Challenges and Change and the 2005 World Summit Outcome Document.[65]

Terrorist Webs, Cyber-terrorists, Sleeper Cells and No Clear Host State

Section 7.2.2 addressed the fact that contemporary terrorists are increasingly less dependent on States or an organizational structure for the success of their operations. Individuals, working alone or in groups, may identify with a given cause but operate to catastrophic affect in virtual isolation. Admittedly, there remains a considerable amount of terrorist activity where an organizational affiliation and a base of operations in a given State are more easily identified. But this emerging form of private terrorist activity poses new challenges for counter-terrorism efforts.

Consider the following examples: terrorist operatives residing for years in a State as a sleeper cell remain out of contact with any command and control structure, and spring into action on their own initiative; individuals in different countries co-ordinate their terrorist activities without having an identifiable base of operations; a lone terrorist launches a devastating cyber-attack against a distant State whose policies she opposes. Is it possible to identify a responsible State in these circumstances?

[63] A similar problem can emerge in the human rights context when a State is powerless to prevent human rights infringements by corporations or other private actors operating in its territory, see DM Chirwa, 'The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights' (2004) *5 Melb J Intl L* 1, 13, 27–28.

[64] See generally D Thürer, 'The "Failed" State and International Law' (1999) 81 *Intl Rev Red Cross* 731.

[65] Report of the High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, UN Doc A/59/565 (2004); GA Res 60/1, UN GAOR, 60th Sess, A/RES/60/1 (2005).

These are difficult cases to which a causation-based system of State responsibility can offer only partial solutions. They reinforce the point that the confrontation against terrorism requires a combination of creative strategies that seek to address both the State and the non-State terrorist actor.[66] An exclusive focus on State responsibility will not eradicate the terrorist threat, and the causal approach to State responsibility advanced here is not presented as a panacea.

Nevertheless, the State responsibility aspects of the problems posed by these scenarios are still better handled by adopting a causal rather than an agency paradigm. Like other terrorist operatives, these independent actors count on State failures of prevention to succeed in their activity and the State's responsibility can still be examined in causal terms. States are required to exercise due diligence in preventing such activity and to refrain from offering it any measure of support. To the extent that the State violates its counter-terrorism duties, its responsibility may be generated both for its own wrongdoing and, depending on the circumstances, for the terrorist attack itself.

The central problem in each of these instances is that the terrorist activity is much harder to detect. To comply with the duty to prevent, States should be obligated to develop new technologies and tactics for coping with this kind of terrorism in a manner consistent with their legal obligations and commensurate both with their capacity and with the scale of the threat. In addition, these kinds of cases elevate the importance of the State's duty to report on compliance with its counter-terrorism obligations and to actively share information and intelligence about suspected terrorist activity. But it will always be necessary to examine the facts of each case to determine whether these duties have been violated and whether the terrorist attack can be regarded as a consequence, in causal terms, of the State's unlawful acts or omissions.

State Responsibility for Catastrophic Terrorism

An additional problem is posed in the case of a non-conventional terrorist attack perpetrated by non-State actors. In this instance, casualties may reach into the hundreds of thousands and whole cities could be devastated. As the UN Secretary-General has recently noted in respect of catastrophic terrorism 'even one such attack and the chain of events it might set off could change our world forever'.[67] Beyond all the other dangers presented by this doomsday scenario, there is a basic question as to whether respect for the rule of law can be expected to hold.

A State that is the victim of such an overwhelming attack may be inclined to retaliate violently against any State associated with the terrorist group, irrespective of its wrongdoing. This prospect would be even more likely in a case where the terrorist organization responsible for the attack lacks a base of operations that is easy to locate. The State of which the terrorists are nationals

[66] See above section 1.1.

[67] Report of the Secretary–General, In Larger Freedom: Towards Development, Security and Human Rights for All, UN Doc A/59/2005 (2005) 26.

and the State from which the terrorists originated could conceivably be targeted without regard to evidence or legal principle.

There is, of course, no way to guarantee that deference to the rule of law would not be discarded in response to an act of catastrophic terrorism, which would itself represent the ultimate rejection of any respect for life or law. But international lawyers have a responsibility to anticipate these scenarios before they materialize and ask whether existing legal structures are suitably equipped to cope with them.[68]

Clearly, a causation-based approach is not responsive to numerous possible situations in which a catastrophic terrorist attack may materialize. The threat posed by such an attack raises a broad range of issues and a diverse set of tools and resources need to be harnessed in preparation for this contingency. But in managing the State responsibility dimensions of this problem preference should arguably be given to a causal rather than an agency paradigm.

There are two main reasons for this. First, a causal model broadcasts to all States that they will not necessarily be immune from direct responsibility by merely avoiding effective control or post-hoc ratification of a terrorist attack. Turning a blind eye to terrorist planning in their territory is not an option if the State wishes to avoid direct accountability for the ensuing atrocity. An incentive is thus provided for tighter control over the non-State terrorist actor that may in turn forestall a devastating terror attack.

Second, in the wake of a catastrophic attack it may well be unreasonable to expect the victim State to constrain its response within the limits of an agency paradigm. If it is clear that the terror attack was made possible through the wrongful acts and omissions of another State it should be anticipated that the victim will direct its response against that State without regard to the existence of a principal–agent relationship. It may be hoped that the adoption of a causal model offers a more realistic chance that the response of the victim State will nevertheless remain grounded in a sound legal framework.

Admittedly, a more aggressive model of State responsibility could offer a better chance of forestalling a non-conventional terrorist attack. Absolute or strict responsibility might be regarded as the strongest incentive for State compliance with counter-terrorism obligations and the simplest legal justification for a harsh counter-terrorist response in the event of an attack. And yet, for all the dangers posed by the threat of a catastrophic attack, absolute or strict State responsibility remains an undesirable option that is unlikely to attract international support. As discussed above, these models are a potential recipe for ongoing conflict between States and unjustified repression within States.[69] Even if their adoption would achieve greater success in restraining private terrorist activity—and that is a debatable proposition—the price to pay is too high.

[68] See generally B Kellman, 'Catastrophic Terrorism—Thinking Fearfully, Acting Legally' (1999) 20 *Mich J Intl L* 537.

[69] See above section 7.5.

9.5 CONCLUSION: THE POLICY BENEFITS OF A CAUSAL MODEL AND ITS STATUS UNDER INTERNATIONAL LAW

As this study draws to a close, it is useful to gather together the various strands of argument that have been advanced to support a causation-based system of State responsibility for terrorism. Three broad policy claims have been presented in this regard.

First, the causal model promotes a legal regime that is driven not by artificial agency standards but by the actual nature of the relationship between the State and the non-State terrorist actor. The image of the State as the only potent force in international affairs is a thing of the past. The fact is that non-State terrorist groups are players on the global stage. The assertion that the State necessarily directs private terrorist activity or is engaged in some jointly planned criminal enterprise is, quite simply, a misrepresentation of the most prevalent forms of State involvement in terrorism. In practice, State participation usually takes the form of acts and omissions that create the opportunity for private terrorist activity to take place. It is in the language of causation and occasioning harm, not in false parallels to a principal–agent relationship, that we find the conceptual tools to describe the contemporary reality by which the State makes terrorism possible.

Second, invoking causation to justify and delimit the scope of State responsibility for terrorism, draws from a deep well of established practice and jurisprudence. The intimate connection between causation and responsibility is firmly rooted in legal and popular thought. The same principles have resonance in international law, though their presence has too often been obscured from view. Indeed, it is the separate delict theory that represents the legal anomaly. Causation-based State responsibility for terrorism accords with general legal and moral accounts of responsibility that cut across cultures and judicial systems, and arguably expresses with greater accuracy the process by which international actors actually make responsibility decisions.

Third, and most important, a causal model of responsibility is superior in terms of its ability to enhance State compliance with counter-terrorism obligations and impose State accountability in event of their violation. Admittedly, causal analysis is far from the only ingredient in achieving this objective. Improved compliance and accountability will not be produced without the political will to translate principles into practice. But a causal approach tells States that they will be judged for the consequences of their own wrongful conduct—no more and no less. They will not be held to account for outcomes beyond their control. They will not be excused for outcomes they were obligated and able to prevent. Their legal responsibility is in their hands, and their international standing will be a function of their own choices.

In practical terms, this causal construct offers a more effective set of tools for confronting the wrongdoing State. State responsibility is expressed not in the

more cautious terms of the failure to prevent or to abstain, but involves the possibility of assigning direct blame for terrorist atrocities. Through this language, international attention is more easily focused on the malfeasant State and support for collective political action more easily acquired. Robust remedial measures can attract the acquiescence, if not the endorsement, of the international community.[70] Because the State is treated as directly responsible for the attack, demands for full reparation from the State will be justified as a matter of right, the proportionality of countermeasures will be examined through a wider lens, and forcible action against State targets may, in appropriate circumstances, become a permissible option.[71] In all these ways, causation-based responsibility can reinforce State accountability for the violations of counter-terrorism obligations, and put the wrongdoing State on notice that it breaches its duties at its peril.

The benefits of the causal model stand out with even greater clarity when weighed against current legal alternatives. Indeed, it is difficult to conjure up a single sustainable argument for holding the State responsible for less or more than that which its wrongdoing has caused. Certainly, the State's sovereign status and its extensive counter-terrorism obligations do not vindicate any mitigation of responsibility by reason of some misplaced fidelity for the public/private distinction. The agency paradigm inexplicably and unnaturally cuts short the State's responsibility, when the magnitude of today's terrorist threat demands greater, not lesser, accountability and an end to what Daniel Byman has called the 'fiction of deniability'.[72] At the other end of the spectrum, the extension of responsibility on absolute or strict standards entails too many detrimental side effects for the international order and finds little support in either theory or practice.

For all its advantages, however, causation-based State responsibility for terrorism is neither devoid of shortcomings nor a panacea for the contemporary terrorist threat. We have already seen that causal principles will bring little benefit in the case of failed States and may be of limited effect when increasingly independent and powerful terrorist operatives succeed in their designs despite the best efforts of governments.[73] Indeed, a causal approach to State responsibility is but one element of what must be a broad and variegated strategy for confronting terrorism in a post-September 11th world.

Moreover, the fact that causation-based State responsibility makes it easier to hold the State accountable for private terrorist acts does create avenues for potential abuse. To mitigate these risks, it will be important to be rigorous in the application of causal analysis, in the assessment of burden of proof, and in maintaining the distinction between State responsibility and the legal consequences that may flow from it.

[70] See above section 5.1.3.
[71] See above sections 5.1.4 and 5.1.6.
[72] D Byman, *Deadly Connections: States that Sponsor Terrorism* (Cambridge, CUP, 2005) 305.
[73] See above section 9.4.2.

But in policy terms, the shift to a causal approach after September 11th has much to recommend it. As the threat of catastrophic terrorism becomes more real, causation-based responsibility offers a legal mechanism that improves the prospects of holding States accountable for the atrocities that their wrongdoing makes possible. And it does so not by devising contrived rules, but by invoking core juridical principles that are already deeply ingrained in law and society.

It is, of course, one thing to claim that a causal model is workable, as a matter of practice, or desirable, as a matter of policy and quite another to claim that it represents a currently applicable legal standard. The question of the present legal status of causation-based responsibility concerns what the law is, not what it ought to be, and it merits individual attention before this analysis is concluded.

In theory, two distinct arguments could be advanced to support the claim that a causal assessment of responsibility in terrorism cases is already accepted as part of the corpus of international law.

The first option would be to suggest that causal principles have emerged as a *lex specialis* in terrorism cases to augment the agency paradigm and the separate delict theory. This line of reasoning would seek to emphasize the significance of the September 11th attacks as a constitutive event for international law. It would treat the willingness of States to assign responsibility to the Taliban without regard to agency criteria as evidence that current normative expectations in the terrorism field embrace causal modes of thinking. This approach is especially appealing to adherents of international incidents analysis who argue that the reactions of elites to specific global events can often be more reliable barometers of contemporary conceptions of international law than are the decisions of judicial institutions.[74]

To strengthen this claim, the *lex specialis* argument would also seek to reduce the significance of contrary incidents and jurisprudence. In this context, it would be argued that contemporary terrorism differs, in orders of magnitude, from the kind of sporadic criminal attacks or localized private violence that occupies the attention of much of the case law.[75] Earlier State practice in response to terrorism incidents would be largely discounted either by reference to changing international attitudes in the wake of September 11th or by highlighting that these cases did not clearly raise questions of State responsibility and international reactions to them can be rationalized without addressing this issue.[76]

A second, and more ambitious, contention would propose that the causal approach underlies the customary law of State responsibility not just for terrorist activity but for all private acts which the State is obligated to control. To defend this claim, one might invoke causation as a general principle of law,[77]

[74] See generally Reisman, above n 55, pp 10–13.
[75] See above section 7.3.
[76] See above section 5.4.
[77] See above section 8.2.

point to the international jurisprudence in which causal concepts were clearly embraced,[78] and reconcile a causal analysis with the ILC Draft Articles.[79] Under this approach, contrary jurisprudence and scholarly writings would be downgraded for obscuring the underlying role of causation in responsibility analysis, while the pervasiveness of causal analysis in the way decisions of responsibility are actually made would be presented as the true evidence of customary norms. The claim would be that causation's role in the law of State responsibility may not always have been made explicit, but its centrality in customary law need only be uncovered not invented.

Both these contentions are possible, and to some extent persuasive, but neither completely justifies confident assertions about the current state of the law. If prevailing conceptions about the formation of customary law are to be respected, the weight of authority that has traditionally accompanied the agency paradigm cannot simply be disregarded. Arguably, a *lex specialis* regime requires broader consensus before it can displace default rules. Similarly, a general customary rule would require more extensive evidence of State practice and *opinio juris* before it becomes settled doctrine.

Notwithstanding the intrinsic weakness of the separate delict theory, it may take time before there is general agreement that its claim to universal and exclusive application in the field of State responsibility for private acts can be discarded. Until such time, it may be more accurate to suggest that the law is in a state of flux, while acknowledging that causation appears at least to be (re)emerging as a guiding principle of State responsibility for terrorism, and possibly for other private acts as well.

In the context of this more modest claim, this study has attempted to offer both the context and the justification for this development in the field of counter-terrorism. As a matter of international law, there is room to debate whether causal principles currently regulate State responsibility for terrorism. But as a matter of principle, the case made here is that there can be little doubt about how this debate should be resolved or about the urgency in doing so.

[78] See above section 8.4.2.
[79] See above section 8.4.3.

10

Concluding Observations

Traced through time, the law of State responsibility for private acts represents a historical record of the evolving power relationship between State and non-State actors. The sovereign State that eventually emerged from the post-Westphalian order enjoyed unrivalled dominance on the world stage and was possessed of a legal personality distinct from its citizens. It was perhaps natural to view its responsibility through an agency prism and regard privately inflicted harm as divorced from notions of sovereign responsibility.

The evolution towards agency was gradual but unmistakable. The identity between the sovereign and his subjects that was common in the medieval age recommended a theory of collective responsibility. But as the boundary was fixed between the public and the private realm, State responsibility without State culpability could not be justified. Nevertheless, throughout the 19th and early 20th century, private insults could still propel nations towards war. The act of the State and the acts of its subjects remained interlinked. Theories of complicity and condonation encouraged the State to comply with its obligations lest it be implicated in the private wrong.

But these theories too could not long be sustained. The pull of the public/private distinction was too strong. In a State-centric order, in which private actors had limited access to the world stage, jurists were at pains to emphasize that governments could be held accountable for their own wrongdoing only, not for the errant conduct of individual private citizens. In a Cold-War world that feared the clash between nuclear powers, this trend was only exacerbated. Few wanted private action to justify State-to-State confrontation. Agency-based responsibility reflected the concerns of this age. An iron curtain was lowered not just between East and West but also between the public acts of the State and the private acts of its citizens.

Today, we live in a different world. It demands a different conception of responsibility. It is a world in which the State still enjoys many of the benefits of sovereignty and still carries its burdens. But it is also a world in which private actors can wield State-like power, for good and for ill.[1] Immersed in ideological fervor, and empowered by technology, non-State terrorist actors can cross territorial and cultural boundaries and wreak devastation without direct State

[1] See generally JT Matthews, 'Power Shift' (1997) 76 *Foreign Aff* 50.

assistance. Power has become diffuse and multi-layered. And no State acting alone can guarantee the security of its citizens.

In such a world it is as important to reconceptualize the rules of State responsibility, as it is to imagine new ways by which to hold non-State actors accountable.[2] To be sure, States share power with non-State actors like never before. But in other respects, State power remains unique. It is the State's acts and omissions that create the opportunity for most private terrorism to take place. Only the State can impose effective controls over private action. Only the State enjoys widespread monopoly over the legitimate use of force. As long as such an international system prevails, citizens will look to their governments to protect them from the growing threats posed by private terrorist actors, and the rules of State responsibility need to adapt to match that expectation.

Responding effectively to these challenges requires a responsibility regime that reflects the reality of the interconnected and multi-actor world in which we live. One need not look far to find it. Relational theories of responsibility resonate across cultures and legal systems. They are deeply embedded in the principles of causation that guide intuitive and moral assessments of accountability. And they are not foreign to the international legal order.

The separate delict theory, and the agency notions on which it is grounded, were advanced in a particular context. They can be understood as a reaction to the concept of collective responsibility or the complicity and condonation theories in the case of injuries to aliens. They can be seen as an attempt to engage State responsibility for private human rights infringements or trans-boundary harm in a system in which the authority of the public/private distinction has been taken for granted. And they can be appreciated as a response to the fear of nuclear power confrontation during the Cold War. But these factors can only offer a contextual explanation for the attraction of the agency paradigm—they do not provide it with a sustainable legal justification.

Today's advocates of agency as the exclusive mechanism for engaging State responsibility for private action have lost sight of this fact. As a result, they present an unmoored and overly restrictive legal rule that is as ill equipped to deal with the contemporary challenges of private violence, as it is at odds with general legal principles by which responsibility of one party for the act of another is determined.

To be freed from the grip of the agency paradigm, it is necessary to remember that the unique characteristics of the international system have never made it immune from the influence of principles that are intrinsic to the very idea of law. International legal specialists that labor in acoustic isolation[3] risk denying

[2] JA Hessbruegge, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law' (2004) 36 *NYU J Intl L & P* 265, 306 (referring to the need for a paradigm shift in the rule of State responsibility for private acts).

[3] The phrase is taken from M Damaška, 'The Shadow Side of Command Responsibility' (2001) 49 *Am J Comp L* 455, 495.

international law the benefits of rich legal concepts that have been well developed by their domestic brethren and penetrate popular discourse.

International legal scholarship that ignores these sources tends towards an artificial formalism that can only result in a disconnect between international law and international reality. The customary norms of international law are not found only in institutional pronouncements and the infrequent decisions of international judicial bodies. Their articulation demands a more rigorous analysis.

The disparate actors that make up the international legal order, and create its normative architecture, inhabit other legal worlds. The positions they adopt in one can sometimes be influenced by the principles ingrained in the other. The factors that determine elite responses to international incidents are hardly limited to the formal and easily retrievable repositories of international law. Their normative attitudes and expectations are informed, *inter alia*, by legal and moral principles that are deeply rooted in the societies in which they live. This study has argued that a causal analysis of responsibility is one such principle. In the wake of the September 11th attacks, its influence on State practice appears to be on the rise.

Causation-based State responsibility does not pretend that the State is omnipotent. It recognizes that private actors can operate today with greater reach and greater independence than ever before. But it argues that this enhanced private capacity is a reason to increase, not decrease, our demands on the State to comply with its international legal obligations. It claims that in a world in which the threat of catastrophic terrorism is a central fear, the State can no longer be excused from the full range of responsibility for private conduct that its wrongdoing has made possible.

Potentially at least, a causation-based approach to State responsibility can have relevance with respect to other forms of private conduct. The capacity to hold States directly responsible for private human rights infringements or privately inflicted environmental harm, even in the absence of an agency relationship, can increase community pressure for compliance by ascribing direct blame to States for the private wrongs which their unlawful conduct has occasioned. It may take time for such an approach to become entrenched in the law of State responsibility, but it is a development that should be welcomed.

As the High-Level Panel on Threats Challenges and Change observed, we live in an era in which 'we all share responsibility for each other's security'.[4] The neglect of one State jeopardizes the security of other States. The freedom granted to terrorists anywhere, is a threat to people everywhere. Atomistic views

[4] Report of the High–Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, UN Doc A/59/565 (2004) 22; see also Report of the Secretary-General, In Larger Freedom: Towards Development, Security and Human Rights for All, UN Doc A/59/2005 (2005) 25 ('On this interconnectedness of threats we must found a new security consensus, the first article of which must be that all are entitled to freedom from fear, and that whatever threatens one threatens all').

of responsibility cannot contend with this reality. Unless we are willing to hold States accountable for the causal effects of their wrongdoing, we risk condemning ourselves to a future of increasing human insecurity. And that is a risk we can ill-afford.

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