# RECONCEPTUALIZING INTERNATIONAL LAW AFTER 9/11: WHAT ROLE FOR STATE RESPONSIBILITY IN THE PREVENTION AND SUPPRESSION OF TRANSNATIONAL TERRORISM?

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## TABLE OF CONTENTS

# ABSTRACT

It is clear that every state has an obligation to prevent terrorist attacks emanating from its territory and injurious to another state. This proposition stems from various multilateral agreements on the suppression of terrorism and Security Council resolutions. It also originates from the fundamental principle of sovereignty, which entails both rights and obligations. However, the current state of knowledge does not exhaustively address the scope of this obligation of prevention and the legal consequences flowing from its violation. The present study attempts to define the contents and contours of such obligation whilst placing particular critical emphasis on the mechanics of state responsibility. Whether obscured by new technologies like the Internet, the sophisticated cellular structure of terrorist organizations or convoluted political realities, the level of governmental involvement in terrorist activities is no longer readily discernible in all instances. Furthermore, the prospect of governments waging surrogate warfare through proxies also poses intractable challenges to the mechanism of attribution under state responsibility. Therefore, it is argued that new rules are required or, alternatively, that a critical reassessment of the role of the law of state responsibility in the prevention and suppression of transnational terrorism should be engaged.

In so doing, the dissertation sets out the shortcomings of the extant scheme of international responsibility whilst concurrently identifying a paradigm shift towards more indirect modes of responsibility under international law, a trend corroborated by recent state and institutional practice. This leads to the controversial question of the possible institutionalization of the implementation of state responsibility. In assessing the potential roles of United Nations organs in this setting, the study carves out a specific – but limited – role for the Security Council in ascertaining the commission of internationally wrongful acts. These considerations pave the way for the policy-oriented, context-sensitive reform of secondary rules of responsibility that follows. After drawing heavily on varied legal and theoretical influences, the study devises and prescriptively argues for the implementation of a strict liability-inspired model grounded in the logic of indirect responsibility with a view to enhancing state compliance with counterterrorism obligations, shifting the focus on prevention and promoting multilateralism and transnational cooperation.

# RÉSUMÉ

Il est clair que le droit international oblige chaque État à prévenir les attentats terroristes provenant de son territoire et portant atteinte aux intérêts d'un autre État. Ce postulat découle de plusieurs conventions multilatérales et résolutions du Conseil de sécurité. Il se fonde également sur le principe de la souveraineté qui entraîne droits et obligations. Or, l'état actuel du savoir n'élucide pas la portée de cette obligation et n'apporte pas plus de précisions au sujet des conséquences juridiques résultant de sa violation. La présente étude vise à cerner le contenu et la portée de cette obligation tout en mettant un accent particulier – et critique – sur les mécanismes du droit de la responsabilité internationale. Possiblement obnubilé par l'avènement de nouvelles technologies comme Internet, la structure cellulaire de groupes terroristes ou des réalités politiques complexes, l'apport fourni par l'État originaire dans le cadre d'activités terroristes peut s'avérer imperceptible. La perspective qu'un État puisse procéder à des agressions indirectes par le biais de personnes ou groupes interposés soulève également d'importants défis au niveau de l'attribution. Par conséquent, ces situations requièrent de nouvelles règles ou, du moins, justifient un réexamen critique du rôle que le droit de la responsabilité peut jouer au niveau de la prévention et de la suppression du terrorisme.

Dans cette optique, l'étude expose l'inadéquation du système actuel de responsabilité en identifiant toutefois un changement de paradigme vers des modes indirects de responsabilité en droit international, un phénomène étayé par la pratique étatique et institutionnelle récente. Voilà donc les bases jetées avant d'aborder l'épineuse question de la mise en œuvre de la responsabilité de l'État par le truchement d'institutions internationales. En évaluant le rôle des organes de l'ONU, l'étude taille un rôle spécifique – quoique modeste – pour le Conseil de sécurité au niveau du constat de l'illicite. Ces observations préparent le terrain pour le projet de réforme des règles secondaires qui suit. S'inspirant d'influences juridiques et théoriques variées dans une perspective de responsabilité indirecte, l'étude propose l'instauration d'un modèle informé par la responsabilité stricte afin d'augmenter la conformité étatique au droit international, d'encourager la prévention et de promouvoir le multilatéralisme et la coopération transnationale.

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# INTRODUCTION

## A) Introductory Remarks

It is no secret that transnational terrorism poses increasingly difficult challenges for international law, along with the enforcement and elaboration of international legal norms. In fact, several recent studies have attempted to elucidate the relationship between international law and terrorism, while drawing on the benefits that can be derived from the former to combat the latter.[1] However, contrary to terrorists of the 60s, 70s, and 80s, modern terrorists wield a considerably expanded scope of reach and influence. Modern technology not only provides them unparalleled access to new and devastating weaponry, but also allows them to broadcast their messages of intimidation and intolerance in unprecedented fashion on a truly global stage, and to a highly captive audience. Indeed, it is undoubtedly with horror that the world recently watched the events of the Mumbai terrorist attacks unfold on television and over the Internet in real-time. These types of private actors egregiously subvert the rules of international law and obfuscate the requisite nexuses between states and individuals upon which the traditional application of international legal norms is painstakingly dependent. On a primary level and remaining oftentimes indistinguishable from the civilian populations in which they seek solace, those private terrorist entities may operate in state-like fashion and inflict broad-reaching transnational violence across borders and cultures, while eluding state-like responsibility.[2] As a corollary, the more diffused and highly de-hierarchised model of terrorism engendering massive and large-scale attacks is of relatively recent vintage.[3]

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[1] See, e.g., Andrea Bianchi (ed.), ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM (2004); Jean-Christophe Martin, LES RÈGLES INTERNATIONALES RELATIVES À LA LUTTE CONTRE LE TERRORISME (2006); Pierre Klein, *Le Droit international à l'épreuve du terrorisme*, 321 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 203-484 (2006); Pablo Antonio Fernández-Sánchez (ed.), INTERNATIONAL LEGAL DIMENSION OF TERRORISM (2009). The emergence of transnational terrorism had also generated international legal scholarship prior to 9/11. See, e.g., Rosalyn Higgins and Maurice Flory (eds.), TERRORISM AND INTERNATIONAL LAW (1997).

[2] See, e.g., Tal Becker, TERRORISM AND THE STATE: RETHINKING THE RULES OF STATE RESPONSIBILITY 1 (2006).

[3] On Al-Qaeda, see, e.g., Rohan Gunaratna, INSIDE AL QAEDA: GLOBAL NETWORK OF TERROR (2002).

But aside from the obvious and moving on to a more general level, transnational terrorism poses a new and singular problem for international law. Perhaps emerging from the vestiges of the antiquated 'foreign office' model of public international law, and decidedly borne out from the now-prevalent phenomenon of the disaggregated state, the repression of privately inflicted transnational violence falls outside of the ambit of traditional international legal protection, at least at the state level. Historically, international law has been far more concerned with potential usurpation of sovereign powers and privileges, breaches of territorial integrity, and inter-state violence than with internationally wrongful acts carried out by non-state actors. In addition, the norms governing the use of force consistently responded to a unitary typology, while the recourses offered rested on predominantly bilateral conceptions of international legal relationships. Human rights protections similarly sought to extend to populations suffering under domination and mistreatment carried out by their own governments. In such -- albeit challenging -- scenarios, international law had a clear frame of reference in assigning blame: such exercise invariably pointed in direction of the nation-state.[4] However, from a *lex ferenda* perspective the debate surrounding state responsibility increasingly takes stock of contemporary developments pertaining to the involvement of private actors and individuals on the international scene, with eminent scholars lamenting the fact that the International Law Commission has, for all intents and purposes, excised the role of non-state actors from the purview of international responsibility by focusing exceedingly on 'bilateral', 'individualistic' and 'privatistic' conceptions of that body of law.[5] Granted, in some sectors private actors have sought to elude regulation by self-regulating, through the adoption of corporate codes of conduct for example, or by reference to soft law regimes.[6] As certain facets of

[4] See, e.g., TERRORISM AND THE STATE, *supra* note 2, at 1 ("…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.").

[5] See, generally, Riccardo Pisillo Mazzeschi, *The Marginal Role of the Individual in the ILC's Articles on State Responsibility*, 15 ITALIAN YEARBOOK OF INTERNATIONAL LAW 39-51 (2004).

[6] For instance, the *Montreux Document* is predicated on a transnational impetus towards self-regulation by the private military and security companies industry. See *The Montreux Document*

international law shift away from a state-centric paradigm to an increasingly transnational reality, however, non-state actors now challenge the rules of state responsibility, at least by their actions, and propel to the fore the need to revisit legal frameworks so as to bolster and identify potential deterrence models in order to prevent and suppress terrorism.[7] Certainly, responding after the fact is important in terms of allocating blame, but a sharp focus should nonetheless be placed on prevention; international legal rules should be harnessed with an equal view to allocating risk *and* to stamping out the roots of transnational terrorism.[8]

It becomes clear from recent events that terrorism is a polymorphic threat – its very practice in various permutations, whether translating in large-scale and massive attacks, more subtle, isolated strikes or Internet-based intimidation, for instance, seems to slip between the cracks of traditional international law enforcement. Preventing terrorism has undoubtedly become a pressing social phenomenon: its authors often do not possess a fixed address; they often blend indiscriminately within the civilian populations that host them; they may operate rather autonomously and without much state support; and, in most cases, they certainly do not display any kind of regard for the rules of international law, the principle of reciprocity or the punishment/deterrence dichotomy.[9] Decidedly, as will be discussed in Chapter 1, international criminal law has a role to play in

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*on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict*, available online at www.icrc.org/web/eng/siteeng0.nsf/htmlall/montreux-document-170908/$FILE/ICRC_002_0996.pdf (last visited on 5 May 2010). Conversely, international legal scholarship is increasingly recognizing that host-states cannot hide behind private military firms to elude official involvement in conflict settings. It follows that, "if the acts of PMFs are attributed to States, the States will lose their claim to neutrality and non-involvement." See Oliver R. Jones, *Implausible Deniability*: *State Responsibility for the Actions of Private Military Firms*, 24 CONNECTICUT JOURNAL OF INTERNATIONAL LAW 239, 258 (2009).

[7] This concern shifts part of the inquiry squarely on the need to explore the relationship between state responsibility law and transnational terrorism. See, e.g., Robert P. Barnidge, Jr., NON-STATE ACTORS AND TERRORISM: APPLYING THE LAW OF STATE RESPONSIBILITY AND THE DUE DILIGENCE PRINCIPLE (2008).

[8] Judge Mohamed Bennouna speaks to this point in a recent book chapter. See *Réflexions sur la régulation internationale du risque à propos du concept de prévention*, in René Hostiou *et al.* (eds.), TERRES DU DROIT: MÉLANGES EN L'HONNEUR D'YVES JÉGOUZO 371-382, 382 (2009).

[9] On the non-applicability of reciprocity to terrorists, for example, see René Provost, *Asymmetrical Reciprocity and Compliance with the Laws of War*, Unpublished Paper, available online at http://ssrn.com/abstract=1427437 (last visited on July 2, 2009), at p. 3, n.13; Mark J. Osiel, THE END OF RECIPROCITY: TERROR, TORTURE, AND THE LAW OF WAR (2009).

repressing terrorism and it partially attains this objective through the channel of *ad hoc* international criminal tribunals, namely under the Statute of the International Criminal Tribunal for Rwanda, which incorporates the crime of 'terrorism' within the furrow of the Tribunal's expertise. Other international instruments and arrangements similarly focus on holding the perpetrators of terrorism accountable under international law. Yet, it is important to note that international criminal law is, by no means, the default regime for repressing and preventing terrorism. In fact, several factors such as the implementation of the Guantánamo Bay detention center, the Annex to the Rome Statute of the International Criminal Court and the criminalization under domestic law of behaviours that, historically, solely amounted to evidentiary elements in criminal cases (e.g. registration in private flight/pilot schools, procurement of sources on explosive-making, dissemination of certain types of speech, membership in certain groups, etc.), clearly point in the direction of domestic criminal law as the preferred regime for holding individuals accountable. The international criminal model, therefore, is an interesting exception to the default regime that is undoubtedly acquiring traction, but that remains nonetheless limited and certainly constrained by jurisdictional, conceptual and political impediments.

Whilst certain initiatives aiming to bolster individual accountability on the international scene are laudable, they fall short in ensuring the accountability of those states that harbour terrorists or in better circumscribing the potential role(s) that states play in supporting or in failing to prevent terrorism. Of vital importance to this topic are the conclusions formulated by the United Nations-mandated High-level Panel on Threats, Challenges and Change in its report, titled *A More Secure World*. Indeed, the Panel proclaimed that, "[s]tates are still the front-line responders to today's threats. Successful international actions to battle poverty, fight infectious disease, stop transnational crime, rebuild after civil war, reduce terrorism and halt the spread of dangerous materials all require capable,

responsible States as partners. It follows that greater effort must be made to enhance the capacity of States to exercise their sovereignty responsibly."[10]

It becomes clear that states have a duty to protect their own citizens against terrorist attacks in light of international counterterrorism obligations and other relevant developments in international law, such as the Responsibility to Protect doctrine ("R2P"). For example, the conceptual tenets of the R2P Doctrine have been brandished in order to substantiate more acute government intervention into the affairs of the Liberation Tigers of Tamil Eelam ("LTTE") secessionist organization in Sri Lanka.[11] Whilst international terrorism is, at times, becoming a highly deterritorialized and decentralized phenomenon, with some policymakers focusing their energies on ungoverned spaces and/or safe havens for the planning and execution of terrorist attacks, this study will demonstrate that terrorists are nonetheless highly dependent on sanctuary or toleration within state borders in order to plan and carry out their actions.[12] Surely, host-states may not wield as much control or influence over private terrorist activities taking place on their territory in all cases, thereby inheriting a more passive role in the violation of primary international legal rules.[13] Yet, states still have an important -- sometimes determinant -- place in the chain of events leading up to the perpetration of transnational terrorist attacks, as their authors often rely on governmental inaction, state toleration or acquiescence, willful blindness or ineffective counterterrorism infrastructures as propitious incubators for their agendas.[14] Consequently, "[w]hen terrorists attack, their victims may not know

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[10] Report of the High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, UN Doc. A/59/565 (2004)[hereinafter *More Secure World*], at 18. See also *Ibid*, at 1 and 9.

[11] See, e.g, Prasad Gunewardene, *Only a Mission to Crush Terrorism*, DAILY NEWS (Sri Lanka), March 24, 2008, available online at http://www.dailynews.lk/2008/03/24/fea02.asp (last visited on 15 May 15 2009).

[12] See, e.g., *infra* Chapter 2, Section D)1. See also René Värk, *State Responsibility for Private Armed Groups in the Context of Terrorism*, XI JURIDICA INTERNATIONAL 184-193, 184 (2006), available online at http://www.juridica.ee/get_doc.php?id=1026 (last visited on July 6, 2009).

[13] Yet, there is no doubt that the obligation of prevention constitutes a primary obligation under international law. Correspondingly, its violation sets in motion the application of the secondary rules of state responsibility. See, e.g., Bennouna, *Réflexions*, *supra* note 8, at 373; Julio Barboza, *Liability*: *Can We Put Humpty-Dumpty Together Again?*, 1 CHINESE JOURNAL OF INTERNATIONAL LAW 499, 500 (2002).

[14] See Becker, TERRORISM AND THE STATE, *supra* note 2, at 2.

where to find them, but there is an address for their grievances and their fears. It is the State."[15]

In light of the foregoing considerations, it becomes clear that the major challenges for international law reside not at the semantic level but, rather, in the efforts to better circumscribe *legal* definitions and frameworks. A particularly difficult challenge is the idea of integrating all relevant actors under a normative framework with a view to bolstering prevention of terrorism and promoting state compliance with counterterrorism obligations. In fact, this study strives to subscribe to what International Court of Justice Judge Mohammed Bennouna has described as the ethos of contemporary international law, "dont la signification ultime réside dans son apport à l'amélioration du sort des personnes humaines, quelles qu'elles soient, dans tous les secteurs d'activités, et par delà l'écran étatique."[16] But how, exactly, can international law, a discipline traditionally concerned with focusing on state action, regulate the acts of private entities and non-state actors? How can international law engage Iran's international responsibility for funding and training Hezbollah factions in their attacks against civilians? Possible scenarios are as endless as relevant interlocutors are diverse.

International legal scholars are increasingly grappling with these questions and seeking ways to regulate the problem of domestic violence and to crack down on internationally wrongful acts carried out by non-state actors. As will be discussed in this dissertation, this question was a central concern in the *Velásquez Rodríguez* case, with the Inter-American Court of Human Rights ("IACHR") investigating the potential application of state responsibility principles to private acts.[17] We are seeing similar efforts across a broad range of situations -- be they aimed at ascertaining the international legal consequences of the actions of rebel groups in armed conflict settings, at delineating state responsibility for the actions

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[15] *Ibid*.

[16] Mohamed Bennouna, *La Protection diplomatique*: *Du standard minimum de traitement des étrangers aux droits de l'Homme*, MELANGES EN L'HONNEUR DE KALLIOPI KOUFA 1-6, 6 (2010).

[17] *Velásquez Rodríguez* case, Judgment of July 29, 1988, IACHR, Series C, No. 4, (1988) 9 HRLJ 212 [hereinafter *Velásquez Rodríguez*], especially at paras. 161-185.

of private military contractors,[18] or at regulating the activities of transnational corporations[19] -- where the objective is to tackle privately-inflicted harm through the screen of the state. After all, if host-states could abdicate their obligation to prevent terrorist attacks emanating from their territory on the basis that the perpetrators were non-state actors, wouldn't that assumption effectively eviscerate the state's sovereign privileges of any significance for the schemes of human security and human rights?[20] In other words, states act as the sole regulators of private conduct within their own borders, as the warrantors of human security in the same setting, and retain an unmatched monopoly over the recourse to force in international relations: they should not be able to dissociate those prerogatives from the responsibilities that inherently flow from them and compel state compliance with obligations, such as counterterrorism undertakings, while seeking to ensure that those powers are harnessed with a view to vindicating specific policy goals and fulfilling common interests on a global scale.

Preventing and suppressing transnational terrorism decidedly qualifies as one of those objectives and constitutes the driving force behind the intellectual inquiry espoused in this project. With this in mind, this dissertation proposes to weigh different arguments in order to determine whether the law of state responsibility can play a role in the prevention and suppression of terrorism, without casting this body of rules as a cure-all or holistic solution to that problem. After all, state responsibility law has always entertained the possibility of holding states accountable for failing to regulate internationally wrongful private conduct. In addition, when seeking legal solutions to bolster prevention and enhance multilateral cooperation and compliance with counterterrorism obligations, the

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[18] See, e.g., Carsten Hoppe, *Passing the Buck*: *State Responsibility for Private Military Companies*, 19 EUROPEAN JOURNAL OF INTERNATIONAL LAW 989-1014 (2008); Marie-Louise Tougas, *La Responsabilité internationale d'État pour le fait d'entreprises militaires privées*, 45 CANADIAN YEARBOOK OF INTERNATIONAL LAW 97 (2007).

[19] See, e.g, Robert McCorquodale and Penelope C. Simons, *Responsibility Beyond Borders*: *State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law*, 70 MODERN LAW REVIEW 598-625 (2007); Juha Kuusi, THE HOST STATE AND THE TRANSNATIONAL CORPORATION: AN ANALYSIS OF LEGAL RELATIONSHIPS (1979); Shadrack B.O. Gutto, VIOLATION OF HUMAN RIGHTS IN THE THIRD WORLD: RESPONSIBILITY OF STATE AND TNCS (1983).

[20] See Becker, TERRORISM AND THE STATE, *supra* note 2, at 2.

importance of state responsibility cannot be sidestepped: its relationship and affinity with the global struggle against terror seems almost indisputable given its centrality in public international law. As one commentator recently remarked, "[s]tate responsibility is, after all, the sacred cow of international law, and terrorism its *bête noire*."[21] Therefore, the rules of state responsibility must be thoroughly and critically explored in order to ascertain whether they can play a role in this quest, or whether they should be revisited in light of recent events and, more importantly, in the face of considerably enhanced terrorist capacity. That is the objective of the present study.

More specifically, the dissertation will make an argument to the effect that international law can countenance a shift towards a law of indirect state responsibility for failures to prevent terrorism. While some aspects of direct responsibility will be canvassed and remain important in the inquiry, the thrust of the argument will hinge on the fact that host-states have a primary duty to control their national territory under international law, which also entails a need to control terrorist factions and activities percolating therein.[22] As a result, we are witnessing a shift in both legal and policy inclinations towards indirect modes of accountability that are concomitantly contingent on i) governmental failures to act or intervene in preventing transnational terrorism and ii) consonant with recent Security Council practice, which almost invariably conflates the obligation of preventing terrorism with the duty of all states to refrain from supporting or harbouring terrorists on their soil. Unlike Tal Becker's recent study, which centres on the role of causation in elucidating the role of state responsibility in responding to terrorism,[23] this dissertation will rather examine the benefits that may be derived from both infusing the law of state responsibility with strict liability logic from a mechanical perspective, and centralizing the implementation

[21] Alain Nissel, *Tal Becker, Terrorism and the State*: *Rethinking the Rules of State Responsibility (Oxford*: *Hart Publishing, 2006)*, 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 245, 245 (2007).

[22] Subject to the context-sensitive policy analysis developed in Chapter 4, this signals that, once a terrorist strike is orchestrated on, or carried out from, a state's territory, a presumption of indirect responsibility automatically flows to that state which, in turn, must refute that presumption by reference to due diligence principles and other policy factors, as applied against the specific facts at hand.

[23] See Becker, TERRORISM AND THE STATE, *supra* note 2.

of state responsibility within the UN Security Council from an operational standpoint. The present dissertation subscribes to a portion of Becker's analytical framework, in that it does not purport to address the decidedly straightforward question of state terrorism, but rather concerns itself with elucidating the role of state responsibility in suppressing/preventing acts of private terrorism, namely where state sponsorship and/or support tends to be far more subtle.[24]

It should be emphasized, at the outset, that endeavouring to define the term 'terrorism' clearly extends beyond the scope of this project, a task that is better left to seasoned international legal scholars and policy-makers. Exceedingly relevant is Rosalyn Higgins' assertion that 'terrorism' amounts to a term 'without legal significance', aiming to create a separate category or infraction to condemn widely-decried acts of a public or private nature that employ illegal tactics and/or strike at protected targets.[25] Whilst Higgins also equated 'terrorism' with a 'term of convenience' elsewhere,[26] her analysis becomes particularly compelling when she explores the rightful place of a separate 'international law of terrorism'. Under this line of inquiry, she ponders whether international law has created a distinct subset of substantive principles under the rubric of 'counterterrorism', or whether scholars are simply extending or applying international legal concepts to a present-day concern.[27]

This project operates on the second proposition and, therefore, does not purport to deliver any expert-level account on terrorist practices or terrorism, more generally. It starts from the assumption that varying degrees of terrorism exist and casts itself, first and foremost, as a study in the law of state responsibility. In so doing, it aims to apply and, in some cases, reformulate some

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[24] A more exhaustive discussion of the rapprochements and dissimilarities between Becker's study and the present dissertation is deployed *infra* in Chapter 4, Section A).

[25] See Rosalyn Higgins, *The General International Law of Terrorism*, in Higgins and Flory, TERRORISM, *supra* note 1, at 13-29, 28. Echoing Higgins' remarks, Richard Baxter, similarly declared that "[w]e have cause to regret that a legal concept of 'terrorism' was ever inflicted upon us. The term is imprecise; it is ambiguous; and above all, it serves no operative legal purpose." See Richard R. Baxter, *A Skeptical Look at the Concept of Terrorism*, 7 AKRON LAW REVIEW 380, 380 (1974).

[26] See Higgins, *The General International Law*, *supra* note 25, at 27. Ben Saul also invokes the term 'political expediency' when discussing Higgins' writings on the matter. See DEFINING TERRORISM IN INTERNATIONAL LAW 177 (2006).

[27] See Higgins, *The General International Law*, *supra* note 25, at 13.

of the underlying tenets of state responsibility law in the context of counterterrorism. As a corollary and bringing Higgins' argument full circle, it follows that the law of state responsibility is sufficiently delineated to encompass acts of terrorism under the rubric of 'internationally wrongful acts', without the need to resort to supplementary definitional contortions.[28] At any rate, the definitional debate is inconsequential for the purposes of reforming the law of state responsibility: as one commentator rightly underscores, the lack of consensus on a universally-accepted definition of 'terrorism' "does not necessarily raise a major issue for identifying the rules of international law applicable for combating terrorism, this including the pertinent secondary rules of State Responsibility."[29]

**B) Overview of Research**

In undertaking the task of advocating a model of indirect state responsibility for failing to prevent transnational terrorism, this project will be divided into four parts. Part I sets out the implications and impact of the events surrounding 9/11 on international law and state responsibility, more specifically. In opening up the discussion, Chapter 1 acts as a general introduction to the topic by framing the major stakes and problems to be addressed in the inquiry, along with the shortcomings of state responsibility in responding to transnational terrorism. Chapter 2 maps out these implications more explicitly by delving into the emerging dichotomy of direct and indirect responsibility. The chapter further attempts to elucidate the consecration of indirect state responsibility by examining the emergence of the 'harbouring' and 'supporting' rule, by canvassing specific historical precedents involving the application of that rule and, ultimately, by situating the Security Council's posture in the debate both before and after 9/11.

This leads into Part II, which sets out to explore the possible institutionalization of the implementation of state responsibility, with particular emphasis on institutional perspectives within the broader United Nations

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[28] Higgins' line of intellectual inquiry seems apposite here. See *Ibid*, at 26. See also Saul, DEFINING TERRORISM, *supra* note 26, at 177.

[29] Pierre-Marie Dupuy, *State Sponsors of Terrorism*: *Issues of International Responsibility*, in Bianchi, ENFORCING, *supra* note 1, at 3-16, 5.

framework. Chapter 3 studies the prospect of advancing the law of state responsibility through existing UN channels, with particular insistence on the Security Council's potential contributions. The chapter thus embarks upon a thorough and methodical examination of the Council's role in the context of counterterrorism, along with its proclivity to administer and interpret the secondary rules of responsibility. This section ultimately identifies a rapprochement between the Council's more traditional executive functions and counterterrorism, generally, leading to the conclusion that the new model of indirect state responsibility can be operationalized through the Security Council in certain, albeit limited, circumstances.

Part III moves towards a more substantial and ambitious proposal for legal reform, with Chapter 4 arguing that the concept of attribution should be excised altogether from the equation of state responsibility in the context of transnational terrorism. In so doing, the study draws heavily on domestic legal analogies, with particular emphasis on tort law and strict liability regimes. Alternatively, the dissertation also takes stock of other potential legal policy reforms to state responsibility, such as the implementation of automatic attribution mechanisms. The project proposes the implementation of a two-tiered strict liability-inspired model in assessing the responsibility of sanctuary states. The discussion, which is pervaded by several rationalist accounts, considerations pertaining to the developing world, and a tension between upholding sovereignty and combating terrorism efficiently, ultimately leads to the exploration – and consequent reformulation – of the obligation of prevention.

Part IV maps out some of the next steps and implications of applying the law of state responsibility to counterterrorism with a view to establishing the foundations of a research prospectus for the further elaboration of research areas building upon the ideas explored in the dissertation. In particular, Chapter 5 casts state responsibility as a partial politico-legal solution to transnational terrorism, while investigating the difficulties associated with self-judging, autoqualification and the quantitative and qualitative exercise of devising legal consequences

following the violation of the obligation of prevention explored previously in Chapter 4.

# PART I – THE INTERNATIONAL RESPONSE TO 9/11 AND ITS IMPACT ON THE LAW OF STATE RESPONSIBILITY

## CHAPTER 1: STATE RESPONSIBILITY, TERRORISM AND INTERNATIONAL LAW

### A) General Remarks: State Responsibility as a Complementary Solution

The horrific attacks of 9/11 and the responses thereto have generated a considerable amount of legal academic writing. In fact, those events have radically challenged certain tenets of the legal and political zeitgeist. Both in the realms of international law and domestic law, several issues of legal, political, and sociological relevance have been propelled to the forefront of academic debate. Recurrent and popular themes in the "war" on terror include the parameters of *jus ad bellum*,[30] issues of international jurisdiction over suspected terrorists,[31] constricting the flow of terrorist funding,[32] immigration policy,[33] violation of human rights and due process,[34] and pre-emptive self-defence.[35] Through a vast,

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[30] See, e.g., Michael Byers, *Terrorism, the Use of Force, and International Law After 11 September*, 51 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 401 (2002); J.I. Charney, *The Use of Force Against Terrorism and International Law*, 95 AMERICAN JOURNAL OF INTERNATIONAL LAW 835-839 (2001).

[31] See, e.g., Christopher C. Joyner, *International Extradition and Global Terrorism*: *Bringing International Criminal to Justice*, 25 LOYOLA OF LOS ANGELES INTERNATIONAL AND COMPARATIVE LAW REVIEW 493 (2003); Lucy Martinez, *Prosecuting Terrorists at the International Criminal Court*: *Possibilities and Problems*, 34 RUTGERS LAW JOURNAL 1 (2002); Vincent-Joël Proulx, *Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era*: *Should Acts of Terrorism Qualify As Crimes Against Humanity?* 19 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 1009 (2004).

[32] See, e.g., Nina J. Crimm, *High Alert*: *The Government's War on the Financing of Terrorism and its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy*, 45 WILLIAM AND MARY LAW REVIEW 1341 (2004); Montgomery E. Engel, *Donating "Blood Money"*: *Fundraising for International Terrorism by United States and the Government's Efforts to Constrict the Flow*, 12 CARDOZO JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 251 (2004); Bruce Zagaris, *The Merging of the Anti-Money Laundering and Counter-Terrorism Financial Enforcement Regimes After September 11, 2001*, 22 BERKELEY JOURNAL OF INTERNATIONAL LAW 123-157 (2004).

[33] See, e.g., Lawrence Lebowitz and Ira Podheiser, *A Summary of the Changes in Immigration Policies and Practices After the Terrorist Attacks of September 11, 2001: The USA Patriot Act and Other Measures*, 63 UNIVERSITY OF PITTSBURGH LAW REVIEW 873-888 (2002); Karen C. Tumlin, *Suspect First: How Terrorism Policy Is Reshaping Immigration Policy*, 92 CALIFORNIA LAW REVIEW 1173 (2004).

[34] See, e.g., Emanuel Gross, *The Influence of Terrorist Attacks on Human Rights in the United States: The Aftermath of September 11, 2001*, 28 NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION 1 (2002); Harold Hongju Koh, *On American Exceptionalism*, 55 STANFORD LAW REVIEW 1479 (2003).

hit-and-miss range of means, it seems that the international community is seeking ways to prevent and suppress transnational terrorism. In gathering international support for its response to the 9/11 attacks, the U.S. elected forcible self-defence as an extreme course of action to redress the initial harm and to repel or contain further threats.[36] While some commentators have rallied behind the military campaign in Afghanistan or inferred that it could be countenanced under existing precepts of self-defence,[37] others have called it into question.[38] This military response casts further doubt as to the appropriate level of retaliation and, more precisely, as to the categorization of available legal responses following 9/11, given that both terrorism and counterterrorism policy do not fit neatly within the "crime" or "war" paradigms.[39] In stark contrast with the armed conflict angle, others have analyzed the legal response to 9/11 through a law enforcement paradigm.[40]

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[35] See, e.g., Michal J. Glennon, *The Fog of Law*: *Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARVARD JOURNAL OF LAW AND PUBLIC POLICY 539, 546-549 (2002); Christopher Greenwood, *International Law and the Pre-emptive Use of Force*: *Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INTERNATIONAL LAW JOURNAL 7 (2003); Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICHIGAN JOURNAL OF INTERNATIONAL LAW 513 (2003).

[36] See Dan Balz, *U.S., Britain Launch Airstrikes Against Targets in Afghanistan*, THE WASHINGTON POST, October 8, 2001, at A1 (detailing the military campaign in Afghanistan aiming to root out Al-Qaeda).

[37] See, e.g., Mary Ellen O'Connell, *Lawful Self-Defense to Terrorism*, 63 UNIVERSITY OF PITTSBURGH LAW REVIEW 889-909 (2002); George Walker, *The Lawfulness of Operation Enduring Freedom's Self-Defense Responses*, 37 VALPARAISO UNIVERSITY LAW REVIEW 489-540 (2003).

[38] See, e.g., Thomas Franck, *Terrorism and the Right of Self-Defense*, 95 AMERICAN JOURNAL OF INTERNATIONAL LAW 839 (2001); John Quigley, *The Afghanistan War and Self-Defense*, 37 VALPARAISO UNIVERSITY LAW REVIEW 541-62 (2003); Mary Ellen O'Connell, *American Exceptionalism and the International Law of Self-Defense*, 31 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY 43 (2002); Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INTERNATIONAL LAW JOURNAL 533, 533-541 (2002).

[39] See, e.g., Noah Feldman, *Choices of Law, Choices of War*, 25 HARVARD JOURNAL OF LAW AND PUBLIC POLICY 457 (2002); Mark A. Drumbl, *Terrorist Crime, Taliban Guilt, Western Victims, and International Law*, 31 DENVER JOURNAL OF INTERNATIONAL LAW & POLICY 69-79 (2002).

[40] For various considerations on the law enforcement paradigm and related issues, see Robert M. Chesney, *Civil Liberties and the Terrorism Prevention Paradigm*: *The Guilt by Association Critique*, 101 MICHIGAN LAW REVIEW 1408 (2003) (reviewing David Cole & James X. Dempsey, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY (2002); David Cole, ENEMY ALIENS: DOUBLE STANDARD AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERROR (2003)); Mary Ellen O'Connell, *To Kill or Capture Suspects in the Global War on Terror*, 35 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 325 (2003).

But aside from the extreme scenario of invading Afghanistan, there exists a multiplicity of complementary, sometimes overlapping, legal regimes that may be harnessed with a view to counteracting transnational terrorism. Among these, international criminal law is becoming an increasingly attractive option, especially since the advent of the International Criminal Court, with scholars calling for the categorization of acts of terrorism as both crimes against humanity[41] and war crimes.[42] Whilst absolutely fundamental under traditional international legal structures, state responsibility law is often overshadowed in the policy debates and the present project starts from the premise that its corpus of rules can be brought to bear on the post-9/11 world. Hence, this dissertation concerns itself with studying the ways in which state responsibility law can contribute to the global struggle against terrorism, without aiming to replace or supplant the aforementioned regimes, which, it must be stressed, remain complementary.

For instance, the features state responsibility can contribute to this ongoing military and law enforcement campaign will remain complementary to international criminal legal mechanisms. That being said, one has to be cautious not to overextend the analysis in the opposite direction by disproportionately grounding accountability mechanisms on an individualized level. Whilst there has been a marked tendency to individualize the discipline in the wake of post-Cold War internal armed conflicts, this, by no means, absolves governments from potential accountability when breaching their obligations under international law.[43] It follows that state responsibility can apply co-extensively with, or in parallel fashion to, liability schemes targeting individuals for their violations of

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[41] See, e.g., Roberta Arnold, THE ICC AS A NEW INSTRUMENT FOR REPRESSING TERRORISM 202-272 (2004); Martinez, *Prosecuting Terrorists*, *supra* note 31, at 52; Ahmed Mahiou, *Le Projet de Code des crimes contre la paix et la sécurité de l'humanité*, 3 L'OBSERVATEUR DES NATIONS UNIES 177-193, 182 (1997).

[42] See, e.g., Sébastien Jodoin, *Terrorism As a War Crime*, 7 INTERNATIONAL CRIMINAL LAW REVIEW 77-115 (2007). Others opine that terrorism amounts to a customary law crime. See, e.g., Antonio Cassese, INTERNATIONAL CRIMINAL LAW 139 (2003); Jordan J. Paust, *Addendum*: *Prosecution of Mr. Bin Laden et al. for Violations of International Law and Civil Lawsuits by Various Victims*, 77 AMERICAN SOCIETY OF INTERNATIONAL LAW INSIGHTS, 21 September 2001, available at www.asil.org.

[43] See Anne-Marie Slaughter and William Burke-White, *An International Constitutional Moment*, 43 HARVARD INTERNATIONAL LAW JOURNAL 1, 19 (2002).

international law;[44] the instruments and mechanisms invoked to enforce such liability will, obviously, differ whether faced with individual responsibility versus state responsibility. As a corollary, states undoubtedly risk the prospect of incurring responsibility should they choose to support or harbour terrorists on their territory.[45] Whilst the possibility of criminalizing state responsibility extends beyond the scope of this dissertation, it should nonetheless be noted that General Assembly Resolution 40/61 explicitly proclaims that criminal liability automatically flows from the perpetration of acts of terrorism, irrespective of the author or authors' identity and structure, be they state-based, state-condoned, state-sponsored or purely individualized.[46]

State responsibility's strength ostensibly lies in its potential *preventive* character, if infused with adequate mechanisms and underlying philosophy. Because we are dealing under that rubric with governments that have to withstand international scrutiny, as opposed to highly motivated individuals pursuing their own political goals, the mere threat of triggering responsibility might compel states to combat terrorism more efficiently within their borders and shift the focus on prevention. For instance, host-states have increasingly begun to criminalize what used to constitute mere evidentiary elements – i.e. restricting access to certain literature, cracking down on bomb making-related activities, monitoring flight/pilot school enrolments, prohibiting membership in certain organizations, freezing the assets of individuals associated with certain organizations and blocking certain charitable donations – as one of the ways to comply with primary counterterrorism obligations (e.g. most particularly the prescriptions stemming from Security Council Resolution 1373).[47] As a result, we are witnessing a series

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[44] See, e.g., George T. Yates, *State Responsibility for Nonwealth Injuries to Aliens in the Postwar Era*, in Richard B. Lillich (ed.), INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 213 (1983).

[45] See, e.g., John Alan Cohan, *Formulation of a State's Response to Terrorism and State-Sponsored Terrorism*, 14 PACE INTERNATIONAL LAW REVIEW 77, 95 (2002).

[46] *Measures to Prevent International Terrorism which Endangers or Takes Innocent Human 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*, G.A. Res. 40/61, U.N. GAOR, 40th Sess., U.N. Document A/Res/40/61 (1985).

[47] The scope of Resolution 1373 will be explored below, especially *infra* in Chapter 4, Section B)5.a).

of shifts towards modes of indirect responsibility as bases for engaging accountability both at the national and international levels, and both at the individual and state levels.[48] For one thing, these shifts probably reflect the significant difficulty in securing evidence to support a conviction for terrorism, *per se*. More importantly, in applying a healthy dose of diligence in meeting international obligations through the adoption of more stringent domestic criminal standards, host-states are likely signalling that they consider their potential liability on the international scene as one of the factors governing and shaping the allocation of their (sometimes scarce) resources in combating terrorism. Additionally, by shifting their domestic policy infrastructures in light of indirect rationales for accountability, those states might not only be able to actually prevent specific terrorist excursions, but also to preempt the application of state responsibility altogether by successfully fulfilling their primary international obligations.

Thus, as will be further discussed in Chapter 4, the prospect of incurring responsibility, coupled with the apprehension of destabilized reciprocal behaviour patterns in international relations, may actually shift incentives onto governments and induce them to comply with their obligations, provided the content of those obligations is sufficiently defined. As Brunnée and Toope underscore, "[f]or some, reciprocity or reciprocal advantage, quintessentially rationalist concepts, lie at the root of legal obligation."[49] Along similar lines, when dealing with state responsibility's decentralized setting and its repertoire of countermeasures, some authors equate the unilateral enforcement of international law with a 'function of power'. In other words, states' compliance with legal obligations is conditioned or shaped, first and foremost, by political and economic concerns and, only

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[48] For a recent exploration of these issues, see Marja Lehto, INTERNATIONAL RESPONSIBILITY FOR TERRORIST ACTS: A SHIFT TOWARDS MORE INDIRECT FORMS OF RESPONSIBILITY (2008).

[49] Jutta Brunnée and Stephen J. Toope, *Persuasion and Enforcement*: *Explaining Compliance with International Law*, 13 FINNISH YEARBOOK OF INTERNATIONAL LAW 273, 279 (2002). See also Rosalyn Higgins, PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 16 (1994). For classical explorations of the basis of international legal obligation, see, e.g., Hersch Lauterpacht and Claud H.M. Waldock (eds.), THE BASIS OF OBLIGATION IN INTERNATIONAL LAW AND OTHER PAPERS BY THE LATE JAMES LESLIE BRIERLY (1958); Myres McDougal, Harold D. Lasswell and W. Michael Reisman, *Theories About International Law*: *Prologue to a Configurative Jurisprudence*, 8 VIRGINIA JOURNAL OF INTERNATIONAL LAW 188, 188-194 (1968).

secondly (sometimes distantly), by considerations of law and justice.[50] Whilst such view will undoubtedly fuel the analysis in subsequent pages, the notion of reciprocity – whether systematized or bilateral – will also remain a vital driving force for the purposes of better explaining norm compliance.

To invoke constructivist parlance, the prospect of incurring responsibility might also promote a 'shared understanding' among nations that transnational cooperation should be increased, and vigilant law enforcement heightened and refined in the face of increasing global threats.[51] A particularly poignant brand of reciprocity correspondingly animates the law of state responsibility – thereby permeating diplomatic relations with a view to enticing states' self-interested compliance with counterterrorism obligations – and will be a running theme throughout this dissertation. As Robert Keohane rightly remarks, reciprocity "seems to be the most effective strategy for maintaining cooperation among egoists."[52] It follows that reciprocity can also cut the other way, that is to say that states can refrain from carrying out specific conduct because they believe they can derive self-interested benefits from that behaviour. As a corollary, consensus-based constructions of international law similarly entail that "consensus comes about because states perceive a reciprocal advantage in cautioning self-restraint."[53] Thus, the central argument will rely, heavily at times, on rationalist

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[50] See, e.g, Karl Zemanek: *Does the Prospect of Incurring Responsibility Improve the Observance of International Law?*, in Maurizio Ragazzi (ed.), INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 125-134, 128 (2005); *The Unilateral Enforcement of International Obligations*, 47 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (ZAÖRV) 32-43, 43 (1987).

[51] See, e.g, Jutta Brunnée and Stephen J. Toope: *Persuasion*, *supra* note 49, at 274-275 (arguing that "[l]aw's influence is strongly felt in processes of persuasion that are grounded in shared understandings of right conduct", and adding that "[t]hese understandings are themselves dependent upon the legitimacy of processes of normative creation and upon positive values embedded in the substantive content of the norms."); *International Law and Constructivism*: *Elements of an Interactional Theory of International Law*, 39 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 19 (2000); *Interactional International Law*, 3 INTERNATIONAL LAW FORUM DE DROIT INTERNATIONAL 186 (2001); *The Changing Nile Basin Regime*: *Does Law Matter?*, 43 HARVARD INTERNATIONAL LAW JOURNAL 105 (2002) (applying the above conclusions to a case study).

[52] Robert O. Keohane, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 214 (1984).

[53] Higgins, PROBLEMS & PROCESS, *supra* note 49, at 16. See also Martti Koskenniemi, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 74 (1989).

accounts in order to better understand and shape a working model of state responsibility for failing to prevent terrorism.[54]

Thus, the purpose of this project lies in articulating potential deterrence models and contributions to counterterrorism within the formal body of rules constituting the law of state responsibility, as incremental as those advances may be. Yet, those contributions may in fact become more significant than they appear upon first glance. Indeed, while the U.S. initially focused its rhetoric on holding individual terrorists accountable after 9/11,[55] another objective emerged in the "war" on terror – working in tandem with the first priority and labelled a "secondary goal" by some[56] – thereby shifting the focus squarely on holding states responsible for their assistance to terrorist groups.[57] The U.S.' posture in this regard, which is also mirrored in the policies of other states and organizations, clearly targets state sponsors of terrorism -- even those merely providing sanctuary to terrorist organizations -- and purports to hold those states responsible for their involvement in terrorism.[58] In this context, the role of state responsibility law does not purport to supersede national or criminal legal systems, nor does it

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[54] See, particularly, *infra* Chapter 4, Sections B)5.b); B)7.a).

[55] See, e.g., George W. Bush, *Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11*, in *America's Ordeal*: *'Our Grief Has Turned to Anger'*, NEWSDAY, September 21, 2001, at A2; Tony Blair, *Why Saddam Is Still a Threat to Britain*, EXPRESS, March 6, 2002, at 12; Joseph Sullivan, *Why War Against Terrorism Is Justified*, FINANCIAL GAZETTE, November 1, 2001. The U.S. government's belief is that the Al-Qaeda network, along with other extremist Islamic terrorist organizations, embody one of the most serious threats to national security. See *Combating Terrorism*: *Protecting the United States, Parts 1 and II*: *Hearings Before the House Subcommittee on National Security, Veterans Affairs and International Relations, Committee on Government Reform*, 107th Congress 155-156 (2002) (Statement of James Caruso, Deputy Executive Assistant Director for Counterterrorism, Federal Bureau of Investigation) [hereinafter Statement of James Caruso].

[56] See, e.g., Sarah E. Smith, *International Law*: *Blaming Big Brother*: *Holding States Accountable for the Devastation of Terrorism*, 56 OKLAHOMA LAW REVIEW 735, 736 (2003).

[57] See, e.g., John Diamond, *Powell Sets Terms for a New Regime*, CHICAGO TRIBUNE, October 25, 2001, at 6; National Security Council, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 6, 13-16 (2002), available online at http://www.whitehouse.gov/nsc/nss.pdf (last visited on June 23, 2008); Jay M. Vogelson, *Multinational Approaches to Eradicating International Terrorism*, 36 INTERNATIONAL LAWYER 67, 70 (2002). But *Cf.* Matthew Levitt, PATTERNS OF TERRORISM 2002: TERROR, COUNTERTERROR, AND STATE SPONSORSHIP (Washington Institute for Near East Policy, Policywatch Number 753, 2003), available online at http://www.thewashingtoninstitute.org/templateC05.php?CID= 1631 (last visited on June 24, 2008).

[58] See National Security Council, NATIONAL STRATEGY FOR COMBATING TERRORISM 15 (2003), available online at http://www.whitehouse.gov/nsc/nsct/2006/nsct 2006.pdf [hereinafter NATIONAL STRATEGY] (last visited on June 20, 2008).

tend to work in disharmony with other concurrent legal regimes such as the respective schemes of international humanitarian law ("IHL") and international human rights, for example. In fact, it would appear that all those regimes work complementarily and, by the same token, superimpose complementary sources of obligations and specific, often-compatible obligations as well.[59] Thus, the primary objective in invoking state responsibility in this setting resides in that system's proclivity to render governments accountable vis-à-vis their counterterrorism obligations and, as a corollary, to induce them to take preventive action with regard to those undertakings while also favouring transnational cooperation in adopting possible solutions to stamp out terrorism.

The relationship between state responsibility and terrorism becomes particularly relevant, and compelling, when one considers that Iran recently provided missiles and other types of weaponry to Hezbollah factions in their attacks against Israel, or that the government of Afghanistan afforded members of Al Qaeda the opportunity to seek refuge on its territory prior to the 9/11 attacks. In such difficult factual scenarios -- where international criminal justice is often eschewed or short-circuited because of the inability to capture or produce the suspected terrorists -- the international community must seek ways to buttress the application of accountability mechanisms to complicit or involved governments, so as to fight impunity and prevent further terrorism. These specific accounts will be amply discussed and reviewed throughout this project.

Before embarking upon a review of potential levels of governmental involvement in terrorism, a healthy dose of political realism seems apposite here. In particular, any study attempting to recast the rules of state responsibility with certain policy objectives in mind will inexorably have to grapple with the idea that the uncertainty surrounding potential legal responses to terrorism will be

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[59] See, e.g., Fateh Azzam, *The Duty of Third States to Implement and Enforce International Humanitarian Law*, 66 NORDIC JOURNAL OF INTERNATIONAL LAW 55, 56 and 69 (1997); Robert Dufresne, *Reflections and Extrapolation on the ICJ's Approach to Illegal Resource Exploitation in the Armed Activities Case*, 40 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 171, 182 (2008). The law of international state responsibility is also complementary with other domestic regimes, such as civil liability. See, e.g., Alan E. Boyle, *Globalising Environmental Liability*: *The Interplay of National and International Law*, 17 JOURNAL OF ENVIRONMENTAL LAW 3, 23-24 (2005).

exacerbated by the margin of appreciation wielded by states (particularly aggrieved ones) as to what constitutes 'terrorism'. This will also have significant implications for the interrelationship between autoqualification and state responsibility, a symbiosis that will be further explored in Chapter 5, Section A)1. More importantly, the compliance pull of primary counterterrorism obligations will unquestionably remain informed and shaped by the resources at the disposal of states in combating terrorism. For instance, it may well be that a state possessing scarce resources decides that it would not be justified in diverting them towards counterterrorism programmes. To counteract this eventuality, and as will be explored in subsequent pages, arguments are increasingly put forth that such states have a positive duty under international law to acquire the requisite counterterrorism capacity and, as a corollary, to harness it with a view to stamping out terrorism percolating within their borders.[60]

Nevertheless, because the topic at hand primarily deals with state negligence at the preventive level, the crux of relevant policy considerations will hinge, to a large extent, on the host-state's degree of autonomy in making policy choices and in prioritizing counterterrorism initiatives. Similarly, certain factual scenarios will elicit very little contestation, as a matter of principle. For instance, the magnitude of the 9/11 attacks makes those excursions hardly contestable in terms of Afghanistan's failure to fulfill its international obligations. Indeed, there is virtually no opposition to the fact that the Afghan government supported and harboured members of Al-Qaeda on its territory, offered them logistical support and repeatedly ignored calls from the Security Council to cease and desist this behaviour. Yet, not all factual scenarios will be as straightforward or as clear-cut for the purposes of international responsibility. In fact, one can envisage marginal cases involving transnational terrorism and carrying peripheral implications for the relevant host-states. For instance, what are a host-state's obligations with regard to individuals maintaining a website for the purposes of recruiting terrorists when the relevant Internet service provider is physically located within its

[60] See, e.g., Becker, TERRORISM AND THE STATE, *supra* note 2, at 143-144 and 146. See also Riccardo Pisillo-Mazzeschi, *The Due Diligence Rule and the Nature of the International Responsibility of States*, 35 GERMAN YEARBOOK OF INTERNATIONAL LAW 9, 25-26 (1992).

borders, such as is the case of Belgium vis-à-vis the activities of Malika El Aroud?[61] Similarly, the reality prevalent in Canada, where there is strict control over both the territory and terrorist activities occurring therein, but where terrorist cells may nonetheless propagate in preparation of terrorist attacks, is far removed from other situations. In that regard, vigilant law enforcement has, thus far, achieved significant gains in thwarting potential terrorist plots and in dismantling cells on Canadian soil. A case in point undoubtedly resides in the recent warehouse arrest of eighteen individuals in Toronto involved in lining cardboard boxes with plastic in order to store fertilizer, unloading considerable quantities of ammonium nitrate, and carrying out other preparative activites in a foiled plot that would have entailed, *inter alia*, detonating bombs outside the Toronto Stock Exchange and the Canadian Security Intelligence Service headquarters. This law enforcement blitz has led to the conviction and imprisonment of Saad Khalid, to admissions of guilt by both Saad Gaya and Mohamed Ali Dirie, and to an admission of guilt by Zakaria Amara, one of the operation's ringleaders.[62] In addition, no successful transnational terrorist strike has been launched from Canada. Conversely, extant structures in other states generate a far less fructuous record of compliance with international counterterrorism obligations. Such is the case of Lebanon, which fails to effectively control a large portion of its territory and which has been frequently used to launch terrorist attacks against civilians, most notably against Israel. As a result, a complex factual interface arises and militates in favour of a context-sensitive, policy-informed approach in tackling these difficult legal and political questions, which shall be developed further in Chapter 4. In the interim, it is useful to briefly discuss the relationship between

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[61] This case will be further explored *infra* in Chapter 4, Section C)2.

[62] See *Alleged Toronto 18 Ringleader Pleads Guilty*, CBC NEWS, October 8, 2009, available online at http://www.cbc.ca/canada/toronto/story/2009/10/08/toronto-18-plot-guilty-plea.html (last visited on 18 October 2009); *Another 'Toronto 18' Member Pleads Guilty*, CBC NEWS, September 29, 2009, available online at http://www.cbc.ca/canada/toronto/story/2009/09/28/toronto-18-terrorism-guilty482.html (last visited on 3 October 2009); *Toronto Bomb Plotter Khalid Gets 14 Years*, CBC NEWS, September 4, 2009, available online at http://www.cbc.ca/canada/story/2009/09/03/terror-trial-sentence090309.html (last visited on 3 October 2009); *Saad Khalid Jailed Over Foiled Plot to Bomb Canadian Military Base*, HERALD SUN, September 4, 2009, available online at http://www.heraldsun.com.au/news/world/saad-khalid-jailed-over-foiled-plot-to-bomb-canadian-military-base/story-e6frf7lf-1225769367333 (last visited on 3 October 2009).

counterterrorism objectives and the primary/secondary dichotomy underlying the law of state responsibility, so as to better frame the discussion to follow.

### B) Counterterrorism Obligations after 9/11 and the Primary/Secondary Divide

At the outset, it is vital to note the existence of an obligation of prevention incumbent upon all states to contain and repel any harmful activity emanating from their territory and injurious to the citizens or rights of third states. While the obligation of prevention can be partially grounded in treaty law, very few stringent accountability mechanisms can be derived from specific multilateral or regional conventions.[63] This reality is most likely attributable to that source of law's overemphasis on extradition[64] and, simultaneously, to the fact that modern counterterrorism law is characterized by a piecemeal approach, thereby targeting specific acts or types of terrorism -- airplane hijacking, high seas excursions, hostage-taking, diplomatic violations, etc. -- without attempting to develop a comprehensive scheme of responsibility for an all-encompassing concept of 'terrorism'.[65] Equally noteworthy in the failure of a more robust and uniform transnational law of counterterrorism is the problem of enforcement. For instance, of all relevant regional counterterrorism instruments, the European Convention on Terrorism remains the sole agreement routinely enforced by the contracting parties.[66]

As will be canvassed in Chapter 4, the obligation of prevention can most persuasively be grounded in the ICJ's holding in the *Corfu Channel* case,[67] and

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[63] See, e.g., William P. Hoye, *Fighting Fire With…Mire? Civil Remedies and the New War on State-Sponsored Terrorism*, 12 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 105, 108-109 (2002).

[64] See W. Michael Reisman, *International Legal Responses to International Terrorism*, 22 HOUSTON JOURNAL OF INTERNATIONAL LAW 3, 28 (1999).

[65] See, e.g., M. Cherif Bassiouni, *Legal Control of International Terrorism*: *A Policy-Oriented Assessment*, 43 HARVARD INTERNATIONAL LAW JOURNAL 83, 91 (2002); Robert J. Beck and Anthony Clark Arend, *"Don't Tread on US"*: *International Law and Forcible State Responses to Terrorism*, 12 WISCONSIN INTERNATIONAL LAW JOURNAL 153, 169 (1994).

[66] See Bassiouni, *Legal Control*, *supra* note 65, at 92.

[67] *Corfu Channel (UK v. Albania), Merits*, I.C.J. REPORTS 1949, p. 4 [hereinafter *Corfu Channel*], at 22. See also, e.g., *British Property in the Spanish Zone of Morocco*, 2 RIAA 615, at p. 640 (1924) [hereinafter *British Property*]; Affaire des *Îles Palmas*, REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 164 (1935) [hereinafter *Îles Palmas*]; *Tehran Hostages Case* (*US* v. *Iran*), [1980] ICJ REPORTS 3, at p. 64 [hereinafter *Tehran Hostages*]; *Janes Case (US v. Mexico)*, 4

different permutations of the original rule can be traced back to various sources of contemporary public international law.[68] In fact, this obligation cropped up long before 9/11 and historically translated into a due diligence obligation, a veritable corollary of state sovereignty.[69] In the present context, this obligation implies that "[s]tates are required under international law to carry out protection by "due diligence," which means that all reasonable measures under the circumstances must be taken to prevent terrorist acts."[70]

In the wake of the events following 9/11, the UN Security Council imposed a categorical obligation to prevent terrorism upon all states via Resolution 1373.[71] Whilst the contents of Resolution 1373 will be thoroughly engaged throughout this dissertation, and particularly in Chapter 4, it should be immediately stressed that this document likely constitutes the cornerstone of post-9/11 international counterterrorism policymaking. Thus, on 28 September 2001 the Security Council decided that all states shall, *inter alia*:

- Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;
- Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens; and

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RIAA p. 82, 87 (1925) [hereinafter *Janes*]; *Massey Claim*, 4 RIAA p. 155 (1927) [hereinafter *Massey Claim*]; *Youmans Case (US v. Mexico)*, 4 RIAA p. 110 (1926) [hereinafter *Youmans Case*]; *Solis*, 4 RIAA p. 358, at 361 (1928) [hereinafter *Solis*]; *Texas Cattle Claims*, (1944), in M. Whiteman (1967) 8 DIGEST OF INTERNATIONAL LAW 749 [hereinafter *Texas Cattle*]; *Home Missionary Society (US v. Great Britain)*, 6 RIAA p. 42 (1920) [hereinafter *Home Missionary*]; *Noyes Case (US v. Panama)*, 6 RIAA p. 308 (1933) [hereinafter *Noyes Case*]. See also Richard B. Lillich and John M. Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 AMERICAN UNIVERSITY LAW REVIEW 217, 222-251, 262-270 (1977).

[68] See, e.g., *infra* Chapter 4, Section C)1.

[69] See, e.g., *Island of Palmas Case (Netherlands* v. *U.S.)*, 2 R.I.A.A. 830, 839 (April 1928) and Judge Moore's Dissenting Opinion in *S.S. Lotus (France* v. *Turkey)*, 1927 P.C.I.J. (ser. A) No. 10, at 4, 88 (July 9). See also, Dupuy, *State Sponsors*, *supra* note 29, at 9; Reisman, *International Legal Responses*, *supra* note 64, at 51.

[70] Jeffrey Alan McCredie, *The Responsibility of States for Private Acts of International Terrorism*, 1 TEMPLE INTERNATIONAL AND COMPARATIVE LAW JOURNAL 69, 86 (1985). See also John-Alex Romano, *Combating Terrorism and Weapons of Mass Destruction*: *Reviving the Doctrine of a State of Necessity*, 87 GEORGETOWN LAW JOURNAL 1023, 1033 (1999); Michael N. Schmitt, *The Sixteenth Annual Waldemar A. Solf Lecture in International Law*: *Bellum Americanum Revisited*: *U.S. Security Strategy and the Jus ad Bellum*, 176 MILITARY LAW REVIEW 364, 391 (2003).

[71] Security Council Resolution 1373 of 28 September 2001, U.N. SCOR, 56th Sess., 438th mtg., U.N. Document S/RES/1373 (2001)[hereinafter *Resolution 1373*].

- 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.[72]

In this broad-reaching statement, the Council imposed a wide range of obligations in the most categorical terms. Amongst the most obvious ones is the duty incumbent upon all states to refrain from sponsoring or supporting terrorism on their territory. Implicit in this obligation is the idea that accountability automatically ensues should a state provide such support or sponsorship to terrorists.[73] When coupled with traditional pronouncements on prevention under international law, a more general obligation of prevention can be derived from this resolution in the context of counterterrorism, notwithstanding specific treaty or conventional regimes imposing separate duties.[74] Whilst other ancillary obligations, such as the duties to punish, extradite and prosecute terrorists, will remain important, albeit peripheral to the main discussion, particular emphasis will be placed on the general duty to prevent terrorism. Even prior to 9/11, the primary aim of the international community in this context was to prevent terrorist activity, and, as will be discussed at length below, the events of 9/11, coupled with the legal response thereto, have placed further policy emphasis sharply on prevention.[75]

It follows that the obligation of prevention will remain, for all intents and purposes, the 'primary' legal obligation to be scrutinized under the lens of state responsibility. Like any other primary norm under international law, the

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[72] Peter J. van Krieken (ed.), TERRORISM AND THE INTERNATIONAL LEGAL ORDER: WITH SPECIAL REFERENCE TO THE UN, THE EU AND CROSS-BORDER ASPECTS 5 (2002).

[73] See, e.g., Jack M. Beard, *America's New War on Terror*: *The Case for Self-Defense Under International Law*, 25 HARVARD JOURNAL OF LAW & PUBLIC POLICY 559, 582 (2002).

[74] See, e.g., Dupuy, *State Sponsors*, *supra* note 29, at 11.

[75] On the international objective of prevention in the realm of counterterrorism, see, e.g., M. Cherif Bassiouni, *Preface*, in M. Cherif Bassiouni (ed.), INTERNATIONAL TERRORISM AND POLITICAL CRIMES xi-xiii (1975); Robert A. Friedlander, TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL 23-25 (1981); Robert Kupperman, *Facing Tomorrow's Terrorist Incident Today*, in Edwin Nobles Lowe and Harry D. Shargel (eds.), LEGAL AND OTHER ASPECTS OF TERRORISM 581-620 (1979); McCredie, *The Responsibility*, *supra* note 70, at 71; John F. Murphy and Alona E. Evans, *Introduction*, in Alona E. Evans and John F. Murphy (eds.), LEGAL ASPECTS OF INTERNATIONAL TERRORISM xxiii-xxxviii and 3 (1978).

emergence of such obligation in the post-9/11 legal landscape evokes an important tension, which must be acknowledged immediately at the outset. Any study delving into the realm of state responsibility must inexorably come to grips with the distinction between primary and secondary obligations, a dichotomy that underpins the logic of the ILC's *Articles on State Responsibility*,[76] along with modern state responsibility repertoire. Whilst certain scholars have questioned the persuasiveness of this distinction,[77] others have defended it or, at least, found that primary and secondary rules cannot, in most cases, be dissociated.[78] Therefore, the mutual interpenetration of rules at both norm-specific levels of international breaches, along with the emergence of norms concomitantly straddling primary and secondary terrain, decidedly signal that both types of obligations remain mutually interdependent and that the overarching distinction prevalent in this area cannot be artificially disabled.[79] Whilst the purpose of this project is not to entertain any particular stance in the broader discussion regarding the validity of the current 'breach-consequence' structure ultimately espoused by the ILC -- nor is it to put that polemic to rest -- the primary/secondary distinction will nonetheless be invoked rather liberally in subsequent pages.

In a broader sense, the mechanics of the *Articles* dictate that, once a primary obligation has been violated,[80] international law sets in motion the

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[76] State Responsibility: Titles and text of the draft articles on Responsibility of States for international wrongful acts adopted by the Drafting Committee on second reading, U.N. Doc. A/CN.4/L.602/Rev.1 (2001). The final draft was adopted by the ILC in 2001. See Report of the International Law Commission on the Work of Its Fifty-Third Session, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) [hereinafter "*ILC Articles on State Responsibility*", "*Articles on State Responsibility*", or *"Articles*"].

[77] See, e.g., Denis Alland and Jean Combacau, *'Primary' and 'Secondary' Rules in the Law of State Responsibility*: *Categorizing International Obligations* 16 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 81-109 (1985); René Provost, *Introduction*, in René Provost (ed.), STATE RESPONSIBILITY IN INTERNATIONAL LAW XII-XIII (2002).

[78] See, e.g., Marko Milanović, *State Responsibility for Genocide*, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW 553 (2006); Tullio Treves, *The International Law Commission's Articles on State Responsibility and the Settlement of Disputes*, in Ragazzi, INTERNATIONAL RESPONSIBILITY, *supra* note 50, at 223-234, 227; Santiago M. Villalpando, L'ÉMERGENCE DE LA COMMUNAUTÉ INTERNATIONALE DANS LA RESPONSABILITÉ DES ETATS 139-141, 333-334 and 384 (2005).

[79] See, e.g., Hugh Thirlway, *Injured and Non-Injured States Before the International Court of Justice*, in Ragazzi, INTERNATIONAL RESPONSIBILITY, *supra* note 50, at 311-328, 323 (2005).

[80] For present purposes, the violation of the relevant primary obligation occurs when a state fails to prevent a terrorist attack emanating from its territory and inflicting harm onto the citizens or rights of another state.

application of secondary rules, which translate into a series of potential legal consequences including restitution and/or compensation for harm done, to invoke municipal legal parlance. In sum, the invocation of this now firmly-implanted but still controversial distinction will cater to a strict cause-and-effect symbiosis: as soon as a wrongful act is committed, which ineluctably entails that a state has breached international law, that state's responsibility will be triggered and specific legal consequences will ensue (which may or may not be juxtaposed with further political and/or diplomatic sanctions). In response, careful analysis will be advanced to bolster the idea that selective deconstruction and elucidation of secondary rules of responsibility may, in fact, enable further clarification of primary rules in the face of normative discrepancies or substantive vacuums, as is the case with certain (poorly-defined) counterterrorism obligations.

### C) The Shortcomings of State Responsibility Vis-à-vis Terrorism

Before embarking upon more substantial analysis of the law of state responsibility, it is vital to survey how the ILC's current rules operate in harmony with international legal principles. Significant emphasis will be placed on the restrictive, and sometimes shortsighted, nature of the ILC's *Articles* when confronted with novel and challenging transnational activities carried out by private actors. These shortcomings will be brought to the fore by the use of practical scenarios, which concomitantly signal the conceptual weaknesses characterizing the scheme of international responsibility and act as a preliminary gloss through which this project should be contemplated. Before turning to specific instances of state involvement, however, one must consider the fact that the relationship between counterterrorism and state responsibility can become permutated in direct correlation with the type and degree of state involvement in terrorist activity.

#### 1. A Gradation of State Involvement

Before invoking specific scenarios, it is important to note that the relationship between the law of state responsibility and counterterrorism is guided by an overarching gradation of state involvement. The idea that a host-state could exert various types of involvement in terrorist activity within its borders is deeply

entrenched in international legal consciousness.[81] In fact, in the 1994 Declaration on Measures to Eliminate International Terrorism the UN General Assembly explicitly recognized this eventuality, by calling on its members to "refrain from organizing, instigating, facilitating, financing, encouraging or tolerating terrorist activit[y]" on their territory.[82] Implicit in this declaration is the idea that "[l]ike other instruments employing this language, the U.N. indicated that accountability therefore applies to a wide spectrum of State involvement in terrorist activity, from State sponsorship to State acquiescence."[83]

While large-scale or catastrophic terrorism poses increasingly intractable challenges for the law of state responsibility, this dissertation will strive to cast a wide enough net to cover the whole gamut of governmental (in)action in terrorism, be it passive or active.[84] More importantly, Chapter 2 identifies an overarching dichotomy that pervades the new paradigm of state responsibility and that divides possible state involvement in terrorism between two polar opposites, based on a binary continuum. Lying at one extremity of the spectrum, direct state responsibility connotes an active involvement in the planning and execution of terrorist attacks by the state, be it through the funding, arming, training, selection and planning of operations or control of the terrorist factions. On the opposite end of the continuum, indirect state responsibility entails a far more subtle, or passive, involvement, ranging from providing logistical support and/or bases of operations to terrorists, to tacit acquiescence of the presence of terrorists on the state's territory, to mere toleration of terrorists paired with fundraising or lobbying on the territory. Obviously, many other increments coexist on the broad spectrum of

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[81] Compare with the respective schematic typologies suggested by the following authors: Antonio Cassese, *The International Community's "Legal" Responses to Terrorism*, 38 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 589, 597-598 (1989); Cohan, *Formulation*, *supra* note 45, at 90-92; Gilbert Guillaume, *Terrorisme et droit international*, 215 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 287-416, 396 (1989-III); Martin, LES RÈGLES INTERNATIONALES, *supra* note 1, at 457-458.

[82] *Measures to Eliminate International Terrorism*, G.A. Res. 49/60, U.N. GAOR, 49th Sess., U.N. Document A/RES/49/60 (1994), at Annex Article 5(a) [hereinafter *Measures to Eliminate*].

[83] Smith, *International Law*, *supra* note 56, at 752.

[84] For an interesting discussion of both active and passive sponsorship of terrorist organizations involving states in South Asia and the Middle East, specifically, see Daniel Byman, DEADLY CONNECTIONS: STATES THAT SPONSOR TERRORISM (2005).

possible state involvement and it is the grey areas, really, that raise the most interesting questions for the purposes of the present study.

It becomes apparent that "states may not be directly implicated in acts of terrorism, but there is a spectrum of state responsibility, ranging from simply being unable to prevent terrorists from using its territory as a base for carrying out such activities, through to actually providing full assistance or control over them."[85] It must be stressed that, at the 'direct involvement' end of the spectrum we find states that are flat-out complicit in terrorism or that wage specific military and paramilitary initiatives through a surrogate terrorist organization that they fully control. At the 'indirect involvement' end, we may be faced with simply negligent states that fail to freeze the assets of terrorist groups or merely tolerate the presence of terrorists on their territory without endorsing any of their activities, simply because they are unable to repel them.

More importantly, it is vital to underscore that both of these extreme scenarios could potentially trigger the law of state responsibility, while the actual degree of liability might remain contingent on, or commensurate with, the level of harm inflicted through the commission of the internationally wrongful act.[86] In fact, a common but perhaps erroneous reading of the authoritative jurisprudence in this field might infer that "[a]pplying the authority provided by the *Corfu Channel Case* to the current international crisis of state-sponsored terrorism, a State cannot *knowingly* acquiesce to terrorist activity within its borders without assuming liability."[87] However, given a translation discrepancy associated with that decision, it is probably fair to argue that the 'consent' or 'knowledge' component should be excised altogether from the primary obligation extracted from the *Corfu Channel* case. More specifically, the French of the original judgment frames the relevant obligation as a duty "pour tout Etat, de ne pas laisser utiliser son territoire aux fins d'actes contraires aux droits d'autres Etats", while the English translation rather invokes an "obligation not to allow knowingly its

[85] Christian M. Henderson, *Michael Byers, War Law*: *International Law and Armed Conflict*, 12 JOURNAL OF CONFLICT AND SECURITY LAW 150, 152 (2007).
[86] See *infra* Chapter 4 , Section B)5.
[87] Smith, *International Law*, *supra* note 56, at 754.

territory to be used for acts contrary to the rights of other States."[88] Whilst the issue of knowledge will be further engaged in subsequent sections,[89] one can see at the outset that the English translation carries, with it, a more onerous burden for establishing responsibility, namely the requirement of knowledge by the host-state that harmful activity is being launched from its territory in order to trigger its international responsibility. In sum, because the French version of the text is authoritative,[90] the obligation of prevention rather entails that host-states ensure that their territories are not used for activities injurious to third parties and/or states. Put another way, a severe obligation may be extracted from the *Corfu Channel* ruling to the effect that states may not allow their territories to be used as launch pads for terrorist excursions, irrespective of whether the involved governments acquiesced to the activities or, arguably, were even cognizant of such operations.[91]

Similarly, the language associated with post-911 state responsibility law has been rather divisive. While some scholars minutely delve into semantics-laden incursions seeking to elucidate the vernacular emerging from years of state support in the Afghanistan-Al Qaeda or Iran-Hezbollah scenarios, for example, others completely discard such endeavours. From a 'qualitative' (to which one should add – 'quantitative' – in some cases) standpoint, some commentators assert that the notions of 'state sponsorship' and 'state support' may, in fact, signal two varying types of state participation in terrorism. In a post-9/11 account, one author declares that "state sponsorship of terrorism is limited to situations where the state planned, directed, and controlled terrorist operations and state support of terrorism includes all other lesser forms of state involvement."[92]

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[88] *Corfu Channel*, *supra* note 67, at 22. [Emphasis added.]

[89] See, specifically, the following sections in Chapter 4, *infra*: B)2.a); B)4.b); B)5.d); B)6.c); C)1.; C)2.

[90] *Corfu Channel*, *supra* note 67, at 37.

[91] Whilst the norm elaborated in *Corfu Channel* might appear general or imprecise (e.g. to abstain from allowing a state's territory from becoming a launch pad for harmful activity), Finnemore and Toope infer that such rule – which they cast as falling under the rubric of 'state responsibility' – has generated strong records of compliance and influence. See Martha Finnemore and Stephen J. Toope, *Alternatives to "Legalization"*: *Richer Views of Law and Politics*, 55 INTERNATIONAL ORGANIZATION 743, 747 (2001).

[92] Scott M. Malzahn, *State Sponsorship and Support of International Terrorism*: *Customary Norms of State Responsibility*, 26 HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW 83,

Similarly, in her 2001 Progress Report on Terrorism and Human Rights, Special Rapporteur Kalliopi Koufa noted that – whilst both terms engender considerable confusion when transplanted into the sphere of state practice – they embody distinct legal meanings, with the notion of 'state support' inherently carrying a lesser form of governmental involvement and control over terrorist activity (e.g. tacit support, logistical support, providing sanctuary, etc.).[93]

Consequently, governments, media and other institutions frequently and liberally brandish these terms for a dual purpose: by pure sensationalistic or propagandistic inclination, or to actually cast judgment on, or pronounce on the legal responsibility of, specific host-states vis-à-vis a terrorist attack.[94] However, this particular construction of those notions failed to acquire credence in some academic circles, with several members of the American Society of International Law's Committee on Responses to State-Sponsored Terrorism voicing their "dissatisfaction with the terms 'state sponsorship' and 'state support' on the ground that these terms lack precise legal content."[95] Nevertheless, it inevitably follows that "state sponsorship and state support of terrorism are solidly entrenched in the discourse of terrorism and are powerful expressions of state complicity, guilt, and participation in acts of terror. As such, these terms serve an important political and legal function, connecting states, which surreptitiously assist terrorists, to their terrible crimes."[96] Consequently, specific levels of governmental input and participation in terrorist activities will be canvassed throughout this project. In the interim, it is imperative to briefly survey potential scenarios on the gradation of state failures in preventing terrorism, in order to shed light on the shortcomings of state responsibility.

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96 (2002). See also *Ibid*, at 97 (further differentiating state 'sponsorship' and state 'support' of terrorism). See also Martha Crenshaw and John Pimlott (eds.), ENCYCLOPEDIA OF WORLD TERRORISM, VOLUME 1 206-207 (1997).

93 See E/CN.4/Sub.2/2001/31, 27 June 2001, at p. 15, para. 54.

94 Malzahn, *State Sponsorship*, *supra* note 92, at 96.

95 The American Society of International Law, NONVIOLENT RESPONSES TO VIOLENCE-PRONE PROBLEMS: THE CASES OF DISPUTED MARITIME CLAIMS AND STATE-SPONSORED TERRORISM 18-19 (1991). See also Abdul Ghafur Hamid, *Maritime Terrorism, the Straits of Malacca, and the Issue of State Responsibility*, 15 TULANE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 155, 164 (2006).

96 Malzahn, *State Sponsorship*, *supra* note 92, at 97.

### 2. Scenario 1: Iran-Hezbollah

Let us reconsider the Iran-Hezbollah example invoked above. The publicly available facts reveal that Iran financed, armed, controlled and directed Hezbollah factions in the context of their terrorist attacks against Israel. According to those facts, the government in Teheran unquestionably controlled and directed this terrorist group and the available evidence tends to indicate that their actions qualify as terrorism. In this quintessential case of direct state involvement in terrorism, Iran's responsibility could clearly be engaged pursuant to a literal reading of the ILC's Article 8, which provides:

> *Conduct directed or controlled by a Stat*e
> 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.[97]

Indeed, this type of scenario falls within the purview of what is classified as 'direct state responsibility' throughout the dissertation.[98] It predominantly hinges on the host-state's direct or active support of individuals in their perpetration of internationally wrongful acts. Therefore, the relevant wrongful act can be construed as emanating from the state, itself, or, at the very least, the state can be seen as complicit in the unlawful act.[99]

Admittedly, the ICJ's holding in the *Genocide* case would seem to run counter to this construction of state responsibility or, at least, to attenuate its persuasiveness with regard to readily establishing direct responsibility for the acts of non-state actors, even in the presence of clear and compelling evidence of significant links existing between the state apparatus and terrorists. While the

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[97] *ILC Articles*, *supra* note 76.

[98] See, particularly, *infra* Chapter 2, Section B).

[99] Interestingly, some commentators are calling for the adoption of more stringent state responsibility parameters in light of international terrorism, a manifestation of which – they argue – can be contemplated through the prism of a theory of state complicity with transnational terrorism. See, e.g., Alison Elizabeth Chase, *Legal Mechanisms of the International Community and the United States Concerning State Sponsorship of Terrorism*, 45 VIRGINIA JOURNAL OF INTERNATIONAL LAW 41-137, 133-136 (2004).

ICJ's judgement operates on the premise that collective responsibility for genocide may be acknowledged, the Court did not find Serbia directly responsible for the genocide perpetrated at Srebrenica. Rather, grounding its reasoning in the Genocide Convention, the Court held that Serbia was only responsible for failing to prevent the genocide and for failing to cooperate with the ICTY in declining to transfer custody over key actors, including Ratko Mladić.[100] As a result, the Court refused to attribute the acts of General Mladić to the Serbian army or to any other official organ of the Serbian governmental apparatus.[101] Irrespective of the fact that the General seemed to have been "administered" from Belgrade, even receiving a promotion to the ranks of Colonel General originating from there, the Court nonetheless adduced from the evidence that Mladić's actions could only be attributed to Republika Srpska.[102]

Whilst this puzzling interpretation of the facts and rigid application of Article 8 by the Court has come under trenchant scrutiny, with some calling the Court's decision-making "an incredible act of myopic legal reasoning",[103] some of the most compelling resistance to the majority's judgment actually emanated from the dissenting voices on the bench. In particular, in his Dissenting Opinion Vice-

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[100] The Court:

> […] notes first that no evidence has been presented that either General Mladić or any of the other officers whose affairs were handled by the 30th Personnel Centre were, according to the internal law of the Respondent, officers of the army of the Respondent – a *de jure* organ of the Respondent. Nor has it been conclusively established that General Mladić was one of those officers; and even on the basis that he might have been, the Court does not consider that he would, for that reason alone, have to be treated as an organ of the FRY [Federal Republic of Yugoslavia] for the purposes of the application of the rules of State responsibility.

*Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 2007 ICJ 91 (February 26, 2007), available online at http://www.icj-cij.org/docket/files/91/13689.pdf (last visited on December 2, 2008) [hereinafter *Genocide Case*], at 139, para. 388.

[101] *Ibid*, at 139, para. 387 ("The Applicant has shown that the promotion of Mladić to the rank of Colonel General on 24 June 1994 was handled in Belgrade, but the Respondent emphasizes that this was merely a verification for administrative purposes of a promotion decided by the authorities of the Republika Srpska.").

[102] See Dissenting Opinion of Vice-President Al-Khasawneh in *Ibid*, at para. 3.

[103] George P. Fletcher and Jens David Ohlin, DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY 194-195 (2008). On academic reactions and problematic aspects of this case, see the following notes and accompanying text, *infra*: 116-17, 124-27, 226-30, 900-01, 919-20, 1013, 1513-14, 1600-01,1743, 1894.

President Al-Khasawneh underscored that Serbia's participation in the genocide can be established by way of "massive and compelling evidence".[104] In addition, he lamented the Court's failure to acquire access over Serbia's records from the Supreme Defence Council, an exercise that may have further bolstered the proposition that there existed a direct connection with the Serbian government.[105] More importantly, noting that the rules of attribution under state responsibility are subject to "subtle variations" and context-specific considerations, the Vice-President compellingly argued that the threshold of control enshrined in Article 8 operates on a variable scale.[106] In fact, this construction of the notion of 'control' undoubtedly finds credence in both past remarks of ILC members[107] and ICTY jurisprudence, most notably in the *Tadić* and *Celebici* cases. In the latter case, the Court expounded that "the 'overall control' test could thus be fulfilled even if the armed forces acting on behalf of the 'controlling state' had autonomous choices of means and tactics although participating in a common strategy along with the controlling State".[108]

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[104] Vice-President Al-Khasawneh's Dissenting Opinion in the *Genocide Case*, *supra* note 100, at para. 3.

[105] *Ibid*, at para. 35.

[106] *Ibid*, at paras. 37-39. It is interesting to compare this Dissenting Opinion with Judge Brower's vocal dissent in *Short v. Islamic Republic of Iran* (1987) 16 IRAN-U.S. CLAIMS TRIB. REP. 76 [hereinafter *Short v. Iran*], at 93-95, 99 and 101 (opining that the Tribunal should have instituted a rebuttable presumption that the departure of U.S. citizens from Iran stemmed from that state's wrongful expulsion, and both lamenting and finding that Khomeini's complete 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.").

[107] See, e.g., *Report of the International Law Commission on the work of its Fiftieth Session, United Nations, Official Records of the General Assembly, Fifty-third Session, Supplement No. 10*, United Nations
doc. A/53/10 and Corr. 1, at para. 395.

[108] *Prosecutor* v. *Delalic*, ICTY Appeals Chamber, 20 February 2001, at para. 47. See also *Prosecutor* v. *Tadić*, ICTY Judgment, IT-94-1-A, 15 July 1999 [hereinafter *Tadić*], at para. 98. The impact of the *Tadić* decision on the law of state responsibility will be thoroughly explored below, particularly *infra* in Chapter 2, Section C). At this juncture, however, a healthy dose of pragmatism is apposite. In particular, it is fair to ponder just how much these ICTY cases actually consecrate a variable standard with regard to Article 8, or whether the ICTY simply disagreed with the ICJ's treatment of the proper non-variable standard.

Whilst the majority's reasoning is problematic, perhaps even retrogressive from the perspective of international justice,[109] it erects relatively few conceptual barriers to the intellectual inquiry ultimately espoused in this project. Surely, the classical interpretation of Article 8 remains inordinately onerous and the Court's reasoning in the *Genocide* case reinforces the commonly shared perception that it will remain extremely reluctant to find a host-state directly responsible for an internationally wrongful act carried out by (seemingly) private actors. The purpose of invoking this first scenario involving terrorism, therefore, was to demonstrate how the rule *might* work in theory, namely where state support for private terrorist enterprises is so flagrant that the mechanics of responsibility are easily engaged. However, giving effect to the content of this scheme might prove challenging in practice, especially in light of strong judicial resistance to loosening the requirements of Article 8, the lack of clarity surrounding the notion of 'control', which will be addressed *infra* in Chapter 4, Section B)2.a), and the refusal to inject context-specific sensibilities into any application of the rules of attribution to the acts of non-state actors. Yet, one positive aspect worth focusing on resides in the Court's inclination to hold Serbia responsible for *failing* to prevent genocide, a posture that can be reconciled with the arguments ultimately endorsed in this dissertation, especially in Chapter 4. The charge levelled in this context, therefore, is international responsibility based on a *failure to act*, which is easily transposable to counterterrorism obligations, as a government's direct liability will be difficult to establish pursuant to the classical rules save in instances of egregious and overt state involvement in terrorism. Thus, the crux of the intellectual inquiry diverts the mechanics of international responsibility towards a model much more compatible with the judicial pronouncements derived from *Corfou Channel* and exemplified in *Tehran Hostages*.

This overture by the ICJ in the *Genocide* case is rather welcome when contrasted with the Iran-U.S. Claims Tribunal's own jurisprudence, which has repeatedly instituted and applied "an exacting, if not impossible, standard of proof

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[109] See, e.g., Kiran Mohan V., *Terrorism and Asymmetric Warfare*: *State Responsibility for the Acts of Non-State Entities – Nicaragua, Tadic, and Beyond*, 8 JOURNAL OF THE INSTITUTE OF JUSTICE AND INTERNATIONAL STUDIES 211, 219 (2008).

on claimants wishing to establish State responsibility".[110] Whilst the Tribunal's jurisprudence is not always consistent,[111] some of its seminal judicial pronouncements have clearly couched its conceptual inclination within the furrow of agency principles and have had some impact on other decisional bodies, such as the Eritrea-Ethiopia Claims Commission.[112] In a series of widely-cited decisions, the Tribunal has insisted upon a crystal clear relationship of agency in order to attribute the acts of non-state actors to Iran, irrespective of that state's failure to protect foreigners, its influence on the private conduct or its widespread policy condoning the expulsion of non-nationals and anti-American sentiment.[113] Similar rulings have been handed down in disputes involving wrongful expropriation, with all three Chambers of the Tribunal expressly or impliedly consecrating the principles of attribution and agency, as now enshrined in the ILC's *Articles*.[114] Equally problematic is the Tribunal's refusal to ascertain Iran's international responsibility on the basis of its failure to exercise due diligence so as to prevent the wrongful private conduct.[115]

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[110] Becker, TERRORISM AND THE STATE, *supra* note 2, at 47. See also *Rankin v. Islamic Republic of Iran* (1987) 17 IRAN-U.S. CLAIMS TRIB. REP. 135 (requiring evidence that specific instructions issued to Iranian revolutionary agents caused the departure and property loss under study, irrespective of the systematic and widespread policy of expulsion of non-nationals that was in place at the time); *Arthur Young & Co. v. Islamic Republic of Iran* (1987) 17 IRAN-U.S. CLAIMS TRIB. REP. 154; *Leach v. Islamic Republic of Iran* (1989) 17 IRAN-U.S. CLAIMS TRIB. REP. 233.

[111] See David D. Caron, *Attribution Amidst Revolution*: *The Experience of the Iran-United States Claims Tribunal*, 84 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 51, 65 (1990).

[112] In a matter related to constructive expulsion, the Eritrea-Ethiopia Claims Commission opined that the impugned expulsion of Ethiopians by Eritrea failed to satisfy the "high threshold" instituted by the Iran-U.S. Tribunal. See Civilians Claims, Ethiopia's Claim 5, 17 December 2004, available online at http:// www.pca-cpa.org/upload/files/ET%20Partial%20Award%20Dec%2004.pdf (last visited on 8 June 2010).

[113] See, e.g., *Short v. Iran*, *supra* note 106, at 85; *William Pereira Associates v. Islamic Republic of Iran* (1984) 5 IRAN-U.S. CLAIMS TRIB. REP. 198; *Computer Sciences Corp. v. Islamic Republic of Iran* (1986) 10 IRAN-U.S. CLAIMS TRIB. REP. 269; *Leonard and Mavis Daley v. Islamic Republic of Iran* (1988) 18 IRAN-U.S. CLAIMS TRIB. REP. 232; *Robert Schott v. Islamic Republic of Iran* (1990) 24 IRAN-U.S. CLAIMS TRIB. REP. 203; *Yeager v. Islamic Republic of Iran* (1987) 17 IRAN-U.S. CLAIMS TRIB. REP. 92 [hereinafter *Yeager*], at 105. But *cf.* Gregory Townsend, *State Responsibility for Acts of De Facto Agents*, 14 ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 635, 651 (1997)

[114] Charles Brower and Jason D. Brueschke, THE IRAN-UNITED STATES CLAIMS TRIBUNAL 442-471 (1998); Allahyar Mouri, THE INTERNATIONAL LAW OF EXPROPRIATION AS REFLECTED IN THE WORK OF THE IRAN-US CLAIMS TRIBUNAL 177-191 (1994).

[115] See Gordon A. Christenson, *Attributing Acts of Omission to the State*, 12 MICHIGAN JOURNAL OF INTERNATIONAL LAW 312, 343 (1991).

Given these evidentiary impracticalities and developments, it will be argued that the preferred course of action for making governments accountable, in situations of support falling short of direct imputability, will no longer hinge on Article 8, but rather focus on the failure of prevention under the aegis of a new indirect responsibility paradigm explored in Chapter 2. As a corollary, it seems that Article 8 is better suited to govern egregious cases of direct and active support of terrorism, a threshold that, if one accepts the *Genocide* ruling on its face, coupled with the *Nicaragua* judgment, remains very difficult to establish even where there is clear and compelling evidence of the host-state's wrongdoing. Thus, it is no surprise that eminent publicists have staunchly criticized the ICJ's formalistic application of attribution principles in the *Genocide* case, which was, arguably, carried out without due regard for intricate evolutionary realities involving a multiplicity of non-state actors operating within a multipolar world.[116] However, as will be discussed in subsequent pages, the *Genocide* case nonetheless provides an interesting foundation for the further development of the 'violation of an obligation of prevention – reparation' tandem, along with related evidentiary issues.[117]

### 3. Scenario 2: Iran-Hezbollah

But let us consider a second example whereby Iran solely provides weaponry and other military support to Hezbollah factions without directing or controlling their terrorist attacks against Israel. Hence, aside from select financial and military assistance, the terrorist organization is completely independent from

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[116] See, e.g., Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 EUROPEAN JOURNAL OF INTERNATIONAL LAW 649 (2007); Antonio Cassese, *On the Use of Criminal Law Notions in Determining State Responsibility for Genocide*, 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 875 (2007); Marko Milanović, *State Responsibility for Genocide*: *A Follow-Up*, 18 EUROPEAN JOURNAL OF INTERNATIONAL LAW 669 (2007). See also Caroline Tosh, *Genocide Acquittal Provokes Legal Debate*, INSTITUTE FOR WAR AND PEACE REPORTING, March 2, 2007 available online at http://iwpr.net/?p=tri&s=f &o=333772&apc_state=henh (last visited on May 20, 2008) (citing Antonio Cassese, Carole Hodge, Andre De Hoogh, Larissa Van den Herik, Robert Cryer and Johannes Houwink ten Cate).

[117] See, e.g., Andrea Gattini, *Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment*, 18 EUROPEAN JOURNAL OF INTERNATIONAL LAW 695 (2007); Ademola Abass, *Proving State Responsibility for Genocide*: *The ICJ in Bosnia v. Serbia and the International Commission of Inquiry for Darfur*, 31 FORDHAM INTERNATIONAL LAW JOURNAL 871 (2008).

the Iranian governmental apparatus and is endowed with its own, distinct chain of command and hierarchy. While carrying out its operations unbeknownst to the Iranian authorities, Hezbollah fires rockets into Israeli territory from its bases of operations in Lebanon and kills civilians.

At the outset, one can immediately see that the bases for attributing an internationally wrongful act to the state, as prescribed in the *ILC Articles on State Responsibility*, start to blur. Given the facts above, it becomes more difficult to demonstrate that Hezbollah was acting on the instructions of, or under the direction or control of, the Iranian state. Indeed, leaving aside the conceptually problematic notion of 'control' for a moment, it would appear that mere instructions flowing from the host-state to non-state terrorists would satisfy the threshold of international state responsibility.[118] However, in the present scenario it becomes rather challenging to prove that Iran exerted that kind of direct influence in the preparation or execution of the attacks. Yet, the fact that it provided weapons and funding to the terrorist organization undoubtedly constitutes an affront to international conscience and decency. Pursuant to the classical rules of agency, Iran would effectively evade direct responsibility in the above scenario.

Moreover, for proponents of an expansive regime of state responsibility, whilst perhaps difficult to countenance morally, this application of the traditional rules remains congruent with classical jurisprudential pronouncements, most notably the ICJ's 1986 decision in the *Nicaragua* case.[119] In that case, the Court was faced with U.S. support of *Contras* rebels in the context of the armed conflict in Nicaragua.[120] Even though the ICJ found that the U.S. had provided various forms of assistance to the guerrillas and that, at some point the rebels were completely dependent on American support to carry out their operations, it

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[118] See, e.g., Anthony Aust, HANDBOOK OF INTERNATIONAL LAW 412-413 (2005) (declaring that "a state is responsible for the acts of private groups that carry out, say, terrorist attacks on its instructions"). On the provision of instructions or the capability of the sending states to issue orders directly on the ground to organizations, see *Schering Corp.* v. *Islamic Republic of Iran*, 5 IRAN-U.S. CLAIMS TRIBUNAL 361, 370 (1984) [hereinafter *Schering*].

[119] *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua* v. *U.S.*), 1986 I.C.J. REPORTS 14 (June 27) [hereinafter *Nicaragua*].

[120] For more background on this account, see Thomas M. Franck, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 60-63 (2002).

ultimately refused to declare that the *Contras* constituted a prolongation of the assisting state.[121] In sum, the Court proclaimed that, in those types of scenarios, even if *preponderant or decisive* – and this is the precise language invoked by the Court – the U.S.'s participation "in the financing, organizing, training, supplying and equipping of the *Contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself" to trigger state responsibility.[122]

In a broad, sweeping judicial precedent, the Court thereby crafted an onerous standard that would become firmly implanted in state responsibility repertoire: the 'effective control' test.[123] According to this rule, the host-state must exert effective control over individual actors when they perpetrate internationally wrongful acts for direct responsibility to attach. This standard is now embodied in the ILC's aforementioned Article 8 and has, most recently and controversially, been applied by the ICJ in the *Genocide Case*.[124] Given, among other things, the possibility that states can wage surrogate warfare via proxies or elude responsibility through other subterfuges, the inadequacy of this line of argument has prompted certain scholars to challenge the desirability and relevance of this rule and to call for the adoption of new standards, better suited to the changing circumstances of transnational terrorism.[125] Such inference is undoubtedly exacerbated by recent technological advances – more specifically, the Internet – which are ripe for engaging in indirect aggression via proxies so as to eschew state responsibility and further obfuscate evidentiary matters.[126] In fact, this line of thinking is precisely what animated Vice-President Al-Khasawneh's

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[121] *Nicaragua*, *supra* note 119, at paras. 110 and 115.
[122] *Ibid*, at para. 115.
[123] *Ibid*.
[124] *Genocide Case*, *supra* note 100, at pp. 142-149.
[125] For a variety of views touching upon these points both before and after the ICJ rendered the *Nicaragua* decision, see, e.g., Slaughter and Burke-White, *An International Constitutional*, *supra* note 43, at 20; Luigi Condorelli, *The Imputability to States of Acts of International Terrorism*, 19 ISRAEL YEARBOOK ON HUMAN RIGHTS 233-246 (1989); Yoram Dinstein, WAR, AGGRESSION AND SELF-DEFENCE 182-183 (3d Edition, 2001); Yoram Dinstein, *The International Legal Response to Terrorism*, in Roberto Ago (ed.), INTERNATIONAL LAW AT THE TIME OF ITS CODIFICATION: ESSAYS IN HONOUR OF ROBERTO AGO (VOL. II) 139-152, 140, 142 (1987).
[126] See, e.g., Scott J. Shackelford, *From Nuclear War to Net War*: *Analogizing Cyber Attacks in International Law*, 27 BERKELEY JOURNAL OF INTERNATIONAL LAW 191, 232 (2008).

searing indictment of the majority's application of Article 8 in the ICJ's recent *Genocide* case. Quite astutely, he voiced a real concern for the fact that "[t]he inherent danger in such an approach is that it gives States the opportunity to carry out criminal policies through non-state actors or surrogates without incurring direct responsibility therefore."[127]

For instance, this is certainly one possible interpretation of Iran's use of Hezbollah factions in order to fulfill specific missions against Israel, albeit through somewhat veiled structures.[128] When considering the fact that Iran arms, trains and funds such units, while also selecting some of their military targets and outlining their missions, it is imperative to ponder whether the *Nicaragua* precedent is adequate to govern the analysis or whether any sort of state assistance to a terrorist organization falling short of the very stringent standard developed in that jurisprudence automatically precludes the application of direct state responsibility. The same line of inquiry can undoubtedly be extended to Syrian sponsorship of Palestinian terrorist factions, another arrangement signalling a subsidizing state's reliance on covert agents or proxy organizations to carry out excursions with a view to eschewing the consequences of an all-out armed conflict and the application of state responsibility.[129] Lebanon's role in providing a safe haven to Hezbollah factions in the southern portion of its territory in order to better strike Israeli civilians also presents a singularly challenging legal scenario. To allow Lebanon to subtract itself from international responsibility because it does not control the extremist elements found within its borders – yet still providing them with territorial sanctuary – appears to run counter to the fight against impunity and, for all intents and purposes, would eviscerate the law of state responsibility of any practical force and utility. In fact, some scholars resoundingly reject the absence of state 'control' of irregular factions as a basis for disabling the application of state responsibility, thereby indicating that new

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[127] Vice-President Al-Khasawneh's Dissenting Opinion in the *Genocide Case*, *supra* note 100, at para. 39.

[128] See, e.g., Keith A. Petty, *Veiled Impunity*: *Iran's Use of Non-State Armed Groups*, 36 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY 191 (2008).

[129] See, e.g., Gregory Rose and Diana Nestorovska, *Towards an ASEAN Counter-Terrorism Treaty*, 9 SINGAPORE YEAR BOOK OF INTERNATIONAL LAW 157, 165 (2005).

rules are direly required.[130] For present purposes, when transposing the *Nicaragua* precedent to counterterrorism, it "communicates the message that the I.C.J. will hold few States accountable for supporting or acquiescing to terrorist activity."[131]

The shortcomings of Article 8 come into sharp relief when considering even more complex factual patterns – or, perhaps more accurately, factually tenuous scenarios for the purposes of triggering state responsibility – such as the aforementioned relationship between Lebanon and Hezbollah factions operating in the southern portion of its territory. Whilst discussing the scope of this provision, one commentator underscores that,

> Hezbollah's inclusion in the Lebanese government, considered in light of Nasrallah's control over both the organization's political and military wings, is relevant in this regard. Yet, there is no evidence that the Hezbollah parliamentarians or cabinet members directed or were otherwise involved in the attacks, or that the Lebanese government controlled the organization, either directly or indirectly. Neither could Hezbollah be fairly characterized as "an organ placed at the disposal of a State by another State" or an entity that "exercised 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" pursuant to Articles 6 and 9, respectively. The organization did not qualify as an "organ" in the meaning of the former, nor was the situation in southern Lebanon of the nature envisioned by the latter.[132]

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[130] See, e.g., Jerzy Kranz, *The Use of Armed Force – New Facts and Trends*, 3 THE POLISH QUARTERLY OF INTERNATIONAL AFFAIRS 68, 81-82 (2006).

[131] Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law*: *Terrorism, the Law, and the National Defense*, 126 MILITARY LAW REVIEW 89, 101 (1989).

[132] Michael N. Schmitt, *"Change Direction" 2006*: *Israeli Operations in Lebanon and the International Law of Self-Defense*, 29 MICHIGAN JOURNAL OF INTERNATIONAL LAW 127, 141-142 (2008). See also Monica Pathak, *Maritime Violence*: *Piracy at Sea & Marine Terrorism Today*, 20 WINDSOR REVIEW OF LEGAL AND SOCIAL ISSUES 65, 77 (2005) (expounding that "[t]his standard [that Article 8 promulgates that there must be a factual link between the *de facto* agent and the State] appears to have steadily eroded by the *Tadic* Case and the global war on terrorism.").

### 4. Scenario 3: Lebanon-Hezbollah (in the Shadows of Iran and Syria's Involvement)

Thus, let us complicate the equation further with a third scenario. In the Iran-Hezbollah scenario, it must be recalled that the terrorist organization was planning and carrying out its attacks from its bases of operations located in the southern portion of Lebanon's territory. Publicly available facts tend to demonstrate that Lebanon at best provided Hezbollah with logistical support, granting it access to bases of operations and training camps on its territory. Upon first glance, this scenario poses considerable challenges to the classical rules formulated under the law of state responsibility. As one commentator notes, "[c]ontroversy and uncertainty arises (heightened post 9/11) as to whether lesser forms of involvement, such as support, 'harbouring', encouragement or even passive acquiescence in wrongs is sufficient to render the acts of criminal organizations attributable to the state."[133] When contemplating both Iran and Syria's involvement in these operations, the 2006 war between Israel and terrorist factions situated in southern Lebanon constitutes a salient and recent example of host-states waging surrogate warfare through a terrorist organization – a structure presumably aimed at eschewing legal responsibility, among other things. Although Hezbollah struck civilian and military targets deep inside Israel, clear and compelling evidence indicated that both Syria and Iran were effectively funding, training and arming Hezbollah. On the last day of the war, catalyzed by a precarious cease-fire induced by Security Council Resolution 1701,[134] 246 rockets were nevertheless launched into Israel.[135]

Manifestly, it would have been impossible for the terrorist organization to pursue its military campaign but-for such assistance. Therefore, a rather straightforward case of direct state responsibility can arguably be ventured against Syria and Iran for past and future Hezbollah attacks, subject to the caveats usually associated with *Nicaragua*'s onerous burden of attribution (and the related

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[133] Helen Duffy, THE 'WAR ON TERROR' AND THE FRAMEWORK OF INTERNATIONAL LAW 49 (2005).
[134] Resolution 1701 of 11 August 2006, U.N. Doc. S/RES/1701.
[135] See *Nasrallah Wins the War*, THE ECONOMIST, August 19-25, 2006, at p. 9

thresholds of 'control' and interdependency that must be met when analyzing the relationship between the host-state and the terrorist organization). In fact, since the end of the Cold War both Iran and Syria have been active and direct sponsors of terrorist enterprises.[136] As discussed previously, such claim would be predicated on aforementioned Article 8 and, potentially, on Article 4, which provides:

> *Conduct of organs of a State*
>
> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.[137]

Conversely, a more challenging claim of indirect responsibility can be levelled against Lebanon for allowing the terrorist organization to operate within its territory (a more direct accusation could be alleged against it, should one accept the argument that Hezbollah has been subsumed under official Lebanese state apparatus).[138] In fact, this latter argument has acquired credence in some academic circles, with some commentators opining that, "under the rules of international state responsibility Hezbollah's acts can be attributed to the state of Lebanon".[139] However, establishing a relationship of 'effective control' between

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[136] See, e.g., Audreay Kurth Cronin, *The Role of Modern States in the Decline and Demise of Terrorism*, in Andrea Bianchi and Alexis Keller (eds.), COUNTERTERRORISM: DEMOCRACY'S CHALLENGE 93-107, 96-97 (2008).

[137] *ILC Articles*, *supra* note 76.

[138] For an application of this reasoning, along with a review of the history of Hezbollah and of the 2006 conflict, see Stefan Kirchner, *Third Party Liability for Hezbollah Attacks Against Israel*, 7 GERMAN LAW JOURNAL 777, 783 (2006).

[139] Achilles Skordas, *Hegemonic Intervention as Legitimate Use of Force*, 16 MINNESOTA JOURNAL OF INTERNATIONAL LAW 407, 442 (2007). For accounts confirming that Hezbollah was subsumed under the state apparatus, along with the influence it wields on Lebanon, see Daniel Byman: *Should Hezbollah Be Next?*, 82 FOREIGN AFFAIRS 54 (2003); *Hezbollah's Dilemma*, April 13, 2005 (author's update), available online at http://www.foreignaffairs.org/20050413 faupdate84277/daniel-byman/hezbollah-s-dilemma.html (last visisted on September 12, 2008);

the Lebanese state and Hezbollah factions would prove rather challenging if contemplated through the prism of the traditional legal rules governing attribution. As will be argued below, such linkage between the host-state and non-state actors in allocating blame for an internationally wrongful act – in this case embodied in Lebanon's failure to prevent transnational terrorism – is best determined as a result of that state's tacit or passive acquiescence of terrorists on its territory (i.e. the 'harbouring and supporting' rule) or, alternatively, of its unwillingness or inability to thwart terrorist threats.[140] Thus, with both Iran and Syria's respective responsibility being difficult to establish under classical rules of attribution, especially in light of the ICJ's recent decision in the *Genocide* case, the dissertation's principal focal point will be to elucidate state responsibility in cases analogous to that of Lebanon. With particular emphasis on *Corfou Channel*, the main argument found herein operates on the premise that states have a primary obligation to control their national territory. Indirect modes of state responsibility are thus required to respond to more vague types of governmental inaction that stray away from the Afghanistan-Al Qaeda model; indeed, more challenging cases arise when governments perpetrate due diligence failures falling short of 'supporting and harbouring' (e.g. Canada fails to prevent LTTE from raising funds on its territory), which, in turn, intertwines other legal norms such as freedom of expression (i.e. what are the legal limits of LTTE's freedom of speech activities in Canada?). The best way to deploy models of indirect responsibility, therefore, is to acknowledge that the territorial dimension underpinning the relationship between terrorists and their host-states not only significantly affects the equation, but remains a catalyst in engaging that very responsibility (i.e. terrorists almost invariably operate out of a given territorial state).[141] Simply put,

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Joshua Slomich, *The Ta'if Accord*: *Legalizing the Syrian Occupation of Lebanon*, 22 SUFFOLK TRANSNATIONAL LAW REVIEW 619, 633 (1998-1999).

[140] For a preliminary discussion of these issues, see Major Jennifer B. Bottoms, *When Close Doesn't Count*: *An Analysis of Israel's Jus Ad Bellum and Jus in Bello in the 2006 Israel-Lebanon War*, APRIL ARMY LAWYER 23, 48-50 (2009).

[141] See, e.g., Matthew C. Waxman, *The Structure of Terrorism Threats and the Laws of War*, 20 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 101, 112 (2010) ("If one believes that the main terrorism threats emanate from territorial sanctuaries that allow for operational planning, training, etc. (as top-down assessment proponents do), then even passive failure to eradicate terrorist havens is more reasonably viewed as an essential facilitating factor. Centralized or tightly

Lebanon was in an altogether different position when compared to Syria and Iran: not only was it better situated to comply with counterterrorism obligations – just like Albania was in a better position to control its national territory in *Corfu Channel* – but it also had to uphold IHL in this specific context.

However, some measure of political realism seems apposite here, as this type of scenario should ineluctably prompt the question of whether the Lebanese state is actually in a position to *effectively* thwart the threat. The Lebanese model is far removed from the reality prevalent in Canada, for instance, where there is strict control over both the territory and terrorist activities taking root therein. As a result, government action against homegrown terrorism – coupled with, and fuelled by, more significant resources – is far more effective under this structure. Conversely, in Lebanon the situations involving terrorism fall within what could be considered a greyer area. Indeed, much of southern Lebanon still eludes effective governmental control, thereby serving as an incubator for terrorist factions to exploit what are essentially, from a pragmatic standpoint, ungoverned spaces.[142] As a result, this type of structure adds an extra layer of complexity to the project of elucidating state responsibility for failing to prevent transborder terrorist excursions. In short, when no effective governmental control over both territory and/or terrorists can materialize, the host-state's lack of capacity to intervene will obfuscate the analysis. As a corollary and as will be discussed in further detail below, the very notion of counterterrorism capacity will also significantly affect the deployment of secondary rules of international responsibility, most notably when ineffective or 'failed' states are implicated.[143] Ultimately, it is difficult to categorically pronounce on such situations in the abstract given the factually-dense nature of determining governmental involvement in terrorism and, from a more indirect perspective, of establishing state failures in preventing wrongful private conduct that they *could*/*should* have

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coordinated structures are assumed to be crucial to conducting large-scale or widespread violence, and to represent vulnerabilities to counter-terrorism efforts. This might suggest that merely allowing terrorist groups to operate from one's sovereign territory should be weighed more heavily in assessing state responsibility for terrorist attacks.").

[142] The pertinence of the notion of 'ungoverned spaces' under the law of state responsibility will be further explored in the context of global warming, *infra* Chapter 5, Section A)3.a).

[143] See, e.g., *infra* Chapter 4, Section B)6.b).

thwarted. In the hopes of somewhat mitigating those analytical pitfalls, a context-sensitive and factually-based policy inquiry will therefore be espoused below, in Chapter 4, Section C)2.

Coming back to the above fact pattern, in the very unlikely and tenuous scenario that Lebanon was found to be complicit with Iran and/or Syria in waging aggression against Israel through Hezbollah factions, Lebanese responsibility could also be triggered through the doctrine of complicity, pursuant to Article 16 of the *ILC Articles on State Responsibility*.[144] That provision reads as follows:

> *Aid or assistance in the commission of an internationally wrongful act*
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> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
>
> (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
>
> (b) the act would be internationally wrongful if committed by that State.[145]

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[144] See, e.g., Natalino Ronzitti, *Italy's Non-Belligerency During the Iraqi War*, in Ragazzi, INTERNATIONAL RESPONSIBILITY, *supra* note 50, at 197, 205 (2005).

[145] *ILC Articles*, *supra* note 76. Interestingly, the notion of complicity, as embodied in Article 16, was recently addressed by the German Federal Constitutional Court in a decision granting extradition of a Yemeni national to the U.S. German officials had arrested the individual pursuant to a warrant issued by the U.S. District Court for the Eastern District of New York, after American authorities had charged the individual with having provided financial assistance to, and having recruited members for, terrorist groups (particularly Al Qaeada and Hamas). The complainant travelled to Germany on the basis of discussions with a Yemeni citizen, who was part of a covert operation led by U.S. authorities aiming to extradite him. Since unlawful behavior by the U.S. would trigger its responsibility under international law in regard to Yemen, "there would be the risk that by extraditing the complainant, Germany would support a United States' action that is possibly contrary to international law, which would make Germany itself responsible under international law *vis-à-vis* Yemen." See Al-M, Individual Constitutional Complaint Procedure, Bundesverfassungsgericht, Federal Constitutional Court, November 5, 2003, 109 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 13, at para. 47, INT'L L. DOMESTIC CTS. 10 (DE 2003). Whilst the Court ultimately allowed the extradition, it made explicit reference to Article 16. For further discussion of the case, see also André Nollkaemper, *Internationally Wrongful Acts in Domestic Courts*, 101 AMERICAN JOURNAL OF INTERNATIONAL LAW 760, 762, 779-780 (2007).

Ultimately, it remains improbable that these scenarios would fit neatly within the long-established rules of attribution. In order to engage both Lebanon and Iran's responsibility, one would have to either accept a relaxation of the standards of attribution or entertain the possibility that a new rule of state responsibility has emerged since the *Nicaragua* case. A case will be made on both grounds throughout this dissertation. That is to say that, on one hand, recent events have significantly challenged, if not loosened, the rules of attribution and, on the other, a new paradigm shift can be identified towards a more expansive rule of indirect responsibility, better suited to tackle non-traditional state sponsorship or toleration of terrorism. At the outset, the *Nicaragua* case can certainly be analogized to cases of terrorism, even though it technically dealt with state-sponsored guerrilla warfare. Whilst those rapprochements are inevitably possible and instructive for the purposes of the present dissertation, it is likely that new legal standards are also being shaped by modern events so as to better adapt to the threats of transnational terrorist activity. Building on this inference, some commentators argue that *Nicaragua*'s 'effective control' test has been overridden by those recent events.[146] Not to mention that in *Nicaragua*, the *Contras*' insurgency was not itself an international crime, thereby making some parallels with the Iran/Syria/Lebanon-Hezbollah relationships challenging. This is not to say, however, that *Nicaragua* does not apply to terrorism, but rather that its rationale might be tempered in certain circumstances. With this in mind, the present project will place more emphasis on the *Corfu Channel* decision when engaging potential legal responses to transnational terrorism, as territorial sovereignty radically alters the nature of the debate and further distances it from the facts of *Nicaragua*. As a corollary, the crux of the arguments to follow will be

[146] For example, Travalio and Altenburg expound that "the rules regarding the imputation of state responsibility for terrorist attacks have evolved since the Nicaragua and Iran Hostages Cases." See Greg Travalio and John Altenburg, *Terrorism, State Responsibility, and the Use of Military Force*, 4 CHICAGO JOURNAL OF INTERNATIONAL LAW 97, 110 (2003), arguing that "these two cases should be confined to their facts and are not applicable to transnational terrorist groups who threaten previously unimagined destruction." *Ibid*, at 105. See also Slaughter and Burke-White, *An International Constitutional*, *supra* note 43, at 20; Peter Margulies, *When to Push the Envelope*: *Legal Ethics, the Rule of Law, and National Security Strategy*, 30 FORDHAM INTERNATIONAL LAW JOURNAL 642, 647 n.21 (2007) (suggesting that a "broader standard is appropriate to encourage State diligence").

premised on the existence of a primary obligation of states to control their national territory. This last scenario thus brings us squarely to those relevant events that have significantly challenged the law of state responsibility, and which will be explored in one last brief case study.

**5. Scenario 4: Afghanistan-Al Qaeda**

Let us now turn to the substance of the study, namely the events crystallizing the shift to a rationale of indirect responsibility as will be discussed in the next chapter. Similarly to the Lebanon-Hezbollah scenario invoked above, one can rely on the Afghanistan-Al Qaeda precedent to legitimize the possible emergence of a new rule of state responsibility. More specifically, it now appears that the international response to the 9/11 attacks has, for all intents and purposes, disabled the effective control test and the *Nicaragua* precedent, at least in cases of state-supported or state-tolerated terrorism.[147]

Prior to 9/11, Afghanistan volunteered no direct support to the Al-Qaeda network, rather providing it with limited logistical support, such as access to training camps and bases of operation on its territory. As will be discussed in Chapter 2, it becomes clear that we are no longer confronted with the classical paradigm of direct state involvement in terrorism, whereby the analysis hinged on the internationally wrongful act itself (namely the terrorist attack), perpetrated by non-state actors but nonetheless attributable to the host-sate because of its complicity or participation in the chain of events. This last scenario rather falls under the rubric of indirect state involvement in terrorism and centres on the host-state's actual and wrongful conduct, be it synonymous with negligence vis-à-vis prevention or with a failure to comply with its due diligence obligations.

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[147] See, e.g., Carsten Stahn, *Terrorist Acts As "Armed Attack"*: *The Right to Self-Defense, Article 51 (1/2) of the UN Charter, and International Terrorism*, 27 FLETCHER FORUM OF WORLD AFFAIRS 35, 37 (2003). See also Carsten Stahn, *"Nicaragua is Dead, Long Live Nicaragua"*: *The Right to Self-Defense Under Art. 51 UN Charter and International Terrorism*, in C. Walter *et al.* (eds.), TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS LIBERTY? 827-877 (2004); Rüdiger 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?*, 7 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 1-78 (2003).

This dissertation will argue that this evolution towards indirect state responsibility for terrorism remains consonant with recent Security Council practice, which almost invariably conflates the obligation of prevention with the duty of all states to refrain from supporting or harbouring terrorists on their territory. More importantly, this formula appears to better reflect modern reality with regard to state support of terrorism, except in clear-cut cases of direct state involvement (e.g. Iran, Libya, Syria). When applying this rationale to the situation prevalent in Afghanistan before 9/11, a model of indirect state responsibility corresponds: publicly available facts reveal that the government of Afghanistan, at best, provided logistical support to Al-Qaeda without having direct participation in the planning or execution of the 9/11 attacks. Quite to the contrary, the public record demonstrates that Al-Qaeda acted autonomously within Afghan territory.[148]

In the future, whenever a terrorist strike is launched from, or organized on, a state's territory, the international community might very well examine what means that state could have employed to prevent the excursion. Thus, the focus of the inquiry now shifts to questions of governmental inaction when there was a positive duty to intervene, be it motivated by complacency, negligence or wilful blindness. In advocating possible models of responsibility to counteract terrorism, significant emphasis will be placed on the assertion, now apparent from the foregoing, that the ILC's *Articles* were drafted with more traditional direct-state-involvement-vis-à-vis-individuals relationships in mind, particularly given their insistence on the notions of control and interdependency.[149]

### D) Adapting the Law of State Responsibility to Counterterrorism

It follows from the preceding considerations that the law of state responsibility for failing to prevent terrorism emanating from, or taking root on, national territory must be clearly ascertained and further developed. Compelling

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[148] See, e.g., Davis Brown, *Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses*, 11 CARDOZO JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 1, 11 (2003).

[149] In all likelihood, this model could fit within what Tal Becker has labelled the traditional 'agency paradigm'. See, generally, TERRORISM AND THE STATE, *supra* note 2.

academic and non-academic calls have been issued to overhaul certain rules of international liability. This project strives to answer those calls and help remedy the conceptual dearth. One possible solution is to envisage the ILC's *Articles* as a contextual tool – part codified customary law, part evolutionary vehicle – capable of adapting to modern and contemporaneous realities. Even if critical observations or revisions to the *Articles* are put forth, one hopes that their current structure can provide for some level of integration of those criticisms without resorting to new codification. As a result, their application and development should reflect those challenges that are ultimately espoused.[150] This project seeks to advance such challenges, especially with regard to the rules of attribution and Article 8.[151]

Along similar lines, Dupuy's prophetic words should be taken into account, as a quintessential preface to this work. Specifically referring to Article 8, he notes:

> This formulation leaves much room for interpretation. In particular, it is not quite clear whether "acting on the instructions" of a State is considered by the ILC as being exactly on the same level as being "under the direction or control" of the State. This ambiguity was most probably left purposely in order to maintain some flexibility for different possible interpretations.[152]

Subsequent pages will heed that invitation and attempt to shed greater light on politically desirable and more efficient rules of state responsibility, so as to better contribute to making the "war" on terror a preventive rather than curative effort.[153] Not only is this legal exploration desirable from the perspective of international law, it also carries with it significant policy implications, both from domestic and international standpoints.

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[150] See, e.g., Chusei Yamada, *Revisiting the International Law Commission's Draft Articles on State Responsibility*, in Ragazzi, INTERNATIONAL RESPONSIBILITY, *supra* note 50, at 117-123, 118.
[151] For the text of Article 8, see *supra* note 97 and accompanying text.
[152] Dupuy, *State Sponsors*, *supra* note 29, at 10.
[153] But *cf*. Major Michael D. Banks, *Addressing State (Ir-)Responsibility*: *The Use of Military Force as Self-Defense in International Counter-Terrorism Operations*, 200 MILITARY LAW REVIEW 54, 57 (2009).

## E) Policy Relevance

The proposed inquiry has policy relevance for a variety of reasons. First and foremost, certain facets of the debate surrounding the application of state responsibility to transnational terrorism have attracted attention from varied intellectual circles. For instance, the idea of engaging Security Council action in promoting both counterterrorism policymaking and the international rule of law lies at the very core of recent high-level inquiries bridging the divide between academic and policy communities.[154] As will be discussed throughout this dissertation, these initiatives are particularly relevant when considering the fact that the Security Council has, itself – through the adoption of Resolution 1373, for example – become an active policymaker on counterterrorism issues and arrogated a new and highly controversial legislative power on the world stage. In response, a recent expert-level joint report by New York University's School of Law and the Austrian government concludes that the Council's recent prounoucements in this area constitute "a tantalizing short-cut to law".[155] From a domestic perspective, it is no secret that Canada has consistently been a champion in promoting the international rule of law and human rights by participating in this transnational legal dialogue. Therefore, it remains in a unique position to influence and shape international policymaking in the hopes of striking a balance between upholding human rights, combating terrorism efficiently and promoting multilateralism, be it through heeding Security Council directives or instituting more informal transnational governmental networks.

Equally important to the project at hand is the abovementioned objective of promoting transnational cooperation on counterterrorism policy, which ineluctably entails a strong focus on intelligence-gathering and intelligence-

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[154] For a more focused chapter-long treatment of the Security Council's role in interpreting and applying the rules of state responsibility to failures of preventing terrorism, see *infra* Part II.

[155] Simon Chesterman of the New York University School of Law's Institute for International Law and Justice and the Austrian Federal Ministry for European and International Affairs, THE UN SECURITY COUNCIL AND THE RULE OF LAW: THE ROLE OF THE SECURITY COUNCIL IN STRENGTHENING A RULES-BASED INTERNATIONAL SYSTEM: FINAL REPORT AND RECOMMENDATIONS FROM THE AUSTRIAN INITIATIVE, 2004-2008 (2008), available online at http://www.bmeia.gv.at/fileadmin/user_upload/bmeia/media/Vertretungsbehoerden/New_York/Kandidatur_SR/FINAL_Report_-_The_UN_Security_Council_ and_the_Rule_of_Law.pdf, at 12.

sharing. Vigilant law enforcement and intelligence-sharing are both vital to an effective counterterrorism campaign not only on a national level (i.e. between sub-national agencies) but also on a transnational level. For instance, intelligence-sharing networks and exchanges between Canada and the U.S. after 9/11 offer a rich and oftentimes divergent record, a topic that has featured prominently in certain policy communities' research dialogue.[156] As noted in those communities' programme of research, Canada's and the U.S.' respective perceptions of the risks and threats involved in fighting terrorism have also been, at times, divergent.[157] More importantly, there is no doubt that states' perception and reaction to the perceived risk of domestic and transnational terrorism will have a considerable impact not only on the formulation of their own policies, but also on their observance of international counterterrorism obligations for the purposes of state responsibility law and adherence to Security Council resolutions. This type of inquiry adequately foreshadows the notion of risk assessment -- which pervades the present project, particularly Chapter 4 -- and the role of both global warming and the precautionary principle in drawing policy-based analogies with the state responsibility/terrorism research agenda underlying the present work.[158]

In short, and for the purposes of state responsibility and the present dissertation, states' compliance with international legal undertakings hinges, to a large extent, on the ways in which domestic policies and reactions mirror some degree of commitment to those international obligations. A case in point, illustrating the practical and policy effects of Security Council engagement in counterterrorism issues, resides in the Council's recent handing down of economic sanctions targeting individuals suspected of entertaining links with Al

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[156] See, e.g., Robert Henderson and Fred Hitz, *One Issue, Two Voices*: *Intelligence Sharing Between Canada and the United States*: *A Matter of National Survival*, The Canada Institute, Woodrow Wilson International Center for Scholars, available online at http://www.wilsoncenter.org/topics/pubs/Canada_6. pdf (last visited on 30 May 2009).

[157] See, e.g., Karlyn Bowmam and Frank Graves, *One Issue, Two Voices*: *Threat Perceptions in the United States and Canada*: *Assesing the Public's Attitudes Toward Security and Risk in North America*, The Canada Institute, Woodrow Wilson International Center for Scholars, available online at http://www.wilsoncenter.org/topics/pubs/threats.pdf (last visited on 30 May 2009).

[158] See, in particular, *infra* Chapter 5, Section A)3.

Qaeda and the Taliban.[159] On one hand, relevant states must certainly take stock of these important legal prescriptions in order to ensure that they meet their international obligations. At the same time, however, the states implementing those international policies must also ensure that they do not conflict with other equally important human rights undertakings.[160] This policy quest undoubtedly starts with a healthy horizontal dialogue at a sub-national level (e.g. law enforcement cooperation between Montreal and Toronto), at a bilateral level (e.g. Canada-U.S.), at a regional level (e.g. European Union) and, finally, at a truly transnational level.

In that regard – and perhaps evincing something of a false start – Canada has recently taken the lead in proposing rhetorically cautious but legally superfluous legislation dealing with holding states accountable for harbouring terrorists. The proposed *Justice for Victims of Terrorism Act* would aim at removing state immunity for those states that the Canadian government deems "supporters of terrorism", thereby amending the *State Immunity Act* and effectively creating a mechanism to sue both terrorist organizations and foreign states for acts of terrorism.[161] Whilst the potential introduction of this legislation may legitimately be construed as a 'political ploy' -- as it could cogently be argued that similar mechanisms are already at the disposal of victims of transnational terror -- the proposed legislative scheme nonetheless propels the issue of state responsibility to the forefront of post-9/11 legal and political

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[159] See the following Security Council resolutions: 1267 of 15 October 1999; 1333 of 19 December 2000; 1363 of 30 July 2001; 1388 of 15 January 2002; 1390 of 16 January 2002; 1452 of 20 December 2002; 1455 of 17 January 2003; 1456 of 20 January 2003; 1526 of 30 January 2004; 1617 of 29 July 2005; 1699 of 8 August 2006; 1730 of 19 December 2006; 1732 of 21 December 2006; 1735 of 22 December 2006.

[160] See, e.g., *Yassin Abdullah Kadi and Al Barakaat International Foundation* v. *Council of the European Union*, Judgment of the European Court of Justice, 9 September 2008, available online at www.curia.europa.eu [hereinafter *Kadi and Al Barakaat*] (invalidating a regulation promulgated by the Council of the EU targeting specific individuals by virtue of UN Security Council resolutions and, therefore, arrogating power to review and control such powers and the resolutions of the Security Council, albeit indirectly).

[161] For more background on this proposed legislation, see, e.g., Gloria Galloway, *Van Loan Details Terror-victim Bill*, GLOBE AND MAIL, June 3, 2009. Interestingly, there is ongoing litigation in the U.S. involving civilians attempting to recoup damages against the PLO for terrorist attacks carried out in Israel. See, e.g., Daniel Wise, *Effort to Collect $116 Million From PLO May Go to Trial*, NEW YORK LAW JOURNAL, May 15, 2008, available online at http://www.law.com/jsp/article.jsp?id=1202421401555 (last visited on 9 July 2009).

debate.[162] Indeed, it strikes at the core of the primary inquiry of the present dissertation: holding states responsible for failing to prevent terrorism. Under the widely-discussed legislative project, it appears that state funding of terrorism and more passive types of state involvement might be sufficient to trigger the application of the *Act* and justify litigation against the responsible states. This prospect will, of course, have significant implications for the paradigm shift towards indirect responsibility advocated below in Chapter 2, along with the modulated content of the obligation of prevention explored in Chapter 4.

More importantly, whilst considerations purporting to clarify public international law when circumscribing state responsibility in relation to non-state actors remain paramount in guiding the analysis, these foregoing policy concerns should always be contemplated as a preliminary gloss through which the present dissertation should be read. With this initial direction now conveyed, the dissertation now turns to the precise and central objective of determining what role state responsibility law can play in the prevention and suppression of transnational terrorism. In so doing, the next chapter explores the post-9/11 paradigm shift towards a law of indirect state responsibility for failing to prevent transnational terrorism.

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[162] For trenchant criticism of the proposed legislation, see René Provost's commentary in both Gloria Galloway, *Terror-victim Law Would Only Apply to Listed Countries*, THE GLOBE AND MAIL, June 8, 2009 and *Canada Hurt by Anti-Terror 'Diversion' Law*, THE STAR PHEONIX, June 4, 2009. Absolutely crucial to the discussion found in subsequent pages is Provost's assertion that one of the major problems associated with this legislation "would be to attribute an act of terror to a foreign government". In fact, attribution of internationally wrongful acts to host-states will remain a central point of analysis throughout the present project, and will be thoroughly explored below in Chapter 4.

## CHAPTER 2: THE IMPACT OF 9/11 ON INTERNATIONAL LAW AND BEYOND[163]

> 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 by the United States and our friends.
>
> – President George W. Bush[164]

### A) General Remarks

Implicit in the foregoing is the idea that, of all the challenges facing the international community, the role of state responsibility is certainly a source for concern. In fact, it has been described as the "most ambitious and most difficult topic of the codification work of the International Law Commission."[165] This problem is further compounded when secondary norms are applied to terrorist activity in order to hold governments accountable for failing to prevent such acts. Whilst this project will argue that the content of the relevant primary counterterrorism obligations is not always adequately circumscribed, even if one assumes that those prescriptions are relatively straightforward, the task of triggering and deploying state responsibility in practice remains 'hotly contested' and subject to political whims, factual idiosyncrasy and, often, concealment of the relevant constitutive acts from public view.[166] To juxtapose an extra layer of complexity with the present inquiry, one should always keep in mind that the true challenge in elucidating the law of state responsibility for fact-specific transnational phenomena lies in devising appropriate and practicable legal

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[163] Some of the premises of what follows considerably expand on the remarks found in *Babysitting Terrorists*: *Should States Be Strictly Liable for Failing to Prevent Transborder Attacks?*, 23 BERKELEY JOURNAL OF INTERNATIONAL LAW 615 (2005).

[164] Cohan, *Formulation*, *supra* note 45, at 93 (quoting Elisabeth Bumiller, *Bush Says War May Go Beyond Afghan Border*, NEW YORK TIMES, November 22, 2001, at B2).

[165] Peter Malanczuk, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 254 (7th ed. 1997). See also Higgins, PROBLEMS & PROCESS, *supra* note 49, at 148 (speaking to the inherent difficulty in codification); Provost, *Introduction*, *supra* note 77, at XII (underscoring the ILC's difficulties in reaching a consensus on the rules to be codified, and stating that "the diversity of opinions within the Commission mirrors the many real substantial uncertainties which characterize this field of international law").

[166] See, e.g., Becker, TERRORISM AND THE STATE, *supra* note 2, at 150-151.

consequences to an internationally wrongful act.[167] In that regard, contemporaneous events are instructive in shedding light on the parameters governing the law of state responsibility, be they the 1968 Beirut raid or the response to Afghanistan's failure to prevent terrorism in 2001. Given the state of modern warfare and ideology-motivated violence,[168] such episodes pose considerable challenges to the law of state responsibility and, on a broader note, to the project of better integrating non-state actors within international legal frameworks.

It should be stressed that the events surrounding 9/11 significantly challenged existing law, a phrase that is now considered *cliché*, but nonetheless true with regard to international law and, more specifically, state responsibility.[169] Many factors are now extending the debate beyond simply assigning blame to negligent or 'wilfully blind' governments. Whether obscured by intricate information networks, new technologies like the Internet, the sophisticated cellular structure of organizations like Al Qaeda, complex financial systems, convoluted political realities, or other factors, the level of government involvement in terrorist activities is no longer readily discernible in all instances.[170] We now live in an era dominated by security concerns and some scholars call for a revamping or, at least, a reassessment of the parameters of state responsibility vis-à-vis terrorism so as to incentivize governments to comply with

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[167] Further exploration of this topic is found, *infra*, in Chapter 5, Section B)1.

[168] On the fundamentals of new terrorism and modern warfare, generally, see Matthew Lippman, *The New Terrorism and International Law*, 10 TULSA JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW 297 (2003); Louis P. Pojman, *The Moral Response to Terrorism and Cosmopolitanism*, in James P. Sterba (ed.), TERRORISM AND INTERNATIONAL JUSTICE 135, 138-141 (2003).

[169] Several commentators generally conclude that U.S.-led military action in Afghanistan has fundamentally challenged international law. See Richard A. Falk, *Rediscovering International Law after September 11th*, 16 TEMPLE INTERNATIONAL & COMPARATIVE LAW JOURNAL 359-369 (2002); Christine Gray, *A New War for a New Century?*: *The Use of Force Against Terrorism After September 11, 2001*, in P. Eden and T. O'Donnell (eds.), SEPTEMBER 11, 2001: A TURNING POINT IN INTERNATIONAL AND DOMESTIC LAW 97-126 (2005); Laurence R. Helfer, *Transforming International Law After the September 11 Attacks?*: *Three Evolving Paradigms for Regulating International Terrorism*, in M.L. Dudziak (ed.), SEPTEMBER 11 IN HISTORY: A WATERSHED MOMENT? 180-193 (2003); John F. Murphy, *International Law and the War on Terrorism*: *The Road Ahead*, 32 ISRAEL YEARBOOK ON HUMAN RIGHTS 117-163 (2003).

[170] For support of this idea, see Barnidge, Jr., NON-STATE ACTORS, *supra* note 7, at 153-154 and 154 n.84.

counterterrorism obligations and to promote transnational cooperation.[171] Furthermore, it is common knowledge that some countries are used as frequent launch pads or training grounds for terrorist organizations. If the events following 9/11 have taught us anything, it is that we must avoid attributing responsibility to those states indiscriminately and rather engage in a serious and methodical analysis of the conduct of the governments involved.

Of particular importance to the discussion are the jurisprudential developments that have occurred over the last 70+ years. As discussed above, one might invoke the *Nicaragua* decision – a precedent (arguably) subsequently tempered by the *Tadić* judgment – which contributed significantly to the law or, at least, to the evolution of the academic discussion.[172] More relevantly, the *Corfu Channel* and *Tehran Hostages* cases are also immensely instrumental in this area and, in many ways, respectively mark the starting point and confirmation of the modern concept of indirect state responsibility.[173] Since the 1960s and 1970s, many terrorist attacks punctuated our collective history and stirred the discussion, be they the 1982 Israel-Lebanon conflict or the 1998 bombing of U.S. Embassies in Africa. Some of these accounts must be revisited to shed some light on the level of responsibility of the states involved, so as to determine whether a shift in accountability mechanisms is acquiring traction in international legal circles.

In 2001, the ILC adopted the *Articles on State Responsibility*, a monumental piece of the legal mosaic on state responsibility. The same year, unprecedented attacks were carried out on U.S. soil by Al Qaeda terrorists, events that are remembered as '9/11'. Following 9/11, the U.S. staged a military campaign in Afghanistan, which subverted the *Nicaragua* and *Tadić* legacy and, as will be argued, somewhat crystallized the definite move toward the

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[171] For a discussion of the omnipresence of security concerns in post-9/11 legal policy and more generally, see Jutta Brunnée and Stephen J. Toope, *Canada and the Use of Force*: *Reclaiming Human Security*, 59 INTERNATIONAL JOURNAL 247, 248, 249, 258–60 (2004); Frédéric Mégret, *"War"? Legal Semantics and the Move to Violence*, 13 EUROPEAN JOURNAL OF INTERNATIONAL LAW 361, 367–68 (2002). See also, generally, Robert Barnidge, Jr., *Should National Security Trump Human Rights in the Fight Against Terrorism?*, 37 ISRAEL YEARBOOK ON HUMAN RIGHTS 85 (2007).

[172] *Nicaragua*, *supra* note 119; *Tadić*, *supra* note 108.

[173] *Corfu Channel*, *supra* note 67; *Tehran Hostages*, *supra* note 67.

implementation of indirect responsibility in international law.[174] These events, coupled with today's soaring technological possibilities and far-reaching effects of terrorist structures, constitute a larger reality, thereby undoubtedly warranting further consideration in better integrating non-state actors in international law and identifying potential deterrence models in the face of enhanced transnational terrorist capacity.

As time passes, international law evolves and, with it, the literature and jurisprudence should follow suit. Many unforeseen elements now shape and inform the equation of state responsibility and, as if confronted with a complex algorithm, we must break down the pieces of this legal puzzle. Since the literature is far from dispositive on the issue, this dissertation proposes to reopen the debate on indirect state responsibility and weigh different arguments in order to shed light on this politically-charged area. The chapter will draw a distinction between direct and indirect responsibility and argue that the international community has, in fact, moved toward a model of indirect responsibility. The ensuing remarks shall, therefore, draw abundantly on past Security Council practice and select ICJ precedents. In developing this argument, the chapter will first delve into the direct/indirect responsibility dichotomy before entertaining a discussion on the foundational concept of attribution under the law of state responsibility. The chapter will then move on to the more prescriptive task of identifying a shift under international law, now also mirrored in many domestic criminal and civil liability legal structures, toward more indirect modes of responsibility. In so doing, it will first trace the evolution of indirect responsibility in contemporary international law whilst also assessing the emergence of the 'harbouring and supporting' rule in counterterrorism contexts. After underscoring the application of that norm in a sampling of pre-9/11 episodes, the chapter will ultimately culminate in exploring the Security Council's

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[174] For example, several commentators agree that the response to the 9/11 has disabled the effective control test. See Stahn, *Terrorist Acts*, *supra* note 147, at 37; J. Wouters and F. Naert, *Shockwaves Through International Law After 11 September*: *Finding the Right Responses to the Challenges of International Terrorism*, in C. Fijnaut, J. Wouters and F. Naert (eds.), LEGAL INSTRUMENTS IN THE FIGHT AGAINST INTERNATIONAL TERRORISM: A TRANSATLANTIC DIALOGUE 411-546 (2004).

role and scope of influence in this debate so as to set the stage for the normative argument put forth in Chapter 3 on the possible institutionaliztion of the implementation of state responsibility.

**B) Direct Versus Indirect Responsibility**

As prefaced above, an overarching dichotomy guides the law of state responsibility for internationally wrongful acts.[175] On one hand, a state may be held accountable if it authored a commission or omission leading to a wrongful act. Hence, through its overt and direct involvement in the matter, whether through aiding or abetting a given deed, the state triggers the mechanism of state responsibility.[176] In such cases, since the action can be linked directly to the state in question, attribution of the wrongful conduct flows to the state and responsibility attaches. This phenomenon frequently materializes when the act in question is carried out by formal instrumentalities, agents of the state or non-state actors that are deemed synonymous with a prolongation of the state.[177] As seen in the previous chapter under Section C)2., we may use direct state responsibility in the context of modern terrorism to attribute the crimes of a terrorist organization to a host-state, as though they amounted to the actions of the state itself. Although hardly defensible, this is one possible interpretation of the events surrounding 9/11, as the government of Afghanistan could be deemed to have acted through individuals or a prolongation of the state, namely members of Al Qaeda. Based on the publicly available facts, however, it is not likely that the government of Afghanistan was waging a surrogate war against the U.S. through

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[175] For a recent application of this dichotomy, see Abdul Ghafur Hamid, *Maritime Terrorism, the Straits of Malacca and the Issue of State Responsibility*, paper presented at the 3rd Asian Law Institute (ASLI) Conference, Shanghai, China, on 25-26 May 2006, available online at http://staff.iiu.edu.my/ghafur/Published%20Articles/Maritime%20Terrorism,%20Straits%20of%20Malacca%20and%20the%20Issue%20of%20State%20Responsibility.pdf (last visited on May 9, 2008), at 9 n.31 and accompanying text (expounding that "[t]errorist acts are normally committed by private persons. However, a State may directly or indirectly be involved in the terrorist activities").

[176] See, e.g., Michael N. Schmitt, COUNTER-TERRORISM AND THE USE OF FORCE IN INTERNATIONAL LAW 44-45 (2002).

[177] On state responsibility for the unlawful acts of agents of state, see, e.g. Franciszek Przetacznik, *The International Responsibility of States for the Unauthorized Acts of Their Organs*, 1 SRI LANKA JOURNAL OF INTERNATIONAL LAW 151 (1989). On state responsibility for the acts of non-state actors, see *ILC Articles*, *supra* note 76, Articles 8 and 11.

members of Al Qaeda and this assertion was never explicitly put forth. Although difficult to substantiate, such a claim is not novel. For example, the possibility of a host-state waging war against the U.S. through a terrorist organization has also been raised very recently in the context of Iraq.[178]

On the other hand, there exists a more subtle type of responsibility, one that hinges on the indirect involvement of a state in a wrongful act. Indirect responsibility usually arises when there is no causal link between the author of the wrongful act and the host-state.[179] For instance, if confronted with a territory that is used as a launch pad for terrorist activities in which the government in place has no knowledge of such conduct and no ties whatsoever to terrorist operations, it would be difficult to directly impute an attack to that state. At that juncture, the analysis focuses on the state's duty of preventing attacks and whether the state failed to thwart a given terrorist strike emanating from its territory. As seen in Chapter 1, Sections C)3.-5., such scenarios often involve passive acquiescence or tacit toleration of irregular units on a sanctuary state's territory. Indeed, the state's breach of its international obligation can also stem from the failure to regulate the internationally wrongful activity or from the failure to provide a remedy for the harm (although, for present purposes, this study will focus primarily on the breach of the obligation of preventing terrorism, which is nonetheless connected to other ancillary undertakings, such as the duties to extradite, to prosecute and to freeze terrorist assets).[180] This approach certainly finds partial grounding in classical expressions of the 'separate delict theory', formulated in a string of arbitral awards handed down by bilateral decision-

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[178] See, e.g., Jason Pedigo, *Rogue States, Weapons of Mass Destruction, and Terrorism*: *Was Security Council Approval Necessary for the Invasion of Iraq?*, 32 GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 199, 217 (2004).

[179] On this issue, see Becker, TERRORISM AND THE STATE, *supra* note 2, at 285-360 (advocating the implementation of causation-based state responsibility for terrorist acts). On the issue of causation in state responsibility, generally, see François Rigaux, *International Responsibility and the Principle of Causality*, in Ragazzi, INTERNATIONAL RESPONSIBILITY, *supra* note 50, at 81-92; *infra*, Chapter 4, Section A).

[180] For support of the initial proposition pertaining to 'indirect responsibility' in this sentence, see, generally, Craig Scott, *Translating Torture into Transnational Tort*: *Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms*, in Craig Scott (ed.), TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION 45-63, 47-48 (2001). For a discussion of the obligation of preventing terrorism, as envisaged in the present dissertation, see *infra* Chapter 4, Section C).

making bodies.[181] Keeping in line with the general principle of non-attribution of private conduct, those bodies espoused a formal distinction between the original internationally wrongful act carried out by individuals and the host-state's own wrongdoing (e.g. failure to punish, extradite or exercise due diligence in repressing the harm). For instance, in the *Lovett Case* the U.S.-Chile Claims Commission of 1892 had to weigh in on the murder of the governor of the local garrison by guerrillas in Chile. Reaffirming the principle of non-attribution, the Commission declared 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."[182] Similarly, an umpire in the *Sambiaggo Case* of 1903 reasoned in the same vein, expounding 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."[183] Like-minded incarnations of the doctrine were also formulated in early arbitral awards dealing with state responsibility-derived aspects of varied factual scenarios, including the *Underhill Cases* in 1903[184] and the *Home Frontier and Foreign Missionary Society Case* of 1920.[185]

The oft-discussed decision of Max Huber in the *British Property in Spanish Morocco Case* of 1925 also aligned, both conceptually and philosophically, with this construction of indirect state responsibility.[186] Indeed, Huber opined that "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 consquences as far as possible. Responsibility for the

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[181] On the separate delict theory, see Becker, TERRORISM AND THE STATE, *supra* note 2, at 24-38.
[182] *Frederik H. Lovett (United States v. Chile)* (1892), reprinted in John Bassett Moore, 3 HISTORY AND DIGEST OF INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 2991 (1898).
[183] *Sambiaggo Case (Italy v. Venezuela)* (1903), 10 REPORTS OF INTERNATIONAL ARBITRAL AWARDS 499, 512.
[184] *Underhill Cases (United Kingdom v. Venezuela)* (1903), 9 REPORTS OF INTERNATIONAL ARBITRAL AWARDS 155, 159.
[185] *Home Frontier and Foreign Missionary Society of the United Brethren in Christ (United States v. United Kingdom)* (1920), 6 REPORTS OF INTERNATIONAL ARBITRAL AWARDS 44.
[186] *British Claims in the Spanish Zone of Morocco Case (United Kingdom v. Spain)* (1925), 2 REPORTS OF INTERNATIONAL ARBITRAL AWARDS 615.

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."[187] Subsequently, Huber had to examine issues related to Spanish responsibility for transboundary thefts in the international zone of Morocco carried out by inhabitants of the Spanish zone. Whilst the arbitrator did not infer responsibility in light of Spain's failure to prevent the thefts, he nonetheless assessed its obligation to prosecute the perpetrators. On that front, Huber held 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."[188]

However, Huber somewhat tempered this statement by adding that "[i]t would…in no circumstances be justifiable to attribute responsibility for the entire damage to a Governement 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."[189] A notion that state responsibility flowing from failing to prevent or punish does not constitute an exception to the principle of non-attribution can certainly -- and persuasively -- be extracted from that case. In sum, the thrust of state responsibility in those cases operates by virtue of the host-state's own wrongdoing and not because of some state-condoned policy or complicity facilitating the act (i.e. the operation of a primary rather than secondary rule).

A series of additional cases bolster the intial postulate that non-attribution entails that responsibility centres not on grounding accountability on the privately-inflicted wrongful act but rather on the state's failure to comply with its own international obligations. According to classical formulations of the principle of non-attribution, a state's passivity is not sufficient, in and of itself, to trigger the application of responsibility; the state in question must clearly be acting in contravention to an international obligation in relation to the wrongful

[187] *Ibid*, at 641-642.
[188] *Ibid*, at 709.
[189] *Ibid*, at 709-710.

act carried out by private parties.[190] In addition to garnering academic credence throughout the 20th Century,[191] this posture was perhaps best exemplified through the settlement of international claims. For instance, the *Noyes Case* of 1933 comes to mind and involved an American citizen's injuries inflicted upon him by a drunken mob in Panama. Judging that responsibility did not flow from these private acts, the Commission held that Panama could only be found responsible for its authorities' own "behaviour 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."[192] Ultimately, the specific circumstances of the case did not warrant a finding of wrongdoing by Panama and, as a corollary, failed to trigger its state responsibility. Similar cases following identical reasoning include, *inter alia*, *Venable*,[193] *Kennedy*,[194] *Kidd*,[195] *Denham*,[196] and *Finnish Shipowners*.[197] Needless to say, this conception of state responsibility for private acts is certainly broad enough to encompass a theory of indirect responsibility for failing to prevent transnational terrorism and has, at least in its classical permutations, attracted the endorsement of leading

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[190] See, e.g., Heinrich Triepel, VÖLKERRECHT UND LANDSRECHT 333-334 (C.L. Hirschfeld (trans.), 1899); Clyde Eagleton, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW 77 (1928); Clyde Eagleton, *Measure of Damages in International Law*, 39 YALE LAW JOURNAL 52, 54 (1929-1930).

[191] See, e.g., Dionisio Anzilotti, *La Responsabilité internationale des États*: *à raison des dommages soufferts par des étrangers*, 13 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 5, 298-299 (1906); Harmodio Arias, *The Non-Liability of States for Damages Suffered by Foreigners in the Course of a Riot, an Insurrection or a Civil War*, 7 AMERICAN JOURNAL OF INTERNATIONAL LAW 724, 747 (1913); Alwyn V. Freeman, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 367-369 (1938); Joseph Gabriel Starke, *Imputability in International Delinquencies*, 19 BRITISH YEARBOOK OF INTERNATIONAL LAW 104, 112 (1938).

[192] *Walter A. Noyes (United States v. Panama)* (1933), 6 REPORTS OF INTERNATIONAL ARBITRAL AWARDS 308, 311.

[193] *H.G. Venable (U.S. v. United Mexian States)* (1927), 4 REPORTS OF INTERNATIONAL ARBITRAL AWARDS 219, 229.

[194] *George Adams Kennedy (U.S. v. United Mexian States)* (1927), 4 REPORTS OF INTERNATIONAL ARBITRAL AWARDS 194, 199.

[195] *Annie Bella Graham Kidd (Great Britain v. United Mexican States)* (1931), 5 REPORTS OF INTERNATIONAL ARBITRAL AWARDS 142, 144.

[196] *Lettie Charlotte Denham and Frank Parlin Denham (United States v. Panama)* (1933), 6 REPORTS OF INTERNATIONAL ARBITRAL AWARDS 312, 313.

[197] *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 REPORTS OF INTERNATIONAL ARBITRAL AWARDS 1480, 1501.

international legal publicists.[198] More relevantly for present purposes, this construction gained even more traction when Roberto Ago defended it in his fourth report to the ILC in 1972.[199]

Not unlike the inquiry under direct responsibility, the focus here therefore hinges on the host-state's breach of an international obligation. However, the breach under indirect responsibility will likely translate into an omission,[200] whether deliberate or innocent, rather than into the commission of an act, whether contributory or complicit,[201] in the terrorist attack. In fact, when dealing with internationally wrongful acts carried out by individuals that may not be attributed to the relevant sanctuary state, the responsibility "originates not in the conduct of those individuals, but in the omissions by the State's own organs."[202] Hence, a state's passiveness or indifference toward the concoction of terrorist agendas on its own territory might trigger its responsibility, possibly on the same scale as though it had actively and directly participated in the planning.[203]

It is vital to further explore the abovementioned dichotomy, as it will govern the ensuing debate. In fact, direct and indirect responsibility may appear conceptually difficult to decipher or distinguish, whilst the delineation between both paradigms has unquestionably blurred on occasion. Although discarded by some scholars, this dichotomy remains a prevalent dimension in the sphere of state responsibility. In particular, some jurists opine that the direct/indirect

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[198] See, e.g., Hans Kelsen, PRINCIPLES OF INTERNATIONAL LAW 121 (1st Edition, 1952); Eduardo Jiménez de Aréchaga: *International Responsibility*, in Karsten Engsig Sørensen (ed.), MANUAL OF PUBLIC INTERNATIONAL LAW 560 (1968); Charles Rousseau, DROIT INTERNATIONAL PUBLIC 376-377 (1953).

[199] See Roberto Ago, Fourth Report on State Responsibility, *Yearbook of the International Law Commission* 71, UN Doc. A/CN.4/264 and Add. 1, at 99 and 124-126.

[200] See Zemanek, *Does the Prospect*, *supra* note 50, at 131 ([i]t is a well-known principle of international law that a State which fails in its duty to prevent the use of its territory for acts contrary to the rights of other States is responsible for the omission."). See also Manuel García-Mora, INTERNATIONAL RESPONSIBILITY FOR HOSTILE ACTS OF PRIVATE PERSONS AGAINST FOREIGN STATES 109-112, 130 (1962). For support of this proposition in the jurisprudence, see *Corfu Channel*, *supra* note 67, at 22.

[201] On complicity in the commission of wrongful acts, see Becker, TERRORISM AND THE STATE, *supra* note 2, at 280-281; Thomas M. Franck and Deborah Niedermeyer, *Accommodating Terrorism*: *An Offence Against the Law of Nations*, 19 ISRAEL YEARBOOK ON HUMAN RIGHTS 75, 79, 99 (1990).

[202] Julio Barboza, *Invocation of Responsibility*, in Kalliopi Koufa (ed.), THESAURUS ACROASIUM VOL XXXIV: STATE RESPONSIBILITY AND THE INDIVIDUAL 7-50, 38 (2006).

[203] See Banks, *Addressing State*, *supra* note 153, at 93 n.222.

dichotomy is erroneous. For instance, in his separate judgment in the *Nicaragua* case, Judge Ago equated indirect responsibility with the transfer of responsibility flowing from one state to another, when the latter exercises control over the former.[204] In addition, as will be discussed below, the present project's conception of indirect responsibility has also sometimes been labelled 'vicarious responsibility', much to the dismay of certain leading experts in the field of state responsibility, such as Ian Brownlie.[205] Nevertheless, the concept of indirect responsibility, as construed in the present dissertation, has arguably been invoked by the ICJ in *Nicaragua* and by the Israeli Commission in the context of its investigation surrounding the Beirut Massacre.[206] As a corollary, it follows that the law on direct responsibility developed considerably faster than indirect responsibility, at least at a conceptual level given high-profile judicial pronouncements on the matter. However, implementing such judicially-derived conceptual inclinations has proven more challenging. This evolution is not so much imputable to the law's propensity to change, but rather to the intimate relationship between direct responsibility and the concept of attribution. Accordingly, a few preliminary remarks about attribution are apposite here.

### C) The Concept of Attribution

Since the proliferation of Israeli reprisals in the 1960s, which often raised questions pertaining to state responsibility,[207] international judiciaries have formally introduced the concept of attribution.[208] Before invoking specific

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[204] *Nicaragua*, *supra* note 119, at 189-190. In the same spirit, see Christenson, *Attributing Acts*, *supra* note 115, at 350 and 360-364.

[205] See Ian Brownlie, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY (PART I) 136 (1983). On the notion of vicarious responsibility, as applicable to individuals, see Steven R. Ratner and Jason S. Abrams, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 129-135 (2001).

[206] See THE BEIRUT MASSACRE: THE COMPLETE KAHAN COMMISSION REPORT 50-63 (1983). See also Becker, TERRORISM AND THE STATE, *supra* note 2, at 314.

[207] See René Provost, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 188 (2002) (highlighting that "[b]elligerent reprisals are construed properly as forming part of rules on state responsibility").

[208] For a recent and thoughtful review of the ICJ's treatment of attribution, see Rosalyn Higgins, *The International Court of Justice*: *Selected Issues of State Responsibility*, in Ragazzi, INTERNATIONAL RESPONSIBILITY, *supra* note 50, at 271-286, 272-275 (reviewing the following cases: *Nicaragua*, *Tehran Hostages*, *Cumaraswamy*, *Avena*, *LaGrand*, *Legality of Use of Force* and *Oil Platforms*). For accounts on the concept, in general, see, e.g., Gordon A. Christenson, *The*

jurisprudence, it is interesting to note that the Definition of Aggression alludes to the question of attribution to states of the acts of their agents. Article 3(g) of the Definition also adds, within the purview 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 of such gravity as to amount to the acts listed [in the preceding paragraphs]."[209] With regard to this definition of 'aggression', Thomas Franck astutely points out that "[t]he prohibition does not specify what "sending" means. Does it include "permitting," or tolerating"?"[210] This, of course, carries distinct significance for the study of indirect responsibility for terrorism as it remains unclear, from this definition, whether the mere toleration, the willful blindness, or the inaction of sanctuary states might corral all necessary requirements to meet the threshold of responsibility in that setting. At any rate, it is imperative to review the concept of attribution as it has been constructed and interpreted by international courts, as the obligation to prevent terrorism can decidedly be grounded in other legal schemes.

In that regard, it remains clear that the ICJ crafted the classical formulation of attribution in 1986. The ICJ was thus confronted with the U.S.' involvement in the funding and training of *Contras* rebels during the Nicaragua armed conflict in the context of the *Nicaragua* decision. Although the U.S. was found to have provided various forms of assistance to the rebels and, even when faced with the fact that the guerrillas were completely dependent on U.S. support at some point, and that such aid was "preponderant or decisive", the ICJ refused to pronounce

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*Doctrine of Attribution in State Responsibility*, in Richard B. Lillich (ed.), INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 320-360 (1983); Starke, *Imputability*, *supra* note 191, at 104-117.

[209] Annex to G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, at 143, U.N. Doc. A/9631 (1974), Article 3(g).

[210] Franck, RECOURSE, *supra* note 120, at 65. Similarly, Pemmaraju Sreenivasa Rao seems to infer that providing safe havens to terrorist organizations does not fall within the 1974 definition of aggression. See Pemmaraju Sreenivasa Rao, *International Crimes and State Responsibility*, in Ragazzi, INTERNATIONAL RESPONSIBILITY, *supra* note 50, at 63-80, 68. However, she later adds in *Ibid*, at 74, that "[t]he conduct enumerated in sub-paragraph 3(g) is not only a crucial element for the definition of aggression but it also constitutes an essential element for treating intervention and cross-border terrorism as unlawful." [Emphasis added.] These considerations will prove extremely relevant in the subsequent portions of this dissertation that will discuss the shift toward indirect state responsibility at international law, along with the importance of the 'harbouring and supporting' rule. See also, Brown, *Use of Force*, *supra* note 148, at 8.

the *Contras* rebels *de facto* U.S. agents.[211] The Court then proceeded to formulate the applicable standard in establishing state responsibility, a postulate that would quickly gain international notoriety as the 'effective control test'. In short, the ICJ opined that, in order to find the U.S. legally responsible for the activities of the *Contras* in Nicaragua, 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."[212] From this decision onward, it became common practice to analyze the degree of effective control exercised by a state over non-state actors in order to determine the level of involvement of that state and, as a corollary, its level of responsibility. Indeed, as explored in Chapter 1, Section C)2., the ICJ recently reiterated the validity of that approach in its controversial *Genocide* judgment. As will be further discussed herein, this test proved to be a considerable development since the 60s and 70s, at least in terms of legal semantics and construction.

Thirteen years after *Nicaragua* and under the aegis of the International Criminal Tribunal for the former Yugoslavia (ICTY), the 'effective control test' was arguably revisited in *Tadić*.[213] The Appeals Chamber found that, when private individuals carry out acts contrary to international law, the only way to attribute such acts to the host-state is to demonstrate "that the State exercises control over the individuals."[214] The Court also pointed out that the degree of control might vary according to the circumstances and that the analysis should be guided by a flexible approach.[215] The Appeals Chamber then purported to draw a distinction between an individual and an organized group, the latter being usually

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[211] *Nicaragua*, *supra* note 119, at para 115. See also *Ibid*, paras. 86-93; Duffy, THE 'WAR ON TERROR', *supra* note 133, at 49. On state responsibility for the acts of *de facto* agents, see Townsend, *State Responsibility*, *supra* note 113. On the liability for action of state organs, see *Immunity From Legal Process of a Special Rapporteur of the Commission of Human Rights*, Advisory Opinion, [1999] ICJ REPORTS 62, 87 (29 April 1999); *Francisco Mallén (United Mexican States)* v. *United States*, 4 R.I.A.A. 173, 174 (1927).

[212] *Nicaragua*, *supra* note 119, at para 115. See also Sikander Ahmed Shah, *War on Terrorism*: *Self Defense, Operation Enduring Freedom, and the Legality of U.S. Drone Attacks in Pakistan*, 9 WASHINGTON UNIVERSITY GLOBAL STUDIES LAW REVIEW 77, 94 (2010).

[213] See Higgins, *The International Court of Justice*, *supra* 208, at 272 (rather inferring that the test of effective control was "not followed" by the ICTY in *Tadić*).

[214] *Tadić*, *supra* note 108, at para. 117.

[215] *Ibid*. The Court also identified various situations where the threshold of control would vary.

characterized by a firm command structure, a body of rules, hierarchical authority, and so on. In the latter case – plausibly also encompassing non-state terrorist groups for present purposes – it was now necessary to demonstrate that the host-state exerted 'overall control' over the group in question, a legal inquiry that marked a significant relaxation of the 'effective control test'.[216] The ICTY pursued the analysis by making a distinction between a group that is militarily organized and a group that is not organized in a military structure.[217] In the former scenario, it would have to be proved that the state "wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity."[218] Conversely, in the case of groups lacking a military structure, the threshold would be higher, as overall control was deemed insufficient and specific instructions[219] flowing from the state to the group in question were required.[220] Alternatively, the threshold could also be satisfied if the state publicly endorsed or approved the acts *ex post facto*, a standard now mirrored by Article 11 of the ILC text.[221] On this topic, it is interesting to draw a parallel with the *Tehran Hostages* case, whereby the responsibility of Iran for an attack carried out by militants on a U.S. embassy was predicated, in part, on the state authorities' subsequent approval of the attack. Following the Ayatollah Khomeini's endorsement of the attacks, the

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[216] *Ibid*, at para. 120. For support of the idea that *Tadić* significantly relaxed the *Nicaragua* standard, see, e.g., Ahmed S. Younis, *Imputing War Crimes in the War on Terrorism*: *The U.S., Northern Alliance, and 'Container Crimes'*, 9 WASHINGTON & LEE RACE & ETHNIC ANCESTRY JOURNAL 109, 114-115 (2003).

[217] *Tadić*, *supra* note 108, at para. 137.

[218] *Ibid*, at para. 131, 137.

[219] The *Tadić* decision essentially did away with the requirement of having specific orders issued from host-states to militarily organized groups. See, e.g., Stahn, *Terrorist Acts*, *supra* note 147, at 47; Mikael Nabati, *International Law at a Crossroads*: *Self-Defense, Global Terrorism, and Preemption (a Call to Rethink the Self-Defense Normative Framework)*, 13 TRANSNATIONAL LAW AND CONTEMPORARY PROBLEMS 771, 781 (2003). In this regard, the *Tadić* decision also delivered an important distinction between non-state groups that are organized in a military hierarchy and groups lacking a military structure, a distinction that has often been ignored or misrepresented in recent scholarship

[220] *Tadić*, *supra* note 108, at paras. 132, 137.

[221] *Ibid*. On the topic of responsibility by endorsement, see Brown, *Use of Force*, *supra* note 148, at 10-12. On the possibility of imputing responsibility to the government of Afghanistan for endorsing the 9/11 attacks, Brown further argues, at 11, that "the publicly available facts are insufficient to impute the September 11th attack to Afghanistan. They do not establish that Al-Qa'ida acted as an agent or instrumentality of the 'Afghan state,' but rather that Al-Qa'ida acted autonomously within Afghanistan."

ICJ equated the continuing occupation of the embassy and the hostage-taking with 'acts of state'. However, it did not attribute the attack and takeover of the embassy to Iran from a purely 'direct' standpoint.[222] At any rate, with the *Tadić* judgment, the ICTY arguably advanced the debate on this issue: if one were to accept that case's central premise on this point, the standard of control a state is deemed to exercise over a group would now vary depending on that very group's organizational structure, its relationship to the host-state, and so on. In this light, an argument could cogently be articulated that an organization like Al Qaeda resembles a military group, given its organization, training, complex cellular structure, efficient financial structures, and the independence between its cells.[223] *Tadić*'s legacy of 'overall control', therefore, governs debates on the question of a state's involvement in funding and training insurgents or terrorists in the post-*Nicaragua* era, not without some degree of resistance.

Indeed, an immediate distinguishing factor complicates the equation when attempting to analogize *Tadić*'s reasoning to states for failing to prevent transnational terrorism, such as was the case of Afghanistan in respect to the attacks of 9/11. In short, pursuant to the ICTY's analysis it would follow that, when the terrorist attack or ensuing armed hostilities do not transpire on the controlling state's territory (e.g. Al Qaeda attacks targets in the U.S.), "more extensive and compelling evidence is required to show that the state is genuinely in control of the units or groups, not merely by financing and equipping them, but also by generally directing or helping plan their actions."[224] It should be recalled that the *Tadić* case dealt primarily with *individual* responsibility, as opposed to *state* responsibility. More specifically, the ICTY was called upon to determine whether the actions of the VRS (Bosnian Serb forces) could be attributed to Yugoslavia ("FRY"), which required that the Tribunal operate on the premise that an international armed conflict emerged between that state and Bosnia-

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[222] *Tehran Hostages*, *supra* note 67, at 33-35.

[223] See, e.g., Jeffrey F. Addicott, *Legal and Policy Implications for a New Era*: *The "War on Terror"*, 4 THE SCHOLAR: ST. MARY'S LAW REVIEW ON MINORITY ISSUES 209, 218 (2002) (referring to Al Qaeda as a "sophisticated "para-military" terrorist network). See also Gunaratna, INSIDE AL QAEDA, *supra* note 3, at 93-112.

[224] *Tadić*, *supra* note 108, at para. 138.

Herzegovina. As a corollary, the question of attribution remained inextricably linked to the exercise of ascertaining individual responsibility for IHL violations. Therefore, the standards extracted from its ruling reflected the specific rules of IHL considered by the Appeals Chamber. In particular, the *Third Geneva Convention of 1949* and the law of organizational structure under humanitarian law commissioned a very specific legal relationship between the relevant actors so as to facilitate the abovementioned determination connecting the VRS and the FRY. Perhaps puzzling to some is the fact that the ICTY – in what has been widely contemplated through the prism of a judicially-driven normative conflict – decided to challenge the standard of state responsibility promulgated by the ICJ in the *Nicaragua* judgment when seeking to apply the adequate legal standard. However, considerable resistance to this jurisprudential inclination was levelled, most interestingly from individual voices on the ICTY bench. In particular, in his Separate Opinion Judge Shahabuddeen called into question the wisdom of contesting the *Nicaragua* precedent when the Court's task consisted of pronouncing on the nature of the conflict at play in the factual record before it.[225] As a result, such observations cannot help but cast an aura of legitimate incredulity around the commonly-held belief that the *Tadić* court incontrovertibly formulated a more nuanced or subtle vision of attribution principles.

However, certain scholars nonetheless take issue with that characterization. In particular, Antonio Cassese – himself a Judge sitting in on that case – recently reviewed the relevance of the *Tadić* precedent within the framework of the ICJ's *Genocide* case. It should be recalled that, in that latter case, the Court applied *Nicaragua*'s 'effective control' standard and ultimately held that the acts of genocide carried out by Bosnian Serb armed forces could not be attributed to FRY. Moreover, the Court rejected the application of *Tadić*'s line of inquiry on the twofold basis that i) the test proposed by the ICTY pertained to the question of ascertaining whether an armed conflict was international in character, as opposed to the separate issue of state responsibility; and ii) the application of the ICTY's standard would have unduly expanded the scope of

[225] See Separate Opinion of Judge Shahabuddeen in *Tadić*, *supra* note 108, at para. 5.

state responsibility law.[226] In response, Cassese points out that, since no rules of IHL were dispositive in determining whether the armed conflict was internal or international in *Tadić*, the ICTY deliberately invoked the rules of state responsibility to fill that void.[227]

Similarly, in his Dissenting Opinion in the *Genocide* case, Vice-President Al-Khasawneh echoed similar concerns after lamenting the majority's rejection of the *Tadić* standard, and opined that "the ILC Commentary to Article 8 does little more than note a distinction between the rules of attribution for the purposes of State responsibility on the one hand, and the rules of international humanitarian law for the purposes of individual criminal responsibility on the other".[228] More importantly, and tapping somewhat into Cassese's argument, the Vice-President "recalled that the Appeals Chamber in *Tadić* had in fact framed the question as one of State responsibility, in particular whether the FRY was responsible for the acts of the VRS and therefore considered itself to be applying the rules of attribution under international law".[229] Ultimately, in referring to the *Genocide* case Cassese argues that, in order to discard the *Tadić* standard, the ICJ "should have proved that, if applied to state responsibility, 'overall control' was unsupported by state practice and *opinio juris*. It follows that the reader expecting a closely-argued decision will be left instead with the impression that the Court's holdings have a tinge of oracularity (oracles indeed are not required to give reasons)."[230]

Consequently, *Tadić*'s contribution to the law of state responsibility cannot be overlooked and some discussion of the case has been present in virtually all modern accounts addressing that area of law. As mentioned

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[226] *Genocide Case*, *supra* note 100, at pp. 143-145, paras. 402-406.
[227] See Cassese, *The Nicaragua and Tadić Tests*, *supra* note 116, at 649.
[228] Vice-President Al-Khasawneh's Dissenting Opinion in the *Genocide Case*, *supra* note 100, at para. 38 (citing James Crawford, INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 112 (2002)).
[229] *Ibid*. Indeed, some commentators infer that both regimes – namely IHL and state responsibility – mutually reinforce each other, thereby signalling that the ICTY was applying an interchangeable standard of attribution. See, e.g., Rüdiger Wolfrum, *State Responsibility for Private Actors*: *An Old Problem of Renewed Relevance*, in Ragazzi, INTERNATIONAL RESPONSIBILITY, *supra* note 50, at 423, 429 n.21; Kirchner, *Third Party Liability*, *supra* note 138, at 783.
[230] Cassese, *The Nicaragua and Tadić Tests*, *supra* note 116, at 651.

previously, however, the most recent judicial pronoucement on state responsibility emanating from the ICJ expressly rejected the application of *Tadić* within the furrow of state responsibility repertoire, much to the chagrin of some international legal experts.[231] It follows that, under some lights, the persuasiveness and bindingness of the *Tadić* decision remain highly suspect when applying the rules of state responsibility to counterterrorism. Hence, it is probably safe to proceed from the assumption that only the *Nicaragua* and *Tehran Hostages* cases offered indisputable authority on the issue of attribution for the purposes of state responsibility prior to 9/11. But even this assumption can be left open to challenge, at least with regard to *Nicaragua*. Indeed, as one commentator notes, it is "a fact that the Court in Nicaragua set out that [*effective control*] test without explaining or clarifying the grounds on which it was based. No reference is made by the Court either to state practice or to other authorities. This is in keeping with a regrettable recent tendency of the Court not to corroborate its pronouncements on international customary rules (other than those traditional rules that are largely upheld in case law and the legal literature) with a showing, if only concise, of the relevant practice and opinio juris."[232] Interestingly, some scholars conversely expound that the ICJ's holding against Iran in the *Tehran Hostages* case is congruent with the 'effective control' test developed in *Nicaragua*, thereby reasserting its relevance in present-day contexts and across a broad range of scenarios linking a state's involvement with the commission of privately-inflicted harm.[233]

At this juncture, it is imperative to stress that legal scholarly accounts dealing with state responsibility consistently cast *Tadić* as both an inexorable contestation to the *Nicaragua* holding[234] and, as envisaged above, a potential

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[231] See, e.g., Tosh, *Genocide Acquittal*, *supra* note 116 (citing Andre De Hoogh for the proposition that the ICJ should have applied the *Tadić* standard in the case). For the ICJ's rejection of *Tadić*, see *Genocide Case*, *supra* note 100, at pp. 143-145, paras. 402-406.

[232] Cassese, *The Nicaragua and Tadić Tests*, *supra* note 116, at 653-654.

[233] Duffy, THE 'WAR ON TERROR', *supra* note 133, at 51 (making this determination on the basis that "the Iranian State was considered capable of putting a stop to an on-going situation and instead chose to endorse and to 'perpetuate' it").

[234] See, e.g., Antonio Cassese, INTERNATIONAL LAW 249 (2nd Edition, 2005). But *Cf.* Kirchner, *Third Party Liability*, *supra* note 138, at 783 (emphasizing that "the *Tadić*-rule does not replace

judicial entry point for a substantial lowering of attribution principles. Yet, alternative constructions of the role of that jurisprudence within the broader framework of state responsibility must also be entertained. Firstly, a careful reading of both cases might reveal more conceptual commonalities than what is usually advertised in the literature. For proponents of this school of thought, sufficient analytical proximity connects both judgments to bolster the conclusion that the seemingly indomitable chasm between both precedents can be dispelled by reference to quantitative considerations, as opposed to more substantive divergences. One author encapsulates this idea by remarking that, "the difference between the attitudes of these two courts is one of degree, not of kind".[235] It ineluctably follows that, by commissioning onerous proof of evidentiary elements by far surpassing financial, logistical or ideological thresholds, the standards of responsibility ultimately endorsed in both decisions fail to provide "a substantial opportunity to establish direct state responsibility in circumstances of clandestine state support to private actors".[236]

Secondly, if the conceptual Rubicon dividing both cases cannot ultimately be traversed, it perhaps evinces a normative fragmentation of public international law. The ILC Study Group on Fragmentation of International Law's own view strongly aligns with this second construction and operates on the premise that "[t]he contrast between *Nicaragua* and *Tadić* is an example of a normative conflict between an earlier and a later interpretation of a rule of international law. *Tadić* does not suggest "overall control" to exist alongside "effective control" either as an exception to the general law or as a special (local) regime governing the Yugoslav conflict. It seeks to *replace* that standard altogether".[237] Finally, some interpretations of *Tadić* have cast that decision as enshrining a misreading

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the *Nicaragua*-formula in the law of state responsibility but is only applicable within the more specialized regime of International Criminal Law.").

[235] Becker, TERRORISM AND THE STATE, *supra* note 2, at 70.

[236] *Ibid*, at 71. See also *Ibid*, at 266-268.

[237] *Fragmentation of International Law*: *Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, The Erik Castrén Insitute Research Reports 21/2007, Hakapaino, 2007, at 32, para. 50. See also Martti Koskenniemi and Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN JOURNAL OF INTERNATIONAL LAW 553-579, 562-567 (2002).

of the tenets of state responsibility laid down in *Nicaragua*, in which case no normative conflict would in fact exist between both precedents. A vocal proponent of this decidedly more conciliatory reading of *Tadić* deplores the ICTY's perhaps uncritical judicial treatment of *Nicaragua*, whilst simultaneously highlighting that no due weight was conversely given to the "alternative of comprehensive control".[238] As Marko Milanović astutely points out, the *Tadić* judgment painstakingly focuses the crux of its challenge to *Nicaragua* against the standard of "effective control" as a threshold exclusively commissioning specific instructions. Interestingly, whilst no inference was ultimately drawn as to whether the circumstances at play in *Tadić* would have satisfied the 'overall control' threshold, the same author posits that the more general but exacting standard developed in *Nicaragua* might have, in fact, been better suited to govern the factual record connecting the FRY and the Bosnian Serb Forces.[239]

Yet, these competing jurisprudential constructions fail to completely untangle the legal bases militating in favour of a shift toward indirect state responsibility. As a result, considerable confusion persists as to one dominant interpretation that may be gleaned from the – supposedly authoritative – precedent laid down in *Nicaragua*.[240] Whilst recent scholarly accounts dealing with the intersection of state responsibility law and counterterrorism are characterized by an acute focus on both *Nicaragua* and *Tadić* -- and how both judgments mutually inform and/or discredit each other -- the potential benefits of placing more analytical emphasis on the *Corfu Channel* decision could yield illuminating results. Indeed, as was mentioned earlier and will be underscored again later on,[241] this case sheds a dispositive light on a potential shift towards more indirect

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[238] See Lehto, INTERNATIONAL RESPONSIBILITY, *supra* 48, at 303.

[239] Milanović, *State Responsibility*, *supra* note 78, at 579-582. See also André J.J. 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*, 72 BRITISH YEARBOOK OF INTERNATIONAL LAW 255-292, 290 (2001).

[240] Claude Kress, *L'Organe de facto en droit international public*: *réflexions sur l'imputation à l'État de l'acte d'un particulier à la lumière des développements récents*, 105 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 93-143, 106 (2001).

[241] See *supra*: Chapter 1, Section B), note 67 and accompanying text; Chapter 1, Section C)1., notes 86-91 and accompanying text. See also *infra*: Section D)1., note 311 and accompanying text; Section D)2., notes 334-335; Chapter 4, Section B)2.a), notes 1054-1055 and accompanying text; Chapter 4, Section B)4.b), notes 1205-1206, 1210 and accompanying text; Chapter 4, Section

forms of state responsibility in counterterrorism settings. In particular, a cautious literal interpretation of that judgment enables its reader to draw the inference that the Court essentially engaged Albania's responsibility for failing to prevent transnational harm emanating from its territory. Juxtaposed with more recent jurisprudence and scholarship, a general conclusion as to Albania's international liability can be extracted from the ruling on the basis of its failure to take reasonable steps to prevent such harm. What is more, the Court's judgment – which also contained a translation variance in its authoritative French version – arguably opened the door to an enhanced obligation of due diligence incumbent upon states and, as a corollary, to an expansive construction of state responsibility should that undertaking become the object of a violation.[242] Taken as a whole, this case at the very least corroborates a shift towards more indirect modes of state responsibility in the face of enhanced transnational terrorist capacity.[243]

Following these developments, the adoption of the ILC's *Articles* in 2001 deployed another crucial effort for the purposes of the discussion at hand. This landmark document took on the very precise and sophisticated task of delineating and defining the law of state responsibility, via an exercise of codification.[244] Hence, it is now written law that "[e]very internationally wrongful act of a State entails the international responsibility of that State."[245] The *Articles* also set out

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B)5.d), notes 1322-1327; Chapter 4, Section C)1., notes 1524-1532 and accompanying text; Chapter 4, Section C)2.b), notes 1650-1651 and accompanying text; Conclusion to Part III.

[242] See *supra* Chapter 1, Section C)1., notes 88-91 and accompanying text.

[243] While some parallels can undoubtedly be drawn with instances of state responsibility for piracy, the nature of that activity – which is often de-territorialized by definition (i.e. by occurring on the high seas) – can be distinguished from the application of state responsibility to transnational terrorism, in which territoriality plays a central role. That said, and by way of example, some commentators underscore that, while it may not be expected to completely eradicate this criminal practice, Somalia must nonetheless be perceived as taking active steps to prevent and punish the acts of piracy perpetrated by its nationals off its territorial waters. See, e.g., Ruwantissa Abeyratne, *The Responsibility of Somalia for the Acts of the Somali Pirates*, 2 JOURNAL OF TRANSPORTATION SECURITY 63-76 (2009).

[244] On the enormous challenges posed by the codification of the law of state responsibility, see Malanczuk, AKEHURST'S, *supra* note 165, at 254 (citing Marina Spinedi and Bruno Simma (eds.), UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY (1987)). Moreover, the application of state responsibility to subject-specific areas also poses increasingly intractable problems. For a recent application, see, e.g., Ian Brownlie, *The Responsibility of States for the Acts of International Organizations*, in Ragazzi, INTERNATIONAL RESPONSIBILITY, *supra* note 50, at 355, 360.

[245] Article 1, *ILC Articles*, *supra* note 76. As ILC Special Rapporteur James Crawford points out in INTERNATIONAL LAW COMMISSION, *supra* note 228, at 78, the principle stated in Article 1 - namely that once a wrongful act is committed, supplementary legal obligations are juxtaposed

the elements of an internationally wrongful act, which may consist of an action or omission. It should be noted, however, that courts have struggled in clearly distinguishing between omissions and surrounding circumstances.[246] It is probably erroneous to contend that, once a terrorist attack is launched from a state's territory, that state will always be held responsible due to an omission.[247] In fact, subsequent sections of this project will discuss scenarios where states are actively attempting to thwart terrorist threats, whether through best efforts or more draconian means, but ultimately fail in containing those threats. In such instances, can that failure be said to logically hinge on an omission from a semantic perspective? At the outset, it is thus fair to say that internationally responsible states are not always complacent, inactive or willfully blind to terrorist activities percolating on their territory.

Conversely, it must also be acknowledged -- perhaps emphatically -- that "acts of omission often are not simply the result of impotence or lack of awareness of the threats to which a state should respond, but can equally be active forms of policy."[248] As such, a state may decide to passively adopt a stance of restraint vis-à-vis terrorist activities taking root on its territory, thereby engendering a challenging legal situation for the purposes of state responsibility further explored, *infra*, in Chapter 4. In such scenarios, the ensuing legal inquiry rather focalises on issues of passive acquiescence to terrorist activity, as opposed to overt condonation or active support of private transnational subversion by the

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with existing state obligations - has been recognized prior to the Commission's adoption of said provision. On this point, see authorities cited by Crawford, in *Ibid*, at footnote 49. Footnote 50 also provides instances where the principle contained in Article 1 was recognized after its formulation by the ILC.

[246] See *Corfu Channel, supra* note 67, at 22-23. See also, *Tehran Hostages* case, *supra* note 67, at 63 and 67; *Affaire relative à l'acquisition de la nationalité polonaise*, 1 *R.I.A.A.* 425 (1924) [hereinafter *L'acquisition de la nationalité polonaise*]; and *Velásquez Rodríguez*, *supra* note 17, which states, at para. 170: "under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions".

[247] But *Cf.* this excerpt by François Rigaux, which could be transposed integrally to counterterrorism, as states have a positive duty to prevent terrorist attacks emanating from their territory: "[s]tate liability is peculiary relevant concerning crimes of omission, which imply that someone had the power and the duty to interfere." See *International Responsibility*, *supra* note 179, at 83.

[248] André Nolkaemper, *Attribution of Forcible Acts to States*: *Connections Between the Law On the Use of Force and the Law of State Responsibility*, in Niels Blokker and Nico Schrijver (eds.), THE SECURITY COUNCIL AND THE USE OF FORCE: THEORY AND REALITY – A NEED FOR CHANGE? 133-171, 162 (2005).

state apparatus. Needless to say, such considerations lie at the very core of recent debates tackling the integration of international normative frameworks with non-state actors, prefaced in the introduction to the dissertation, and straddle the conceptual grey areas of public international law that the present study seeks to engage. When a government relies on the perpetration of terrorist acts by non-state actors for the furtherance of its own political objectives, one can legitimately ponder whether that state's act of omission actually morphs into an act of commission (for example, by extending undue hospitality to terrorists within its borders so as to derive indirect political benefits from their activities).[249] Moreover, in the face of novel terroristic structures involving sanctuary governments surreptitiously electing policies of tactical non-involvement or acquiescence, the formal bases for attributing private conduct to states developed under the law of state responsibility no longer appear indelible from a *lex ferenda* standpoint.

Under the framework of the ILC's *Articles*, one of the ways to trigger state responsibility for seemingly private acts entails that there must be attribution of the wrongful act to the state in question, whilst the act must amount to the breach of an international obligation of the state. This principle, which is now codified at Article 2 of the *Articles*, has also received wide support in international jurisprudence.[250] As a corollary, the obligation incumbent upon the wrongful state of ensuring reparation and of redressing the harm also mirrors a corresponding right, accruing to the aggrieved state, of receiving said

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[249] See, e.g., Christenson, *Attributing Acts*, *supra* note 115, at 369. For a similar argument under self-defence, see Glennon, *The Fog of Law*, *supra* note 35, at 550.

[250] Article 2 of the *ILC Articles*, *supra* note 76, reads as follows:

> There is an internationally wrongful act of a State when conduct consisting of an action or omission:
>
> (a) Is attributable to the State under international law; and
>
> (b) Constitutes a breach of an international obligation of the State.

This principle is also recognized in jurisprudence, albeit sometimes invoking different jargon. See, e.g., *Phosphates in Morocco, Preliminary Objections*, 1938, *P.C.I.J.*, Series A/B, No. 74 [hereinafter *Phosphates in Morocco*], at 10 and 28, *Tehran Hostages* case, *supra* note 67, at paras. 56, 90; *Nicaragua*, *supra* note 119, at para. 226; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia),* 1997 I.C.J. REPORTS 7 [hereinafter *Gabčíkovo-Nagymaros*], at para. 78; *Dickson Car Wheel Company*, 4 *UNRIAA* 669 (1931) [hereinafter *Dickson Car*], at 678.

reparation.[251] These provisions operate on the premise that a primary rule of international law has been violated by a state in order to trigger the application of secondary rules[252] of state responsibility contained in the *Articles*.[253] Hence, we will invariably confront the violation of an international obligation when addressing an internationally wrongful act, irrespective of whether the breach was generated through direct or indirect involvement. Furthermore, a breach will be established regardless of the origin of the obligation under scrutiny, should it be predicated on treaty law,[254] on customary law,[255] on general rules of international law[256] or on *jus cogens*.[257]

Although these principles are fairly straightforward, their application has not always been limpid with regard to the direct/indirect responsibility dichotomy.[258] By way of example, as will be discussed in Chapter 3, Sections

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[251] This proposition has also received wide academic support. For a non-exhaustive list, see Anzilotti, *La Responsabilité*, *supra* note 191, at 13; Charles Calvo, LE DROIT INTERNATIONAL THÉORIQUE ET PRATIQUE: TOME PREMIER 107, 400 (2nd Edition, 1870); Charles de Visscher, *Le déni de justice en droit international*, 52 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 421 and 433 (1935-II); Alfred Verdross, *Règles générales du droit international de la paix*, 30 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 271-517, 462 (1929-V).

[252] The significance of establishing the parameters of secondary rules of responsibility in the international legal framework cannot be overemphasized. For quintessential appreciations of the ILC's work in this area, see Spinedi and Simma, UNITED NATIONS, *supra* note 244.

[253] On the distinction between primary rules and secondary rules of state responsibility and its underlying philosophy, see U.N. Doc. A/CN.4/152 at 228, at para. 5 (1963); Alland and Combacau, *'Primary' and 'Secondary'*, *supra* note 77.

[254] *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, Judgment of 20 Feb., [1969] ICJ REPORTS p. 3 [hereinafter *Continental Shelf*], at 38-39, para. 63; *Nicaragua*, *supra* note 119, at 95.

[255] *Ibid*.

[256] See Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 126.

[257] See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 *U.N.T.S.* 331, especially Article 53; Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 127. See also Article 12 of the *ILC Articles on State Responsibility*, *supra* note 76 (providing that the "origin and character" of an international obligation is irrelevant in demonstrating a breach of that duty). For more background on *jus cogens* obligations, see *Case Concerning the Legality of Use of Force (Yugoslavia* v. *U.S.)*, 1999 I.C.J. 916, 965 (June 2); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k (1987).

[258] This phenomenon is evident in the treatment of attribution by the ICJ. Although not directly on point, the Court's reasoning in *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*, *Merits, Judgment of 6 November 2003*, [2003] ICJ REPORTS, p. 161 [hereinafter *Oil Platforms Merits*], at paras. 48-57, encapsulates the sometimes conceptually elusive nature of the mechanism of attribution. See also Higgins, *The International Court of Justice*, *supra* 208, at 274-275 (discussing attribution through the lens of the burden of proof, and contrasting a crucial distinction between what could be termed a 'whodunit' model of attribution, pursuant to the *Oil Platforms* case, and more substantial bases for attribution).

B)2. and B)4., the Security Council's treatment of attribution vis-à-vis Libya's involvement in the *Lockerbie* case remains puzzling to this day[259] and can, perhaps, only be explained by reference to a logic of indirect responsibility or, alternatively, by concerns of political expediency. A pivotal contemporaneous event, namely the U.S.' response to 9/11, has also exacerbated the confusion surrounding this legal distinction. Whilst it has evolved over time, the U.S.' approach in the "war" on terror, along with its sometimes conflicting dimensions, has engendered tactical tensions and hardly-reconcilable policy strategies.[260] More importantly, the decision to take action against Afghanistan[261] effectively collapsed both branches of state responsibility into one confused framework.[262] Conversely, some scholars interpret the U.S.' post-9/11 involvement in the "war" on terror as creating a distinct and cognizable objective of holding states accountable for assisting terrorist groups. This priority would, on one hand, unquestionably engage the rules of state responsibility and, on the other hand, operate in tandem with the primary objective of holding the individual terrorists, themselves, responsible for their attacks.[263]

Although use of force against Afghanistan clearly obfuscated the legal basis underlying U.S. action,[264] the attacks of 9/11 and the response to them

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[259] See, e.g., Vera Gowland-Debbas, *Security Council Enforcement Action and Issues of State Responsibility*, 43 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 55-98, 66 (1994) (analyzing the Libyan precedent and foreshadowing both a language that would be used recurrently by the Security Council in the field of counterterrorism and a logic that would simultaneously inform that language and, in turn, signal a shift toward a model of indirect responsibility for failing to prevent terrorist attacks).

[260] See, e.g., David Hastings Dunn, *Bush, 11 September and the Conflicting Strategies of the 'War on Terrorism'*, 16 IRISH STUDIES IN INTERNATIONAL AFFAIRS 11-34 (2005).

[261] Some of the legal rhetoric following 9/11 has been careful in characterizing the U.S. intervention in Afghanistan. See, e.g., John Yoo, *Transferring Terrorists*, 79 NOTRE DAME LAW REVIEW 1183, 1186 (2004) (terming it a 'military campaign').

[262] This confusion was exacerbated by the U.S.' initial bellicose rhetoric, which lumped several unrelated factors into one difficult approach. See, e.g., Press Release, *Address to a Joint Session of Congress and the American People*, White House, 20 September 2001, available online at http://www.whitehouse.gov/ news/releases/2001/09/20010920-8.html (last visited on 15 August 2007) [hereinafter *Address to a Joint Session*]. See also Brigitte Stern, *La Responsabilité internationale des Etats*: *Perspectives récentes*, in COURS EURO - MÉDITERRANÉENS BANCAJA DE DROIT IINTERNATIONAL (VOLUME VII) 659-721, 686 (2003) (wondering if this type of 'amalgam' can be envisaged under the law of state responsibility).

[263] See, e.g., Smith, *International Law*, *supra* note 56, at 736.

[264] See, e.g., Karl Zemanek, *Self-Defence Against Terrorism*: *Reflexions on an Un-precedented Situation*, in Marino Menéndez (ed.), EL DERECHO INTERNACIONAL EN LOS ALBORES DEL SIGLO

(along with the corresponding international endorsement of this reaction) clearly engaged the issue of state responsibility.[265] However, it proved difficult to reconcile both of these aspects with existing conceptions of state responsibility for private conduct.[266] This line of argument is certainly not singular when addressing U.S. foreign policy, as many commentators also criticize the merging of conceptually distinct legal categories in the context of Iraq, for instance.[267] In the same spirit, subsequent paragraphs will purport to examine how the international response to 9/11 has potentially created a new precedent under international law, along with a significant shift in the law of state responsibility.[268] In other words, this project attempts to re-establish and delineate the significant boundary between direct and indirect responsibility, whilst devoting careful analysis to the question of indirect state responsibility in preventing terrorist attacks. We may start from the premise that several scholars acknowledge that 9/11 operated a significant shift in international law or, at least, challenged it and made combating terrorism a priority.[269]

The events of 9/11 created incentive for governments, policymakers, and judiciaries around the globe to revisit and revamp their respective legislation, whether dealing with national security issues[270] or immigration policy, for instance.[271] In light of notable shortcomings both in relevant jurisprudence[272] and

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XXI: HOMENAJE AL PROFESSOR JUAN MANUEL CASTRO-RIAL CANOSA 695-714, especially at 702-705 (2002). But *Cf.* Leila Nadya Sadat, *Terrorism and the Rule of Law*, 3 WASHINGTON UNIVERSITY GLOBAL STUDIES LAW REVIEW 135, 144 (2004).

[265] See, e.g., Zemanek, *Does the Prospect*, *supra* note 50, at 130.

[266] See, e.g., Becker, TERRORISM AND THE STATE, *supra* note 2, at 216; Olivier Corten and François Dubuisson, *Operation "Liberté Immuable"*: *Une Extension Abusive du Concept de Légitime Défense*, 106 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 51, 66 (2002); Steven R. Ratner, *Jus ad Bellum and Jus in Bello after September 11*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 905, 908 (2002).

[267] Brunnée and Toope, *Canada and the Use*, *supra* note 171, at 247, 250 (enumerating human rights, refugee protection, and threats to international peace and security as being subsumed into one super-category of "threat pre-emption").

[268] This position, which was also defended elsewhere by the present author, has been endorsed by some commentators, notably in Mohan V., *Terrorism*, *supra* note 109, at 211.

[269] See, e.g., Brunnée and Toope, *Canada and the Use*, *supra* note 171, at 247.

[270] See, e.g., Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("USA Patriot Act") Act of 2001, Pub.L.No.107-56, 115 Stat 272.

[271] On the issue of U.S. changes to immigration policies post-9/11, see Lebowitz and Podheiser, *A Summary*, *supra* note 33, at 873-888; Tumlin, *Suspect First*, *supra* note 33, at 1173.

in the global legal order,[273] it seems that the international community also initiated significant changes to the law of state responsibility. It follows from this proposition that clear-cut cases of overt involvement by governments -- whether through planning and overall control of non-state terrorist organizations or encouraging *de facto* state agents to breach international obligations (i.e. 'auxiliaries' or 'volunteers' being outsourced by state organs to perpetrate unlawful acts)[274] -- are governed by the direct responsibility paradigm and extend beyond the immediate scope of the present project. Indeed, given the current status of international politics, it is fair to assume that a state that overtly and directly supports,[275] endorses,[276] authorizes,[277] and/or condones a terrorist attack against another state will presumably not withstand international scrutiny. However, based on the theory of the *Nicaragua* and *Tadić* decisions, it is not clear whether a finding of direct responsibility in those instances would require more than fulfilling these elements for that state to attain the effective or overall control thresholds. A salient example of a state engaging in such practices would undoubtedly be that of Iran, which leads the way across the globe in

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[272] See, e.g., Slaughter and Burke-White, *An International Constitutional*, *supra* note 43, at 20 ("The traditional 'effective control' test for attributing an act to a state seems insufficient to address the threats posed by global criminals and the states that harbor them.")

[273] Some commentators express that international law is inadequate or, at best, inefficiently tailored to address the phenomenon of modern terrorism. See, e.g., Bassiouni, *Legal Control*, *supra* note 65, at 83-103; Yves Daudet, *International Action Against State Terrorism*, in Higgins and Flory, TERRORISM, *supra* note 1, at 201 (discussing the emergence of state terrorism and noting that "[t]he solutions invoked by international law have proved both awkward and inadequate".).

[274] See Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 110.

[275] Some commentators express that this type of state support for terrorist activities could be addressed and met with sanctions through the channel of the UN Security Council. See, e.g., Mark B. Baker, *Terrorism and the Inherent Right of Self-Defense (A Call to Amend Article 51 of the United Nations Charter)*, 10 HOUSTON JOURNAL OF INTERNATIONAL LAW 25, 26-27 (1987);

[276] On the question of responsibility by endorsement, see Brown, *Use of Force*, *supra* note 148, at 12.

[277] Many important international decisions recognize that conduct authorized by a state may be attributed to it. See, e.g., *The "Zafiro"*, 6 *R.I.A.A.* 160 (1925) [hereinafter *Zafiro*], *Stephens, 4 R.I.A.A.*, Vol. IV, 265 (1927) [hereinafter *Stephens*], at 267, *Lehigh Valley Railroad Company, and others (U.S.A.)* v. *Germany (Sabotage Cases)*, especially the *Black Tom* and *Kingsland* incidents, *R.I.A.A.*, vol. VIII 84 (1930) and *R.I.A.A.*, vol VIII, 225 (1939), at 458 [hereinafter *Lehigh Valley*, *Black Tom* and *Kingsland*].

directly/actively sponsoring terrorism[278] through its funding and training of Hezbollah factions, Palestine Islamic Jihad, and Hamas.[279] Hence, both from conceptual and theoretical standpoints, direct responsibility does not generate much confusion.[280] However, the issue of indirect responsibility is far more problematic both in terms of policy and legal content, and therefore warrants careful and thorough examination.

Before embarking upon the next portion of the study, it is nonetheless crucial to acknowledge the abovementioned interplay – sometimes bordering on what some have construed as a 'bastardly' conflation of two distinct regimes[281] – between state responsibility and self-defence. In that regard, any analytical endeavour seeking to better define the parameters of state responsibility in counterterrorism contexts should always simultaneously consider the potential benefits of reeling in the law of self-defence into the inquiry. As will be seen in Chapter 5, this juxtaposition of two distinct regimes was very much alive in the recent *Armed Activities* case, where the ICJ held that Uganda could not invoke a right to self-defence against the Democratic Republic of the Congo because it had harboured an armed militia on its territory.[282] Aside from actually determining state responsibility for a host-state's mere harbouring of terrorists -- perhaps coupled with the provision of logistical support and/or weaponry and training -- the prospective invocation of self-defence as a response to a state's failure to prevent transnational terrorism constitutes one of the primary points of friction in terms of legal policy. In particular, once a state's failure to prevent a terrorist attack emanating from its territory becomes a predicate for triggering state responsibility, can an aggrieved state redress that harm by adopting a forcible response based on self-defence precepts?

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[278] See, e.g., U.S. Department of State, PATTERNS OF GLOBAL TERRORISM: 2001 (2002), available online at http://www.state.gov/documents/organization/10319.pdf (last visited on June 28, 2008), at 64.

[279] See, e.g., *Ibid*; *Anderson* v. *Islamic Republic of Iran*, 90 F. Supp. 2d 107, 112 (D.D.C. 2000); Hoye, *Fighting Fire*, *supra* note 63, at 107-108.

[280] See Baker, *Terrorism*, *supra* note 275, at 36 ("Of course, where the state itself is directly behind the terrorist attacks, its responsibility is clear.").

[281] See, e.g., Martin, LES RÈGLES INTERNATIONALES, *supra* note 1, at 497.

[282] See *infra* Chapter 5, Section A)2.

Whilst the purpose of this dissertation is not to shed more light on the tenets of self-defence – a self-contained and analytically distinct category under international law[283] – but rather focus on the implications of counterterrorism for the law of state responsibility, it simply cannot dissociate the former regime entirely from the ensuing analysis. This reality is substantiated by several factors. First, it is implausible to deny that both legal fields, state responsibility and self-defence, have developed considerably since 9/11, both through the vehicle of United Nations and state practice (*lex lata*) and within legal scholarship as well (*lex ferenda*). Second, it appears that both regimes have evolved in tandem over the last nine years. Indeed, virtually all accounts dealing with the current state of international responsibility mechanisms inexorably delve into the next stage of the inquiry so to speak – although not unambiguously or uncontroversially in some instances – that is the possibility of invoking self-defence in response to a state's failure to prevent transnational terrorism. Put another way, the use of force against terrorism is consistently envisaged through a state responsibility prism. Whilst the analytical focus herein remains primarily concerned with elucidating the parameters governing the mechanics of state responsibility, a study driven by such objective failing to acknowledge the self-defence dimension of this legal debate -- most relevantly at the stage of devising legal consequences -- would not escape some sense of academic paucity. Third, when analyzing state practice in holding states accountable for failing to prevent terrorism, significant emphasis is placed on the deployment of state responsibility as a legal predicate for the invocation of self-defence. Thus, this explains the presence of precedents involving recourse to force in the present chapter's analysis. Yet, the mere fact that those episodes implicate Article 2(4) and Article 51 considerations does not disqualify them from having some impact on the primary inquiry. Simply put, the true mechanics of state responsibility crop up at an earlier stage following a state's breach of international law. But they are not necessarily antithetical to the subsequent deployment of self-defence repertoire. With this in mind, these

[283] See, e.g., Ian Brownlie, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 375 (1963) (underscoring that both regimes should not be conflated).

remarks act as preliminary gloss through which the post-9/11 evolution of indirect responsibility should be contemplated.

## D) A Paradigm Shift: Toward a Law of Indirect Responsibility

### 1. Evolution of Indirect Responsibility in International Law

The previous paragraphs alluded to the international response to 9/11 as a potential turning point in the modern law of state responsibility. It is true that this precedent, coupled with the apparent paradigm shift toward a model of indirect responsibility explained in the next paragraphs, has considerably paved the way for rethinking the regime of indirect state responsibility. Although this point will be explored in the present section, a few preliminary observations seem apposite here.

As seen above, Article 2 indicates that the conduct underlying an internationally wrongful act must be attributable to the state in order to trigger responsibility.[284] This conduct may translate into an action or omission; there is no real difference in the application of both types of behaviour.[285] This portion of Article 2 is undeniably founded for cases like *Nicaragua* and *Tadić*, where state actors share an intimate link with the host-state or when non-state individuals become *de facto* state actors, through the mechanisms of control and attribution. However, what these cases did not consider is easily identifiable: modern terrorism.[286] The world is now faced with new and significant threats, sophisticated terrorist organizations and complex financial structures. There are instances where states wield no control over terrorists operating on their territory. The only causal link between such a state and the wrongdoer is the fact that they are bound by a territorial element: they coexist in the same geographically and politically-delineated area. An additional element can often be juxtaposed in this equation, namely state toleration or acquiescence to the terrorists electing that territory as a base of operation.

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[284] See *supra* note 250.
[285] See Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 82.
[286] See generally Lippman, *The New Terrorism*, *supra* note 168.

In response to this challenge, a series of arguments advocating the excision of attribution in this context will be put forth in Chapter 4, with some insistence on hermeneutically-focused policy inclinations.[287] Whilst due consideration will be allotted to this line of inquiry at that stage, it is nonetheless interesting to now raise the possibility that the law of indirect responsibility might be better served by adjusting the content of some key provisions enshrined in the ILC's *Articles*. For instance, it has been shown above that political pragmatism and evidentiary impediments considerably restrict the prospect of establishing direct responsibility against host-states and, as a corollary, that more passive forms of state involvement in terrorism are increasingly attracting attention. The focus of the inquiry, therefore, is increasingly shifting towards indirect modes of liability, as states are expected to comply with their duties to intervene and to prevent transnational terrorism. Along the lines of the arguments espoused in Chapter 4, the rationale of indirect responsibility explored in the coming pages might be better addressed through a disjunctive – as opposed to conjunctive – reading of Article 2. Consequently, the ensuing policy-based revision of that provision would entail that "[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission": "(a) is attributable to the State under international law; ~~and~~ **OR** (b) constitutes a breach of an international obligation of the State."[288] In favouring this construction, the second disjunctive component of the Article emphasizes unfettered analytical focus on states' obligation to prevent without expending undue attention to meeting the laborious requirements of attribution. This adjustment might foster a better understanding of the varying roles sanctuary states play in supporting terrorism – which may range from direct control over terrorist agents to passive toleration of irregular units – but which, in the most problematic cases, entail a more hands-off form of involvement.

Whilst particular brands of catastrophic or large-scale ideological terrorism have become increasingly deterritorialized or decentralized phenomena,

[287] In particular, see the considerations pertaining to Article 12, *infra*, Chapter 4, Section B)2.a).
[288] See original version of Article 2, *ILC Articles on State Responsibility*, *supra* note 76.

the prevalent model nonetheless entails that "[n]onstate actors usually establish a base of operations within the boundaries of a sovereign state from which they plan and carry out terrorist actions in other countries."[289] Given a state's inherent visibility – as contrasted with the secretive nature of most terrorist cells or groups – it logically follows that intervening against a host-state can sometimes be more easily achieved than rooting out a terrorist cell within its borders, subject to the usual limitations cautioned vis-à-vis sovereignty-erosive instrusion into the exclusive jurisdiction of states.[290] To invoke popular parlance, such a state liability-minded model thus seeks to cut out the 'middle man' and go directly to the source – or purports to attain the exact opposite objective – depending on how, precisely, the facts of a given scenario identify the actual 'enabler' of an impugned terrorist strike. In other words, when and how a state is cast as the 'middle man' depends largely on matters of factual and conceptual interpretation, and ultimately bears little semantic incidence on the broader equation of counterterrorism if one accepts that a shift towards indirect responsibility now pervades international law. Not to mention the fact that a sanctuary state appears in most cases, almost irrefutably, to amount to the 'middle man' unless it actively participates in the planning and execution of terrorist attacks.

This reality prompted Luigi Condorelli to underscore that instances of terrorist activities fermentating on a state's territory -- that is to say that such operations have cropped up through the usurpation of the "lawful exercise of sovereignty, or of exclusive rights of jurisdiction, over a certain territory or space" -- serve as a 'catalyst' in triggering state responsibility.[291] From the perspective

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[289] José Javier Teurbe-Tolón, *Questions Concerning the Legality of the Use of Force in Southern Lebanon During the Israel-Hezbollah Conflict of 2006*, 21 NEW YORK INTERNATIONAL LAW REVIEW 95, 95 n.3 and accompanying text (2008).

[290] On the tensions arising as a result of the intervention in that state's exclusive jurisdiction, see Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 287, 377 (4th Edition, 1990). On the secretive nature of terrorism, see Kenneth W. Abbott, *Economic Sanctions and International Terrorism*, 20 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 289, 298-299 (1987); Smith, *International Law*, *supra* note 56, at 738 ("the inherently secret nature of terrorism serves to protect terrorists from punishment. Consequently, it is necessary to focus not on deterring the terrorist organizations that actually carry out attacks, but on holding their State sponsors and supporters accountable.").

[291] See Condorelli, *The Imputability*, *supra* note 125, at 240. See also Roberto Ago, Fourth Report on State Responsibility, [1972] YEARBOOK OF THE INTERNATIONAL LAW COMMISSION,

of forcefully stamping out terrorist networks operating on a given territory, the (seemingly sacred) principle of territorial integrity underpinning the modern nation-state also impedes available recourses under the rubric of self-defence, given that "non-state actors do not operate out of the high seas but are based in other states' territories."[292] It must be recalled that, even in situations of repeated transborder insurgency, respect of territorial integrity and political independence remains an important consideration under international law. A case in point is found in the 1982 Israel-Lebanon conflict, whereby Lebanon lost control of a portion of its territory from which PLO terrorists launched attacks against Israel. During a period of relative calm in the hostilities, the UN General Assembly called for restoration of "the exclusive authority of the Lebanese State throughout its territory up to the internationally recognized boundaries."[293] In fact, the loss of territorial control by Lebanon in favour of a terrorist organization – be it the PLO or Hezbollah – will be a recurrent theme and analytical vantage point in this dissertation.

In sum, it is fair to say that most terrorist organizations "have some state association, for terrorist actors must act within a system of sovereign states and virtually always have bases within states",[294] irrespective of the actual degree of involvement of governments in the planning and execution of excursions carried out by those groups. As a general rule, however, it is likely that such involvement will more frequently translate into the mere toleration by a state of terrorists on its territory, as opposed to active or direct state sponsorship of terrorist activity.[295] However, one must avoid falling prey to the temptation of embracing an all-encompassing conception of territorial association between terrorists and

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Volume 2, UN Doc. A/CN.4/SER.A/1972/Add.1, at p. 97, para. 65 (also invoking the term 'catalyst' in similar circumstances). From the perspective of territorial jurisdiction, it also follows that "[a] state may be subject to penalties for a failure to exercise jurisdiction if the offense is committed within its borders." See McCredie, *The Responsibility*, *supra* note 70, at 73.

[292] Duffy, THE 'WAR ON TERROR', *supra* note 133, at 159 (also noting that concerns arise in this setting regarding the invocation of self-defence).

[293] See General Assembly Resolution 37/123E of 16 December 1982.

[294] Beck and Arend, *"Don't Tread on US"*, *supra* note 65, at 163. See also Brown, *Use of Force*, *supra* note 148, at 4; Emanuel Gross, *The Laws of War Waged Between Democratic States and Terrorist Organizations*: *Real or Illusive?*, 15 FLORIDA JOURNAL OF INTERNATIONAL LAW 389, 444 (2003).

[295] For support of this proposition, see Smith, *International Law*, *supra* note 56, at 742.

sanctuary states, overly inspired by the Afghanistan-Al Qaeda precedent. Given that 'having a base' within a state can become a vague concept under some lights, it is crucial not to ultimately espouse an inordinately reductive model of state-terrorist(s) relationships, particularly in cases of state inability where host-nations are engaged in a struggle against terrorism but are unable to thwart the threat. Doing so would not only militate in favour of instituting an unrealistic and *absolute* territorial counterterrorism obligation -- as opposed to a more practicable due diligence standard -- but would also remove interesting cases from the purview of the analysis: the Lord Resistance's Army in Uganda, the Shining Path in Peru, the Unified Communist Party (Maoist) in Nepal, the Japanese Red Army in Japan, to list a few.

Conversely, state support of terrorist cells has historically proven indispensable in enabling some terrorists to carry out their attacks.[296] As former U.S. State Department advisor Abraham Sofaer noted twelve years before 9/11, "States have the resources to provide [terrorist] groups with the training, equipment, support, and instructions that enable them to inflict far greater damage than would be possible by independent agents."[297] As a result, the devastation of state-sponsored terrorism arising in the 1980s exponentially surpassed, in scope and magnitude, the terrorist excursions of independent groups.[298] However, the events of 9/11 have also shown that terrorist cells can act autonomously and carry out large-scale and horrendous attacks without any direct or significant state support. For instance, the Al-Qaeda network, which orchestrated a series of transnational terrorist excursions both before and after 9/11, has implemented fundraising mechanisms across the globe through legal and illegal channels and businesses.[299] Whilst this new model warrants further consideration, terrorist

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[296] See, e.g., Sofaer, *The Sixth*, *supra* note 131, at 377.

[297] *Ibid*, at 98. See also Bruce Hoffman, INSIDE TERRORISM 185-186 (1998).

[298] See, e.g., Hoffman, INSIDE TERRORISM, *supra* note 297, at 189; John F. Murphy, STATE SUPPORT OF INTERNATIONAL TERRORISM: LEGAL, POLITICAL, AND ECONOMIC DIMENSIONS 31 (1989).

[299] See, e.g., U.S. Department of State, PATTERNS OF GLOBAL TERRORISM: 2002 119 (2003), available online at http://www.state.gov/documents/organization/20177.pdf (last visited on June 19, 2008). As a result, it follows that "States may no longer serve as the promiment source of life for terrorist cells." See Smith, *International Law*, *supra* note 56, at 737. On Al-Qaeda's

organizations will nonetheless continue to rely heavily on territorial support in order to better plan and execute their attacks.[300] It inexorably follows that terrorists "still require the sanctuary of States to effectively operate" and, as corollary, that "States remain an important focus in responding effectively to terrorism."[301] In that regard, the secondary rules of state responsibility must be critically engaged.

It is also likely that terrorists could be operating independently and unbeknownst to state authorities. Similarly, one can certainly envisage scenarios where terrorist factions carry out internationally wrongful acts -- or acts of aggression and/or terrorist activities -- from within the borders of a state without its consent.[302] A recent application of this type of unsanctioned arrangement took root in the 2006 Israel-Hezbollah conflict, in which the armed wing of the terrorist organization launched attacks against Israel from the southern portion of the Lebanese territory.[303] Whilst Lebanon's responsibility can arguably be engaged in that account pursuant to general tenets of international law, the precise mechanics and extent of such accountability remain to be clarified. Therefore, it is imperative to establish the parameters of indirect responsibility in such instances.

In that regard, one cannot overemphasize the importance of the *Tehran Hostages* case in the evolution of legal regimes applicable to host-states. In 1979, a student militant group took over a U.S. embassy and its consulates in Iran, leading to serious vandalism, destruction of property and the capture and

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involvement in the majority of terrorist attacks in the five years following 9/11, see Statement of James Caruso, *supra* note 55, at 153; Levitt, PATTERNS, *supra* note 57.

[300] See, e.g., National NATIONAL STRATEGY, *supra* note 58, at 1, 3, 15-17 and 19; Meghan L. O'Sullivan, SHREWD SANCTIONS: STATECRAFT AND STATE SPONSORS OF TERRORISM 6 and 322 n.9 (2003); Schmitt, *The Sixteenth*, *supra* note 70, at 377 and 379.

[301] Smith, *International Law*, *supra* note 56, at 737.

[302] See, e.g., *Tel-Oren* v. *Libya*, 726 F.2d 774, 806-08 (D.C. Cir. 1984) (distinguishing the responsibility of a state from the accountability of a non-state actor for support of terrorism). See also Catherine Tinker, *Is the United Nations Convention the Most Appropriate Means to Pursue the Goal of Biological Diversity?*: *Responsibility for Biological Diversity Conservation Under International Law*, 28 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 777, 785 (1995) (inferring that state responsibility cannot be triggered solely by the actions of non-state actors).

[303] For support of this proposition, see Teurbe-Tolón, *Questions*, *supra* note 289, at 96. For more background on that conflict, see George K. Walker, *The 2006 Conflict in Lebanon, or What Are the Armed Conflict Rules When Legal Principles Collide?*, in David K. Linnan (ed.), ENEMY COMBATANTS, TERRORISM, AND ARMED CONFLICT LAW: A GUIDE TO THE ISSUES 252-279 (2008).

detention of 50 American citizens, mostly diplomatic and consular personnel.[304] In light of these facts, the ICJ first had to establish whether the takeover, ransacking of the embassy, and hostage-taking – an operation that lasted approximately three hours – was directly attributable to the Iranian state. Whilst its reasoning somewhat aligned with the underlying philosophy of *Tadić*, the Court formulated the applicable standard of direct responsibility in the following terms: "[t]heir [the militants'] conduct might be considered as itself directly imputable to the Iranian State only if it were established that, in fact, on the occasion in question the militants acted on behalf of the State, having been charged by some competent organ of the Iranian State to carry out a specific operation."[305] In sum, the ICJ rejected the rationale of direct involvement of the state in the attack but recognized that Iran failed to fulfill its duty to protect foreign diplomatic missions from assault.[306] A finding of direct responsibility in this scenario "would have required that the attackers act as agents or organs of the Iranian government, but no evidence indicated that to be the case."[307]

Although Iran was not found responsible through the channel of direct responsibility, the Court proceeded on the basis of indirect responsibility, thereby magnifying Iran's obligation to protect the embassy and its personnel: "the initiation of the attack on the United States Embassy…and…the attacks on the Consulates at Tabriz and Shiraz the following day, cannot be considered as in itself imputable to the Iranian State 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."[308] By virtue of several treaty provisions and principles of international law, Iran was deemed to have a duty to protect the victims of the attack, along with the embassy.[309] Furthermore, the Court emphasized the importance of the obligation at hand, labelling it a 'categorical' duty, thereby expecting Iran to 'take appropriate steps' in order to

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[304] See *Tehran Hostages*, *supra* note 67.
[305] *Ibid*, at para. 58. [Emphasis added.]
[306] See *Ibid.* at para. 58 (concluding that, in light of the evidence before it, the Court could not establish the requisite nexus between the state and the militant group).
[307] Brown, *Use of Force*, *supra* note 148, at 10-11.
[308] *Tehran Hostages* case, *supra* note 67, at para. 61. [Emphasis added.]
[309] *Ibid*, at para. 61-62.

fulfill this undertaking.[310] In an excerpt ostensibly building on the judicial starting point of the modern law of indirect responsibility formulated by the French text in the *Corfu Channel* decision,[311] the ICJ articulated Iran's failure to protect the embassy in a manner that proves conceptually and philosophically adjacent to the modern obligation of preventing terrorist attacks. Indeed, the Court emphasized that "the Iranian Government failed altogether to take any "appropriate steps" to protect the premises, staff and archives of the United States' mission against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion."[312]

In the same paragraph, the ICJ added that "the failure of the Iranian Government to take such steps was due to more than mere negligence or lack of appropriate means."[313] It is interesting to note that, amongst several factors that the Court considered, the question of the state's inaction on that specific day bears special consideration. In fact, the ICJ reviewed several other similar instances where Iranian authorities reacted pro-actively to thwart hostage situations. In light of previous state involvement in combating insurrectional conduct, the Court found that Iran's passiveness in the *Tehran Hostages* case was blatantly inconsistent with that line of precedents.[314]

Thus, a more limpid boundary between direct responsibility and indirect responsibility was finally drawn in the *Tehran Hostages* decision. It is now clear that, under the direct responsibility paradigm, the initial focus of the inquiry hinges on the conduct of an extraneous person or group and not on the actions of the host-state itself. The overarching objective, therefore, is to establish whether the wrongful action or omission, as engendered by the person or group, is directly

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[310] *Ibid,* at para. 61 ("By a number of provisions of the Vienna Conventions of 1961 and 1963, Iran was placed under the most categorical obligations, as a receiving State, to take appropriate steps to ensure the protection of the United States Embassy and Consulates, their staffs, their archives, their means of communication and the freedom of movement of the members of their staffs.").

[311] On the broader reading of state responsibility law in the French version of the *Corfu Channel* decision, see, *supra*, Chapter 1, Section C)1., especially notes 87-91 and accompanying text, and, *infra*, notes 334-335 and accompanying text.

[312] *Tehran Hostages* case, *supra* note 67, at para. 63.

[313] *Ibid*.

[314] *Ibid*.

attributable to the state. Interestingly enough, through the lens of *Nicaragua* and *Tadić*, this primary objective becomes inordinately contingent on the questions of control and direction exerted by the state over the person or group that authored the wrongful act. In fact, the question of control, as exercised by the host-state, has become a sort of touchstone in recent scholarly attempts to reconcile both judgments.[315] In broader terms, as will be discussed in subsequent sections, the notion of governmental control over non-official state entities and/or non-state actors often remains inextricably tied to the deployment of state responsibility mechanics. In fact, this idea even became the focal point in situations involving the application of the formal rules of state responsibility within domestic legal repertoire, notably in the *TrendtexTrading* case.[316]

Under the aegis of a strictly traditionalist approach, the final analysis culminates into three possible scenarios: the acts of state agents officially emanate from the host-state; non-state actors are deemed to be *de facto* government agents; or the acts of terrorist groups or insurgents are directly attributable to the host-state without labelling them formal instrumentalities or agents of the state *per se* (i.e. by way of official state endorsement or adoption of the wrongful conduct).[317] It should also be mentioned that, in times of war, traditional state responsibility law extends both to military personnel acting in an official capacity and/or in an *ultra vires* fashion, and to acts perpetrated by individual soldiers in a private capacity.[318] When considering the events of 9/11, however, it seems improbable that the attacks could, in fact, be attributed to the government of Afghanistan, even if analyzed through the lens of subsequent endorsement. Indeed, the public

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[315] See, e.g., Derek Jinks, *State Responsibility for the Acts of Private Armed Groups*, 4 CHICAGO JOURNAL OF INTERNATIONAL LAW 83, 89 (2003).

[316] See *Trendtex Trading Corp.* v. *Central Bank of Nigeria*, [1977] 1 Q.B. 529, 559-560 (C.A.).

[317] Along similar lines, consider Dupuy, *State Sponsors*, *supra* note 29, at 9-11 (distinguishing, on one hand, "acts of terrorism *directly* perpetrated by a State's organs" from "acts which were carried out by private persons, but with the support and / or control of a State" and identifying, on the other, similar classifications of state-condoned or *ultra vires* and non-state actions). See also Pierre-Marie Dupuy, *Quarante ans de codification du droit de la responsabilité internationale des Etats*: *Un bilan*, 107 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 305-348 (2003).

[318] For support of this proposition, see Luigi Condorelli: *Imputation à l'Etat d'un fait internationalement illicite*: *Solutions classiques et nouvelles tendences*, 189 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 9-221, 146 (1984-VI); *The Imputability*, *supra* note 125, at 233 and *seq*.

record indicates that Al Qaeda benefited from a large margin of autonomy within Afghanistan. Furthermore, there is no evidence that Afghanistan endorsed the attacks. Quite to the contrary, the Afghan state disavowed any involvement in the attacks.[319] Similar reasoning can also extend to the lead-up to the 2006 Israel-Lebanon war, as the Lebanese state never claimed that it 'ordered' Hezbollah to attack Israel or 'provided' any direction on that front.[320] In that regard, Lebanese Prime Minister Siniora rather emphasized that "[t]he [Lebanese] government...was not aware of what was to take place and does not adopt the operation carried out by Hizbullah to capture the two Israeli soldiers."[321]

It logically follows from the foregoing considerations that, contrary to direct responsibility, which focuses on the wrongful act itself, indirect responsibility is predominantly concerned with the conduct of the host-state, embodied in its failure to fulfill an international obligation (e.g. failing to adopt measures to prevent or punish a terrorist act emanating from its territory) rather than in its commission of some positive act (e.g. instructing, funding, arming, controlling and sending terrorists to kill civilians in a neighbouring country). In fact, this type of responsibility was thoroughly explored in the *Velásquez Rodríguez* case. Speaking to the interpretation of obligations that could readily be analogized to counterterrorism undertakings, the IACHR voiced it position in the following terms: "[a]n illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to 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 to it as required by the Convention."[322]

Similarly, while the rubric of 'indirect responsibility' should attract a broader categorization and cannot be reduced to context-specific liability

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[319] For support of these propositions, see Brown, *Use of Force*, *supra* note 148, at 11.
[320] See *Statement by Prime Minister Fouad Siniora*, DAILY STAR, July 17, 2006, available online at http://www.dailystar.com.lb/article.asp?edition_ID=1&article_ID=74027&categ_id=2# (last visited on 23 June 2007).
[321] *Ibid*.
[322] *Velásquez Rodríguez*, *supra* note 17, at para. 172.

standards (e.g. *respondeat superior*), it should be noted that it has sometimes been referred to as 'vicarious responsibility', perhaps erroneously.[323] Whilst some international legal accounts dealing with 'vicarious responsibility' make analogies and parallels immensely useful on points of detail, the thrust of this dissertation argues for a stand-alone category of 'indirect responsibility' that may or may not implicate some elements found in context-specific liability standards, depending on the circumstances at hand. In addition, several municipal legal constructions of the principle of 'vicarious responsibility' predicate the establishment of liability on the absence of any misbehaviour or unlawful act on the part of the party responsible, thereby making a rapprochement with the topic at hand conceptually dubious. Indeed, holding host-states accountable for failing to prevent transnational terrorism under international law categorically implies wrongdoing by the state, predominantly manifested by its failure to intervene and meet its due diligence threshold when it was compelled to do so by a positive obligation.

In the aftermath of 9/11, there has been a shift toward indirect responsibility whenever a state's territory is used to launch or prepare a terrorist strike, or when a state harbours terrorists. This evolution now requires meticulous and thoughtful consideration.

### 2. Impact on Primary Norms: The Emergence of the Harbouring and Supporting Rule

Unlike under the direct responsibility paradigm, the question of indirect responsibility entails a far more subtle type of involvement. As mentioned previously, the focus of the analysis rests on the understanding that, absent any direct implication by the host-state in a terrorist attack launched from its territory, that state may still be held accountable for its failure to prevent the given attack.

It is well documented that a state will usually not answer for the acts of private or non-state actors or, at the very least, that the unlawful behaviour will

[323] The concept of indirect responsibility, as construed in the present dissertation, is somewhat compatible with the notion of 'vicarious responsibility', as found in Robert Jennings and Arthur Watts (eds.), OPPENHEIM'S INTERNATIONAL LAW 502-03 (9th Edition, 1999). Invoking similar jargon, Davis Brown also expresses the difference between direct responsibility (labelled 'original responsibility' therein) and indirect responsibility. See *Use of Force*, *supra* note 148, at 13.

not be attributable to the host-state.[324] In other words, only conduct of the host-state's organs will be imputable to it. However, international law also recognizes that the actions of private persons may bind the host-state, should those actors or groups qualify as 'agents' of the state.[325] Absent any control or instigation by the state so as to elude the considerations found in the *Nicaragua* and *Tadić* line of reasoning, it becomes clear that a terrorist organization that carries out an attack on a stand-alone basis cannot be tantamount to an 'agent' of the state. The legal regime applicable to such perpetrators, therefore, becomes somewhat intractable or, at least, difficult to circumscribe unless one accepts the rationale that the various laws governing international crimes can fill that void.[326] Significant policy questions crop up: how can we ensure government accountability for failing to diligently suppress terrorist activities even if such government had no direct involvement in the perpetration of those activities? Can state responsibility law play a role in suppressing terrorism, so as to avoid impunity and to shift the focus squarely on prevention, transnational cooperation and vigilant law enforcement?

Historically, the idea that a state will usually not be responsible for actions of private persons was deeply rooted in international legal culture and has been confirmed on a number of occasions, including in the *Tellini* case of 1923.[327] Following the assassination on Greek territory of several members of an international commission overseeing the delimitation of the Greek-Albanian

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[324] For support of this proposition, see, e.g., Jennings and Watts, OPPENHEIM'S, *supra* note 323, at 502-503; Malanczuk, AKEHURST'S, *supra* note 165, at 259. For a thoughtful and recent account on the issue, see Wolfrum, *State Responsibility*, *supra* note 229, at 423-434.

[325] See Brownlie, SYSTEM, *supra* note 205, at 132-66; David D. Caron, *The Basis of Responsibility*: *Attribution and Other Trans-Substantive Rules*, in Richard B. Lillich and D. Magraw (eds.), THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 109 (1998). On the specific question of Osama bin Laden's status as an agent of the state, see the comments of John Quigley, *International Law Violations by the United States in the Middle East as a Factor Behind Anti-American Terrorism*, 63 UNIVERSITY OF PITTSBURGH LAW REVIEW 815, 826 (2002).

[326] See, e.g., Wolfrum, *State Responsibility*, *supra* note 229, at 424 (speaking to the difficulty of conceptualizing the law of state responsibility in relation to individuals).

[327] For more background and discussion on this case, see James Barros, THE CORFU INCIDENT OF 1923: MUSSOLINI AND THE LEAGUE OF NATIONS (1965).

border, the League of Nations organized a special legal committee.[328] In that regard, it sought to have that committee address the legal issues raised by the international incident.[329] Although the committee clearly rejected the possible attribution of the assassination to Greece, it opined that a host-state could be held responsible in like circumstances if it "*has neglected to take all reasonable measures for the prevention* of the crime and pursuit, arrest and bringing to justice of the criminal."[330] This language clearly foreshadowed a move from the more traditional analysis of the connection between state actors and the host-state to a rigorous examination of the conduct of the host-state itself vis-à-vis the wrongful act authored by private persons. These considerations are even more relevant when contrasted to the findings in the *Tehran Hostages* case.

Indeed, the parallel between both cases is striking, even though they were decided nearly 60 years apart. In both instances, the inquiry hinged on a rationale of indirect responsibility, with particular emphasis placed on the host-state's failure to bring its conduct within the purview of its international obligation to prevent the occurrence of the given illicit event. To refute the claim that the acts of private actors may be attributable to the sanctuary state in such circumstances is the best way to understand a decision like *Tehran Hostages*: "[f]or example a receiving State is not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it."[331]

As mentioned previously, the *Tehran Hostages* decision was instrumental in advancing the law of indirect responsibility. The ICJ concretely recognized that a state can be responsible for the actions of irregulars launched from its territory, especially when the wrongful act could have been avoided or even partially thwarted. This underlying rationale undoubtedly influenced the Court's reasoning, as recognized by ILC Special Rapporteur Crawford: "[i]n the

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[328] Twenty and Twenty First mtgs., 11 LEAGUE OF NATIONS OFFICIAL JOURNAL 1338-1352 (1923), at 1349 (discussing proper jurisdiction for such matters under Article 15 of the *League of Nations Covenant*).

[329] See Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 91.

[330] 4 LEAGUE OF NATIONS OFFICIAL JOURNAL 524 (1924). See also Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 110 n.99 (citing the *Janes* case, *supra* note 67).

[331] Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 92.

*Diplomatic and Consular Staff* case, the Court concluded that the responsibility of Iran was entailed by the "inaction" of its authorities which "failed to take appropriate steps", in circumstances where such steps were evidently called for."[332] Based on this reasoning and bearing in mind that terrorism poses a significant and polymorphic threat, it is apparent that the inaction of host-states will be thoroughly scrutinized when a given terrorist strike could have been avoided. At the primary level of the international breach (bearing in mind here that the engagement of state responsibility entails, first and foremost, the violation of a primary norm, e.g. the obligation to prevent terrorism), the analysis will ineluctably shift towards establishing the duty of host-states to forestall attacks rather than to their involvement in funding, supporting or directing terrorist activities. As a corollary to the abovementioned principles, this paradigm shift toward indirect responsibility correspondingly signals the imposition of a greater burden of precaution or prevention on host-states.[333]

These considerations are further bolstered by the holding extracted from the *Corfu Channel* decision, which, in tandem with the fact that the French version of that decision is authoritative,[334] provides considerable legal ammunition in advocating the adoption of a responsibility-expansive standard for injurious activities emanating from a state's territory. Indeed, the French text of the ICJ's ruling excises the notion of 'consent' or 'knowledge' from the equation and creates a stringent obligation upon host-states to diligently suppress and prevent harmful acts launched from their territory.[335] There is every indication – and certainly strong policy impetus – that this rationale could extend to

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[332] *Ibid*, at 82.

[333] In Chapter 4, Sections B)4. and *seq*., *infra*, an attempt to implement a strict liability-infused approach to faciliate the law of indirect state responsibility will be carried out. Bearing in mind such domestic law analogies for the moment, it is interesting to note, in passing, that the cost of preventing terrorist acts is particularly acute in the context of landowner liability. See, e.g., Melinda L. Reynolds, *Landowner Liability for Terrorist Acts*, 47 CASE WESTERN LAW REVIEW 155, 175 (1996). On the question of insurance policies, see, e.g., Thierry S. Renoux and André Roux, *The Rights of Victims and Liability of the State*, in Higgins and Flory, TERRORISM, *supra* note 1, at 251-263, 252 ("[a]s for the insurance companies, they have for a long time excluded terrorist attacks from their risks covered.").

[334] See *supra* note 90 and accompanying text.

[335] *Corfu Channel*, *supra* note 67, at 22.

counterterrorism and concomitantly substantiate the adoption of an indirect state responsibility standard for failing to prevent transborder attacks.

In that regard, another undeniable pivotal point of reference in the modern development of indirect state responsibility rests in the interpretation of post-9/11 events. Following the attacks carried out by Al Qaeda members against American targets, the U.S. and its allies launched an international response against Afghanistan.[336] Some commentators have questioned the legality of such retaliation[337] while others have condoned it, or, at least, found it justified under existing international legal standards.[338] Regardless of one's interpretation of this response, U.S. action in Afghanistan has significantly affected international law, especially the realm of state responsibility.

One could certainly argue, as done by others, that the classical test of attribution, as found in *Nicaragua*, has been subverted by U.S. action in Afghanistan. More moderate commentators express that "aspects of collective response to the September 11 attacks strongly suggest that the threshold for attribution has been lowered substantially."[339] Others suggest the existence of a varying scale under the *Nicaragua* framework in characterizing acts of terrorism as 'armed attacks',[340] by reference to Article 51 of the *UN Charter*.[341] Regardless

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[336] With regard to the underlying considerations of the U.S.' decision to attack Afghanistan, including self-defence concerns and alternative routes contemplated by the U.S., see David Abramowitz, *The President, Congress, and Use of Force*: *Legal and Political Considerations in Authorizing Use of Force Against International Terrorism*, 43 HARVARD INTERNATIONAL LAW JOURNAL 71-103 (2002).

[337] See, e.g., Quigley, *The Afghanistan War*, *supra* note 38, at 541-562; Steven Becker, *"Mirror, Mirror on the Wall…"*: *Assessing the Aftermath of September 11th*, 37 VALPARAISO UNIVERSITY LAW REVIEW 563-626 (2003). For different views on this debate, see also Mary Ellen O'Connell, *Lawful and Unlawful Wars Against Terrorism*, in Ved P. Nanda (ed.), LAW IN THE WAR ON INTERNATIONAL TERRORISM 79-96 (2005); Paust, *Use of Armed Force*, *supra* note 38, at 533-557.

[338] See Brown, *Use of Force*, *supra* note 148; O'Connell, *Lawful Self-Defense*, *supra* note 37, at 889-909; Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME LAW REVIEW 1335, 1344 (2004).

[339] Jinks, *State Responsibility*, *supra* note 315, at 89.

[340] Similarly, it is widely accepted that international responsibility also entails varying degrees of actual liability. See Gaetano Arangio-Ruiz, *State Fault and the Forms and Degrees of International Responsibility*: *Questions of Attribution and Relevance*, in Michel Virally (ed.), LE DROIT INTERNATIONAL AU SERVICE DE LA PAIX, DE LA JUSTICE ET DU DÉVELOPPEMENT: MÉLANGES MICHEL VIRALLY 25-42 (1991); Willem Riphagen, *Second Report on the Content, Forms and Degrees of International Responsibility*, U.N. GAOR. U.N. Doc. A/CN.4/344 (1981), reprinted in

of possible competing legal interpretations of post-9/11 action – whether framed within the furrow of state responsibility or self-defence – it is difficult to contend that Afghanistan did in fact exercise effective or overall control over Al Qaeda. Publicly available facts tend to demonstrate that the host-state harboured terrorists and, at best, provided them with limited logistical support.[342] Hence, the attribution argument, as found under *Nicaragua* and *Tadić*'s line of reasoning, seems to fail at the outset given Al Qaeda's complex structure and large margin of organizational and operational autonomy.[343] In such scenarios, assertions that private conduct should be attributed to a host-state are generally hard to countenance, given the tenuous connection between the international misfeasor and the official state apparatus.

In retrospect, it is clear that Afghanistan probably did not have any direct implication or knowledge of the preparation or planning of the attacks.[344] Consequently, the U.S. could not simply pin responsibility on Al Qaeda alone but "sought to impute al Qaeda's conduct to Afghanistan simply because the Taliban had harbored and supported the group".[345] Thus, the U.S. did not initially entertain a claim that Al Qaeda acted on behalf of the government of Afghanistan. It rather favoured a rationale of indirect involvement, stating that the government of Afghanistan had supported members of Al Qaeda.[346] However, as the stage

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[1981] 2 YEARBOOK OF INTERNATIONAL LAW COMMISSION 79, U.N. Doc. A/CN.4/SER.A/1981/Add.1 (Vol. II, First Part, p. 79).

[341] See Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HARVARD INTERNATIONAL LAW JOURNAL 41-51 (2002).

[342] It appears that Al Qaeda operated independently from the Taliban regime. See, e.g., Manooher Mofidi and Amy E. Eckert, *"Unlawful Combatants" or "Prisoners of War": The Law and Politics of Labels*, 36 CORNELL INTERNATIONAL LAW JOURNAL. 59, 75 (2003). It is interesting to note that, in justifying self-defence against Afghanistan, the U.S. premised its position on a two-prong approach. First, the U.S. characterized 9/11 as an 'armed attack', pursuant to Article 51 of the *UN Charter*. Second, it predicated its right to use force on the fact that Afghanistan had 'supported' and 'harboured' members of Al Qaeda. See Charney, *The Use of Force*, *supra* note 30; Jinks, *State Responsibility*, *supra* note 315, at 89.

[343] See Brown, *Use of Force*, *supra* note 148, at 11.

[344] See Jinks, *State Responsibility*, *supra* note 315, at 89.

[345] *Ibid*.

[346] See, e.g., Letter Dated 9 October 2001 from President Bush to congressional leaders reporting on combat, available online at http://www.whitehouse.gov/news/releases/2001/10/20011009-6.html (last visited on 13 March 2005) [hereinafter *October 9th Letter*], at para. 1 ("U.S. Armed Forces began combat action in Afghanistan against Al Qaida terrorists and their Taliban supporters. This military action is a part of our campaign against terrorism and is designed to disrupt the use of Afghanistan as a terrorist base of operations."). [Emphasis added.]

was being set for the retaliatory strikes against Afghanistan, President Bush did pronounce direct accusations against the government of Afghanistan, declaring that its members had committed murder by supporting and harbouring terrorists.[347] However, it is fair to say that "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 agency criteria for the attribution of private acts."[348] However, the U.S.' posture was perhaps further bolstered by the fact that the international community had, for all intents and purposes, seemingly convicted Afghanistan of harbouring Al Qaeda members on its territory and, additionally, of providing them with logistical support in the preparation of their attacks.[349] This finding, coupled with the quasi-immediate conflation of Al Qaeda and Afghanistan, puzzled certain scholars.[350] This confusion and, perhaps irony, was further exacerbated by the fact that the U.S.' Central Intelligence Agency had initially supported the Taliban in their efforts to repel Soviet troops some years earlier.[351]

As the 'war' on terrorism transitioned into a full-fledged operation, it became clear that the U.S. would not differentiate between host-states and terrorists[352] and would concomitantly attempt to extirpate 9/11 perpetrators from any territory that offered them shelter.[353] As the U.S. shifted its national security

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[347] See, e.g., *A NATION CHALLENGED; Bush's Remarks on U.S. Military Strikes in Afghanistan*, NEW YORK TIMES, Oct. 8, 2001, at B6; President Bush' speech to the UN General Assembly on November 10, 2001, available online at http://www.whitehouse.gov/news/releases/2001/11/20011110-3.html (last visited on 17 March 2005) [hereinafter *November 10 Speech*].

[348] Becker, TERRORISM AND THE STATE, *supra* note 2, at 216-217. See also Duffy, THE 'WAR ON TERROR', *supra* note 133, at 54, 189.

[349] See, e.g., Byers, *Terrorism*, *supra* note 30, at 403.

[350] See, e.g., Dupuy, *State Sponsors*, *supra* note 29, at 9 (characterizing this turn of events as 'striking').

[351] See, e.g., Richard Mackenzie, *The United States and the Taliban*, in William Maley (ed.), FUNDAMENTALISM REBORN? AFGHANISTAN AND THE TALIBAN 91 (1998).

[352] See Jinks, *State Responsibility*, *supra* note 315, at 84-85.

[353] In the *November 10 Speech*, *supra* note 347, President Bush also spoke to this point ("The allies of terror are equally guilty of murder and equally accountable to justice. The Taliban are now learning this lesson -- that regime and the terrorists who support it are now virtually indistinguishable.").

posture to a vision of 'strategic unilateralism and tactical multilateralism',[354] it became clear that, with it, its strategy in the 'war' on terror also shifted "from one that targeted terrorists as criminals to one that treats terrorists and supporting States capable of threatening the US and its allies, as threats to national security".[355] Whilst this inclination prompted some scholars to query whether the law of state responsibility would now "require an even lower standard of control of the "host" state over the terrorists in its midst",[356] it certainly cast a shadow of doubt over what was perceived as traditional rules of attribution. One can certainly find support -- even acquiescence -- for this position in the global community of states.[357] Nevertheless, the oft-reiterated U.S. belief that there should be no escape clause for states that harbour terrorists triggered a polemic over whether the much-discussed 'harbouring and supporting' notion created a corresponding primary rule of international law,[358] or whether it solely engendered a change in the secondary rules of attribution. Should the latter interpretation be retained, it might signal that *Nicaragua* and *Tehran Hostages*' respective lines of inquiry have been overridden by contemporaneous events.[359]

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[354] The language is borrowed from Harold Hongju Koh, *Jefferson Memorial Lecture*: *Transnational Legal Process after September 11th*, 22 BERKELEY JOURNAL OF INTERNATIONAL LAW 337, 350-351 (2004).

[355] Abraham A. Sofaer, *On the Necessity of Pre-emption*, 14 EUROPEAN JOURNAL OF INTERNATIONAL LAW 209, 209 (2003).

[356] Siegfried Wiessner, *The Articles on State Responsibility and Contemporary International Law*, in Koufa, THESAURUS ACROASIUM, *supra* note 202, at 246-269, 257-258.

[357] For instance, the European Union General Affairs Council stated, on 8 October 2001: "The Al Qaida network and the regime which supports and harbours it are now facing the consequences of their action." See *EU Declares Full Solidarity and Wholehearted Support for U.S.*, Washington File (EUR515), U.S. Department of State, Washington D.C., October 12, 2001, available online at http://www.european-security.com/index.php?id=525 (last visited on 5 May 2008). It should be noted that not a single state took issue with the U.S.' posture in the UN General Assembly. Consequently, Travalio and Altenburg inferred that "[t]he world reaction – or more accurately, the lack fo a world reaction – to the consistently repeated U.S. position is perhaps the strongest manifestation of evolving customary international law regarding the use of force against terrorism." See *Terrorism*, *supra* note 146, at 109.

[358] See Jinks, *State Responsibility*, *supra* note 315, at 95.

[359] For example, Travalio and Altenburg expound that "the rules regarding the imputation of state responsibility for terrorist attacks have evolved since the Nicaragua and Iran Hostages Cases." See *Terrorism*, *supra* note 146, at 110, also arguing that "these two cases should be confined to their facts and are not applicable to transnational terrorist groups who threaten previously unimagined destruction." *Ibid*, at 105. See also Slaughter and Burke-White, *An International Constitutional*, *supra* note 43, at 20; Peter Margulies, *When to Push*, *supra* note 146, at 647 n.21 (suggesting that a "broader standard is appropriate to encourage State diligence").

Moreover, through a conceptually nebulous application of international law the U.S. collapsed direct and indirect responsibility into one unpalatable approach; indeed, it is apparent that the U.S.' finding of responsibility against Afghanistan was imbued both with direct and indirect responsibility undertones. From a logical perspective, equating host-states with terrorists is hardly defendable absent clear and compelling evidence of collusion between both entities, including egregious perpetration of terroristic enterprises by state agents or members of the governing apparatus. However, the portion of the 9/11 precedent pertaining to indirect responsibility signals a monumental shift in international law; whilst the U.S. never explicitly set out what, exactly, the notion of 'harbouring' entailed from the perspective of international law, certain scholars have nonetheless construed it as the catalyst of a 'revolution in the law of state responsibility'.[360]

Whilst the duty to prevent terrorism can be grounded in general principles of international law and important contemporary jurisprudential pronouncements, post-9/11 Security Council practice can nevertheless be construed as a law-shaping endeavour, even accepting the premise that such obligation should be rooted in treaty law, which, incidentally, it also is across a vast spectrum of international obligations. As Professor Franck highlights, "practice cannot by itself amend a treaty, but, as the Court has also pointed out [in the *Namibia Advisory Opinion*], the practice of a UN organ may be seen to interpret the text and thereby to shape our understanding of it."[361] On another occasion dealing solely with state practice in the *Nicaragua* decision, the ICJ delivered similar reasoning along these lines: "[t]he significance for the Court of cases of State conduct prima facie inconsistent with the principle of non-intervention lies in the nature of the ground offered as justification. Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by

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[360] See, e.g., Sepehr Shahshahani, *Politics Under the Cover of Law*: *Can International Law Help Resolve the Iran Nuclear Crisis?*, 25 BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL 369, 399-400 (2007).

[361] Franck, RECOURSE, *supra* note 120, at 174, citing *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)*, [1971] I.C.J. REPORTS 16 at 22, para. 22 [hereinafter *Namibia Advisory Opinion*]. See also *Nicaragua*, *supra* note 119, at 109, para. 207.

other States, tend towards modification of customary international law."[362] It should be emphasized that scholars have put forth like-minded advances regarding the *ILC Articles on State Responsibility*, most notably to the effect that their future development and application should take certain suggested revisions and criticisms into account.[363] In the aggregate, therefore, it is probably fair to interpret U.S. action in Afghanistan as motivated by the government of Afghanistan's failure to prevent terrorist attacks emanating from its territory and its refusal to stop harbouring Al Qaeda members.[364] As a corollary, the impact of the U.S.' ensuing invasion of Afghanistan on the law of state responsibility needs to be ascertained more clearly but it would appear, at least *prima facie*, that this precedent has considerably relaxed some standards of state responsibility and consecrated a shift towards a law of indirect responsibility when dealing with counterterrorism obligations.

This type of legal reasoning is not entirely novel. In fact, the contents of the 1970 UN Declaration on Friendly Relations were also precursory to the modern law of indirect responsibility, as they indicated that "[e]very 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."[365] From this

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[362] *Nicaragua*, *supra* note 119, at 109, para. 207.

[363] See, e.g., Yamada, *Revisiting*, *supra* note 150, at 118.

[364] There are hints of this reasoning in 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, U.N. Doc. No. S/2001/946 (2001) [hereinafter *October 7th Letter*] ("my Government has obtained clear and compelling information that the Al-Qaeda organization, which is supported by the Taliban regime in Afghanistan, had a central role in the attacks…The attacks…and the ongoing threat to the United States…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."; and "From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent people"). See also Christopher S. Wren, *US Advises UN Council More Strikes Could Come*, NEW YORK TIMES, 9 October 2001, at B5.

[365] 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), at 122, U.N. Doc. A/8082 (Oct. 24, 1970) [hereinafter Declaration on Friendly Relations] [Emphasis added.]; Baker, *Terrorism*, *supra* note 275, at 38. See also Jorge Peirano, *International Responsibility and Cooperation for Development*, in Ragazzi, INTERNATIONAL RESPONSIBILITY, *supra* note 50, at 183-196, 191.

excerpt, it is apparent that the UN General Assembly might have been concerned not only with host-states directly orchestrating attacks against other states, but also with the possibility of passive, willfully blind or negligent governments not exercising a sufficient degree of control or diligence over irregular units. However, prior to 9/11 it was still unclear whether the mere tolerance or passive support of terrorist organizations on its territory was sufficient to trigger a state's responsibility for failing to prevent or monitor their activities.[366] In this regard, state terrorism was, and should be, perceived as particularly serious, as it constitutes a fundamental breach of international law. Yet, under certain lights the practice of state terrorism may arguably take on different forms – from direct action to mere tolerance – thereby obfuscating the search for clear legal postulates governing the direct/indirect dichotomy (e.g. when does mere toleration fulfill the criteria of state terrorism and trigger the mechanics of direct responsibility, and when does the same conduct trigger the application of indirect responsibility?).

Although somewhat relevant prior to 9/11, the concept of 'harbouring' and 'supporting' terrorists now seems to have achieved international precedence over more traditional, agency-based applications of attribution. This change is particularly significant when considering that both *Nicaragua*[367] and *Tadić*[368] rejected financial and military assistance as the sole basis for imputing direct responsibility to a state,[369] even if such aid proved "preponderant or decisive." If we take this finding as one of the only consistent and uncontroversial points between these two decisions, coupled with the known fact that terrorists need

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[366] See, e.g., Daudet, *International Action*, *supra* note 273, at 202.

[367] The ICJ also added, *supra* note 119, at para. 115, that the participation by the host-state, "even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself…for the purpose of attributing to the United States the acts committed by the *contras*". See also *Ibid*, at para. 110.

[368] *Tadić*, *supra* note 108, at para. 130 ("it is not sufficient for the group to be financially or even militarily assisted by a State").

[369] For a recent discussion of these aspects, see Wolfrum, *State Responsibility*, *supra* note 229, at 428-429. For a recent application of this idea by the ICJ, see *Genocide Case*, *supra* note 100, at p. 139, para. 388.

assets to operate and that various actors across the globe are attempting to forestall their financial autonomy,[370] two conclusions seem apposite.

First, there seems to be an irreconcilable discrepancy between the reasoning found in *Nicaragua* and *Tadić*, both of which impose a stringent burden on the aggrieved state in order to establish direct responsibility, and the course of action followed in the U.S.-Afghanistan case, which seems to alleviate the injured state's onus on an exponential level if contemplated through a state responsibility prism. The international community is thus shaping a standard that even state-sponsored, state-organized or state-condoned terrorism cannot obscure or eschew, a standard that would rather simply condemn the opening of national borders to terrorist organizations as a basis for engaging international liability mechanisms. Based on that logic, the mere provision of logistical support or the sheltering of terrorists on national territory will supplant any inquiry into the level of control a host-state exercises over a given attack. It follows that the onus of the injured state in establishing indirect responsibility has decreased considerably, whilst the burden of precaution and accountability of the host-state has grown significantly. As a corollary, the notions of risk management, precaution and legal accountability constitute running themes throughout any study of the relationship between state responsibility and transnational terrorism.[371] In fact, as ILC Special Rapporteur Sreenivasa Rao concluded in his Third Report on international liability for injurious consequences arising out of acts not prohibited by

[370] Much has been written on the efforts to freeze terrorist assets and to obstruct fundraising channels of organizations. See, e.g., Fletcher N. Baldwin, *The Rule of Law, Terrorism and Countermeasures Including the USA Patriot Act of 2001*, 16 FLORIDA JOURNAL OF INTERNATIONAL LAW 43 (2004); Crimm, *High Alert*, *supra* note 32, at 1341; Engel, *supra* note 32; Eric J. Gouvin, *Bringing Out the Big Guns*: *The USA Patriot Act, Money Laundering, and the War on Terrorism*, 55 BAYLOR LAW REVIEW 955 (2003).

[371] For recent and thoughtful accounts on the interplay between these concepts and the law of state responsibility, see Jutta Brunnée, *International Legal Accountability Through the Lens of the Law of State Responsibility*, 36 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 21-56 (2005); Wouter G. Werner, *Responding to the Undesired*: *State Responsibility, Risk Management and Precaution*, 36 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 57-82 (2005).

international law (prevention of transboundary damage from hazardous activities), "prevention, on the other hand, is concerned with the management of risk."[372]

Second, the first conclusion being inextricably tied to this one, there appears to be some resistance from the international community against reverting back to a model of direct state responsibility. Moreover, it is fair to assume that in the future, indirect responsibility will frequently preempt most considerations related to a host-state's level of direct control in a given terrorist enterprise. This shift in international law, which still requires a few adjustments, now completely centres on a state's failure to prevent an excursion led by terrorists from its territory onto another.[373] Some scholars certainly subsume this scenario under the exceptions to the general rule of non-attribution of private conduct, aside from those expressly mentioned in the ILC's *Articles*,[374] but predicate any situation of indirect responsibility on the existence of a primary obligation upon the host-state to intervene.[375] For present purposes, this threshold seems easily met, as a primary obligation incumbent upon sanctuary states to repress and prevent terrorist attacks emanating from their territory undeniably exists.

In a broader sense, the true challenge therefore lies in elucidating the relationship between bilateral and multilateral tensions stemming from the mechanics of international responsibility, as they are shaped and transformed by

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[372] A/CN.4/510, 9 June 2000, at 13, para. 27. See also Pemmaraju Sreenivasa Rao, *Prevention of Transboundary Harm from Hazardous Activities*: *A Sub-topic of International Liability*, 32 ENVIRONMENTAL POLICY AND LAW 27 (2002).

[373] Similarly, commentators argue that the U.S.-led response against Afghanistan may have engendered a shift in the law of state responsibility. See Jinks, *State Responsibility*, *supra* note 315, at 83-84; Brown, *Use of Force*, *supra* note 148, at 2. The present dissertation will follow a different route by arguing a more radical paradigm shift. On the possible intersection between use of force and state responsibility, generally, see Erin L. Guruli, *The Terrorism Era*: *Should the International Community Redefine Its Legal Standards on Use of Force in Self-Defense?*, 12 WILLAMETTE JOURNAL OF INTERNATIONAL LAW & DISPUTE RESOLUTION 100-123 (2004); Lauri Hannikainen, *The World After 11 September 2001*: *Is the Prohibition of the Use of Force Disintegrating?*, in Jarna Petman and Jan Klabbers (eds.), NORDIC COSMOPOLITANISM: ESSAYS IN INTERNATIONAL LAW FOR MARTTI KOSKENNIEMI 445-468 (2003).

[374] See, e.g., Wolfrum, *State Responsibility*, *supra* note 229, at 424-425 (discussing possible scenarios under Articles 8 and 9 of the ILC's *Articles*).

[375] See *Ibid*, at 425 (also citing *Velásquez Rodríguez*, *supra* note 17). This reality, in turn, informs his reading of *Yeager*, *supra* note 113, at 103-104, and also echoes some of the views already expressed in this chapter, especially with regard to the *Tehran Hostages* case. It should also be reiterated that his conception of indirect responsibility is contingent on a primary obligation to intervene. See *Ibid*, at 430-431.

difficult and sometimes fact-specific phenomena such as the proliferation of non-state actors[376] and *erga omnes* obligations.[377] This discussion ultimately gravitates towards, and further reinforces, the idea that, since the ILC's codification of responsibility is predominantly contingent on state control or endorsement of private conduct, certain tenets of state responsibility must be revisited in light of recent involvement of private actors at the transnational level.[378] The bases for attribution under the *Articles* and the deterritorialized nature of certain private activities, such as terrorist operations and the outsourcing of state and non-state violence, immediately come to mind.[379] This animates Tal Becker's recent reassessment of the rules of attribution vis-à-vis terrorism: "[u]nlike 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 esily identify the source of that threat. It has no fixed address. It offers no easy target for a response."[380]

Furthermore, the very idea of indirect responsibility is inextricably connected with the need to better circumscribe the role of non-state actors in the scheme of state responsibility. As a corollary, it follows that the ILC's *Articles* remain exceedingly focused on a (perhaps dated) unitary and bilateral conception of inter-state relations.[381] Indeed, certain eminent scolars decry the fact that the

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[376] In discussing non-state actors within state responsibility, Emanuel Roucounas, rightly highlights that "[p]ast efforts to distinguish between direct and indirect responsibility were explained by the need to locate the individual within the system." See *Non-State Actors: Areas of International Responsibility in Need of Further Exploration*, in Ragazzi, INTERNATIONAL RESPONSIBILITY, *supra* note 50, at 391-404, 392.

[377] For instance, Villalpando, L'ÉMERGENCE DE LA COMMUNAUTÉ, *supra* note 78, underlines, at 319, that the violation of an *erga omnes* obligation typically engenders different effects for certain States, and applies this reasoning to an armed attack.

[378] See, e.g., Roucounas, *Non-State Actors*, *supra* note 376, at 392-403.

[379] On this point, see, e.g., N. Okany, *State Delegation of Functions to Private or Autonomous Entities*: *A Basis for Attribution Under the Rules of State Responsibility*, in Koufa, THESAURUS ACROASIUM, *supra* note 202, at 329-345; Wolfrum, *State Responsibility*, *supra* note 229, at 423-434.

[380] Becker, TERRORISM AND THE STATE, *supra* note 2, at 1.

[381] See, generally, Georg Nolte, *From Dionisio Anzilotti to Roberto Ago*: *The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-State Relations*, 13 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1083 (2002).

*Articles* predominantly focus on inter-state responsibility, operate on a 'bilateral', 'individualistic' and 'privatistic' conception of international law and, ultimately, fail in ascribing a better defined role to the individual in establishing the international responsibility of states.[382] It would follow that the extant scheme of responsibility should be able to countenance "the increasingly significant role of the individual (natural or legal person) and of other non-State entities" in contemporary international relations and, correspondingly, overcome the "*strictly interstate* character of traditional international law and of the *statist* approach to that law."[383] It also follows from this prevalent state centrism that the notion of 'control' underlies much of the logic found in the *Articles*, but fails to provide any concrete solutions in the hard cases involving non-state actors. The present dissertation will take issue with this notion of 'control' in Chapter 4, and correspondingly argue that the concept of attribution itself is flawed.[384] As certain areas of international law shift away from a state-centric conception towards an increasingly transnational paradigm, it seems that the concept of international responsibility must be reexamined in light of recent events and trends. As one commentator observes, "[t]he fact that today States have to face direct action by individuals so as to put that responsibility into operation is just one other consequence of the evolution of international law."[385] In light of this quest, the study now turns to the more concrete task of querying whether the 'harbouring and supporting' rule can historically be cast as an analytical stepping stone towards a better understanding of modern state responsibility mechanisms vis-à-vis terrorism.

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[382] Pisillo Mazzeschi, *The Marginal Role*, *supra* note 5, at 39-40. For further discussion on how past efforts to distinguish between direct and indirect liability "were explained by the need to locate the individual within the system", see Roucounas, *Non-State Actors*, *supra* note 376, at 392; Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 61-65 and 91-122.

[383] Pisillo Mazzeschi, *The Marginal Role*, *supra* note 5, at 39-40.

[384] This line of reasoning is consonant with arguments previously advanced in other accounts. See Proulx, *Babysitting Terrorists*, *supra* note 163; Vincent-Joël Proulx, *International Responsibility Today*: *Essays in Memory of Oscar Schachter • L'émergence de la communauté internationale dans la responsabilité des Etats*, 18 EUROPEAN JOURNAL OF INTERNATIONAL LAW 581, 583, 586 and 590 (2007).

[385] Francisco Orrego Vicuña*, The Protection of Shareholders Under International Law*: *Making State Responsibility More Accessible*, in Ragazzi, INTERNATIONAL RESPONSIBILITY, *supra* note 50, at 161-170, 169.

### 3. Specific Incidents Involving the Harbouring and Supporting Rule Before 9/11

There is nothing revolutionary in claiming that a host-state is violating its duties because it harbours or supports terrorists on its territory. In fact, the Security Council has frequently deplored the continuing use of Afghan territory for the 'sheltering' and 'training' of terrorists. Resolution 1267 remains a probative example whereby the Council accused the government of Afghanistan of perpetrating egregious violations of international law by sheltering terrorists, allowing the presence of training camps and providing safe haven to Osama bin Laden and his associates on its territory. The Council urged Afghanistan to "cease the provision of sanctuary and training for international terrorists and their organizations".[386] Given the paradigm shift argued above, coupled with the legal response to 9/11, it is fair to say that indirect responsibility has acquired creedence in international law and will probably constitute the preferred course of action of several injured states in the future. Therefore, considerable weight must be given to the implications of the harbouring and supporting of terrorists for state responsibility.

#### a) The 1982 Israel-Lebanon Conflict

The 1982 Israel-Lebanon conflict is a salient example of an episode involving the harbouring and supporting rule also stemming from previous friction, namely the 1956 Sinai incident, opposing Israel to Egypt. After sending troops across the 1949 cease-fire line into the Sinai, Israel invoked precedents of transborder excursions by Palestinian *fedayeen* as a basis for its transborder response.[387] The argument was not well-received by the Security Council; yet, its ensuing resolution did recognize, albeit by implication, a link between the Palestinian excursions and Israel's reaction.[388] The draft resolution consequently

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[386] U.N. S.C. Resolution 1267 (1999), 15 October 1999, UN Doc. S/RES/1267 (1999) [hereinafter *Resolution 1267*]. Similar concerns pertaining to the 'use of Afghan territory' for the 'sheltering and training of terrorists' have been expressed in the following Security Council Resolutions: S/RES/1214 of 8 December 1998; S/RES/1333 of 19 December 2000 [hereinafter *Resolution 1333*]. See also, generally, Franck, RECOURSE, *supra* note 120, at 95-96.

[387] See U.N. Doc. S/PV.748 (1956).

[388] See RES S/3710 of 30 October 1956.

called upon Israel to withdraw from Egyptian territory. This implicit message was later substantiated by another Council resolution, which allowed the UNEF body to prevent further Palestinian excursions into Israel as part of its peacekeeping mandate. In that document, the Council expressly "[*c*]*onsiders* that, after full withdrawal of Israel from the Sharm el Sheikh and Gaza areas, the scrupulous maintenance of the Armistice Agreement requires the placing of the United Nations Emergency Force on the Egyptian-Israel demarcation line and the implementation of other measures".[389]

Following the Sinai incident, it became common practice for Palestinian militants to launch strikes from the Lebanese territory into Israel.[390] After invading a large part of the Lebanese territory, Israel contended that the PLO had effectively turned the southern part of Lebanon into a launch pad for terrorist attacks.[391] Israel further submitted that the PLO had appropriated most of the Lebanese territory,[392] and using language redolent of the paradigm shift towards indirect responsibility, asserted that Lebanon failed to fulfill its "duty to prevent its territory from being used for terrorist attacks against other States".[393] In a rebuttal somewhat precursory to the *Nicaragua* and *Tadić* reasoning, Lebanon refuted responsibility for the incident by alleging that the bases from which the attacks were launched evaded its own control.[394] Subsequently, calling on Israel to withdraw from Lebanon, Ireland spearheaded a resolution that was unanimously endorsed.[395] In the days that followed, Israel put forth several emotive and vivid arguments as to its decision to initiate military action after years of murderous incursions perpetrated by PLO members against Israelis.[396] In its plea, Israel again reiterated that Lebanon had become a launching pad for

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[389] Security Council Resolution 1125(XI) of 2 February 1957. [Emphasis added.]
[390] Letter dated 13 March 1978 from Representative of Israel to UN Secretary-General, U.N. Doc. A/33/64 (1978).
[391] See Franck, RECOURSE, *supra* note 120, at 57.
[392] *Ibid*. See also Desmond McForan, THE WORLD HELD HOSTAGE: THE WAR WAGED BY INTERNATIONAL TERRORISM 46-47 (1987) (stating that the PLO operated as a "state within a state").
[393] Letter dated 27 May 1982 from the representative of Israel to the UN Secretary-General, U.N. SCOR, 37th Yr., at 119, U.N. Doc S/15132 (1982).
[394] Franck, RECOURSE, *supra* note 120, at 57.
[395] U.N. Doc. S/RES 509 (1982).
[396] For example, see U.N. SCOR, 37th Yr., 2375th Mtg., at 4, para. 38 (1982).

terrorist activities, referring to it as a "logistic centre and refuge for members of the terrorist internationale from all over the world."[397] The Security Council remained undeterred in its objective to restore peace in the region and a Spanish resolution demanding the cessation of hostilities was ultimately adopted.[398]

Both the Sinai and the 1982 incidents can be convincingly analogized to the U.S.-Afghanistan situation, as the attacks were instigated by irregular forces, namely PLO members, and launched from a third-party state, Egypt and Lebanon respectively.[399] Yet, the Security Council rejected Israel's plea of self-defence,[400] and the PLO irregulars were eventually relocated in Tunis by Lebanon.[401] In the 9/11 scenario, the government of Afghanistan harboured members of the Al Qaeda network without participating in the planning or execution of the attacks. However, contrary to the 1982 incident, the Council permitted U.S. action in Afghanistan.[402] This difference in the application of international law is difficult to explain and is premised on a two-fold conclusion.

First, the 9/11 experience plausibly illustrates the shift toward indirect responsibility as the superseding model, now fully endorsed by the international community. In other words, the arguments presented by Israel in 1982 did not resonate with the international community. Almost 20 years later, while the government of Afghanistan provided safe haven to Al Qaeda members, a very similar factual situation engendered an unprecedented international response, along with the breeding of a "war" that is both novel and indeterminate in

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[397] *Ibid*, at 5, para. 41. See also McForan, THE WORLD, *supra* note 392, at 45-46 (stating that the "Lebanese Government's inability to rectify the situation, resulted in Lebanon sacrificing its sovereignty to the Palestinian terrorists.").

[398] See U.N. Doc. S/RES/508 (1982); U.N. Doc. S/RES/509 (1982).

[399] In the context of the 1982 incident, Franck, RECOURSE, *supra* note 120, at 59, explores the responsibility of the third-party sanctuary state through the lens of self-defence: "[i]n that light, 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 transborder subversion, yet has not itself participated in these armed attacks.") [Emphasis added.] Based on 9/11, the answer to this question seems to be affirmative.

[400] Some scholars also opine that Israel's claim to self-defence is barred by the illegal occupation of certain territories. See, e.g., Christine Gray, INTERNATIONAL LAW AND THE USE OF FORCE 102 (2000). At the outset, this proposition seems to bring about a distinguishing factor with the U.S.-Afghan example given that, before attacking Afghanistan in 2001, the U.S. did not occupy the Afghan territory illegally.

[401] Franck, RECOURSE, *supra* note 120, at 59.

[402] Security Council Resolution 1368 (2001), 12 September 2001, U.N. Doc. S/RES/1368 (2001) [hereinafter *Resolution 1368*].

character.[403] Whilst it is true that the Council might have allotted more weight to questions of sovereignty in the Lebanese incident, a legally emphatic affirmation of the indirect responsibility paradigm seems more indicative of what transpired after 9/11.

Second, an interesting tension between respecting the sovereignty/territorial integrity/dignity of states and combating terrorism efficiently pervades these relationships.[404] As a result, two vital interests come into conflict. On one hand, the international community must protect its fundamental values, especially when dealing with serious violations of community norms. This might entail adopting more stringent and sovereignty-corrosive standards of state responsibility. On the other hand, the Westphalian system of nation-states places particular emphasis on the respect of every state's sovereignty.[405] The argument becomes particularly compelling when transferring this tension to counterterrorism, as human lives are often at stake, sometimes on a large scale. In a recent book chapter on state responsibility and diplomacy, after reviewing the U.S.S. Pueblo case of 1968 opposing the U.S. and North Korea, Kazuhiro Nakatani suggests that this tension might be better resolved in favour of human security (for present purposes, by combating terrorism efficiently): "[f]or modern democratic States, what is paramount is to protect their nationals' lives rather than uphold in the abstract the dignity of the State. Therefore, similar responses will continue to occur in future cases, when human lives are at peril."[406]

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[403] On the topic of the duration of the war on terror, some commentators opine that the military conflict will be "measured by the persistence of fear that the enemy retains the capacity to fight." See Joan Fitzpatrick, *Speaking Law to Power*: *The War Against Terrorism and Human Rights*, 14 EUROPEAN JOURNAL OF INTERNATIONAL LAW 241, 251 (2003). As a corollary, "there is a real risk of a perception of 'permanent emergency' whereby the exception becomes the norm." Duffy, THE 'WAR ON TERROR', *supra* note 133, at 346. See also *Human Rights Committee, General Comment No. 29*: *Derogations During a State of Emergency (Article 4)*, [2001], UN Doc. HRI/GEN/1/Rev.6 (2003) at 186, and especially at para. 2.

[404] It is helpful to recall that, in the context of the 1982 incident, a few days after Israel declared a cease-fire, the UN General Assembly sought to consecrate Lebanon's "sovereignty, territorial integrity, unity and political independence". See A/RES-7/5 of 26 June 1982, only available at http://domino.un.org. On the question of Israel's unilateral cease-fire, see 1982 UNITED NATIONS YEAR BOOK 440.

[405] Villalpando speaks to this point, albeit through the lens of international criminal responsibility. See L'ÉMERGENCE DE LA COMMUNAUTÉ, *supra* note 78, at 119.

[406] See *Diplomacy and State Responsibility*, in Ragazzi, INTERNATIONAL RESPONSIBILITY, *supra* note 50, at 37-47, 40-41. It should be noted that the 'state responsibility component' of Nakatani's

From a broader pragmatic perspective, this line of thought must always be tempered or balanced against egregious political self-interest, a veritable driving force and catalyst in dictating compliance or disregard for international legal rules. In particular, one must not lose sight of the fact that many states may be more concerned with sheltering themselves from direct responsibility than with the ability to pin such responsibility on other states, even if their own nationals are victims of the internationally wrongful act in question.[407] As will be discussed in Chapter 4, under heading A)7.b), the international legal mechanisms of responsibility cast the state in a considerably stigmatic light. Therefore, devising effective counterterrorism policies will ineluctably entail a reconsideration of the virtues and limits of state sovereignty.

The ensuing dilemma can be summarized as follows: if a state cannot efficiently thwart terrorist activities emanating from its territory, or has lost control over the region where bases of operation are located, should we expect it to require extraneous forces or law enforcement units to enter its territory and repress the threat? Should this type of reaction be framed within the ambit of countermeasures under state responsibility, it brings the concern of the proportionality of those countermeasures to the fore.[408] It follows that disproportionate countermeasures may also trigger the responsibility of the state that instituted them. Expanding on these considerations and bringing the argument full circle, one author identifies a viable solution: "[o]n peut au contraire considérer que l'incursion limitée de forces de police, pour capturer un terroriste que l'État sur le territoire duquel il évolue refuse de poursuivre ou

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account dealt primarily with a diplomatic impasse, albeit predicated on a devastating human tragedy, but it remains quite instructive for present purposes. Similarly, the relationship between terrorism, diplomacy and state responsibility is certainly in need of further exploration. For a thoughtful account addressing some of these issues, see E. Marks, *Diplomacy and Terrorism*: *Conflicting Systems*, in Han, H.H. (ed.), TERRORISM & POLITICAL VIOLENCE: LIMITS & POSSIBILITIES OF LEGAL CONTROL 41-58 (1993)). For more background on the U.S.S. Pueblo incident, see *Release at Panmunjom of Crew of U.S.S. Pueblo*, 63 AMERICAN JOURNAL OF INTERNATIONAL LAW 682-685 (1969).

[407] See, e.g., Becker, TERRORISM AND THE STATE, *supra* note 2, at 35.

[408] See, generally, *Gabčíkovo-Nagymaros*, *supra* note 250, at 56, para. 85; *Concerning Air Services Agreement of 27 March 1946 (U.S. v. France)*, 54 INTERNATIONAL LAW REPORTS 303, 337. See also Constantine Antonopoulos, THE UNILATERAL USE OF FORCE BY STATES IN INTERNATIONAL LAW 319-320 (1997).

d'extrader en contradiction d'une obligation internationale, conventionnelle par exemple, peut être une contre-mesure proportionnée."[409]

It is interesting to note that the tension between upholding state sovereignty and combating terrorism efficiently also came to life in the context of the 1995 Turkey-Iraq crisis. Turkish forces invaded the northwestern portion of the Iraqi territory, as it was used as a frequent launch pad for attacks against Turkey by Kurdish irregulars. Iraq invoked the recurrent claim as to the violation of its territorial integrity and sovereignty.[410] Although Iraq persisted in making claims against the Turkish invasion, the Security Council remained unmoved by the Iraqi plea.[411] This type of inaction by the Council would foreshadow the new indirect responsibility paradigm: a state could now attempt to repress transborder subversion into a neighbouring country where terrorist launch pads and bases of operation are located. The guiding principle, however, still seemed to hinge on the proportionality of the response to the cross-border insurgency.[412]

At this juncture, it should be stressed that, when writing about lawful countermeasures in *Nicaragua*, the ICJ hinted at the fact that proportionate, forcible countermeasures might be available to a victim state in responding to an internationally wrongful act involving the use of force but falling short of an 'armed attack'. This has some implications for the purposes of the present study insofar as an internationally wrongful act involving force carried out by terrorists could technically be attritubed to the host-state without fulfilling the requirements of an 'armed attack' and, therefore, be assessed through the lens of state responsibility. Hence, the counteracting mechanism would reside in whatever proportionate countermeasures are ultimately endorsed and adopted by the victim

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[409] Martin, LES RÈGLES INTERNATIONALES, *supra* note 1, at 493.
[410] See 1995 U.N.Y.B. 494, U.N. Doc. S/1995/272.
[411] See U.N. Doc. S/1996/401; U.N. Doc. S/1996/762; U.N. Doc. S/1996/860; U.N. Doc. S/1996/1018; 1996 U.N.Y.B. 236-237.
[412] For an application of this principle post-9/11 and other guidelines regularizing recourse to force against terrorism, see Michael C. Bonafede, *Here, There, and Everywhere*: *Assessing the Proportionality Doctrine and U.S. Uses of Force in Response to Terrorism after the September 11 Attacks*, 88 CORNELL LAW REVIEW 155-214 (2002); Sage R. Knauft, *Proposed Guidelines for Measuring the Propriety of Armed State Responses to Terrorist Attacks*, 19 HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW 763-788 (1996). On the Turkey-Iraq situation, see Franck, RECOURSE, *supra* note 120, at 63-64.

state (which could, presumably, include some incremental or limited incursions involving reduced types of force, such as local law enforcement arrangements or, more controversially, modest military action), a proposition that does not run counter to conventional wisdom (especially after 9/11 and 7/7). Whilst the ILC's *Articles* preclude the adoption of forcible countermeasures,[413] some legal scholarship seems to frame such reactions, either explicitly or implicitly, within the corpus of state responsibility rules and correspondingly gives credence to the idea that some limited forcible reaction to a terrorist act could fit within the broader framework of countermeasures under general international law (which, incidentally, constitutes a *renvoi* to the customary rules of state responsibility).[414]

In exposing its reasoning in *Nicaragua*, the Court first drew a distinction between the degrees of forcible wrongful acts, thereby concluding that "it will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms."[415] In further exploring the adoption of lawful countermeasures, the Court expounded that "a use of force of a lesser degree of gravity cannot…produce any entitlement to take collective counter-measures involving the use of force" but left the door open to the unilateral adoption of such countermeasures -- albeit proportionate -- by the aggrieved states (e.g. El Salvador, Honduras or Costa Rica).[416] Whilst the further examination of this tension clearly has some incidence on the territorial integrity of sovereign nations, it is also interesting to note that, prior to 9/11, some commentators expressed that the harbouring of terrorists by a state should in fact preempt any claim to sovereignty.[417] Consequently, this tension will be further

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[413] See *Articles*, *supra* note 76, Article 50(1)a); Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 281, 283.

[414] See, e.g., Yutaka Arai-Takahashi, *Shifting Boundaries of the Right of Self-Defence – Appraising the Impact of the September 11 Attacks on Jus Ad Bellum*, 36 INTERNATIONAL LAWYER 1081, 1085-1086 (2002).

[415] *Nicaragua*, *supra* note 119, at 96-97, para. 191.

[416] *Ibid*, at 127, para. 249. See also *Ibid*, at 110-110, paras. 210-211.

[417] See Baker, *Terrorism*, *supra* note 275, at 40. In the same vein, see Ian Brownlie, *International Law and the Activities of Armed Bands*, 7 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 712, 718 (1958) (inferring that the support or toleration of terrorist activities by a host-state amounts to aggression); Condorelli, *The Imputability*, *supra* note 125, at 233-246; Dinstein, WAR, AGGRESSION, *supra* note 125, at 182-183; Rao, *International Crimes*, *supra* note 210, at 66;

explored in Section E) of this chapter and in Chapter 4, under headings B)6.b) and B)7.b).[418]

In the interim, it is nonetheless helpful to underscore the fact that the very notion of 'sovereignty' in this setting is not only shaped by the above tension, but is also ultimately transformed by the juxtaposition of other competing legal regimes, such as the R2P Doctrine, in the ensuing legal inquiry. As such, certain scholars – most notably Anne-Marie Slaughter – have correspondingly noted a "tectonic shift" in the etymology of the concept of 'sovereignty'.[419] Similarly, the R2P Report produced by the International Commission on Intervention and State Sovereignty recognizes the emergence of a terminological change in public international law from a "right to intervene" to a "responsibility to protect", which inexorably entails a recasting and a re-conceptualization of the very notion of state sovereignty, a vision that would presumably steer the present discussion into a responsibility-expansive direction.[420] In fact, it would appear that the law of state responsibility could become coextensive with the R2P Doctrine for the purposes of ascertaining violations of international obligations. Taking the case of the Sudan, for instance, should R2P become fully implemented, this would entail not only an obligation on that state to protect its own people, but it would also subject it to international scrutiny in light of the mechanisms of state responsibility. As a corollary, it would also open it up to unilateral and/or collective responses by virtue of R2P for failing to thwart massive human rights abuse, a situation that might be analogized to some failures to prevent terrorism as

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Reisman, *International Legal Responses*, *supra* note 64, at 39; Ronzitti, *Italy's Non-Belligerency*, *supra* note 144, at 205.

[418] See also Reisman, *International Legal Responses*, *supra* note 64, at 50-51.

[419] Anne-Marie Slaughter, *Security, Solidatity, and Sovereignty*: *The Grand Themes of UN Reform*, 99 AMERICAN JOURNAL OF INTERNATIONAL LAW 619, 627 (2005).

[420] THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY 11-12 (2001) [hereinafter *R2P Doctrine*]. The Commission added that, "while it [the shift in language] can remove a barrier to effective action, [it] does not, of course, change the substantive issues which have to be addressed". See *Ibid*, at 12. This reality also connotes a shift from collective security to a responsibility to protect. See, e.g., Ramesh Thakur, THE UNITED NATIONS PEACE AND SECURITY: FROM COLLECTIVE SECURITY TO THE RESPONSIBILITY TO PROTECT (2006).

will be discussed throughout the present study.[421] Coming back to the historical treatment of the 'harbouring and supporting' rule for a moment, it should be briefly mentioned that the events surrounding the Beirut Raid are also instructive for the purposes of the debate at hand.

**b) The Beirut Raid**

Bowett rightly asserted, especially in light of the Beirut raid, that the Security Council usually discards the notion of "collective guilt" in situations at the periphery of traditional state responsibility, where civilians aid or harbour terrorists.[422] Following the attack on the El Al Boeing 707 at Athens airport by two possible members of the Popular Front of the Liberation of Palestine, Israel failed in its attempt to establish the responsibility of Lebanon.[423] In fact, a flight from Beirut to Athens constituted the only territorial link between the two perpetrators and Lebanon.[424] In language premonitory of the new paradigm of indirect responsibility, Israel accused Lebanon of "assisting and abetting acts of warfare, violence, and terror by irregular forces and organizations."[425] However, the argument did not convince the Council and was rejected accordingly.[426]

The decision by the Council not to endorse the reprisal was met with great disapproval by Israel, stating that the Council was one-sided in its finding of international responsibility and emphasizing the fact that Lebanon's role had not

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[421] See Jutta Brunnée and Stephen Toope, *Norms, Institutions and UN Reform*: *The Responsibility to Protect*, 2 JOURNAL OF INTERNATIONAL LAW & INTERNATIONAL RELATIONS 121, 128 (2005).

[422] Derek W. Bowett, *Reprisals Involving Recourse To Armed Force*, 66 AMERICAN JOURNAL OF INTERNATIONAL LAW 1, 13 (1972). On the notion of collective guilt, generally, see George P. Fletcher, *The Storrs Lecture*: *Liberals and Romantics At War*: *The Problem of Collective Guilt*, 111 YALE LAW JOURNAL 1499 (2002).

[423] For details of the account, see Bowett, *Reprisals*, *supra* note 422, at 13 n.53 and authorities cited.

[424] For a detailed account on the Beirut raid, see Baker, *Terrorism*, *supra* note 275, at 34-35.

[425] Letter dated 29 December 1968 from Israel to the President of the Security Council, U.N. Doc. S/8946 (1968).

[426] U.N. Doc. S/PV. 1460, at 28-30. The Beirut raid is not the only course of action of its kind, as states have used force to retaliate against terrorism. Israel's raid of Entebbe in 1976 and the U.S.' bombing of Libyan camps in 1986 come to mind. For a detailed account of the facts surrounding both incidents, see Baker, *Terrorism*, *supra* note 275, at n.76, 94, and accompanying text. For a recent discussion on the raid of Entebbe from the perspective of international responsibility, see Giovanni Battaglini, *War Against Terrorism Extra Moenia, Self-Defence and Responsibility*: *A Pure Juridical Approach*, in Ragazzi, INTERNATIONAL RESPONSIBILITY, *supra* note 50, at 137-149, 146 (2005).

been thoroughly scrutinized.[427] Most importantly, the reasoning behind the refusal to condone the Israeli reprisal in 1968 signals another important difference when contrasted with the modern posture vis-à-vis indirect responsibility. In the Beirut raid days, the commission of a previous wrongful act by the host-state predicated recourse to a reprisal against it as a target: "[c]learly, even under traditional law, the target of any reprisal had to be shown to have committed a prior delict so that, without proof of delictual conduct *by the Lebanon*, the Council was disinclined to accept Israel's plea of justification, quite apart from the issue of proportionality."[428] Although the threshold of 'prior delict' might be fulfilled through the failure of a state to prevent terrorist excursions emanating from its territory,[429] the U.S.-Afghanistan precedent has substantially lowered this standard.

It must be recalled that Afghanistan did not participate in the planning or execution of the 9/11 attacks. The 'prior delict' it committed was harbouring and offering logistical support to Al Qaeda members, which was still tantamount to a violation of its obligation of prevention; virtually no evidence corroborating governmental direction or control over the terrorist network can be corralled from the public record.[430] This reality must always be contrasted with *Nicaragua* and *Tadić*, which both expounded that financial and military assistance to terrorists is insufficient to attribute direct responsibility to the subsidizing states. The departure from this important notion foreshadows a quasi-definite shift from direct responsibility to indirect modes of international responsibility. It should be stressed that the above review of relevant incidents deliberately excluded the U.S.-Nicaragua situation, as the U.S. took direct part in the activities by sending and training irregular forces. That fact pattern can be distinguished from situations where states harbour completely autonomous terrorists, whilst having

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[427] See Richard Falk, *The Beirut Raid and the International Law of Retaliation*, in Morton A. Kaplan (ed.), GREAT ISSUES OF INTERNATIONAL POLITICS: THE INTERNATIONAL SYSTEM AND NATIONAL POLICY 38-39 (1970). See also Richard A. Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AMERICAN JOURNAL OF INTERNATIONAL LAW 415-443 (1970).

[428] Bowett, *Reprisals*, *supra* note 422, at 14.

[429] The obligation of preventing transnational terrorist attacks will be explored in detail in Chapter 4, *infra*.

[430] See, e.g., Becker, TERRORISM AND THE STATE, *supra* note 2, at 217.

no direct implication or knowledge of the activities being planned on their territories. Should a similar situation to that of *Nicaragua* arise, it would likely be covered by the new indirect responsibility paradigm with less conceptual difficulty than in cases merely involving tacit or passive acquiescence/toleration of terrorists. For example, if an aggrieved state cannot establish direct responsibility, it could alternatively focus on the host-state's obligation to prevent terrorist attacks emanating from its territory. As this project unfolds, it will contend that this second mechanism should not merely be reduced to an alternative route and could, arguably, supplant the direct responsibility paradigm altogether in many cases. For one thing, that posture would partly do away with the legal and political pitfalls associated with branding host-states "directly" responsible, a prospect that the ICJ is extremely reticent to facilitate. In that regard, the work of the Security Council following 9/11 weighs heavily in the balance.

**E) The Security Council's Posture Before and After 9/11**

Of particular significance to the discussion of indirect responsibility is Security Council Resolution 1373,[431] which now moves toward a general and severe prohibition against supporting and harbouring terrorists.[432] For instance, the Council proclaimed that "all States shall…Refrain from providing any form of support, active or passive, to entities or persons involved in terrorists acts…Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens".[433] Much in the same vein, whilst perceived as a 'root cause' of terrorism,[434] the notion of denying safe havens to terrorist organizations was very much alive in the ILC's work in attaining a definition of the crime of 'terrorism' in the context of the *Draft Code of Offences Against Peace and Security of*

[431] *Resolution 1373*, *supra* note 71.
[432] For a general discussion on Security Council posture and resolutions in dealing with terrorism, see Battaglini, *War Against Terrorism*, *supra* note 426, at 141.
[433] *Resolution 1373*, *supra* note 71. [Emphasis added.]
[434] This language is loosely based on Rao's own words in *International Crimes*, *supra* note 210, at 69.

*Mankind*.[435] Although *Nicaragua* and *Tadić* recognized that the provision of military and financial support to terrorists would not suffice, in itself, to establish direct state accountability, the move initiated by Resolution 1373 has completely overshadowed the debate of direct responsibility.[436] In fact, it may have completely supplanted it: a state that provides any kind of tangible support to a terrorist organization will inevitably be caught under the discipline of Resolution 1373. Indeed, a corresponding shift has been observed in the literature to the effect that the international community has moved toward of model of indirect responsibility, and it "appears that violation of 1373 *itself* is increasingly being characterized as constituting a threat to international peace and security."[437] Conversely, it should be noted that certain scholars call into question the widely perceived lucidity underlying Resolutions 1368 and 1373.[438]

Up until 9/11, the establishment of state responsibility for the excursions of irregular groups focused on the degree or level of control exercised by the host-state. For example, several years prior to the formulation of the 'effective' and 'overall' control standards, while writing about the Israeli strike of 24 February 1969 against guerilla camps located in Damascus, one scholar expressed that "[i]t may be doubted whether this notion of "collective responsibility" will commend itself to the Security Council so as to avoid condemnation. Nor, indeed, is it clear

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[435] See, e.g., Formulation of the Nurnberg Principles, UNGA Resolution 488(V), 320th Plenary Meeting, 12 December 1950, (Djonovich, ed.), Series I, Vol. I; THE WORK OF THE INTERNATIONAL LAW COMMISSION (6th Edition, 2004), i, at 76. See also Rao, *International Crimes*, *supra* note 210, at 69.

[436] See, e.g., Eric Talbot Jensen, *The ICJ's "Uganda Wall": A Barrier to the Principle of Distinction and an Entry Point for Lawfare*, 35 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY 241, 267 (2007) (noting that "the international community is moving to a system where states are held indirectly liable for the actions of entities within their borders").

[437] Cecilia M. Bailliet, *The "Unrule" of Law*: *Unintended Consequences of Applying the Responsibility to Prevent to Counterterrorism, A Case Study of Columbias's Raid in Ecuador*, in Cecilia M. Bailliet (ed.), SECURITY: A MULTIDISCIPLINARY NORMATIVE Approach 175-230, 176 (2009).

[438] Frédéric Mégret is particularly critical of the Security Council, or, alternatively, of the general perception of its post-9/11 counterterrorism efforts. See Mégret, *"War"?*, *supra* note 171, at 375 (also remarking that "the picture that emerges is more that of a Council stumbling in the dark than of it signing a blank cheque to the anti-terrorism coalition."). See also Hannikainen, *The World After*, *supra* note 373, at 446-448. But *Cf.* Sadat, *Terrorism*, *supra* note 264, at 145 (noting that, "although notably silent on the use of force", Resolutions 1368 and 1373 "recognize "the inherent right of self defense.""). For more discussion on the content of Resolutions 1368 and 1373, see Saul, DEFINING TERRORISM, *supra* note 26, at 233-238.

why it should, unless and until Israel can demonstrate that the various "liberation movements" fall under common planning and control, and so far the evidence is very much to the contrary."[439]

As this study has shown by reference to specific incidents, the Security Council often rejected the idea of collective guilt, along with a finding of responsibility solely based on harbouring terrorists. In cases where it found states responsible on that basis, the Council often condemned the reaction of the aggrieved states as disproportionate.[440] Given the potential harm to innocent civilians posed by terrorism, coupled with the far-reaching effects of Resolution 1373,[441] the international community appears to have crystallized the shift towards indirect responsibility. From now on, the analysis will be far more concerned with a state's responsibility to *prevent* terrorist activities rather than with the question of attribution. As a corollary, the whole mechanism of Resolution 1373 renders the discussion of 'control' somewhat futile. The global community recognizes that terrorism is a reality that must be combated seriously and methodically. Thus, the degree of control a state exercises over a terrorist organization does not hold the relevance it once did. In mounting its international response, for instance, at no time did the U.S. focus on Afghanistan's control over Al Qaeda. In fact, the evidence clearly suggests that Al Qaeda acted independently, without any outside interference or input into its complex cellular structure.[442] These developments indicate that the international community is imposing a heavier burden of precaution on host-states, and rightly so.[443]

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[439] Bowett, *Reprisals*, *supra* note 422, at 15 and footnote 61. [Emphasis added.]

[440] This was the case with regard to Israel's invasion of Lebanon in 1982. In that regard, see Martin, LES RÈGLES INTERNATIONALES, *supra* note 1, at 493.

[441] For detailed discussion on Resolution 1373 and its implications for counter-terrorism, see Eric Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 333-341 (2003); Eric Rosand, *Security Council Resolution 1373 and the Counter-Terrorism Committee*: *The Cornerstone of the United Nations Contribution to the Fight Against Terrorism*, in C. Fijnaut, J. Wouters and F. Naert (eds.), LEGAL INSTRUMENTS IN THE FIGHT AGAINST INTERNATIONAL TERRORISM: A TRANSATLANTIC DIALOGUE 603-632 (2004).

[442] See Gunaratna, INSIDE AL QAEDA, *supra* note 3, at 72-112.

[443] See, e.g., Ruth Wedgwood, *The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense*, 99 AMERICAN JOURNAL OF INTERNATIONAL LAW 52, 58 (2005).

Before 9/11, the Council's attitude toward the repression of transborder subversion had been, at best, confused or fact-specific.[444] In some instances, the Council remained unmoved by a state's plea of territorial infringement when a neighbouring state invaded its territory in pursuit of cross-border insurgents. Whilst the object of the injured nation's action was to eliminate the bases of terrorist operations in the sanctuary state, the international community condoned a right to use force in certain circumstances. The events of 1995-1996, when Turkish forces set foot on Iraqi soil in pursuit of Kurdish irregulars, serve as one example.[445] Iran shortly followed suit, resorting to aerial attacks on Kurdish bases from which insurgent troops launched excursions.[446]

This reality is even more striking when contrasted with certain analogous episodes in the Arab-Israeli experience. For example, on 24 February 1969, Israel proceeded with aerial assaults on terrorist camps belonging to the Popular Front for the Liberation of Palestine.[447] It was suspected that these acts were provoked by two previous attacks, namely "the attack on El Al aircraft at Zurich on February 18 and the bombing of a Jerusalem supermarket."[448] However, a rival terrorist organization known as Al Fatah claimed responsibility for the incidents. As emphasized by some, the Council would likely not be convinced by the legitimacy of such retaliation and the crux of the legal analysis would hinge on whether the guerilla bands actually fell under "a unified command."[449] Once again, the legal discussion ineluctably reverted back to the question of 'control' over terrorist organizations rather than on establishing the responsibility of the territorial state in harbouring terrorists (i.e. the state's control *over national territory*).

In contrast with recent events, Professor Bowett called into question the "assumption…that the territorial state assumed responsibility because it had the

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[444] On the incongruities found in such practice, see Franck, RECOURSE, *supra* note 120, at 64-68.
[445] See the previous comments on this account, *supra* notes 411-412 and accompanying text.
[446] See U.N. Doc. S/25843, U.N. Doc. S/1996/602 (1996). See also 1996 U.N.Y.B. 268-269.
[447] Bowett, *Reprisals*, *supra* note 422, at 14.
[448] *Ibid*.
[449] *Ibid*, at 15.

power to prevent these activities."[450] He claimed that it is probably unrealistic, based on arguments of size and capacity of host-states,[451] to expect countries like Jordan and Lebanon to efficiently thwart all terrorist operations on their territory.[452] These concerns evince the complexity of such scenarios and evoke the abovementioned tension between respecting territorial sovereignty and combating terrorism efficiently. In fact, this tension has been very much alive in post-9/11 transnational attempts to thwart future terrorist attacks. The perhaps legally untenable – and decidedly politically questionable – flipside to this argument is that, once a state reveals itself to be incapable of preventing private terrorist strikes emanating from its territory, aggrieved states may be inclined to circumvent habitual politico-legal avenues (i.e. United Nations procedure, diplomacy) in adopting unilateral responses. In turn, such responses may arguably be undertaken in violation of relevant human rights standards or other international legal norms. The U.S.' missile strike on Al Qaeda targets in Yemen in November 2002 arguably falls under that category.[453] In substantiating its action, the U.S. heavily relied upon "Yemen's apparent inability to exert much control over its remote and largely lawless border region with Saudi Arabia, which the Americans say serves as the country's main sanctuary for Al Qaeda."[454] From a policy perspective, therefore, if we accept that Lebanon cannot efficiently thwart terrorist activities on its own territory because of widespread guerrilla activities, what exactly do we expect it to do? Based on Resolution 1373, we

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[450] *Ibid*, at 20.

[451] These concerns will be addressed in Chapter 4 of this dissertation.

[452] Bowett, *Reprisals*, *supra* note 422, at 14.

[453] Interestingly, some have reported that the Yemeni government pre-authorized the U.S.-led attack. See, e.g., Walter Pincus, *U.S. Strike Kills Six in Al Qaeda; Missile Fired by Predator Drone; Key Figure in Yemen Among Dead*, WASHINGTON POST, November 5, 2002, at A1. In response, some authors conclude that, whether truthful or not, Yemen's approval "hardly matters for the sake of maintaining the formalities of international law", as "the appearance of sovereignty and sovereign equality of states is maintained" when states agree to cooperate with the U.S. on international efforts in repressing terrorism. See Martin L. Cook, *Ethical and Legal Dimensions of the Bush "Preemption" Strategy*, 27 HARVARD JOURNAL OF LAW AND PUBLIC POLICY 797, 809 (2004).

[454] James Risen and Judith Miller, *C.I.A. Is Reported to Kill a Leader of Qaeda in Yemen*, NEW YORK TIMES, November 5, 2002, at A14; Pincus, *U.S. Strike Kills Six*, *supra* note 453, at A1. Similarly, since 9/11 the United States has been involved in various military operations in the Philippines, Georgia and Pakistan. See, e.g., Seth Mydans, *Threats and Responses*: *Asian Front*: *Filipinos Awaiting U.S. Troops with Skepticism*, NEW YORK TIMES, February 28, 2003, at A11.

should probably require it to allow extraneous forces or law enforcement units on its territory to suppress the threats, although such a response would erode the concept of sovereignty (but, in that case, Lebanon would be incapacitated and, therefore, unable to exercise its sovereignty in the first place or, at least not in a manner compatible with the obligation of non-intervention in the affairs of other states).[455] Indeed, the concept of governmental inefficiency will become pivotal in the second tier of the strict liability-infused approach advocated in Chapter 4 and was very much alive in the 2006 Israel-Hezbollah conflict. Following allegations of Lebanon's inefficiency in constricting the flow of Hezbollah weapons and ammunition originating from Syria and Iran,[456] a United Nations-mandated team of experts carried out the task of assessing the situation prevalent along the Lebanese border. Amongst its conclusions was the fact that Lebanese border guards demonstrated a "worrying lack of performance" and, in addition to accusations of corruption by the guards, the experts determined that, whilst the Lebanese army had deployed more than 8000 troops to secure the 250-kilometer frontier with Syria in the fall of 2006, "Lebanese security forces lacked adequate resources to accomplish their objective".[457]

Moreover, these considerations illustrate the inherent difficulty in analogizing a collective history of terrorism and reprisals, such as the Arab-Israeli

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[455] Ironically, Hersch Lauterpacht believed that "the traditional respect for State sovereignty refrained the development of the law of international responsibility, particularly regarding the consequences of responsibility." It followed that "the traditional theory limited responsibility only to the reparation for damage (material and moral), without it being possible for States, as a result of their sovereignty, to be punished. This vision, however, in exempting the State from the consequences of its own violations of the law, appeared entirely arbitrary, limiting the action of justice at the international level." See Antônio Augusto Cançado Trindade, *Complementarity Between State Responsibility and Individual Responsibility and Individual Responsibility for Grave Violations of Human Rights*: *The Crime of State Revisited*, in Ragazzi, INTERNATIONAL RESPONSIBILITY, *supra* note 50, at 253-269, 261. See also Hersch Lauterpacht, *Règles générales du droit de la paix*, 62 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 95-422, 339, 349-350 (1937-IV), particularly at 350-352.

[456] On Iran and Syria's support of Hezbollah factions, see Nada Bakri, *Backers of Hezbollah and Government Clash As Strike Disrupts Lebanon*, NEW YORK TIMES, May 8, 2008, at A6; Nada Bakri and Graham Bowley, *Confrontation in Lebanon Appears to Escalate*, NEW YORK TIMES, May 8, 2008, at A6; Nada Bakri, *Clashes in General Strike in Lebanon*, NEW YORK TIMES, May 8, 2008, at A6; Robert F. Worth and Nada Bakri, *Hezbollah Threatens Attacks on Israeli Targets*, NEW YORK TIMES, February 15, 2008, at A6.

[457] C.I. Bosley, *Iran Allegedly Skirts Hezbollah Arms Ban*, ARMS CONTROL TODAY, *Arms Control Association* (September 2007), available online at http://www.armscontrol.org/act/2007_09/IranSkirts.asp (last visited on 2 May 2008).

record, to single events or to an uninterrupted chain of events, such as the 9/11 attacks or the recent train bombing in Madrid. Conversely, an argument can be advanced to the effect that the U.S.-Afghanistan scenario might fit, albeit difficultly, under what could be termed an 'overall relationship' theory, especially given the series of terrorist attacks perpetrated against U.S. targets.[458] These considerations will become even more relevant in light of ILC's Article 14(3), which expressly provides for the extended breach of an obligation when premised on a duty to prevent (i.e. the obligation to prevent terrorist attacks). That provision specifies that "[t]he breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation."[459]

Whilst the obligation of prevention and its implications will be discussed subsequently, especially in Chapter 4, a few preliminary remarks are warranted. A relatively straightforward case can be made that Afghanistan has repeatedly failed to fulfill its obligation to prevent terrorism when considering the aforementioned series of Al Qaeda-led excursions linked with the Afghan territory and previous Security Council condemnations. Hence, there was a continuing breach by Afghanistan in not complying with its international obligations, as evidenced by its repeated failures to thwart terrorist threats on its territory. Based on that logic, Afghanistan would be indirectly responsible for an internationally wrongful act. Article 14 of the ILC's *Articles* and *Corfu Channel*, coupled with *Tehran Hostages*, which alludes to "successive and still continuing breaches by Iran of its obligations to the United States under the Vienna

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[458] In sum, the U.S. continuously maintained an adversarial posture vis-à-vis Afghanistan following the perpetration of several terrorist attacks substantially linked with the Al Qaeda network, a significant contingent of which was sheltered on Afghan territory (i.e. thereby signalling a violation of that state's obligation of prevention). However, not all these attacks were similarly linked to the Afghan territory and, in apportioning state responsibility, serious consideration should also be given to the potential involvement, direct or indirect, of Iran, Saudi Arabia and Sudan in those attacks. Those terrorist strikes include the bombing of the Khobar Towers, the U.S. Embassy bombings in Africa, the bombing of the U.S.S. Cole, and the events of 9/11.

[459] *Articles*, *supra* note 76. [Emphasis added.] See also, *infra*, Chapter 4, Section B)3.a).

Conventions of 1961 and 1963",[460] all make a compelling case for a finding of indirect responsibility in the U.S.-Afghanistan scenario. In the context of counterterrorism, therefore, the mechanism of Article 14 is probably better tailored to govern a lasting relationship – albeit punctuated by attacks and reprisals – between two or more states.[461]

Hence, it is imperative that the law of indirect responsibility be clearly ascertained in conformity with the will of the international community to combat terrorism efficiently, using "all necessary steps".[462] True enforcement of this objective will either occur through a substantial strengthening of the regime of state responsibility, thereby enhancing prevention, or via a significant loosening or decimation of state sovereignty. The latter option would probably prove temporarily adequate to address concerns pertaining to ineffective or 'failed' states,[463] as harbouring terrorists has sometimes been equated with relinquishing sovereignty or, at best, with the exercise of a state function that is deeply incompatible with the cardinal principles of sovereignty.[464] However, the former scenario seems far better suited to the current state of international law and is, arguably, the most effective way to empower a global counterterrorism campaign while upholding some fundamental values of the international legal order, such as the sovereign equality between states. The protection of human life also comes to mind, especially when considering that terrorism claims the lives and limbs of

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[460] *Tehran Hostages*, *supra* note 67, at paras. 80 and 78.

[461] On the distinction between instantaneous and continuing breaches, see *Rainbow Warrior (N. Z. v. Fr.)*, 20 *R.I.A.A.* 217 (1990) [hereinafter *Rainbow Warrior*], at 264, para. 101. On the question of continuing breaches, generally, see Joost Pauwelyn, *The Concept of a 'Continuing Violation' of an International Obligation*: *Selected Problems,"* 66 BRITISH YEARBOOK OF INTERNATIONAL LAW 415 (1995).

[462] *Resolution 1368*, *supra* note 402.

[463] For a thoughtful discussion of this issue, from the perspective of failed states, see Zemanek, *Does the Prospect*, *supra* note 50, at 131. See also Antonio Cassese, *Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUROPEAN JOURNAL OF INTERNATIONAL LAW 993, 997 (2001); Robin Geiss, *Civil Aircraft As Weapons of Large-Scale Destruction*: *Countermeasures, Article 3Bis of the Chicago Convention, and the Newly Adopted German "Luftsicherheitsgesetz"*, 27 MICHIGAN JOURNAL OF INTERNATIONAL LAW 227, 247 (2005); Mégret, *"War"?*, *supra* note 171, at 383-384.

[464] See, e.g., Binyamin Netanyahu, *Terrorism: How the West Can Win*, in TERRORISM: HOW THE WEST CAN WIN 220 (1986); Jordan J. Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Non-immunity for Foreign Violators Under the FSIA and the Act of State Doctrine*, 23 VIRGINIA JOURNAL OF INTERNATIONAL LAW 191, 221-225 (1983).

innocent civilians and remains a particularly repugnant offence under any stretch of the imagination.[465]

Recent Security Council posture on indirect state responsibility has not always been consistent. For instance, "in September 2000, the Security Council specifically rejected the Rwandan authorities' claim to a right to attack Hutu insurgents operating out of neighboring territory."[466] Reviving the aforementioned tension between sovereignty and preventing transborder subversion, the Council invoked the violation of territorial integrity as one of the bases for condemning the Rwandan excursion.[467] Irrespective of the discrepancies found in recent Council resolutions, the U.S.' response to 9/11 seems to have crystallized the modern shift towards indirect responsibility.[468]

In addition, the response to 9/11 marks a clear but a potentially exceptional departure from the uncertainty of previous practice with regard to indirect responsibility. This evolution is attributable, first and foremost, to the unprecedented level of support generated by the U.S. in mounting its response to 9/11.[469] On 12 September 2001, the UN General Assembly adopted a resolution, which "[*u*]*rgently calls* for international cooperation to prevent and eradicate acts of terrorism, and stresses that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of such acts will be held accountable."[470] On the same day, the Council also categorically condemned the terrorist attacks on U.S. soil and, invoking language redolent of the paradigm shift, emphatically prompted all states "to work together urgently to bring to

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[465] For support of this proposition, see, e.g., INTERNATIONAL COMMISSION OF THE RED CROSS, *Basic Rules of the Geneva Conventions and Their Additional Protocols* (1988); Edward Kwakwa, THE INTERNATIONAL LAW OF ARMED CONFLICT: PERSONAL AND MATERIAL FIELDS OF APPLICATION 39 (1992). The ICJ has also pronounced on the importance of protecting civilian life. See, e.g., *Legality of the Threat or Use of Nuclear Weapons*, 35 *I.L.M.* p. 809 (Advisory Opinion of July 8, 1996) [hereinafter *Nuclear Weapons Advisory Opinion*], at 827, para. 78 (categorizing the non-targeting of civilians as one of the "cardinal principles" of humanitarian law).

[466] Franck, RECOURSE, *supra* note 120, at 66.

[467] See U.N. Doc. S/RES/1304 (2000), at 2, which speaks of the "violation of the sovereignty and territorial integrity of the Democratic Republic of Congo."

[468] Consider Franck, RECOURSE, *supra* note 120, at 54, and 66-67.

[469] See Proulx, *Babysitting Terrorists*, *supra* note 163, at 640 (discussing support from the North Atlantic Treaty Organization, the Organization of American States and other prominent intergovernmental bodies).

[470] U.N. Doc. A/Res/56/1 (2001). [Emphasis added.]

justice the perpetrators, organizers and sponsors of these terrorist attacks…that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors will be held accountable."[471] Resolution 1368 was followed sixteen days later by Resolution 1373,[472] the landmark document in modern counterterrorism initiatives. Although Resolution 1368 recognized the inherent right to invoke individual or collective self-defence, Resolution 1373 reiterated that right but reaffirmed "the need to combat by all means, in accordance with the Charter [of the United Nations], threats to international peace and security caused by terrorist acts."[473] This set of international postulates and findings signalled a departure from previous Security Council practice[474] and consecrated the international community's newfound obdurate will in combating terrorism.[475]

The question now becomes whether this one precedent will have instituted a viable and enduring rule of international law, or whether it simply amounts to a one-time distortion of the rules of state responsibility in order to cater to a (seemingly uncontestable) response to a horrific and unprecedented series of attacks. As will be discussed in subsequent sections, other incidents tend to

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[471] *Resolution 1368*, *supra* note 402. [Emphasis added.]

[472] *Resolution 1373*, *supra* note 71.

[473] *Ibid*. [Emphasis added.] These two documents have also paved the way for other Security Council Resolutions on the U.S.-Afghanistan relationship. See, e.g., U.N. Doc. S/RES/1383 (2001); U.N. Doc. S/RES/1386 (2001). Most importantly, the UN Security Council adopted U.N. Doc. S/RES/1378 (2001), which expressly embraces the new indirect responsibility paradigm by condemning "the Taliban for allowing Afghanistan to be used as a base for the export of terrorism by the Al-Qaida network and other terrorist groups and for providing safe haven to Usama Bin Laden, Al-Qaida and others associated with them". [Emphasis added.]

[474] For example, the Security Council did not recognize a right to self-defence in favor of the U.S. following the 1998 bombing of the embassies in Tanzania and Kenya. On this point, see Jinks, *State Responsibility*, *supra* note 315, at 85-86. In response to 9/11, Jinks further argues, at 86, that "the Security Council impliedly endorsed, without expressly authorizing, the use of force against Afghanistan." See also Nicholas Rostow, *Before and After*: *The Changed UN Response to Terrorism Since September 11th*, 35 CORNELL INTERNATIONAL LAW JOURNAL 475-490 (2002). On the Security Council's role in combating international terrorism, see Curtis A. Ward, *Building Capacity to Combat International Terrorism*: *The Role of the United Nations Security Council*, 8 JOURNAL OF CONFLICT AND SECURITY LAW 289-305 (2003).

[475] Resolution 1368 also indicated the Council's "readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism". See *Resolution 1368*, *supra* note 402, at para. 5. See also Battaglini, *War Against Terrorism*, *supra* note 426, at 140; Robert A. Caplen, *The 'Charlie Brown Rain Cloud Effect' in International Law*: *An Empirical Case Study*, 36 CAPITAL UNIVERSITY LAW REVIEW 693, 741 (2008). See also, generally, Olivier Corten, *Vers un renforcement des pouvoirs du Conseil de sécurité dans la lutte contre le terrorisme?*, in Karine Bannelier, Olivier Corten, Théodore Christakis and Barbara Delcourt (eds.), LE DROIT INTERNATIONAL FACE AU TERRORISME: APRÈS LE 11 SEPTEMBRE 2001 259-278 (2002).

corroborate the notion that the rules of state responsibility are evolving, and rightly so from a *lex ferenda* perspective, so as to better address transnational violence and, as a corollary, to prevent governments from shielding themselves from international accountability. Operating on the premise that, since terrorists have, themselves, subverted international legal rules by their actions, certain commentators expound that "[w]here the rules of the game are indeed changing appears to be in the jettisoning of the rules pertaining to international legal responsibilities."[476] Similarly, the application of the rules of state responsibility is literally being challenged and, ultimately, tempered in real-time, as recent events, such as Pakistan's and India's potential involvement in the (failed) prevention of the terrorist attacks in Mumbai, may serve to give further contour to the interpretation of these norms through the vehicle of state practice.[477] Indeed, it appears that Lashkar-e-Taiba, the terrorist network behind the devastating Mumbai attacks in November 2008, has only intensified since those episodes and is, once again, determined to strike India.[478] Not only do these events suggest that efforts should be stepped up in order to dismantle this organization and other similar networks, but they also evince the pressing need to devise effective and enhanced deterrence and prevention models in order to address the scourge of transnational terrorism. The contention that may be extracted from the foregoing considerations, and from the arguments explored below, is that this objective can be partly achieved through the paradigm shift towards a law of indirect state responsibility.

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[476] Edel Hughes, *Entrenched Emergencies and the "War on Terror"*: *Time to Reform the Derogation Procedure in International Law?*, 20 NEW YORK INTERNATIONAL LAW REVIEW 1, 58 (2007).

[477] See, e.g., Ruwantissa Abeyratne, *Terror in Mumbai – A Legal Perspective*, DAILY NEWS, 29 November 2008, available online at http://www.dailynews.lk/2008/11/29/fea01.asp (last visited on 30 November 2008) (discussing several bases for assessing state responsibility vis-à-vis the terrorist attacks in Mumbai).

[478] See, e.g., Lydia Polgreen and Souad Mekhennet, *Network of Militants Is Robust After Mumbai Siege*, NEW YORK TIMES, September 30, 2009.

## CONCLUSION TO PART I

With these observations in mind, it is highly probable that the response to 9/11 crystallized the modern shift toward an international law of indirect state responsibility, irrespective of the overwhelming or exceptional support it received from the international community. Two conclusions may be drawn from the examples and accounts described above, which collectively fostered the new paradigm. First, although the "harbouring and supporting" principle was somewhat ingrained in international legal culture during the 1970s, there has been a significant recrudescence of claims against transborder subversion in non Arab-Israeli contexts. It is now accepted practice for an injured nation to accuse a host-state of not preventing excursions into the former state's territory. Most importantly, but perhaps controversially, as a direct consequence of establishing state responsibility, the aggrieved state may be permitted to use force to restore peace and security in some cases. As one commentator expounds, "[a]lthough traditionally addressed as a law enforcement problem, it is now clear that international terrorism will often necessitate some sort of military response."[479]

Second, and as a corollary to the first conclusion, the question of 'control' is now overshadowed by other considerations. It seems that the "effective-overall control" dichotomy has eroded and, with it, the direct responsibility paradigm has started to fade considerably. It is perhaps fair to say that the underlying legal tests found in *Nicaragua* and *Tadić* are now often obliterated from the equation, save in clear and wanton cases of direct state involvement in terrorist activities. Indeed, as the events of 9/11 have shown, terrorist organizations often operate independently and autonomously, making their connection to governments blurred or virtually untraceable. In addition, the prospect of governments waging surrogate warfare through private individuals or proxies also poses a significant challenge to the mechanism of attribution. Indeed, "[t]he tendency for those in power to achieve their ends through private or non-State actors, thereby avoiding

[479] Jinks, *State Responsibility*, *supra* note 315, at 91; Robert O. Keohane, *The Globalization of Informal Violence, Theories of World Politics, and the "Liberalism of Fear*, DIALOGUE I-O 29-43 (2002), available online at http://mitpress.mit.edu/journals/INOR/Dialogue_IO /keohane.pdf (last visited on 10 March 2006).

attribution, engenders a wide range of conduct by inaction where both deniability and non-attribution serve to enhance the power of those in control of a State, if they in fact have control."[480] Along similar lines, some commentators have hinted at the idea that the level of state accountability for terrorism could, under certain lights, be commensurate with the degree of governemental sponsorship of such activity, whilst the actual connection between the host-state and a terrorist cell might simultaneously affect this computation and pose further evidentiary challenges.[481] After all, in many instances "[a] State's involvement in terrorism is inevitably clandestine and exceedingly difficult to prove."[482] These preliminary considerations will undoubtedly serve as reliable building blocks for the discussion of the inadequacy of the notion of 'control' as a principal basis for establishing state responsibility under the *ILC Articles on State Responsibility*.[483]

In many instances, no principal-agent nexus can be demonstrated between a terrorist organization and the government of the host-state, another militating factor favouring a regime of indirect responsibility. In such scenarios, the central preoccupation rather hinges on a) whether the host-state harboured the terrorists and b) whether it fulfilled its obligation to prevent a terrorist attack emanating from its territory. In sum, the response to 9/11 likely initiated a significant shift towards indirect responsibility, but the journey does not end there: there must be a reconsideration of the severity and efficiency, or lack thereof, of the current scheme of state responsibility vis-à-vis transnational terrorism.[484] Such an endeavour should inevitably call into question the *raison d'être* of the concept of attribution, a hypothesis that will drive the main premises underpinning Part III of the present dissertation.

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[480] Christenson, *Attributing Acts*, *supra* note 115, at 313.

[481] See, e.g., Sara N. Schiedeman, *Standards of Proof in Forcible Responses to Terrorism*, 50 SYRACUSE LAW REVIEW 249, 261 (2000); Smith, *International Law*, *supra* note 56, at 746 ("State accountability becomes less clear as the relationship between the State and the terrorist cell weakens, and the evidence to prove the existence of such a relationship disappears.").

[482] Becker, TERRORISM AND THE STATE, *supra* note 2, at 150.

[483] See *infra* Chapter 4, Section B)2.a).

[484] Michael Reisman delivers a quintessential formulation of the problem at hand in the following terms: "[w]e are concerned here with the policies that have been prescribed in contemporary international law with respect to a state in whose territory terrorist acts are planned when the state has the capacity to prohibit such action." See *International Legal Responses*, *supra* note 64, at 42.

However, before turning to policy considerations and possible reforms of the law of state responsibility, one must absolutely review the law as it currently stands and, more importantly, study the input of specific institutions in promoting the further development and elaboration of that body of law. In particular, since the codified rules of state responsibility have largely been developed under the aegis of the United Nations, it is only logical to look to that organization's institutional practice more extensively in order to better assess how and to what extent: i) those institutions are suited to interpret and contribute to the development of that corpus of rules; and ii) the relevant rules can truly flourish within institutional parameters (as opposed to the traditional model of inter-state implementation) with a view to addressing the problem of transnational terrorism, specifically. In so doing, the remarks in the previous section dealing with the Security Council's posture on indirect responsibility and transborder terrorism, both before and after 9/11, provide an appropriate bridge into Part II of the dissertation. More importantly, they presage considerable emphasis on the Security Council's role, however limited it may be, in implementing and interpreting the rules of state responsibility, an interrelationship that will be thoroughly canvassed and explored as a central component of the next chapter.

# PART II – IMPLEMENTING STATE RESPONSIBILITY AFTER 9/11: INSTITUTIONAL PERSPECTIVES

## INTRODUCTION

This chapter builds upon the conclusions of Part I and operates on the premise that a shift towards a law of indirect state responsibility for failing to prevent transnational terrorism can be countenanced under current international legal structures. What is more, the thrust of the inquiry herein delves into the possible implementation of state responsibility through existing United Nations institutions, a challenging hypothesis given that organization's legal framework and the resistance to subjecting the fate of states' reputations to a politically-volatile multilateral process.

Whilst the principal organs of the United Nations, particularly the ICJ and the Security Council, may appear somewhat suited to advance that body of law, those institutions' incursions into the law of state responsibility have been rather limited. In addition, international judiciaries have often – perhaps overly cautiously – steered clear of the application of state responsibility. The ICJ's record is certainly a case in point. Indeed, the ICJ has often sidestepped the mechanics of state responsibility in cases where a finding of the commission of an internationally wrongful act could have played a pivotal role in the proceedings.[485] Perhaps more relevantly, the international responsibility of states in specific circumstances, namely that of France and Libya, has been established outside international judicial settings in both the *Rainbow Warrior* and *Lockerbie* cases. This certainly militates in favour of the argument that the ICJ is being

[485] See, e.g., *LaGrand (Germany v. United States of America), Judgment*, [2001] ICJ REPORTS, p. 466; *Elettronica Sicula S.p.A. (ELSI), Judgment*, [1989] ICJ REPORTS, p. 15; *Nuclear Tests (Australia* v. *France), Judgment*, [1974] ICJ REPORTS, p. 253; *Nuclear Tests (New Zealand* v. *France*), *Judgment*, [1974] ICJ REPORTS, p. 457; *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*, *Preliminary Objections, Judgment*, [1996] ICJ REPORTS, p. 803 (and *Counter-Claim, Order of 10 March 1998*, [1998] ICJ REPORTS, p. 190; *Merits*, *supra* note 258). See also the following *Kosovo* cases: *Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*; *Legality of Use of Force (Serbia and Montenegro* v. *Canada)*; *Legality of Use of Force (Serbia and Montenegro* v. *France)*; *Legality of Use of Force (Serbia and Montenegro* v. *Germany)*; *Legality of Use of Force (Serbia and Montenegro* v. *Italy)*; *Legality of Use of Force (Serbia and Montenegro* v. *Netherlands)*; *Legality of Use of Force (Serbia and Montenegro* v. *Portual)*; *Legality of Use of Force (Serbia and Montenegro* v. *United Kingdom)*.

excluded, perhaps of its own volition in some cases where it sidestepped the mechanics of state responsibility when it could have made a free-standing determination of liability or further advanced international legal doctrine, from participating directly in the major growth areas involving the law of state responsibility.[486] As discussed in Chapter 1, the ICJ's recent analysis of state responsibility in the *Genocide* case would prove otherwise upon first glance. Whilst it is unlikely that the ICJ would be inclined to declare that a state has failed to comply with its obligation to prevent terrorism in another scenario, that case demonstrated the Court's reliance on the rigid formulation of classical rules of agency, while offering little in the way of critical or evolutive interpretations of those norms.

Despite these reservations, considerable support remains for the possible implementation of state responsibility through international organizations. In fact, the ILC has, at times, formally contemplated this eventuality. In particular, the Security Council seems equipped to deal with the determination of state responsibility in some instances of terrorism and has expressly done so in *Lockerbie*. In addition, the Council disposes of politico-legal tools to exert some influence on the repression of terrorism, a function that has generated some high-level inquiries on the matter.[487] As a corollary, the Council's potential role in advancing state responsibility may also have some incidence, albeit limited, on the scheme of use of force and fill some normative void where the application of attribution principles appears intractable. As one commentator argues, "principles of state responsibility indeed are relevant to a determination of the legality of self-defence, as they can underlie, exist parallel to, and sometimes supplant the criteria contained in the primary rules on self-defence…attempts to disconnect the principles of attribution in the law of state responsibility and the law on the use of force are generally based on weak legal authority and are generally undesirable…the Security Council plays a key role in grey areas where the

[486] In broader terms, compare with the appraisal of the Court's work of former ICJ President, in Sir Robert Jennings, *The International Court of Justice After Fifty Years,* 89 AMERICAN JOURNAL OF INTERNATIONAL LAW 493 (1995).

[487] See Chesterman and the Austrian Federal Ministry, THE UN SECURITY COUNCIL, *supra* note 155, at 12.

applicability of principles of attribution is unclear."[488] The purpose of this chapter, therefore, is to determine the extent of that role, however limited it may be, and to situate the possible implementation of state responsibility through UN institutions within the broader project of devising a scheme of international liability better suited to the changing threats of terrorism.

As prefaced above, the dissertation now turns to the UN's recent contributions in further delineating the law of state responsibility for failing to prevent terrorist attacks. Set against the backdrop of a rich legal tapestry, the many relevant *dicta* of the ILC, the ICJ, the General Assembly and the Security Council interweave, and ultimately inform the broader framework of state responsibility. Whether some of their more conceptually nebulous interpretations and applications can be disentangled, and clear postulates extracted, remains to be seen. In tackling these questions, Section A will briefly assess existing institutional mechanisms in implementing state responsibility by specifically looking at the structure of the ICJ, the General Assembly and the Security Council. In setting the stage for the argument to follow, that section concludes by exploring the prospects and limits of the Council's powers within the purview of the inquiry at hand, and frames the major analytical stakes involved in this debate with specific reference to the Council's quasi-judicial exercise of powers. Given that the Council has promulgated enhanced and broad-reaching counterterrorism duties and increased states' due diligence obligations after 9/11, it seems logical to exclusively focus on that organ's contribution to the law of state responsibility, as opposed to other bilateral or regional bodies. Moreover, existing literature also confirms the Council's centrality and influence in this debate. Section B ultimately delves into the relationship between the Council and the rules of state responsibility by analyzing its impact on Chapter VII powers and on the extensiveness of Council practice with a view to elucidating this interrelation. Whilst both the process of Council decision-making and the nature of its decisions in this setting are difficult to untangle, the chapter operates on the premise that the Council must strike a delicate balance between political and legal *considerations*

[488] Nolkaemper, *Attribution*, *supra* note 248, at 139.

while employing a quasi-judicial *process* or *method* in reaching a decision about international peace and security, which may involve applying the law of state responsibility to acts of transnational terrorism. This discussion paves the way for a more thorough analysis of the Council's role in actually implementing state responsibility for terrorism. In so doing, the chapter specifically considers the expansion of Chapter VII powers to include state responsibility, the Council's powers in relation to secondary norms and the rights of states vis-à-vis the implementation of state responsibility notwithstanding Council involvement. Ultimately, this part concludes by identifying an overlap of objectives between the *sui generis* mission of counterterrorism and the Council's more traditional functions, thereby facilitating the prospect of a rapprochement with the law of state responsibility.

## CHAPTER 3: ADVANCING STATE RESPONSIBILITY THROUGH UNITED NATIONS INSTITUTIONAL MECHANISMS

### A) Assessing Existing Institutional Mechanisms in Implementing State Responsibility

Inherent in the debate of whether state responsibility can play a role in the suppression and prevention of terrorist attacks is the idea of institutionalizing the implementation of that body of law. According to textbook legal principles, it is no secret that responsibility flowing from an internationally wrongful act is typically actuated, and ultimately implemented, through inter-state mechanisms. Consequently, this begs the question whether state responsibility for failing to prevent terrorist attacks could be implemented – even at all – through the existing mechanisms of the United Nations. In that regard, the relationship between the extant scheme of state responsibility and certain UN organs, especially the Security Council, must be addressed squarely. It should be noted, at the outset, that the institutionalization of dispute settlement mechanisms is not synonymous, or even interchangeable, with the separate question of implementing state responsibility in an institutionalized setting.[489] Dispute resolution mechanisms are much more reminiscent of 'jurisdictional' functions, which, in turn, signals considerable implications for the interpretation and application of secondary rules of responsibility, whilst the more traditionally labelled 'executive' functions of any organ that determines (and perhaps implements) responsibility imply that it is barred from pursuing similar judicial/jurisdictional inquiries.[490] It is useful to note, in passing, that international law differs considerably in this respect from municipal law. Ordinarily, in domestic law the 'jurisdictional act' (which determines both the illegality and the culprit) precedes and conditions the implementation of responsibility, a task that falls under the aegis of the executive branch. Conversely, in international law the determination of an internationally

[489] For more background and a multiplicity of views on dispute resolution mechanisms in the field of state responsibility, see *Symposium*: *Counter-measures and Dispute Settlement*: *The Current Debate Within the ILC*, 5 EUROPEAN JOURNAL OF INTERNATIONAL LAW (1994) (including contributions by Gaetano Arangio-Ruiz**,** Vladlen S. Vereshchetin, Mohamed Bennouna, James Crawford**,** Christian Tomuschat**,** Derek Bowett**,** Bruno Simma and Luigi Condorelli).

[490] See, e.g., Villalpando, L'ÉMERGENCE DE LA COMMUNAUTÉ, *supra* note 78, at 421.

wrongful act, coupled with the corresponding implementation of responsibility, are relegated concomitantly to a single legal subject or actor (i.e. a state or an international organization fulfilling an executive function). In the latter scenario, judicial intervention operates an *ex post facto* review of this determination in the context of subsequent dispute resolution or settlement proceedings.[491]

More importantly, the application of state responsibility has often been linked with the activities of international organizations, especially when taking stock of collective interests, or interests emblematic of the international community as a whole.[492] Consequently, the scholarly debate surrounding this issue has divided sharply into two respective camps. On the one hand, certain commentators conceptualize the implementation of aggravated community responsibility -- that is to say the legal consequences flowing from the perpetration of internationally wrongful acts harming collective interests and usually stemming either from *jus cogens* or *erga omnes* obligations -- solely through the lens of institutional mechanisms. On the other hand, detractors of this view acknowledge the existence of an unstructured, somewhat self-regulated, system resulting from general international law and highly dependent on the notions of self-help and the unilateral invocation of state responsibility by affected states.

According to the first view, which has received wide academic support,[493] aggravated community responsibility can only be actuated through institutional

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[491] For a classical formulation of this principle, see, e.g., Georges Scelle, DROIT INTERNATIONAL PUBLIC: MANUEL ÉLÉMENTAIRE AVEC LES TEXTES ESSENTIELS 654 (1944).

[492] For an application of this, see, e.g., Bernhard Graefrath, *International Crimes and Collective Security*, in Karel Wellens (ed.), INTERNATIONAL LAW: THEORY AND PRACTICE: ESSAYS IN HONOUR OF ERIC SUY 237-252, 239 (1998).

[493] See, e.g., Denis Alland, *International Responsibility and Sanctions*: *Self-Defence and Countermeasures in the ILC Codification of Rules Governing International Responsibiliy*, in Spinedi and Simma, UNITED NATIONS, *supra* note 244, at 143-195, 186-195; Jorge Cardona Llorens, *Deberes jurídicos y responsabilidad internacional*, in HACIA UN NUEVO ORDEN INTERNACIONAL Y EUROPEO: ESTUDIOS EN HOMENAJE AL PROFESOR DON MANUEL DÍEZ DE VELASCO 158-159 (1993) (see also *Ibid*, at 159-163: arguing that unilateral reactions to breaches remain available to states, regardless of any institutionalized procedure); Pierre-Marie Dupuy, *Observations sur la pratique récente des 'sanctions' de l'illicite*, 87 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 505, 546-548 (1983); Willem Riphagen, *State Responsibility*: *New Theories of Obligation in Interstate Relations*, in Ronald St.J. MacDonald and Douglas M. Johnson (eds.), THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY 581-625, 607 (1983).

channels so as to better coordinate reactions to violations of *erga omnes* obligations. This position carries, with it, particular significance for counterterrorism, as it will be argued that the duty to prevent terrorism amounts to an *erga omnes* obligation. Thus, invoking ILC parlance, the progressive affirmation of *erga omnes* obligations in modern international law "has led the international community to turn towards a system which vests in international institutions other than States exclusive responsibility, first, for determining the existence of a breach of an obligation of basic importance to the international community as a whole, and, thereafter, for deciding what measures are to be taken in response and how they are to be implemented."[494] In turn, this view paves the way for two distinct positions on the possible institutionalization of the implementation of state responsibility.

First, this school of thought acknowledges that existing international procedures and organizations, most notably UN organs, are adequately suited to ensure the implementation of state responsibility. This thinking was pervasive in the commentaries accompanying Article 19 (on the international crime of the state)[495] and Article 30 (on countermeasures),[496] both adopted by the ILC during the first reading. It was also the primary driving force behind Special Rapporteur Willem Riphagen's proposed draft articles, which provided for the implementation of the consequences flowing from the commission of

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[494] *Yearbook of the International Law Commission*, 1979, Vol. II, Second Part, p. 119 (resulting from the Eight Report on State Responsibility by Mr. Robert Ago, Special Rapporteur, A/CN.4/318 and ADD.1-4, at para. 91, in *Yearbook of the International Law Commission*, 1979, Vol. II, First Part, p. 43). On Ago's position, see Third Report on State Responsibility by Mr. Robert Ago, Special Rapporteur, A/CN.4/246 and Add. 1-3, in *Yearbook of the International Law Commission*, 1971, Vol. II, First Part, at p. 221, and his remarks in Antonio Cassese, Marina Spinedi and Joseph H.H. Weiler (eds.), INTERNATIONAL CRIMES OF STATE: A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY 238-239 (1989).

[495] See, e.g., paras. 16 and 22-29 of the commentary accompanying Article 19, adopted in the first reading, in *Yearbook of the International Law Commission*, 1976, Vol. II, Second Part, pp. 102-108 (with particular emphasis on "the fact that the United Nations Charter attaches specific consequences to the breach of certain international obligations"). See also the various positions defended within the ILC: Robert Ago (*Yearbook of the International Law Commission*, 1976, Vol. I, at 58-59), Mustafa Kamil Yasseen (*Ibid*, at 62-63) and Alfredo Martínez Moreno (*Ibid*, at 70-71). For a brief overview of the positions espoused by various states on this debate, see, e.g., Marina Spinedi, *International Crimes of States*: *The Legislative History*, in Cassese, Spinedi and Weiler, INTERNATIONAL CRIMES, *supra* note 494, at 7-140, 64-65.

[496] See paragraph 21 of the commentary accompanying Article 30, adopted in the first reading, in *Yearbook of the International Law Commission*, 1979, Vol. II, Second Part, p. 121.

international crimes through habitual procedures found under the aegis of the UN, as they pertain to the maintenance of international peace and security.[497] At the time this position was raised within the ILC, the corresponding concern of whether this course of action would actually increase the UN's role in the implementation of state responsibility was simultaneously brought up. More importantly, it was also pointed out that involvement of the Security Council in the implementation process might carry, with it, political impediments with "the exercise of the right of veto" potentially being "incompatible with the requirement of solidarity."[498] At any rate, this line of reasoning signified that, as part of its membership within the international community, any state involved with the mechanics of responsibility would be exercising new rights and obligations in the broader context of a concerted community of states.[499] Similarly, several states and commentators rejected the existence of a special regime addressing the consequences of grave violations of *jus cogens* obligations outside of the UN framework, as they exhibited particular resistance to the idea that

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[497] See Draft Article 14(3), as proposed by Special Rapporteur Riphagen (Sixth Report on the Content, Forms and Degrees of International Responsibility (Part Two of the Draft Articles); and "Implementation" (mise en oeuvre) of International Responsibility and the Settlement of Disputes (Part Three of the Draft Articles), by Mr. Willem Riphagen, Special Rapporteur, A/CN.4/389 of 2 April 1985, in *Yearbook of the International Law Commission*, 1985, Vol. II, First Part, p. 21). The relevant portions of the proposed draft article read as follows:

> 1. An international crime entails all the legal consequences of an internationally wrongful act and, in addition, such rights and obligations as are determined by the applicable rules accepted by the international community as a whole. […]
> 3. Unless otherwise provided for by an applicable rule of general international law, the exercise of the rights arising under paragraph 1 of the present article and the performance of the obligations arising under paragraphs 1 and 2 of the present article are subject, *mutatis mutandis,* to the procedures embodied in the United Nations Charter with respect to the maintenance of international peace and security. [Emphasis added.]

In addition and much in the same vein, Draft Article 15 stated that an act of aggression engendered all relevant rights and obligations found in the *UN Charter*. See *Ibid*, Article 15.

[498] *Ibid*, at 24, para. 151.

[499] See *Yearbook of the International Law Commission*, 1985, Vol. II, First Part, p. 14, at para. 9; Andrea Gattini, *A Return Ticket to 'Communitarisme', Please*, 13 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1181, 1182 (2002). See also, generally, André de Hoogh, OBLIGATIONS ERGA OMNES AND INTERNATIONAL CRIMES: A THEORETICAL INQUIRY INTO THE IMPLEMENTATION AND ENFORCEMENT OF THE INTERNATIONAL RESPONSIBILITY OF STATES 56-57 (1996).

countermeasures can be adopted unilaterally by states other than the 'direct' victim of the violation in such instances.[500]

Second, under this first general view it is argued that the institutionalization of the implementation of state responsibility is clearly desirable inasmuch as it would do away with some of the risks and pitfalls inherent in any state-led unilateral initiatives and reactions.[501] This trend also pervades other important dimensions of international law – namely with regard to the institutionalization of mediation between states, for example – and "rather than by force or threats of force has led to the stability of states and the relations between them."[502] However, this second position further implies that the institutionalized implementation of state responsibility fails to find any grounding in international law, as it currently stands, and could only seek steadier footing through the creation of an adequate institutional mechanism (either *ex novo* or by the adaptation of existing mechanisms to the requirements of state responsibility).[503] In that light, it follows that we must always keep in mind the possibility of adapting existing UN mechanisms in order to facilitate the implementation of state responsibility for failing to prevent transnational

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[500] See, *inter alia*: certain members of the ILC (in Report of the International Law Commission on the work of its fifty-second session, 1 May - 9 June and 10 July - 18 August 2000, Official Records of the General Assembly, Fifty-fifth session, Supplement No.10, A/55/10, at p. 60, para. 366, or Report of the International Law Commission: Fifty-Third Session (23 April-1 June and 2 July-10 August 2001), A/56/10, at p. 36, para. 54); the observations of Mexico (A/CN.4/515/Add.1 of 3 April 2001, at pp. 8-12) and of Poland (A/CN.4/515/Add.2 of 1 May 2001, at pp. 18-19); the observations of Cameroon, Greece, Iran and Mexico within the Sixth Commission (cited in Fourth Report on State Responsibility by Mr. James Crawford, Special Rapporteur, A/CN.4/517 of 2 April 2001 [hereinafter *Fourth Report* – Crawford], at p. 28, para. 73, notes 107-108 and accompanying text); Bruno Simma, *Does the UN Charter Provide an Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations Erga Omnes?*, in Jost Delbrück (ed.), THE FUTURE OF INTERNATIONAL LAW ENFORCEMENT: NEW SCENARIOS – NEW LAW? 125, 136 (1993); Santiago Ripol Carulla, *El Consejo de seguridad y la defensa de los derechos humanos*: *Reflexiones a partir del conflicto de Kosovo*, 51 REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL 59-87, 73-74 (1999).

[501] For thoughtful discussion on the institutionalization of the implementation of community responsibility, through existing United Nations mechanisms and other institutional vehicles, see Pierre Klein, *Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law and United Nations Law*, 13 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1241, 1241-1255 (2002).

[502] Ryan Patton, *Federal Preemption in an Age of Globalization*, 37 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 111, 117 (2005). See also Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO STATE LAW JOURNAL 649, 650 (2002).

[503] See also Villalpando, L'ÉMERGENCE DE LA COMMUNAUTÉ, *supra* note 78, at 417.

terrorism. In many ways, this reasoning animated the proposals of Special Rapporteur Arangio-Ruiz in his quest to subsume UN procedures and organs, along with the creation of a regime of responsibility for international crimes of states, under a single framework.[504] In addition, different members within the ILC also advanced similar arguments during its works surrounding the first reading.[505] During a different era of the ILC's work, Roberto Ago was also a vocal advocate of the institutionalized implementation of state responsibility through international institutions, especially for grave violations of international law. Not surprisingly, this rationale prompted him to envisage international law gravitating "towards a system vesting in international institutions other than States the exclusive responsibility, first, for determining the existence of a breach of an obligation of basic importance to the international community as a whole, and thereafter, for deciding what measures should be taken in response and how they should be implemented."[506]

In contrast, according to the second general view, there exists under general international law an aggravated regime of community responsibility hinging on unilateral invocation, along with unilateral adoption of countermeasures, by affected states. Proponents of this view endorse the idea that

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[504] The theoretical reasoning of the Special Rapporteur was mapped out under the heading titled 'The Indispensable Role of International Institutions'. See Seventh Report on State Responsibility by Mr. Gaetano Arangio-Ruiz, Special Rapporteur, A/CN.4/469 of 9 May 1995 and Add.1 (25 May 1995) [hereinafter *Seventh Report* – Arangio-Ruiz], at pp. 25-49, paras. 70-138. See also Fifth Report on State Responsibility by Mr. Gaetano Arangio-Ruiz, Special Rapporteur, A/CN.4/453/Add.2 of 8 June 1993 and Add.3 (17 June 1993), in *Yearbook of the International Law Commission*, 1993, Vol. II, First Part, pp. 1-62 [hereinafter *Fifth Report* – Arangio-Ruiz], at pp. 24-26, paras. 90-95. His project ultimately led him to suggest Draft Article 19 (see *Fifth Report* – Arangio-Ruiz, at pp. 37-38, para. 139), which established an implementation mechanism flowing directly to the states, but also simultaneously subject to the intervention of both the political (General Assembly or the Security Council) and judicial (International Court of Justice) organs of the United Nations.

[505] See, e.g., Report of the International Law Commission on the work of its forty-seventh session (2 May-21 July 1995), A/50/10, at pp. 56-57, paras. 312-317; paragraphs 7-13 of the Commentary accompanying Article 51, adopted in the first reading, in Report of the International Law Commission on the work of its forty-eighth session, 6 May - 26 July 1996, Official Records of the General Assembly, Fifty-first session, Supplement No.10, A/51/10 [hereinafter *ILC Report 1996*], at p. 71.

[506] Eight Report on State Responsibility by Mr. Roberto Ago, Special Rapporteur, in *Yearbook of the International Law Commission*, 1979, Vol. II, First Part, at p. 43, paras. 91-92. For an analysis of the ILC's work during this period, see Denis Alland, *La légitime défense et les contre-mesures dans la codification du droit international de la responsabilité*, 110 JOURNAL DU DROIT INTERNATIONAL 728 (1983).

a breach of an obligation *erga omnes* could be determined and, even acted upon, absent any institutional structure aiming to counteract such breach.[507] Indeed, this appears to be the reasoning underlying the ILC's *Articles*, which codify customary international law but provide no guidance on the possible institutionalization of the implementation of state responsibility.[508] As a result, the relationship between this regime of responsibility and the activities of international organizations, especially those of the UN, can be analyzed through two distinct lenses.

On the one hand, existing institutional mechanisms (especially UN organs, geared towards the maintenance and/or restoration of international peace and security) can be construed as playing a minimal role in the context of international responsibility.[509] In particular, their potential contributions would either be significantly hampered by deficiencies endemic to the UN's nature and makeup (i.e. ill-suited procedures, inefficiency or institutional paralysis in the face of grave violations), or simply eschewed because falling within the ambit of other areas of international law.[510] It inevitably follows that community responsibility – an area that concerns itself solely with redressing unlawful acts harming collective interests – would then flow from general international law and vest, upon individual states, rights and obligations originating from the same source. Ironically, the conclusion of the ILC's works following the first reading leaned towards this model. In light of indomitable controversies surrounding the

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[507] Consider Eric Wyler, *From 'State Crime' to Responsibility for 'Serious Breaches of Obligations Under Peremptory Norms of General International Law'*, 13 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1147, 1151 (2002).

[508] See, generally, Pierre-Marie Dupuy, *A General Stocktaking of the Connections Between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility*, 13 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1053, 1060 (2002) (noting that the disappearance of the notion of 'crime' from the *Articles on State Responsibility* has the effect of allowing "the state's responsibility to be detached from any criminal or penal connotation; over and above getting rid of burdensome symbolism, this terminological innovation may seem to justify better the absence in the part of the text on implementation of responsibility of any machinery inspired by the criminal procedures of domestic law"). [Emphasis added.] See also *Ibid*, at 1064 ("The 'crime' and its substitutes remain a formidable political weapon, which certain states intend to retain mastery of without undergoing the constraints that any institutionalization of responsibility would risk introducing.") [Emphasis added.]

[509] See, e.g., Klein, *Responsibility*, *supra* note 501, at 1247-1250 (discussing this idea in the context of *jus cogens* duties).

[510] See *Ibid*.

attempted establishment of an efficient institutional mechanism, the 1996 Draft Articles ultimately favoured the unilateral implementation of responsibility by affected states.[511]

On the other hand, an alternate viewpoint emphasizes the importance of the reaction of international organizations to emergency situations resulting from the commission of serious wrongful acts against the international community as a whole.[512] Thus, although clearly relevant, the general framework of state responsibility would play a marginal role in protecting fundamental community interests.[513] More specifically, this would translate into two possible scenarios, namely that i) the adoption of unilateral countermeasures would be excluded; or ii) the adoption of unilateral countermeasures would be subordinated to the primacy of an institutionalized collective action.[514]

This line of reasoning clearly informed Special Rapporteur James Crawford's proposal during the second reading at the ILC. Whilst acknowledging the primacy of international organizations in dealing with international breaches causing emergency situations vis-à-vis *erga omnes* obligations (with particular emphasis on the UN's pursuit of its objectives under Chapter VII), he ultimately submitted that secondary rules of state responsibility could only play an ancillary, albeit important, role.[515] This conclusion is important for present purposes insofar as large-scale terrorist attacks can sometimes generate states of panic and emergency. Following Crawford's lead, should a terrorist strike create a state of social panic or unrest, the law of state responsibility could operate as a

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[511] See, e.g., paragraph 2 of the Commentary accompanying Article 51, in *ILC Report 1996*, *supra* note 505, at p. 71 (discussing the distinction between 'crimes' and 'exceptionally grave delicts' in this context).

[512] See, e.g., Gowlland-Debbas, *Security Council Enforcement Action*, *supra* note 259, at 58 and 63.

[513] See, e.g., Karel Wellens, *The UN Security Council and New Threats to the Peace*: *Back to the Future*, 8 JOURNAL OF CONFLICT & SECURITY LAW 15, 48-53 (2003) (and sources cited therein).

[514] See, e.g., Christine Chinkin, THIRD PARTIES IN INERNATIONAL LAW 337 (1993); D.N. Hutchison, *Solidarity and Breaches of Multilateral Treaties*, 59 BRITISH YEARBOOK OF INTERNATIONAL LAW 151-215, 212-213 (1988); Linos-Alexander Sicilianos, LES REACTIONS DÉCENTRALISÉES À L'ILLICITE: DES CONTRE-MESURES À LA LÉGITIME DÉFENSE 174-175 (1990); Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 217-384, 310-311 (1994-VI); Ian Sinclair's remarks in Cassese, Spinedi and Weiler, INTERNATIONAL CRIMES, *supra* note 494, at 257.

[515] See Third Report on State Responsibility by Mr. James Crawford, Special Rapporteur, A/CN.4/507/Add.4 of 15 March 2000 [hereinafter *Third Report* – Crawford], at pp. 5-6, para. 372.

supplement to principal humanitarian and crisis management initiatives spearheaded under the aegis of the UN. This is not to suggest that state responsibility law plays the *same* role as those initiatives -- or even brings the same efficiency, 'legitimacy', purpose or implementation model to the table -- but rather that it can play *some* role in the grander scheme of things. For instance, holding a state accountable for failing to prevent a terrorist attack might generate international scrutiny and shift power dynamics to ensure accountability and indemnification, whilst also mobilizing certain key constituencies in redressing the harm and in preventing further terrorist threats originating from the same source. More importantly, as it will be argued later, the failure to prevent a terrorist attack is tantamount to the violation of an *erga omnes* obligation, which simultaneously triggers the application of community responsibility (meaning that all members of the international community have a vested interest in counteracting the breach and redressing the harm), along with the involvement of international organizations (especially the UN and the Security Council, more precisely).

With this in mind, Crawford's original posture becomes particularly relevant for the advancement of the law of state responsibility for the failure to prevent terrorism. However, it would seem that his view initially rejected the engagement of secondary rules of state responsibility when dealing with 'willfully blind' governments, or the mere 'toleration'/'harbouring' or 'supporting' of terrorist factions – which was evidenced as a widespread practice when exploring the shift to a law of indirect responsibility in the previous chapter – and rather favoured granting organs like the Security Council extensive powers in dealing with these types of matters. When extrapolated to the context of counterterrorism, Crawford's approach carries distinct resonance.[516] Yet, these introductory remarks do not completely shed light on the relationship between the actions of UN organs and the law of state responsibility.

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[516] *Ibid* (also citing Report of the Secretary-General pursuant to General Assembly resolution 53/35, The Fall of Srebrenica, A/54/549, 15 November 1999; Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, 15 December 1999, and the statement of the Secretary-General of 16 December 1999.). [Emphasis added.]

The current scheme of state responsibility, as supplemented by the ILC's *Articles*, indicates that the prevalent system of implementation – based on the unilateral invocation and implementation of responsibility by individual states, along with a repertoire of inter-state measures – effectively supplants the prospect of pursuing any sort of (overt) institutionalization of the implementation of liability, at least for the moment.[517] However, the involvement of institutional mechanisms in the process of implementation remains desirable in some cases, especially in the field of community responsibility, but does not constitute a prerequisite for the application of secondary norms, or even for the recognition of the existence of those rules or of an internationally wrongful act.[518]

Therefore, and in light of active participation of UN organs in counterterrorism, the debate over the possible institutionalization of state responsibility generates at least two overarching queries: a) on the one hand, whether the actions of UN organs are governed by the law of state responsibility (and, as a corollary, whether those organizations can or do play a role in the implementation of state responsibility or in addressing the consequences of internationally wrongful acts); and b) on the other hand, whether the unilateral implementation of responsibility by individual states is precluded, tempered, or excluded altogether by the intercession of international organizations.

In framing the broader questions pertaining to the relationship between state responsibility and UN organs, four possible scenarios are readily identifiable at the outset.[519] First, the action of an international organization may be completely divorced from the law of state responsibility, in that the organization's objectives do not coincide with those of the determination or the implementation of the consequences of wrongful acts, thereby also failing to obstruct the ordinary application of secondary rules of responsibility. In such instances, institutional

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[517] Moreover, the ILC's debates did not present the best locus for venturing upon institutional reforms of international organizations. See, e.g., *Third Report* – Crawford, *supra* note 515, at pp. 5-6, para. 372.

[518] See, generally, Edith Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 798 (2002).

[519] These are based on Villalpando's remarks in the context of community responsibility. See Villalpando, L'ÉMERGENCE DE LA COMMUNAUTÉ, *supra* note 78, at 423. Needless to say, these scenarios can occur individually – i.e. isolated from one another – or in some mixed configuration.

involvement does not affect, nor preclude, the application of state responsibility law as it currently stands. Second, the actions of international organizations may actually come into conflict with the law of state responsibility; in that eventuality, the organization in question could determine consequences vis-à-vis unlawful behaviour, or impose sanctions/coercive measures inimical to, or incompatible with, the scheme of secondary rules of responsibility. In such cases, the organization's proposed solution would likely supersede the application of the general law of state responsibility, pursuant to the principle of *lex specialis*.[520] Third, the actions of an international organization could prove totally instrumental in implementing state responsibility, in that the organization would in fact be called upon to apply secondary rules of responsibility, whilst its scope of operation would, concomitantly, be regimented by the same corpus of norms. Finally, the actions of an international organization could turn out to be complementary to the application of general secondary rules of responsibility. Thus, in the event of a breach involving the violation of an *erga omnes* obligation (e.g. a counterterrorism duty), the international organization's repertoire (e.g. sanctions, lobbying power, regulatory-like influence) might provide additional safeguards or means of protecting community interests, even if the organization's measures fall outside of the ambit of habitual state responsibility law (i.e. do not fit within the unilateral implementation of state responsibility by a victim-state because they are adopted in an institutional setting). Therefore somewhat double-coating the protections usually associated with the application of state responsibility, in such scenario the organization's action would not hinder the deployment of secondary rules.

It is apparent from the foregoing that the relationship between the application of state responsibility and the actions of UN organs, especially the Security Council, needs to be further engaged. In attempting to elucidate this relationship, this chapter will proceed on a two-tiered approach. On one hand,

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[520] See, e.g., Bruno Simma and Dirk Pulkowski, *Of Planets and the Universe*: *Self-Contained Regimes in International Law*, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW 483, 490 (2006) (noting that "a strong form of *lex specialis* could exclude the application of the general regime of state responsibility altogether, either by explicit provision or by implication, that is, by virtue of a regime's particular structure or its object and purpose.").

after briefly canvassing possible contributions by other UN organs, it will explore some of the theoretical and practical underpinnings of the Council's contributions to state responsibility and, ultimately, attempt to achieve a rapprochement between the Council's Chapter VII powers and counterterrorism. On the other hand, it will embark upon a more concrete analysis of this phenomenon with regard to modern terrorism – along with other relevant contributions by UN organs – and finally query whether any kind of concerted thread, or conclusion, can be drawn from Council practice vis-à-vis the state responsibility/terrorism debate.

Part A briefly assesses the efficiency of existing UN mechanisms, namely the ICJ, the General Assembly and the Security Council, in implementing state responsibility. It then specifically addresses the quasi-judicial exercise of Council powers with a view to framing the discussion to follow. Part B delves into the sophisticated question of the mutual influence/interpenetration of state responsibility law and Council action, and ultimately leads to the aforementioned rapprochement so as to frame the debate squarely within the ambit of counterterrorism. The dissertation now turns to a brief appraisal of the efficiency of existing UN mechanisms in implementing state responsibility.

**1. The International Court of Justice**

Because of jurisdictional constraints, the ICJ cannot autonomously and actively play a role in implementing state responsibility. Indeed, its main jurisdictional impediments preclude it from unilaterally invoking the consequences flowing from a breach of an international obligation. In fact, the Court will rather often formulate some incarnation of the obligation of reparation when faced with an unlawful situation, without predicating its remedy on a "free-standing" declaration of international responsibility.[521] Conversely, it may undertake a complimentary function consisting of oversight and review of the

[521] See, e.g., *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, 2002 ICJ REPORTS 3, 31-32, paras. 75-76 (February 14); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 2004 ICJ REPORTS 136, 201-202 [hereinafter *Wall Advisory Opinion*], para. 163 (July 9). For academic support of this proposition, see Higgins, *The International Court of Justice*, *supra* 208, at 284-285; Nollkaemper, *Internationally Wrongful Acts*, *supra* note 145, at 768 n.42.

implementation of state responsibility by other entities, or ultimately adjudicate disputes arising over the application of secondary rules of responsibility. As will be discussed below, the ICJ's contributions are particularly helpful when addressing the mechanics surrounding the secondary level of international breaches, such as the interpretation of trans-substantive rules, i.e. attribution, along with the application of other nebulous legal areas, such as the invocation of responsibility[522] by 'injured' and 'non-injured' states.[523] In light of its apparent impartiality, mission statement and capacity to adjudicate disputes, and its ability to deliver advisory opinions on international legal issues,[524] the ICJ constitutes an attractive avenue in upholding legal stability and observance of the rules of responsibility, at least upon first glance. However, the Court's potential input in interpreting and in advancing this body of law remains seriously limited in that it may only adjudicate cases in which the wrongful state has conceded its jurisdiction over the dispute.[525] Moreover, its judgment is only binding on those states that are parties to the proceedings,[526] thereby signalling that the Court's rulings, and any 'precedential' value that may be derived from them, would be significantly hampered.

**2. The General Assembly**

Although seemingly apt for the implementation of state responsibility vis-à-vis terrorism under some lights, the General Assembly remains fettered by clear

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[522] For thoughtful accounts on the invocation of responsibility, see, e.g., Ian Scobbie, *The Invocation of Responsibility for the Breach of 'Obligations under Peremptory Norms of General International Law'*, 13 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1201-1220 (2002); Peirano, *International Responsibility*, *supra* note 365, at 190-194; Weiss, *Invoking State Responsibility*, *supra* note 518, at 798-816.

[523] On this issue, see, e.g., Thirlway, *Injured*, *supra* note 79, at 311-328.

[524] See Statute of the International Court of Justice, June 26, 1946, 59 Stat. 1055, 8 U.N.T.S. 993 [hereinafter *ICJ Statute*], Articles 65-68.

[525] See *ICJ Statute*, *supra* note 524, Article 36.

[526] See *Ibid*, Article 59. See also Michael J. Struett, *The Transformation of State Sovereign Rights and Responsibilities Under the Rome Statute for the International Criminal Court*, 8 CHAPMAN LAW REVIEW 179, 189 (2005) (observing that Article 59 "proscribes the precedential value for the World Court's decisions"). It must also be noted that Article 94(1) of the *ICJ Statute*, *supra* note 524, reads as follows: "[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is party." For recent support, see Shabtai Rosenne, *Decisions of the International Court of Justice and the New Law of State Responsibility*, in Ragazzi, INTERNATIONAL RESPONSIBILITY, *supra* note 50, at 297-309, 297. He later adds that "[u]nder the new law of responsibility, non-compliance with a judgment on the merits, if established, could be a cause of action." See *Ibid*, at 308.

institutional restrictions, thereby precluding it from comprising an exclusive and overarching mechanism in applying secondary norms. Pursuant to the *UN Charter*, the Assembly "may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter" and "make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters".[527] Interestingly, its operations have sometimes fallen outside of the purview of restoring international peace and security, most notably in the fields of human rights, self-determination and environmental protection, all relevant areas under state responsibility. Irrespective of how the debates surrounding the roles of both the General Assembly and the ICJ in implementing state responsibility are ultimately resolved, however, those resolutions have little or no impact on the argument ultimately explored in the present dissertation.

### 3. The Security Council

The chapter now turns to the crux of the prescriptive argument: the potential implementation of state responsibility via the channel of the Council. Before doing so, some preliminary remarks on the prospects and limits of such involvement are warranted.

#### a) Prospects and Limits

The Council appears, on its face, to be suited in contributing to the implementation of state responsibility for the failure to prevent terrorism in certain circumstances. Indeed, the *UN Charter* devolves vast powers to the Council in safeguarding collective interests, thereby aiming primarily to confer upon it the responsibility of maintaining or restoring international peace and security.[528] It is no surprise, therefore, that the *UN Charter* has sometimes been

[527] Article 10 of the Charter of the United Nations, adopted 26 June 1945, entered into force 24 Oct. 1945, as amended by G.A. Res. 1991 (XVIII) 17 Dec. 1963, entered into force 31 Aug. 1965 (557 UNTS 143); 2101 of 20 Dec. 1965, entered into force 12 June 1968 (638 UNTS 308); and 2847 (XXVI) of 20 Dec. 1971, entered into force 24 Sept. 1973 (892 UNTS 119) [hereinafter *UN Charter*].

[528] This language is borrowed from Article 24(1) of the *UN Charter*, *supra* note 527.

described as the "constitution of the international legal system".[529] Whilst operating within the scope of its mandate, the Council thus simultaneously exerts executive and operational powers and can take stock, or act on, fundamental interests concerning the international community as a whole.[530] Moreover, the particular scheme of powers devolved to the Council, which involves recourse to coercive measures, offers a wide range of options in ensuring compliance with international obligations and in implementing state responsibility. For instance, the Council's binding and far-reaching decisional power, pursuant to Article 25 of the *UN Charter*, immediately springs to mind.[531]

A first significant obstacle to the acknowledgement that the Security Council might exert general competence in implementing state responsibility is attributable to the very structure of the UN. It also hinges, to a large extent, on the tension between restraints imposed on Council action and judicial review of its resolutions, two issues appearing semantically adjacent at first glance, but clearly distinct in scope and in practice.[532] As a corollary, it follows that an *ultra vires* decision by the Council can engender distinct legal consequences, outside of the issue of judicial review. Support for this proposition is exemplified through the so-called 'right of last resort' of Members to evade compliance, in certain cases, with an illegal Council resolution.[533] When engaging in this debate,

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[529] See, e.g., Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 531-619 (1998).

[530] See, for instance, the ICTY Appeals Chamber's treatment of the Security Council's powers in *Prosecutor* v. *Tadić*, Case IT-94-1-AR72, Interlocutory Appeal on Jurisdiction, 2 October 1995, at para. 37.

[531] *UN Charter*, *supra* note 527, Article 25. For a judicial application of Article 25 and of the bindingness of Security Council resolutions, see *Namibia Advisory Opinion*, *supra* note 361, at p. 54, paras. 114-116.

[532] See, e.g., Krzysztof Skubiszewski, *The International Court of Justice and the Security Council*, in Vaughan Lowe and Malgosia Fitzmaurice (eds.), FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOUR OF SIR ROBERT JENNINGS 626-627 (1996); Vera Gowland-Debbas, *UN Sanctions and International Law*: *An Overview*, in Vera Gowland-Debbas (ed.), UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW 1-28, 14 (2001).

[533] For support of this proposition, see, e.g., Michel Virally, *L'ONU devant le droit*, 99 JOURNAL DE DROIT INTERNATIONAL 531 (1972); Dan Ciobanu, PRELIMINARY OBJECTIONS RELATED TO THE JURISDICTION OF THE UNITED NATIONS POLITICAL ORGANS 174 (1975). For a contrary opinion, see Quincy Wright, *The Strengthening of International Law*, 98 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 1-295, 125 (1959-III); Ebere Osieke, *The Legal Validity of Ultra Vires Decisions of International Organizations*, 77 AMERICAN JOURNAL OF INTERNATIONAL LAW 255 (1983).

however, one should consider Christian Dominicé's cautionary words, which signal that "a violation of the Charter, whilst theoretically possible, is not a serious hypothesis."[534]

In sum, there exists wide judicial and academic support for the notion that the Council is not above the law.[535] However, although its decisions must observe the objectives and principles enshrined in the *UN Charter*,[536] along with general international law, there is no corresponding method or mechanism to ensure the legality of its decision-making. Framing the inquiry solely within the purview of judicial resolution, it is possible to identify two, albeit imperfect, recourses available to a state targeted by Council-imposed sanctions. On one hand, a state complying with Council sanctions can appear before the ICJ so that the Court may rule on the original sanction-creating resolution (i.e. this was the case of the motions submitted by Libya in the *Lockerbie* case).[537] Pursuant to this option, such scenario would not directly subject the Council to the judicial recourse, whilst a finding of illegality would probably trigger a power struggle within the UN. On the other hand, the aforementioned state could request that the competent

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[534] *The International Responsibility of the United Nations for Injuries Resulting from Non-Military Enforcement Measures*, in Ragazzi, INTERNATIONAL RESPONSIBILITY, *supra* note 50, at 363, 366.

[535] See, e.g., *Prosecutor* v. *Dusko Tadić*, ICTY Appeals Chamber, No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 [hereinafter *Tadić* – Defence Motion], at para. 28; Nicolas Angelet, *International Law Limits to the Security Council*, in Gowlland-Debbas, UNITED NATIONS SANCTIONS, *supra* note 532, at 71-82; Michael Bothe, *Les limites des pouvoirs du Conseil de sécurité*, in René-Jean Dupuy (ed.), THE DEVELOPMENT OF THE ROLE OF THE SECURITY COUNCIL: PEACE-KEEPING AND PEACE-BUILDING 67-81 (1993); Benedetto Conforti, *Le pouvoir discrétionnaire du Conseil de sécurité en matière de constatation d'une menace contre la paix, d'une rupture de la paix ou d'un acte d'agression*, in René-Jean Dupuy (ed.), THE DEVELOPMENT OF THE ROLE OF THE SECURITY COUNCIL : PEACE-KEEPING AND PEACE-BUILDING 51-60 (1993); Martti Koskenniemi, *The Police in the Temple*: *Order, Justice and the UN – A Dialectical View*, 6 EUROPEAN JOURNAL OF INTERNATIONAL LAW 325-348 (1995). But *Cf.* John Foster Dulles, WAR OR PEACE 194-195 (1950).

[536] Article 24(2) of the *UN Charter*, *supra* note 527. As a corollary, the Council's broad decisional powers do not, in turn, habilitate Members to comply with *ultra vires* resolutions, or with decisions that are inconsistent with the *UN Charter*. See, e.g., Karl Zemanek, *The Legal Foundations of the International System*: *General Course on Public International Law*, 266 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 9-335, 96 (1997). But *Cf.* M.K. Nawaz, *Law and International Organization – A Perspective on the United Nations*, 17 INDIAN JOURNAL OF INTERNATIONAL LAW 239 (1977); Eric Suy, *Article 25*, in Jean-Pierre Cot and Alain Pellet (eds.), LA CHARTE DES NATIONS UNIES 481 (1991).

[537] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya / United Kingdom)*, Provisional Measures, Order of 14 April 1992, [1992] *ICJ Reports* 1992, p.3 [hereinafter *Lockerbie*].

organs within its own official governing apparatus submit a request for an advisory opinion from the ICJ. The admissibility of such a request, however, remains doubtful or, at least, problematic, while the resulting opinion would prove non-binding.[538]

Thus, such a structure paves the way for potential abuses of power, overreactions, and political score-settling, all behaviours that, ironically, UN institutionalization purports to eradicate.[539] By the same token, it is also reasonable to infer that the overarching principle of sovereign equality between UN member-states *ipso facto* precludes the Council from deriving unlimited (and unchecked) powers from its mandate.[540] This proposition also finds support in both ICJ and ICTY jurisprudence.[541] Although elucidating the relationship between the Council and the implementation of state responsibility remains largely contingent on the resolution of the judicial review question,[542] it remains immensely helpful to delve deeper into the role of the Council in advancing this body of law. The objective here, therefore, does not consist in taking position or in resolving the aforementioned debate, a task better left to seasoned international

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[538] On this issue, see Giorgio Gaja, *Réflexions sur le rôle du Conseil de sécurité dans le nouvel ordre mondial*: *À propos des rapports entre maintien de la paix et crimes internationaux des Etats*, 97 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 297, 315-317 (1993).

[539] See, e.g., Gowlland-Debbas, *Security Council Enforcement Action*, *supra* note 259, at 73-74; Andreas L. Paulus, *Peace Through Justice? The Future of the Crime of Aggression in a Time of Crisis*, 50 WAYNE LAW REVIEW 1, 20-21 (2004); Jennifer Trahan, *Defining "Aggression"*: *Why the Preparatory Commission for the International Criminal Court Has Faced Such a Conundrum*, 24 LOYOLA LOS ANGELES INTERNATIONAL AND COMPARATIVE LAW REVIEW 439, 460-461 (2002).

[540] See, e.g., Simma, *From Bilateralism*, *supra* note 514, at 270; Aristotle Constantinides, *An Overview of Legal Restraints on Security Council Chapter VII Action With a Focus on Post-Conflict Iraq*, available online at http://www.esil-sedi.org/english/pdf/Constantinides.pdf (last visited on 2 December 2006).

[541] See, e.g., *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, [1948] ICJ REPORTS [hereinafter *Conditions of Admission of a State*], at 64 ("[t]he political character of an organ cannot release it from the observance of treaty provisions established by the Charter, when the constitute limitations on its powers or criteria for its judgment"); *Prosecutor* v. *Tadić*, ICTY Appeals Chamber, No. IT-94-1-AR72, at para. 28 ("[t]he Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be.").

[542] See, e.g., Mohammed Bedjaoui, THE NEW WORLD ORDER AND THE SECURITY COUNCIL: TESTING THE LEGALITY OF ITS ACTS (1994); Derek W. Bowett, *The Impact of Security Council Decisions on Dispute Settlement Procedures*, 5 EUROPEAN JOURNAL OF INTERNATIONAL LAW 89-101 (1994) (placing particular emphasis on its correlation with international responsibility); John Dugard, *Judicial Review of Sanctions*, in Gowlland-Debbas, UNITED NATIONS SANCTIONS, *supra* note 532, at 83-91.

law scholars and policymakers.[543] However, it should be mentioned at the outset that, whilst a strong academic current supports the proposition that the ICJ should act as a check on the legality of Council decision-making,[544] it is not likely that the Council would feel compelled to comply with a ruling by the Court purporting to intervene and impede its action.[545] Indeed, as will be argued later on, the Council has interpreted its Chapter VII powers rather broadly, thereby signalling a potential disconnect between, on one hand, the undesirable scenario of granting it unfettered discretion in the interpretation of its own functions[546] and, on the other, the seemingly prevalent judicial vacuum in reviewing its operations. Hence, it is up to members of the international community to bridge that gap and to fill the judicial void: "[i]f the Security Council is not the exclusive interpreter of its own powers (and if there is no competent judicial organ), a residual power to determine the legality of Security Council action rests with the international community and individual member States of the UN."[547]

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[543] See, e.g., Pierre-Marie Dupuy, *The Constitutional Dimension of the Charter of the United Nations Revisited*, 1 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 1-33, 26-27 (1997); Vera Gowland-Debbas, *The Functions of the United Nations Security Council in the International Legal System*, in Michael Byers (ed.), THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 277, 306-311 (2000); Graefrath, *International Crimes*, *supra* note 492, at 241, 246-248.

[544] See, *inter alia*: José E. Alvarez, *Judging the Security Council*, 90 AMERICAN JOURNAL OF INTERNATIONAL LAW 1 (1996); Mohammed Bedjaoui, NOUVEL ORDRE MONDIAL ET CONTRÔLE DE LA LÉGALITÉ DES ACTES DU CONSEIL DE SÉCURITÉ (1994); Peter H.F. Bekker, *Case Note Concerning the Decision of the International Court of Justice, 27 February 1998*, 92 AMERICAN JOURNAL OF INTERNATIONAL LAW 503 (1998); Matthias Herdegen, *The "Constitutionalization" of the UN Security System*, 27 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 135 (1994); Thomas M. Franck, *The "Powers of Appreciation": Who Is the Ultimate Guardian of UN Legality?*, 86 AMERICAN JOURNAL OF INTERNATIONAL LAW 519 (1992).

[545] See Georg Nolte, *The Limits of the Security Council's Powers and its Functions in the International Legal System*: *Some Reflections*, in Byers, THE ROLE OF LAW, *supra* note 543, at 315-326, 318.

[546] This issue has generated considerable writing and is perfectly summarized by W. Michael Reisman in the following terms: "[t]he practical questions, then, are: who will review Security Council actions and who will determine the content, if any, of the arguably limiting legal principles." See *The Constitutional Crisis in the United Nations*, 87 AMERICAN JOURNAL OF INTERNATIONAL LAW 83, 92 (1993). See also Judith G. Gardam, *Legal Restraints on Security Council Military Enforcement Action*, 17 MICHIGAN JOURNAL OF INTERNATIONAL LAW 285, 288-289 n.11, 296-297 (1996).

[547] Nolte, *The Limits*, *supra* note 545, at 318. See also Herdegen, *The "Constitutionalization"*, *supra* note 544, at 158 and *seq.*; Alexander Orakhelashvili, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 59, 85 (2005).

Finally, the voting procedure governing Council resolutions may be advantageous in implementing state responsibility in instances of transnational terrorism, but also simultaneously constitutes an impediment to the development of that field of law. On the one hand, the limited membership in the Council might be better equipped to tackle time- and politically-sensitive situations involving terrorism in a speedy and efficient manner. Consequently, this aligns with the view that concerns for expediency and efficiency underpin the rationale for granting extended responsibility to the Council in maintaining or restoring international peace and security.[548] Moreover, the broader UN community seems equitably represented through geographical repartition and allotment of seats to non-permanent Members. On the other hand, and not surprisingly, the granting of a permanent role within the Council to certain Members poses significant challenges to the principle of equal sovereignty. Although this structure was originally intended to reflect a post-World War II reality,[549] some authors still contend that the selection of permanent Members accurately reflects present-day balance between dominant powers.

In particular, one must divert attention to the fact that, whilst attractive when viewing the Council's action *stricto sensu*, namely when the opinions of dominant military powers can help shape efforts in restoring peace and security, this line of reasoning becomes somewhat untenable when devising a role for the Council in implementing state responsibility for collective interests.[550] Equally alarming is the fact that a veto power is allocated to the same Members and, essentially, subjects Council action to political considerations driving individual states. As one commentator observes, "[i]n many important cases the veto rule has prevented effective actions."[551] Aside from possibly shunning collective interests in some instances, this poses another considerable challenge to the

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[548] See Eyal Benvenisti, *The US and the Use of Force*: *Double-Edged Hegemony and the Management of Global Emergencies*, 15 EUROPEAN JOURNAL OF INTERNATIONAL LAW 677, 689-690 (2004).

[549] See, e.g., Leland Goodrich and Anne Simons, THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY 344 (1955).

[550] Graefrath, *International Crimes*, *supra* note 492, at 252 n.63; Simma, *Does the UN Charter*, *supra* note 500, at 145.

[551] Jonathan I. Charney, *Third State Remedies in International Law*, 10 MICHIGAN JOURNAL OF INTERNATIONAL LAW 57, reprinted in Provost (ed.), STATE RESPONSIBILITY, supra note 77, at 241.

equilibrium that institutionalized implementation of state responsibility would seek to achieve. This is not to say that political considerations are inherently foreign – or even undesirable – in the instituationalized implementation of state responsibility, but obstacles to its deployment can nonetheless originate in the exercise of veto power. In addition, the voting process might unnecessarily paralyse Council action in situations involving serious violations of international law, while also rendering the whole exercise futile in cases involving the commission of a wrongful act by a permanent Member or Members.[552] It should be emphasized, however, that this observation would obviously extend beyond the purview of Council resolutions pertaining to the peaceful settlement of disputes, pursuant to Chapter VI, under which the parties to the proceedings refrain from voting in accordance with Article 27(3) of the *UN Charter*.[553] At any rate, it becomes apparent that this issue remains inextricably connected to the fashion in which Council powers are ultimately conceptualized.

**b) The Council's 'Quasi-judicial' Exercise of Powers**

As will be demonstrated in the present chapter, the Council's role in applying the rules of state responsibility for counterterrorism purposes will hinge, to a large extent, on the ways in which its powers are ultimately contemplated and conceptualized. In particular, any study exploring this topic will have to operate on the premise that whatever application of international law the Council engages in will invariably involve concurrent political considerations. Put another way, and framing the line of inquiry squarely within the parameters of the relevant legal framework, the law of state responsibility provides an environment, or a locus, within which political decisions can be made against a juridical backdrop. As a corollary, this regime is, by no means, antithetical to the functions habitually carried out by the Council. In short, ascertaining the commission of an internationally wrongful act by a host-state and devising the ensuing legal consequences remains, in large part, an inherently political endeavour. That said, however, this exercise is by no means bereft of legal implications. In fact, such

[552] See, generally, David Caron, *Governance and Collective Legitimation in the New World Order*, 6 THE HAGUE YEARBOOK OF INTERNATIONAL LAW 29 (1993).
[553] *UN Charter*, *supra* note 527.

determination oftentimes straddles 'quasi-judicial' terrain in that it seeks to facilitate a political decision, i.e. assigning blame for failing to prevent transnational terrorism. Yet, it does so while also striving to subscribe to legal paramaters or criteria -- both *objective* (i.e. the general obligation of providing reparation) and *subjective* (i.e. attribution) -- a process which invariably entails: the determination of the rights of the parties involved in a contentious situation; some level of judging (i.e. either by applying relevant legal norms to the facts at hand or by making some juridical finding grounded in a moral appreciation of international law); the legal characterization and qualification of relevant facts and acts; and a legal assessment of appropriate remedies to redress the politically-informed perception of the internationally wrongful act in question.[554]

Indeed, this dichotomous politico-legal dimension inexorably pervades much of international decision-making, especially with regard to the activities of the UN's decisional organs, and was very much alive in the ICJ's advisory opinion on the *Conditions of Admission of a State to Membership in the United Nations*.[555] In that case, the Court was asked whether Members of the UN could make their votes on the admission of a state to the UN contingent on factors extraneous to Article 4 of the *UN Charter*, a provision that regulates the admission of new states. In fact, the very question put to the Court was drafted in a fashion that highlighted this tug-and-pull between the political and legal spheres, precisely by asking the judicial organ to shed light on whether a member-state is "*juridically* entitled to make its consent to the admission dependent on *conditions not expressly* provided by paragraph I of the said Article?"[556] In sum, the legal conundrum submitted to the Court was framed in terms of a conflict of politics versus law. In particular, Article 4 of the *UN Charter* involved the assessment of five criteria to be met by an applicant state seeking admission to the

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[554] But *Cf*. Seventh Report on State Responsibility by Mr. Gaetano Arangio-Ruiz, Special Rapporteur, A/CN.4/469 of 9 May 1995 and Add.1 (25 May 1995), at p. 36, para. 97; Provost, INTERNATIONAL HUMAN, *supra* note 207, at 310.

[555] For a recent account exploring the relationship between international responsibility and the admission of states to the United Nations, see Thomas D. Grant, *International Responsibility and the Admission of States to the United Nations*, 30 MICHIGAN JOURNAL OF INTERNATIONAL LAW 1095 (2009).

[556] *Conditions of Admission of a State*, *supra* note 541, at 58. [Emphasis added.]

UN, namely i) statehood; ii) a peace-loving state; iii) acceptance of the obligations enshrined in the *UN Charter*; iv) the ability to carry out such undertakings; and v) the willingness to do so.

The Court pointed out that such determination necessarily hinged on the *judgment* of both the General Assembly and Council.[557] More importantly for the discussion to follow, the Court noted that Rule 60 of the *Provisional Rules of Procedure of the Security Council* expressly prescribed the exercise of the Council's *judgment* in formulating its recommendation on state membership in the UN.[558] As a corollary, the Court rightly underscored that, in laying out its reasoning, UN organs could rest their decisions regarding admission on political factors connected to the requirements of admission under the *UN Charter*. In sum, the wording of Article 4 provides for some degree of appreciation, which inherently signifies that a decision on admission -- initially based on the legal exegesis extracted from the *Charter* -- can simultaneously be couched in a political light.[559] Needless to say, this reasoning also extends individually to member-states casting their votes, which can, in the Court's view, be predicated on concerns of 'political expendiency' falling outside the ambit of Article 4.[560] Thus, the Court ultimately held that no conflict existed between the functions of the UN's political organs and the prescriptions of public international law entrenched in Article 4.[561]

This conclusion is extremely relevant for the purposes of exploring the potential contributions of state responsibility law in advancing counterterrorism

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[557] *Ibid*, at 62.
[558] *Ibid*, at 63.
[559] See *Ibid* ("[i]t does not…follow from the exhaustive character of paragraph I of Article 4 that an appreciation is precluded of such circumstances of fact as would enable the existence of the requisite conditions to be verified. Article 4 does not forbid the taking into account of any factor which it is possible reasonably and in good faith to connect with the conditions laid down in that Article. The taking into account of such factors is implied in the very wide and very elastic nature of the prescribed conditions; no relevant political factor – that is to say, none connected with the conditions of admission – is excluded.").
[560] *Ibid*, at 64.
[561] *Ibid* ("[t]o ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of its constitution. In this case, the limits of this freedom are fixed by Article 4 and allow for a wide liberty of appreciation. There is therefore no conflict between the functions of the political organs, on the one hand, and the exhaustive character of the prescribed conditions, on the other.").

initiatives. In particular, the Council's role in this regard – which has been described by some as 'hybrid'[562] – can possibly straddle both political and judicial terrain when connecting the rules of state responsibility to the Council's functions. Whilst traditionally perceived as predominantly political in nature, the Council's exercise of powers in this context defies straightforward definition, thereby leading scholars to acknowledge the presence of a distinct, albeit diffuse, adjudicative dimension in its decision-making.[563] Equally important is the notion that, whilst the Council's powers primarily gravitate towards enforcement logic, confusion nonetheless surrounds the presence of quasi-judicial undertones in the application of its mandate.[564] This ambiguity is undoubtedly exacerbated by the semantic adjacency of the Council's Chapter VI powers – especially Articles 33-38 of the *UN Charter* (i.e. the 'Pacific Settlement of Disputes') – with what appear to be more traditional judicial functions. Particularly striking is the wording of Article 37 of the *UN Charter*, which states the following:

> 1. Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.
> 2. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.[565]

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[562] See Kathleen Renée Cronin-Furman, *The International Court of Justice and the United Nations Security Council*: *Rethinking a Complicated Relationship*, 106 COLUMBIA LAW REVIEW 435, 438-441 (2006).

[563] See Jost Delbrück, *Functions and Powers*: *Article 24*, in Brunno Simma *et al.* (eds.), THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 442, 446 (2002) (discussing a philological approach to interpreting the *UN Charter*: "unambiguous findings as to the normative and political meaning of Art. 24 cannot be arrived at"); Cronin-Furman, *The International*, *supra* note 562, at 438 (highlighting that the Council's decision-making "frequently seems to include adjudicative powers").

[564] See, e.g., Nigel D. White, THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY 61 (1990) ("The confusion is created because the change of emphasis from policeman to judge did not involve a wholesale revision of the Dumbarton Oaks proposals; instead the judicial provisions were tacked on so that the fundamental role the Council should play in relation to international disputes is unclear.").

[565] Article 37 of the *UN Charter*, *supra* note 527.

Along similar quasi-judicial lines, Article 38 of the *UN Charter* also casts the Council's powers within the furrow of dispute resolution by enabling it to "make recommendations to the parties with a view to a pacific settlement of the dispute".[566]

With this in mind, it is arguably impossible to construe the Council's exercise of powers as purely 'political' or 'judicial' in all circumstances. Nevertheless, as will be discussed throughout the rest of this chapter, the Council has been called upon to weigh in on state responsibility-related issues in a quasi-judicial fashion, a manifestation of its powers that could easily be transposed to counterterrorism. In fact, it was expressly done – although not unambiguously – in the *Lockerbie* case as will be discussed later on. Of equally compelling relevance is the Council's treatment of the Iraq-Kuwait conflict in which it determined the boundaries of an international border and, by the same token, indicated that its quasi-judicial powers can be exercised rather extensively within the realm of secondary rules of state responsibility. There is no doubt that this application of Council powers strikes at the very core of Jost Delbrück's own vision of the debate at hand, which emphasizes that "binding decisions which are of a judicial nature could be taken in the course of dealing with a case before the S[ecurity] C[ouncil] as, for instance, the adjudication of a contested territory to one of the disputing parties."[567] With some level of political pragmatism also in mind, however, this controversial precedent cannot escape some sense of potentially stretching the exercise of the Council's powers to the very boundaries of its mandate and should, in turn, prompt interlocutors to query whether the Council's permanent Members would accept and implement the prescriptions of such a resolution, had it applied to their own borders. As a corollary, this far-reaching exercise of the Council's functions, albeit at the secondary level of responsibility, should always be read in tandem with the expansive Resolution

[566] *Ibid*, Article 38.
[567] Delbrück, *Functions and Powers*, *supra* note 563, at 447.

1373, which made significant advances at the primary normative level, as discussed elsewhere in the present study.[568]

Conversely, it should be mentioned that significant scholarly resistance hinders the construction of Council powers as entirely adjudicative in nature, with particular reluctance to the prospect of contemplating Articles 37 and 38 of the *UN Charter* through a quasi-judicial prism.[569] Surely, such posture can find support in the Council's frequent refusal to assign legal blame when dealing with situations involving the rules of state responsibility, but the same can be said of ICJ practice.[570] Nevertheless, this conventional scheme cannot escape the impression of having, at the very least, been partially promulgated with a view to habilitating the Council to make political determinations against a legal backdrop, whilst upholding the maintenance of international peace and security as its foremost concern. The very nature of the disputes dealt with by the Council often involves complex international legal questions and, whilst the Council's invocation and application of international law can sometimes be construed as random or arbitrary, further bolsters the assertation that such provisions must have been "intended to invest the Council with quasi-judicial powers".[571] In fact, it would be difficult to entirely discredit the Council's exercise of quasi-judicial powers; rather, its practice points in the other direction and clearly supports the contention that Council decision-making can simultaneously straddle both political and judicial spheres.[572]

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[568] See, e.g., *supra* Chapter 1, Sections B) and E); Chapter 2, Section E). See also *infra*, Chapter 4, Section B)5.a).

[569] See, e.g., Oscar Schachter, *The Quasi-Judicial Role of the Security Council and the General Assembly*, 58 AMERICAN JOURNAL OF INTERNATIONAL LAW 960, 960 (1964).

[570] See *Ibid*, at 961; Rosalyn Higgins, *The Place of International Law in the Settlement of Disputes by the Security Council*, 64 AMERICAN JOURNAL OF INTERNATIONAL LAW 1, 17 (1970).

[571] White, THE UNITED NATIONS, *supra* note 564, at 61.

[572] See Tae Jin Kahng, LAW, POLITICS, AND THE SECURITY COUNCIL 13 (1969) ("[T]he Security Council has not only executive power, but also legislative and judicial powers.") [References omitted.]; Vera Gowland-Debbas, *Commentary*, in Connie Peck and Roy S. Lee (eds.), INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE 254-265, 256 (1997) (emphasizing that, whilst the Council's role can be primarily cast as political "whose determinations under Article 39 are considered to be factual and discretionary and, moreover, it is not bound to follow judicial procedures, it has…made determinations of law and invoked the responsibility of States with definitive legal effects, as well as extensive legal consequences").

It is no surprise, therefore, that the Council has been described as a 'quasi-judicial' body, especially in light of precedents involving the deployment of its dispute settlement powers.[573] A vocal proponent of this line of argument was Hans Kelsen. Indeed, the intricate dual role of the Council prompted him to expound that both the General Assembly and the Council "in so far as they, too, are competent to settle disputes, are only quasi-judicial organs of the United Nations." In addition, according to Kelsen "[t]his is true even if the interpretation is accepted that recommendations made by the Security Council for the settlement of disputes under Articles 37, 38 or 39 are, as decisions of the Council in accordance with Article 25, binding upon the parties."[574] Interestingly, Judge Weeramantry endorsed Kelsen's classification of the Council's powers in his Dissenting Opinion to the oft-discussed *Lockerbie* case.[575] Therefore, and as will be shown below, the Council's powers in this context are decidedly not construed as purely judicial. More importantly, nor does that eventuality underpin the crux of the argument seeking to reel in the application of state responsibility law within the purview of the Council's activities in instances involving transnational terrorism.

Quite to the contrary, the law of state responsibility merely provides the opportunity for the Council to prounounce on political matters within a legal framework – albeit in a quasi-judicial fashion – namely by ascertaining illegal conduct and devising the legal consequences of that behaviour with the furtherance of international peace and security as an organizing principle. In undertaking this mission, the Council's treatment of disputes will involve quasi-judicial findings in some instances. However, it should be stressed that this is also the case in the traditional application of state responsibility, as this area of international law simply cannot be severed from the strident political undertones

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[573] See Oscar Schachter, *The Quasi-Judicial Role*, *supra* note 569, at 961 (opining that, even though a quasi-judicial role may not have featured prominently in UN foundational programmes, "governments have repeatedly called upon the political organs to pass judgments on whether states have observed their obligations").

[574] Hans Kelsen, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS 476-477 (1950).

[575] See Dissenting Opinion of Judge Weeramantry in *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockberbie (Libyan Arab Jamahiriya v. U.S.)*, [1992] I.C.J. 114, 167 (14 April).

that pervade it. After all, when an aggrieved state unilaterally applies secondary rules of responsibility outside of an institutionalized setting -- that is to say without the intercession of the ICJ or the Council -- the ensuing process is unquestionably prone to straddle quasi-judicial terrain since it involves self-judging, autoqualification and unilateral enforcement of legal consequences.[576] In turn, this necessarily entails a unilateral application of international law to the facts at hand, the determination of the legal rights and positions of the involved parties and the legal characterization of certain facts and acts, whilst potentially operating within a politically volatile environment.

As will be explored below, the dual role of the Council is not without some equivocating consequences on the functions of the ICJ.[577] In particular, the framework laying out the scope of the Council's powers expressly provides for the referral of legal questions to the ICJ, primarily by application of Article 36, paragraph 3 of the *UN Charter*, which stipulates that "[i]n making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court."[578] Yet, the Council seldom exercises its option to seek extraneous legal guidance on the disputes before it -- a power derived from Article 29 of the *UN Charter*, which enables the Council to establish subsidiary organs, and the *Provisional Rules of Procedure*, which allow it to seek external guidance or assistance[579] -- thereby connoting a tendendy towards what could plausibly be construed as quasi-judicial protectionism. In short, on occasion the Council may consider that its powers are sufficient to reconcile both the political and legal dimensions of a given dispute involving the application of state responsibility. Historically, the Council has rarely relied on the invocation of

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[576] For further discussion on unilateral self-judging and autoqualification, see *infra* Chapter 5, Section A)1.

[577] See Vera Gowland-Debbas, *The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case*, 88 AMERICAN JOURNAL OF INTERNATIONAL LAW 643, 655-658 (1994) (expanding on the "[a]bsence of a [h]ierarchy between the [t]wo [o]rgans").

[578] Article 36, paragraph 3 of the *UN Charter*, *supra* note 527.

[579] See *Ibid*, Article 29; Provisional Rules of Procedure of the Security Council, S.C. Resolution 96 of 21 December 21, 1982, Rule 39, U.N. Doc. S/RES/96/Rev.7.

these formal procedures and even more seldomly suggested submission of a dispute to the ICJ; strikingly, the Council has never sought an advisory opinion from the Court, save in the *Namibia* case.[580] As a result, this apparent quasi-judicial protectionism may very well be guided by a markedly distinctive method – perhaps even warranting a *sui generis* designation – developed by the Council in dealing with legal issues related to the exercise of its functions.

Ultimately, the foregoing considerations pave the way for the inquiry to follow in that the 'quasi-judicial' nature of the Council's powers in applying state responsibility rules to transnational terrorism lies at the very core of what warrants elucidation. Indeed, the line separating political and legal considerations begins to blur in difficult cases, with the Council's delimitation of the Iraq-Kuwait border remaining a quintessential illustration of this confusion and, additionally, of an actuely extensive application of the secondary norms of state responsibility. When interlocutors are confronted with this specific quasi-judicial manifestation of the Council's powers, they should necessarily ponder whether the Council's decision-making seeks to apply the international law of state sovereignty. Or, rather, is the Council simply deploying its Chapter VII powers with political expediency in mind, an exercise that may be reconciled with the imposition of secondary obligations under the law of state responsibility? In turn, this line of questioning generates further distinct inquiries. In particular, would the ICJ then be bound by the Council's determination of the Iraqi border or, for present purposes, by far-reaching, sovereignty-erosive and Council-imposed secondary obligations based on the responsibility of a host-state for failing to prevent transnational terrorism?[581] As a corollary, would such exercise of the Council's powers be considered *ultra vires* under international law? After all, the Council is no stranger to controversial applications of its functions. One only has to think of Resolution 940, which marked unprecedented UN involvement in endorsing the use of force for the purposes of restoring democracy, a finding that could

[580] See, e.g., Kahng, LAW, POLITICS, *supra* note 572, at 5; *Namibia Advisory Opinion*, *supra* note 361. Interestingly, the Council suggested the submission of a dispute between Albania and the U.K. to the ICJ in 1947, which ultimately paved the way for the *Corfu Channel* litigation. See S.C. Resolution 22, UN Doc. S/INF/2/REV.1 (II), at 3 (1947).

[581] Although not directly on point, consider S.C. Resolution 248, S/RES/248 of 24 March 1968.

presumably be transposed to extreme cases of egregious transational terrorism. In particular, the Council unanimously authorized a U.S.-spearheaded multinational force to reinstate the lawfully elected President, Jean-Bertrand Aristide, along with the accompanying legitimate state apparatus in Haiti.[582]

In attempting to resolve these questions, the line of inquiry propels the Council's treatment of, and relationship to, international law to the analytical fore. By way of preface, it must be stressed that this relationship is anything but limpid.[583] In that regard, the *UN Charter* is relatively unhelpful, simply directing the Council to "act in accordance with the Purposes and Principles of the United Nations."[584] In attempting to delineate the scope of this scheme, Higgins astutely contrasted the Council's dispute settlement powers with those of the ICJ as "operation *within* the law, rather than decision according *to* the law."[585] Conversely, whilst recurrent arguments are advanced to the effect that the Council may, in fact, be carrying out its functions outside of a legal framework,[586] they erect relatively few conceptual barriers to the hypothesis explored below.

The main contention advanced is that state responsibility repertoire offers a locus for the Council to execute its normal political functions, which may or may not be practicable in specific circumstances involving a state's failure to prevent transnational terrorism. Therefore, it should be no surprise -- and by the same token, no significant impediment to the exploration of the Council's potential contributions to state responsibility -- that this organ's dispute settlement function is primarily actuated through a political prism. In fact, it is difficult to

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[582] See Security Council Resolution 940, S/RES/940 of 31 July 1994. It is also interesting to note that the Resolution specifically invokes state responsibility language in emphasizing that the Council "[d]ecides…to assist…the democratic Government of Haiti in fulfilling its responsibilities in connection with". The Resolution then goes on to enumerate specific legal obligations. See *Ibid*, at para. 9.

[583] For further discussion of this aspect of Council decision-making, see Cronin-Furman, *The International*, *supra* note 562, at 441.

[584] Article 24, paragraph 2 of the *UN Charter*, *supra* note 527.

[585] Higgins, *The Place of International Law*, *supra* note 570, at 16.

[586] See, e.g., White, THE UNITED NATIONS, *supra* note 562, at 69 (remarking that international law "play[s] a residual role in the work of a political body such as the Security Council"); Delbrück, *Functions and Powers*, *supra* note 563, at 447 (putting forth the proposition that "the decision-making procedure of the [Council] is fundamentally different from that of the ICJ" because whilst "[t]he ICJ has to decide exclusively on the basis of international law (Art. 38 of the ICJ Statute)…the S[ecurity] C[ouncil] has to decide primarily according to political criteria.").

envisage a category of internationally wrongful acts riper for political considerations – and, at the same time, so legally evocative – than a state's failure to prevent terrorism. It logically follows that, whilst the Council "[is] bound by the Charter and therefore must apply and interpret it in particular cases, the criteria [it] use[s] are not judicial criteria."[587] The guiding mantra should not boil down to 'all judicial or nothing' in exploring the Council's application of state responsibility. It should rather take stock of the delicate balance required between political and legal *considerations* the Council weighs while employing a quasi-judicial *process* or *method* in reaching a decision about international peace and security, a notion certainly not inimical to counterterrorism objectives or to the essence of the law of state responsibility.

Conversely, a healthy dose of candour at the outset warrants the formulation of a caveat to the effect that exploring the possible institutionalization of the implementation of state responsibility carries, with it, patent limitations and shortcomings. In particular, the Council's potential contributions to the law of state responsibility would become ineffective if directed at a non-member of the United Nations. For example, such would have been the case had Switzerland harboured members of Hezbollah on its territory back when it only had observer status within the Organization; additionally, more persuasive allegations can be levelled in light of Palestine's territorial hosting of both Hamas and Hezbollah factions. Similar logic could ostensibly apply to Western Sahara, a territory in dispute between Morocco and the Polisario Front. Whilst the territorial portions not subject to Moroccan control, i.e. the 'Free Zone', fall under the direction of the Polisario Front-proclaimed Sahrawi Arab Democratic Republic, the UN nonetheless officially designates Western Sahara as a 'non-self-governing territory'. Regardless of this designation, such states would remain legally obligated to comply with primary counterterrorism obligations and, by implication, would have to ensure observance of secondary rules of state responsibility in the event of a breach of the primary norms. However, they

[587] Oscar Schachter, *The UN Legal Order*: *An Overview*, in Oscar Schachter and Christopher C. Joyner (eds.), 1 UNITED NATIONS LEGAL ORDER 1, 13 (1995).

would eschew the application of the *UN Charter*, thereby drastically limiting the potential impact of the Council in the application of international legal rules.

The foregoing should, therefore, constitute a preliminary gloss through which the remainder of this chapter's argument is to be contemplated, particularly in light of the intricate interplay between political and legal considerations involved in state responsibility-related situations. These opening remarks also preface the importance of further exploring the relationship between the Council and the implementation, application and interpretation of the rules of state responsibility. Whilst considerable insistence has been placed, thus far, on the Council's limited judicial settlement functions, the potential implications of Chapter VII must also be brought into the fold. In its practice, the Council has interpreted rather liberally the parameters of the powers devolved to it by Chapter VII of the *UN Charter*, and has often invoked language and used an approach redolent of state responsibility repertoire. This practice has also sparked a considerable scholarly debate, which shall be explored in the next section before turning to the specific issue of counterterrorism.

## B) The Relationship between the Security Council and the Rules of State Responsibility[588]

### 1. Chapter VII Powers

Pursuant to Article 39 of the *UN Charter*, Council action is predicated on a two-prong approach: firstly, on the requisite situation under the Charter's scheme, namely that the Council "shall determine the existence of any threat to the peace, breach of the peace, or act of aggression"; and secondly, on its purpose, in that the Council "shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."[589] Interestingly, one author underscores that the definition of 'aggression' adopted by the General Assembly in 1974 was "not

[588] Some premises of the analysis that follows considerably expand on Proulx, *International Responsibility*, *supra* note 384.
[589] Article 39 of the *UN Charter*, *supra* note 527.

intended to provide a basis for individual criminal responsibility, but to provide guidance to the Security Council in determining state responsibility."[590]

Upon first glance, however, the purview of the *Charter*'s text does not seem to carry, with it, much margin for the implementation of state responsibility by the Council. With this in mind, Pierre-Marie Dupuy expounds that Council action under Chapter VII usually gravitates towards stabilizing situations where a single, collective interest remains in peril: international peace.[591] The underlying rationale leading to the adoption of this provision was most probably couched in *stricto sensu* logic, thereby conceptualizing its substance as narrowly encompassing a unidimensional construction of use of force through a primarily inter-state model.[592] In the same vein, Chapter VII Security Council action has sometimes been construed as a 'police intervention', or interpreted as aiming to restore international order given the Council's overarching mission of ensuring international peace and security.[593] Needless to say, most classical constructions of the Council's powers did not interpret this objective as inclusive of a supervisory mechanism or capacity over state behaviour, nor did they read in the implementation of state responsibility within its furrow. In fact, proponents of this view often dissociated both aspects in their own scholarship.[594] Drawing on Article 1(1) of the *UN Charter*, a similar viewpoint could posit that the principles of justice and international law are inextricably linked to the resolution of

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[590] Garth Schofield, *The Empty U.S. Chair*: *United States Nonparticipation in the Negociations on the Definition of Aggression*, 15 HUMAN RIGHTS BRIEF 20, 21 (2007).

[591] *Observations sur la pratique*, *supra* note 493, at 544.

[592] See, e.g., Gaja, *Réflexions sur le rôle*, *supra* note 538, at 301; Martti Koskenniemi, *The Place of Law in Collective Security*, 17 MICHIGAN JOURNAL OF INTERNATIONAL LAW 457 (1996).

[593] See, e.g., Antonio Cassese, INTERNATIONAL LAW 234 and 323 (2001); Alvarez, *Judging the Security Council*, *supra* note 544, at 39. For various critiques of the distribution of those police powers within the Security Council framework, see, e.g., José E. Alvarez, *Constitutional Interpretation in International Organizations*, in Jean-Marc Coicaud and Veijo Heiskanen (eds.), THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS 104, 108 (2001); Bardo Fassbender, *Pressure for Security Council Reform*, in David M. Malone (ed.), THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY 341 (2004); *More Secure World*, *supra* note 10.

[594] See, e.g., Gérard Cohen-Jonathan, *Article 39*, in Jean-Pierre Cot and Alain Pellet (eds.), LA CHARTE DES NATIONS UNIES: COMMENTAIRE ARTICLE PAR ARTICLE 648 (1985); Kelsen, THE LAW, *supra* note 574, at 293-295, 735-737; Hans Kelsen, *Collective Security and Collective Self-Defence Under the Charter of the United Nations*, 42 AMERICAN JOURNAL OF INTERNATIONAL LAW 783, 788-789 (1948). On the interplay between security considerations and the enforcement of international law, see Clyde Eagleton, *International Law and the Charter of the United Nations*, 39 AMERICAN JOURNAL OF INTERNATIONAL LAW 751-754 (1945).

disputes, in accordance with Chapter VI of the *UN Charter*, as opposed to the adoption of collective measures aiming to prevent or counteract threats to peace or to repress acts of aggression or other breaches of peace grounded in Chapter VII. It follows from this reasoning that the application of general international law would fall outside the ambit of Council powers.[595]

As confirmed by the Appeals Chamber of the ICTY, it should be noted that the Council exerts discretionary power in interpreting both prerequisites found within Article 39 of the *UN Charter*.[596] Yet, this power is not unlimited and the Council's discretion is not unfettered.[597] In addition, the *Charter* does not shed any light on, or provide a definition of, the terms 'threat to the peace', 'breach of the peace' and 'act of aggression'[598] whilst, when confronted with a choice of which measure and/or sanction to apply, the Council retains, through a *renvoi* to Articles 41 and 42 of the *Charter*, an unfettered margin of discretion in making this determination. Consequently, "[t]his conceptual imprecision provides a broad scope of manoeuvre to the Council in assessing whether a situation constitutes a threat to peace, a breach of the peace, or an act of aggression."[599] It follows that the Council has often pursued a very broad line of reasoning under the aegis of Chapter VII, at least in two ways relevant to the study at hand: i) first, it has interpreted the idea of 'breach to the peace' in a very

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[595] See, e.g., Georges Abi-Saab, *De la sanction en droit international*: *Essai de clarification*, in Jerzy Makarczyk (ed.), THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRZYSZTOF SKUBISZEWSKI 61, 74 (1996); Wladyslaw Czaplinski, *Concepts of Jus Cogens and Obligations Erga Omnes in International Law in the Light of Recent Developments*, 23 POLISH YEARBOOK OF INTERNATIONAL LAW 87, 96 (1997-1998); Gowland-Debbas, *The Functions*, *supra* note 543, at 287.

[596] See *Tadić* – Defence Motion, *supra* note 535, at paras. 28-31.

[597] See, e.g., Bothe, *Les limites des pouvoirs du Conseil de sécurité*, *supra* note 535, at 69-70.

[598] On this issue, see also the definition of 'aggression' in General Assembly Resolution 3314 (XXIX) of 14 December 1974, at Article 2 (confirming the Security Council's discretionary power on this issue: "The First use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression *although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed* would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.") [Emphasis added.] See also Gaja, *Réflexions sur le rôle*, *supra* note 538, at 299-300; Peter Kooijmans, *The Enlargement of the Concept 'Threat to the Peace'*, in René-Jean Dupuy (ed.), THE DEVELOPMENT OF THE ROLE OF THE SECURITY COUNCIL: PEACE-KEEPING AND PEACE-BUILDING 111 (1993).

[599] Marc Perrin de Brichambaut, *The Role of the United Nations Security Council in the International Legal System*, in Byers, THE ROLE OF LAW, *supra* note 543, at 269-276, 270.

liberal fashion, in order to make it more expansive and inclusive of scenarios not only directly linked to the potential initiation of armed hostilities in the context of an international armed conflict, such as the maintenance of colonial domination, *apartheid*, grave and massive human rights violations and terrorism;[600] and ii) second, in the spirit of Article 39's open-ended construction, the Council has imposed sanctions and measures purporting to maintain or restore international peace and security, which, admittedly, exceeded the scope and list of enumerated eventualities in Articles 41 and 42 of the *UN Charter*.

Although these issues will be addressed more thoroughly in subsequent sections, one preliminary conclusion seems apposite here: the realm of counterterrorism does not appear so far removed from the objectives of the Council, or from its practical operations. It can surely be included within the gamut of offences encompassed by Chapter VII, as some transnational terrorist attacks will invariably engender some kind of destabilizing effect on international peace and security. In fact, while enumerating ethnic cleansing, genocide, and other gross violations of human rights -- including the right to self-determination and grave breaches of humanitarian law -- as forming part of the security fabric, one commentator posits that "[t]he concept of international peace and security has thus acquired a meaning that extends far beyond that of collective security (envisaged as an all-out collective response to armed attack)".[601]

In attempting to shed some light on this evolution, the dissertation now turns to a brief study of Council practice, while bearing three objectives in mind. First, by reviewing select Council incursions into different areas, including state responsibility, the extensiveness of its practice, along with its corresponding

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[600] See, e.g., Thomas Franck, *The Security Council and 'Threats to the Peace'*: *Some Remarks on Remarkable Recent Developments*, in René-Jean Dupuy (ed.), THE DEVELOPMENT OF THE ROLE OF THE SECURITY COUNCIL: PEACE-KEEPING AND PEACE-BUILDING 83-110 (1993); Gaja, *Réflexions sur le rôle*, *supra* note 538, at 301-307; Klein, *Responsibility*, *supra* note 501, at 1245; Kooijmans, *The Enlargement*, *supra* note 598, at 111-121.

[601] Gowlland-Debbas, *The Functions*, *supra* note 543, at 289. See also Vera Gowlland-Debbas, *The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance*, 11 EUROPEAN JOURNAL OF INTERNATIONAL LAW 361, 365 (2000). For a recent and comprehensive account on the relationship between collective security and international state responsibility, generally, see Mathias Forteau, DROIT DE LA SÉCURITÉ COLLECTIVE ET DROIT DE LA RESPONSABILITÉ INTERNATIONALE DE L'ETAT (2006). On the same topic, see Gowlland-Debbas, *The Limits*, *supra* note 601, at 364-366.

pervasiveness and relevance to the field of counterterrorism, comes into sharp relief. Second, by better understanding these incursions and how they pertain to state responsibility, more precisely, one will be able to venture upon steadier analytical terrain so as to draw some preliminary rapprochements and move closer to elucidating the relationship between the Council and state responsibility, while placing emphasis on counterterrorism. Finally, this exercise will provide an opportunity to canvass academic reactions to this practice in order to better frame the argument, delve deeper into specific issues and potential restraints on Council contribution to state responsibility, and ultimately take position on the role of the Council in advancing state responsibility law for the failure to prevent terrorist attacks.

**2. The Extensiveness of Security Council Practice**

In the broad exercise of its Chapter VII powers, the Council has sometimes rested its own practice on reasoning all too reminiscent of state responsibility considerations. Therefore, it has relied upon its operational function to actually engage in concrete acts or deeds, namely the issuing of resolutions, while also invoking state responsibility-inspired language. In other words, it has somewhat advanced state responsibility law both through positive actions and, to use constructivist parlance, via rhetorical processes. Whilst detractors and legal theorists might readily identify flaws in this approach, this argument is (perhaps) better appreciated by pushing the constructivist analogy a step further, and by likening the Council to a state for the purposes of the advancement of state responsibility because it is composed of states. In fact, this idea is, by no means, farfetched when contemplated through the prism of other Council powers: "[t]he truth is that the Security Council in doing certain things – such as creating criminal courts – has state-like qualities."[602] With this in mind, it is also interesting to note that certain constructivists collapse both positive state actions and rhetorical commitments under the heading of state practice.[603]

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[602] James Crawford and Tom Grant, *International Court of Justice,* in Thomas G. Weiss and Sam Daws (eds.), THE OXFORD HANDBOOK ON THE UNITED NATIONS 193-213, 205 (2007).

[603] See, e.g., Friedrich Kratochwil, *Citizenship*: *On the Border of Order*, in Yosef Lapid and Friedrich Kratochwil (eds.), THE RETURN OF CULTURE AND IDENTITY IN INTERNATIONAL

Although this line of reasoning is difficult to countenance in the present context, it aptly highlights the difficulty in striking a balance between state actors and international organizations in identifying norm-creating precedents, especially in a volatile field like counterterrorism. A case in point is the response to 9/11 and will be addressed in more detail in subsequent sections, especially in Chapter 4.

At the outset, therefore, one could be particularly swayed by the idea that state responsibility law is not only affected by norm-creating precedents, be they spearheaded by international organizations and state actors, but can also be shaped by language, especially in high-level settings and fora like that of the Council. Put another way, language becomes an integral part of the precedent-setting process, especially in politically sensitive areas like counterterrorism – where primary stakeholders and actors tend to weigh their words carefully – and language ultimately adopted reflects a profound resolve in embodying, in the most precise terms possible, the principles and philosophy underlying a specific position, decision or resolution.

Although the roles of both international organizations and state actors in advancing state responsibility will require further exploration, these brief remarks act as a preliminary gloss through which subsequent sections should be read, while also steering the inquiry away from classical notions that positive deeds, not language, are necessarily and always more instrumental in situations involving various players and competing interests. For instance, the communication of clear and compelling messages remains a *sine qua non* criterion in Fuller's theoretical inquiries, a notion that seems hardly reconcilable with setting aside the idea that language may play a prominent role in shaping relations and norms in hostile settings.[604] At any rate, and picking up on the thread explored earlier, it is

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RELATIONS THEORY 181, 190-194 (1996); Nicholas Greenwood Onuf, *Constructivism*: *A User's Manual*, in Vendulka Kubàlkovà et al. (eds.), INTERNATIONAL RELATIONS IN A CONSTRUCTED WORLD 58, 59 (1998); Alexander Wendt, *Collective Identity Formation and the International State*, 88 AMERICAN POLITICAL SCIENCE REVIEW 384, 390 (1994).

[604] See, e.g., Lon L. Fuller, *Human Interaction and the Law*, 14 AMERICAN JOURNAL OF JURISPRUDENCE 1, 31 (1969) (discussing his interactional theory of law and suggesting that "while enemies may have difficulty in bargaining with words, they can, and often do profitably half-bargain with deeds", and later adding that "[h]ere the prime desideratum is to achieve – through acts, of course, not words – the clear communication of messages of a rather limited and negative import; accordingly there is a heavy concentration on symbolism and ritual.") [Emphasis added.]

probably safe to contend that both language and action converge into a symbiotic rapport and contribute, simultaneously, to shaping international relations in the delicate area of counterterrorism.[605] Thus, at this stage it is sufficient to underscore that the Security Council has sometimes relied upon state responsibility in substantiating its political decisions, a notion that has received academic support and prompted some authors to analyze certain facets of Council practice in light of state responsibility repertoire.[606] Such practice indeed warrants closer examination.

In particular, the Council has intervened in situations where internationally wrongful acts had been perpetrated against the international community as a whole. Although the Council has never formally pronounced on a possible 'act of aggression', a scenario expressly recognized in Article 39 of the *UN Charter* but never defined elsewhere within the same document -- possibly because the Council dreads invoking such undefined language[607] (ironically, it readily invokes the concept of 'terrorism' and adopts far-reaching resolutions on that topic without working from any accepted definition of the term) -- it has nonetheless equated 'threat to the peace' with state behaviours amounting to violations of *erga omnes* obligations. In interpreting this strand of Council resolution-making, certain commentators point out that resolutions imposing sanctions predicated on a 'threat to peace' are contingent on considerations revolving around the principle of legality. For the same scholars, it inexorably follows that the violation of an international obligation constitutes a *sine qua non*, and determinant, element in

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He further adds, in *Ibid*, that "[p]aradoxically the tacit restraints of customary law between enemies are more likely to develop during active warfare than during a hostile stalemate of relations; fighting one another is itself in this sense a "social" relations since it involves communication"). [Emphasis added.]

[605] For thought-provoking theoretical accounts on interaction and international law, see Jutta Brunnée and Stephen J. Toope: *International Law and Constructivism*, *supra* note 51; LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT (2010).

[606] See, e.g., Pierre-Marie Dupuy, *Quelques remarques sur l'évolution de la pratique des sanctions décidées par le Conseil de sécurité des Nations Unies dans le cadre du chapitre VII de la Charte*, in Gowlland-Debbas, UNITED NATIONS SANCTIONS, *supra* note 532, at 47-55 (highlighting select aspects); Gaja, *Réflexions sur le rôle*, *supra* note 538, at 297-320; Gowlland-Debbas, *Security Council Enforcement Action*, *supra* note 259; Gowlland-Debbas, *The Functions*, *supra* note 543, at 288-294; Gowlland-Debbas, *UN Sanctions*, *supra* note 532, at 8-12.

[607] See Pierre-Marie Dupuy, *L'impossible agression*: *Les Malouines entre l'O.N.U. et l'O.E.A.*, 28 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 337, 342-343 (1982). See also Gowlland-Debbas, *Security Council Enforcement Action*, *supra* note 259, at 63.

the establishment of a 'threat to the peace'.[608] Similarly, one commentator rightly underscores that "[d]eterminations under Article 39 have thus been linked to alleged breaches of international law and imputed to particular legal entities, with the violation becoming a constituent element of the threat to or breach of the peace".[609] By reading the prior requirement of state responsibility into its decision-making, namely the violation of an obligation leading to the analysis of the concept of legality, the Council thus initiates an important rapprochement with secondary norms, thereby significantly narrowing the gap between its functions and the implementation of state responsibility.

Amongst the aforementioned violations of *erga omnes* obligations, the Council has intervened in the following cases, *inter alia*: acts involving aggression or the use of force,[610] the unlawful invasion of a state's territory by another,[611] interferences (both military and non-military) on the territory of another state,[612] the refusal of the peoples' right to self-determination,[613] systematic and massive human rights violations[614] (in particular genocide,[615]

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[608] See, e.g., Abi-Saab, *De la sanction*, *supra* note 595, at 75; Jean Combacau, LE POUVOIR DE SANCTION DE L'ONU: ETUDE THÉORIQUE DE LA COERCITION NON MILITAIRE 104-106 (1974); Philippe Weckel, *Le chapitre VII de la Charte et son application par le Conseil de sécurité*, 37 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 169-171 (1991).

[609] Gowlland-Debbas, *The Functions*, *supra* note 543, at 288. See also *Ibid*, at 292 (remarking that "findings of illegality have formed in practice a constituent part of Council determinations" and that "it is evident that peace could not be restored without putting an end to the violation."). For a contrary view, particularly critical of Gowlland-Debbas' position, see Nolte, *The Limits*, *supra* note 545, at 322-323 ("It is true that the Council has the power to impute responsibility, but again, this is limited to the extent that it is necessary for the exercise of its other powers.").

[610] See the following Security Council resolutions counteracting recourses to force (also sometimes termed 'acts of aggression' by the Council): by Portugal against Zambia (Resolution 268 of 28 July 1969), Guinea (Resolutions 275 of 22 December 1969, 289 of 23 November 1970 and 290 of 8 December 1970) or Senegal (Resolutions 273 of 9 December 1969, 294 of 15 June 1971 and 321of 23 October 1972); by Southern Rhodesia against neighbouring states (Resolutions 326 of 2 February 1973, 328 of 10 March 1973, 403 of 14 January 1977, 424 of 17 March 1978, etc.); by South Africa against neighbouring states (Resolutions 300 of 12 October 1971, 418 of 4 November 1977, 466 of 11 April 1980, etc.).

[611] See, e.g., Iraq's invasion of Kuwait: Resolutions 660 of 2 August 1990, 661 of 6 August 1990, 665 of 25 August 1990 and 687 of 3 April 1991.

[612] See, e.g., the interferences by neighbouring states in the territory of Bosnia-Herzegovina (Resolutions 752 of 15 May 1992, 757 of 30 May 1992 and 836 of 4 June 1993); or the interferences in the territory of the Democratic Republic of Congo (Resolutions 1234 of 9 April 1999 and 1304 of 16 June 2000).

[613] See the case of Southern Rhodesia (Resolutions 232 of 16 December 1966 and 253 of 29 May 1968).

[614] See, *inter alia*, the following examples: political repression in Southern Rhodesia (Resolutions 253 of 29 May 1968 and 277 of 18 March 1970); massive violence and acts of murder against

racial discrimination,[616] *apartheid*[617] and ethnic cleansing[618]), contraventions to IHL,[619] and terrorist attacks.[620] By broadening the scope of its decisional authority to include acts of terrorism, coupled with its usage of state responsibility guidelines in some segments of its reasoning, the Council in many ways signals its potential role in advancing state responsibility law, whilst a *prima facie* parallel with the events following 9/11 certainly comes full circle under this light.

It also becomes apparent that the decisions and requests issued by the Council in such situations hinge, to a large extent, on logic congruent with the law of state responsibility.[621] For instance, the Council often calls upon a wrongful state to cease a given behaviour that is synonymous with a 'threat to the peace' and concomitantly amounts to the violation of an international obligation incumbent upon said state. Certain examples immediately come to mind, such as the situation in Southern Rhodesia (Resolutions 217 of 20 November 1965 and

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African peoples in South Africa (Resolution 418 of 4 November 1977); the expulsion and poor treatment of people, and their property, carried out by Iraq in Kuwait (Resolution 670 of 25 September 1990); the repression of Iraqi civilian populations (Resolution 688 of 5 April 1991); the repression in Kosovo by Yugoslavian authorities (Resolution 1199 of 23 September 1998); the situation in East Timor (Resolution 1264 of 15 September 1999).

[615] See, e.g., the situation in Rwanda (Resolutions 918 of 17 May 1994 and 925 of 8 June 1994). It should be noted, however, that in these Resolutions the Security Council does not attribute the perpetration of the genocide to specific persons or entities, including the Rwandan government. Instead, an expert commission (Resolution 935 of 1 July 1994) and an international criminal tribunal (Resolution 955 of 8 November 1994) were subsequently instituted, but with the sole purpose of imposing individual criminal responsibility upon guilty individuals.

[616] See, *inter alia*, the following examples: the declaration of independence voiced by a racist minority in Southern Rhodesia (Resolution 216 of 12 November 1965); the situation in South Africa (Resolution 418 of 4 November 1977).

[617] See, e.g., the situation in South Africa (Resolution 418 of 4 November 1977).

[618] See, e.g., the situation in Bosnia-Herzegovina (Resolutions 757 of 30 May 1992, 787 of 16 November 1992 and 820 of 17 April 1993).

[619] See, *inter alia*, the following examples: Iraq's invasion of Kuwait: (Resolutions 666 of 13 September 1990 and 670 of 25 September 1990); the conflict in Bosnia-Herzegovina (Resolutions 787 of 16 November 1992 and 827 of 25 May 1993); the situation in Rwanda (Resolution 918 of 17 May 1994); the repression in Kosovo by Yugoslavian authorities (Resolution 1199 of 23 September 1998); the situation in East Timor (Resolution 1264 of 15 September 1999).

[620] See, e.g., Resolution 748 of 31 March 1992 (calling upon Libya to cease all forms of terrorism); Resolution 1054 of 26 April 1996 (directed against Sudan following the assassination of Egyptian President, Addis Abeba).

[621] See, e.g., Vera Gowland-Debbas, *Sanctions Regimes Under Article 41 of the UN Charter*, in Vera Gowland-Debbas (ed.), NATIONAL IMPLEMENTATION OF UNITED NATIONS SANCTIONS: A COMPARATIVE STUDY 3-31, 19-20 (2004). See also Sophie Clavier, *Contrasting Perspectives on Preemptive Strike*: *The United States, France, and the War on Terror*, 58 MAINE LAW REVIEW 566, 575 (2006) ("Even after the attacks of September 11th, the Security Council, in adopting Resolutions 1368 and 1373, emphasized states' responsibility in combating and preventing terrorism").

253 of 29 May 1968), the invasion of Kuwait by Iraq (Resolution 661 of 6 August 1990), the repression of Iraqi civilians (Resolution 688 of 5 April 1991), interferences by neighbouring states in Bosnia-Herzegovina (Resolution 752 of 15 May 1992), terrorist actions and support of terrorist groups by Libya (Resolution 748 of 31 March 1992), genocide and humanitarian law violations in Rwanda (Resolution 918 of 17 May 1994), repression of civilians in Kosovo (Resolution 1199 of 23 September 1998) and interferences within the Democratic Republic of Congo (Resolutions 1234 of 9 April 1999 and 1304 of 16 June 2000).

At least on one occasion, the Council imposed an obligation of reparation upon Iraq in the context of its invasion of Kuwait, thereby mirroring an integral component of state responsibility repertoire in its decision-making by reaffirming: "that Iraq, without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990…*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".[622] In the same resolution, the Council instituted a Commission responsible for managing a fund, also therein created, so as to indemnify victims of the conflict.[623] It should be recalled, however, that some authors queried whether the creation of this entity fell outside the ambit of the Council's powers and was, therefore, *ultra vires*.[624] Granted, this precedent must be perceived as a particularly expansive application of responsibility principles, given that Iraq was also made liable for damage caused by coalition forces. Nevertheless, the implementation of state responsibility by the Council can prove conceptually beneficial in sidestepping the evidentiary impasses

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[622] Resolution 687 of 3 April 1991, at para. 16. [Emphasis added.]
[623] *Ibid*, at paras. 18-19.
[624] See, e.g., Graefrath, *International Crimes*, *supra* note 492, at 244-245. For more background and divergent views on the efficiency of the UN Compensation Commission for Iraq, see, *inter alia*: Georges Affaki, *La Commission d'indemnisation des Nations Unies*: *Trois ans d'épreuve au service du règlement des différends internationaux*, 20 DROIT ET PRATIQUE DU COMMERCE INTERNATIONAL 471, 516 (1994); Gordon A. Christenson, *State Responsibility and the UN Compensation Commission* : *Compensating Victims of Crimes of State*, in Richard B. Lillich (ed.), THE UNITED NATIONS COMPENSATION COMMISSION 311-364, 348-358 (1995); Pierre d'Argent, *Le Fonds et la Commission de compensation des Nations Unies*, 25 REVUE BELGE DE DROIT INTERNATIONAL 485, 499 (1992).

identified above in Part I, especially when it comes to unilaterally establishing a state's international responsibility or surmounting the exorbitant burden of proof associated with attribution. As a result, by confirming Iraq's international liability, Resolution 687 absolved claimants "from the otherwise heavy burden of proving the liability of a sovereign state."[625]

Moreover, the Council's posture in this instance marks a departure from previous practice, in that it connotes a significant diversification in the imposition of secondary obligations stemming from the violation of primary obligations.[626] Although responsibility was deemed established by virtue of the text, alone, it nonetheless embodied the disciplines of responsibility and the corresponding ideas of reparation and return to legality.[627] In fact, it has become trite to say that "[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form."[628] Along similar lines, the Council has also previously invoked the obligation of reparation following the

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[625] Mojtaba Kazazi, *An Overview of Evidence before the United Nations Compensation Commission*, 1 INTERNATIONAL LAW FORUM DU DROIT INTERNATIONAL 219 (1999). See also David J. Bederman, *The United Nations Compensation Commission and the Tradition of International Claims Settlement*, 27 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW & POLITICS 1, 19 (1994) (expounding that Resolution 687 "obviated the need for claimant countries [and claimants] to litigate whether there had been a predicate act implicating Iraq's state responsibility"); John J. Chung, *The United Nations Compensation Commission and the Balancing of Rights Between Individual Claimants and the Government of Iraq*, 10 UCLA JOURNAL OF INTERNATIONAL LAW AND FOREIGN AFFAIRS 141, 155 (2005).

[626] For support of this proposition, see Martin, LES RÈGLES INTERNATIONALES, *supra* note 1, at 467.

[627] This proposition has received wide support. See Kazazi, *An Overview of Evidence*¸ *supra* note 625, at 221; Andrea Gattini, *The UN Compensation Commission*: *Old Rules, New Procedures on War Reparations*, 13 EUROPEAN JOURNAL OF INTERNATIONAL LAW 161, 172 (2002); John R. Crook, *The United Nations Compensation Commission*: *A New Structure to Enforce State Responsibility*, 87 AMERICAN JOURNAL OF INTERNATIONAL LAW 144, 147 (1993); Marco Frigessi di Rattalma, *Le Régime de Responsabilité Internationale Institué par le Conseil D'administration de la Commission de Compensation des Nations Unies*, 101 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 45 (1997); Brigette Stern, *Un Système Hybride*: *La Procédure de Règlement Pour la Réparation des Dommages Résultant de L'occupation Illicite du Koweit par l'Irak*, 37 MCGILL LAW JOURNAL 625 (1992).

[628] *Chorzów Factory Case* (Jurisdiction), PCIJ Ser. A, No. 9 (1927), at 21. See also *The Factory At Chorzów (Claim for Indemnity) (The Merits)*, PCIJ Ser. A, No. 17 (1928) [hereinafter *Chorzów Factory* case – Indemnity], at 29. For academic support and discussion of surrounding issues, see Constantin P. Economides, *La Responsabilité de l'Etat pour fait internationalement illicite*: *Les points positifs et négatifs du projet de la Commission du droit international*, in Koufa, THESAURUS ACROASIUM, *supra* note 202, at 165-239, 203-204; Christine Gray, *Is There and International Law of Remedies?*, 56 BRITISH YEARBOOK OF INTERNATIONAL LAW 25-47 (1985-1986), reprinted in Provost, STATE RESPONSIBILITY, *supra* note 77, at 173; Higgins, PROBLEMS & PROCESS, *supra* note 49, at 148.

commission of an internationally wrongful act, albeit without resting its finding on Chapter VII. Several cases come to mind and include South Africa's aggression against Angola (Resolution 387 of 31 March 1976), crimes committed against civilians in the occupied territories by Israel (Resolution 471 of 5 June 1980), Israel's aerial assault against Iraqi nuclear plants (Resolution 487 of 19 June 1981), the hostile act of South Africa against Lesotho (Resolution 527 of 15 December 1982) and Israel's intervention in Tunisia (Resolution 573 of 4 October 1985).

It also follows that, although invariably subject to political considerations, collective action taken under the aegis of the United Nations embodies the essence of return to legality, an objective either facilitated by reverting back to pre-breach conditions or by effecting practical change: "[n]evertheless, in their *consequences*, these mechanisms, as sanctions, have an important, law-enforcement function, their objective being to restore legality, which may be achieved either by a return to the *status quo ante* or by instituting change, though in some cases such measures may even appear to acquire a punitive character."[629] This is not to say, however, that the conceptual chasm dividing the law of state responsibility and the imposition of international sanctions by the Council was always cogently articulated or unambiguously traversed in the work of the United Nations. Nor does it bolster the assertion that imposing such collective sanctions is effective or uncontroversial in the grander scheme of things.[630] In that regard, the sanctions imposed by the Council upon Iraq during a period spanning over a decade are particularly instructive and signal the conflation of state responsibility repertoire and other international legal schemes. In particular, it becomes clear that the sanctions against Iraq primarily served a punitive character, a response that, arguably, should have been articulated more clearly within the furrow of state responsibility principles. This is undoubtedly what leads Bardo Fassbender

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[629] Gowlland-Debbas, *Security Council Enforcement Action*, *supra* note 259, at 63.

[630] See, generally, Makio Miyagawa, DO ECONOMIC SANCTIONS WORK? (1992); Dominicé, *The International Responsibility*, *supra* note 534, at 369; Denis J. Halliday, *The Impact of the UN Sanctions on the People of Iraq*, 28 JOURNAL OF PALESTINE STUDIES 29-37 (1999); Roger Normand, *A Human Rights Assessment of Sanctions*: *The Case of Iraq, 1990-1997*, in Van Genugten and De Groot (eds.), UNITED NATIONS SANCTIONS: EFFECTIVENESS AND EFFECTS, ESPECIALLY IN THE FIELD OF HUMAN RIGHTS: A MULTI-DISCIPLINARY APPROACH 19, 25 (1999).

to view them as a "disguised form of punishment of a deafeated aggressor state", a punitive application of the Council's powers that would have, in his view, benefited more if formulated unequivocally under the law of international responsibility. What is more, the "Council was unable to explain convincingly which of these different rationales [punishment versus state responsibility] prevailed at a given time, whether their relative importance could change, and how this could influence the Council's preparedness to modify the sanctions regime".[631]

Nevertheless, several measures and sanctions imposed by the Council could undoubtedly be construed as distinct and particularly binding manifestations of the concepts of satisfaction or assurances and/or guarantees of non-repetition.[632] Notable examples include: the devising of procedures towards the delineation of an international border,[633] the creation and imposition of a demilitarized area,[634] the reaffirmation of the international obligations of a given state,[635] the disarmament and the subjection of a state to weapons inspections,[636] and the implementation of an international security response and presence.[637] Borrowing from a familiar line of inquiry, whilst the ICJ did not have to pronounce on the responsibility of Libya in the context of the *Lockerbie* case, the Council was

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[631] Bardo Fassbender, *Uncertain Steps Into a Post-Cold War World*: *The Role and Functioning of the UN Security Council After a Decade of Measures Against Iraq*, 13 EUROPEAN JOURNAL OF INTERNATIONAL LAW 273, 281-282 (2002).

[632] For support of this proposition, see Gowlland-Debbas, *The Functions*, *supra* note 543, at 293. For a concrete example of this practice by the Security Council, see the measures imposed in Resolution 687 of 3 April 1991, especially at para. 4, in which the Council reaffirms the necessity of obtaining assurances that Iraq's intentions were peaceful following its invasion and illegal occupation of Kuwait. For more background on these two concepts and related issues, both before and after the adoption of the ILC's *Articles*, see, e.g., Brownlie, SYSTEM, *supra* note 205, at 208-210; Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 196-206; Bernhard Graefrath, *Responsibility and Damages Caused*: *Relationship Between Responsibility and Damages*, 185 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 9-149, 87-91 (1984-II); Arthur Watts, *The Art of Apology*, in Ragazzi, INTERNATIONAL RESPONSIBILITY, *supra* note 50, at 107-116.

[633] See, e.g., the invasion of Kuwait by Iraq (Resolution 687 of 3 April 1991).

[634] See, e.g., *Ibid*, at para. 5-6.

[635] *Ibid*, at para. 2 (highlighting the inviolability of the border between both states), para. 7 (dealing with obligations prohibiting the use of certain weapons), and para. 32 (addressing international terrorism).

[636] *Ibid*, at para. 7-14. Additional obligations – ranging from the control of biological and ballistic weapons to nuclear armament – were also imposed on Iraq.

[637] See, e.g., the situation in Kosovo (Resolution 1244 of 10 June 1999).

called upon to weigh in on the question of attribution of the impugned terrorist acts.[638] One can, therefore, extract a form of satisfaction – albeit an acutely political application of that mode of reparation in that precise scenario – from ensuing Security Council Resolutions 731, 748 and 883.[639] In fact, by virtue of its own decision-making the Council seemed to provide satisfaction to the U.S., the U.K. and France by proclaiming a 'condemnation' of Libya's support of the terrorist bombings of 1988 and 1989. On its face, this application of the concept of satisfaction could reasonably fall within the ambit of the ILC's *Articles* and partially fulfill the requirements of reparation under the law of state responsibility.[640] Perhaps more compelling was the Council's imposition of cessation of the internationally wrongful act and assurances/guarantees of non-repetition upon Libya in the same setting, pursuant to the then-non-formulated Draft Article 30.[641] More generally, the transplantation of this principle to modern counterterrorism would be straightforward: a salient example of this exercise would be the obligation upon states to cease harbouring and supporting terrorist groups on their territory, as was evidenced by the case of Afghanistan both before and after 9/11.[642]

Furthermore, the Council has often reaffirmed and imposed, upon third states, an obligation of non-recognition of situations flowing from internationally wrongful acts. Although the ICJ had clearly pronounced approvingly on this issue in the *Namibia Advisory Opinion*,[643] it subsequently refused to acknowledge that an obligation of non-recognition automatically flows from the determination of an internationally wrongful act,[644] thereby seemingly challenging the connection between an international breach and an automatic obligation of non-recognition in

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[638] For support of this proposition, see, e.g., Dissenting Opinion by Judge Bedjaoui in *Lockerbie*, *supra* note 537, at p. 37, para. 10.
[639] See, e.g., Martin, LES RÈGLES INTERNATIONALES, *supra* note 1, at 468 n.76 and accompanying text.
[640] See *ILC Articles on State Responsibility*, *supra* note 76, Article 37.
[641] See Security Council Resolution 748 of 31 March 1992, at para. 2.
[642] See, e.g., Dupuy, *State Sponsors*, *supra* note 29, at 11.
[643] See *Namibia Advisory Opinion*, *supra* note 361, at p. 54, para. 117.
[644] See *East Timor (Portugal vs. Australia)*, [1995] ICJ REPORTS, p. 90 [hereinafter *East Timor* case], at pp. 103-104, paras. 31-32.

the scheme of collective security.[645] Nevertheless, some commentators resolve this discrepancy by inferring that no express determination of illegality had been put forth in the resolutions under study in the *East Timor* case.[646] Therefore, it can be said with certainty that there exists an obligation of non-recognition originating from any internationally wrongful act.[647] More importantly, this obligation does not stem from the *UN Charter* but rather from both the law of state responsibility and general international law;[648] the secondary rules of responsibility actually fill the void whenever the Council decides to incorporate state responsibility reasoning within its own logic. Implicit in this proposition is the fact that, should the Council determine the existence of a wrongful act (although this might prove to be a nebulous exercise in itself), the obligation of non-recognition would automatically attach to the Council's decision. These premises reinforce the idea that state responsibility can be and is compatible with the broader scheme of the Council's decision-making, and that this body of law may on occasion provide a framework for the Council's own action.[649]

Two cases in point are the unlawful acquisition of a territory resulting from the use of force[650] and the acquiescence to a government perpetrating, or

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[645] See, e.g., Forteau, DROIT DE LA SÉCURITÉ, *supra* note 601, at 198 n.98 and accompanying text (also citing V.H. Ascensio, L'AUTORITÉ DE CHOSE DÉCIDÉE EN DROIT INTERNATIONAL PUBLIC 410-413 and 407-415 (1997)).

[646] See *East Timor* case, *supra* note 644, at 198.

[647] See James Crawford, *The General Assembly, The International Court and Self-Determination*, in Vaughan Lowe *et al.* (eds.), FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOUR OF SIR ROBERT JENNINGS 585-605, 605 (1996) (noting that this obligation is "generally held to be automatic and not contingent on action by the political organs of the United Nations."). See also, generally, Georges Abi-Saab, *The Concept of 'International Crimes' and its Place in Contemporary International Law*, in Cassese, Spinedi and Weiler, INTERNATIONAL CRIMES, *supra* note 494, at 141-142; Hersch Lauterpacht, RECOGNITION IN INTERNATIONAL LAW (1947); *Yearbook of the International Law Commission*, 1976, Vol. II, Second Part, at p. 101.

[648] For a recent application by the ICJ, see *Wall Advisory Opinion*, *supra* note 521, at para 163(3)D ("[a]ll States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction."). See also Yamada, *Revisiting*, *supra* note 150 (linking the Court's formulation of the obligation of non-recognition with Article 41 of the ILC's *Articles*).

[649] Mathias Forteau elegantly summarizes this line of argument. See DROIT DE LA SÉCURITÉ, *supra* note 601, at 198 (hypothesizing a scenario where the ICJ would have held that the Security Council resolutions determined the existence of an internationally wrongful act in the *East Timor* case).

[650] See, *inter alia*, the following examples: the Israeli occupation of the Syrian Golan (Resolution 497 of 17 December 1981, at para. 1); the invasion of Kuwait by Iraq (Resolution 670 of 25 September 1990); the hostilities in Bosnia-Herzegovina (Resolutions 819 of 13 April 1993

resulting from, a serious violation of international law.[651] In such cases, the Council reaffirms the obligation of *all* states to cooperate with the directly affected, wronged state and/or other states in order to ensure cessation of the international wrongful act.[652] Taken in the aggregate, this set of international obligations has been described as "an essential legal weapon in the fight against grave breaches of the basic rules of international law",[653] and clearly mirrors the contents of Article 41 of the ILC's *Articles*, which reads as follows:

> 1. States shall cooperate to bring an end through lawful means any serious breach within the meaning of article 40.
>
> 2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.
>
> 3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this

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("reaffirming that any taking or acquisition of territory by the threat or use of force, including through the practice of "ethnic cleansing", is unlawful and unacceptable") and 836 of 4 June 1993). See also Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 250 (also listing "attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples"). The ICJ has also unequivocally called upon states not to recognize the denial by a state of the right of self-determination of peoples. See *Namibia Advisory Opinion*, *supra* note 361, at p. 56, para. 126 (holding that "the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law").

[651] See, *inter alia*, the following examples: the regime imposed by the racist minority in Southern Rhodesia (Resolutions 216 of 12 November 1965, 217 of 20 November 1965 and 277 of 18 March 1970); any regime imposed by the occupier in Kuwait (Resolution 661 of 6 August 1990); the unilateral declaration of any entity in Bosnia-Herzegovina (Resolution 787 of 16 November 1992).

[652] See, *inter alia*, the following examples: the situation in Southern Rhodesia (Resolutions 217 of 20 November 1965 (granting the cessation of unlawful activity solely in favour of the United Kingdom) and 254 of 18 June 1968) (requesting moral and material assistance to be provided to the peoples of Southern Rhodesia in its quest for freedom and independence); the invasion of Kuwait by Iraq (Resolution 661 of 6 August 1990). This will obviously have a tremendous impact on counterterrorism efforts. See, e.g., Gowlland-Debbas, *The Functions*, *supra* note 543, at 292 ("Council resolutions have therefore included calls for the cessation of the acts in question, such as withdrawal from occupied territory, an end to violations of human rights or humanitarian law, *or the renunciation of terrorism*.) [Emphasis added.]

[653] Christian Tomuschat, *International Crimes by States*: *An Endangered Species?*, in Karen Wellens (ed.), INTERNATIONAL LAW: THEORY AND PRACTICE: ESSAYS IN HONOUR OF ERIC SUY 253, 259 (1998).

> Chapter applies may entail under international law.[654]

Although this provision, coupled with Article 40 of the *Articles*, most probably constitutes the ILC's compromise on the very controversial 'crime of state' debate,[655] it is nonetheless quite illuminating for the purposes of the present study. Firstly, it clearly corroborates the theory that state responsibility logic convincingly permeates Council decision-making in some instances. Suffice it to borrow from one commentator to declare that "[i]t is clear from the Draft Articles, commentaries and debates that in this optique of State responsibility, UN mechanisms for peace maintenance are encompassed as legal sanctions."[656] Secondly, this legal scheme might be brought to bear upon a future situation involving state-sponsored or state-condoned terrorist attacks. In a broader sense, whilst Article 41 and its commentary are not dispositive on whether cooperation should be institutionalized or not, they do not appear, on their face, to preclude reactions taken by individual states.[657] As Special Rapporteur James Crawford highlighted, the idea of cooperation is better explained by the fact that "it is often the only way of providing an effective remedy."[658]

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[654] *Articles*, *supra* note 76. For a discussion of this provision, see Brigitte Stern, *A Plea for 'Reconstruction' of International Responsibility Based on the Notion of Legal Injury*, in Ragazzi, INTERNATIONAL RESPONSIBILITY, *supra* note 50, at 93-106, 95-96.

[655] For more background and radically divergent views on the criminalization of state responsibility, see, *inter alia*: Derek W. Bowett, *Crimes of State and the 1996 Report of the International Law Commission on State Responsibility*, 9 EUROPEAN JOURNAL OF INTERNATIONAL LAW 163-173 (1998); Cassese, Spinedi and Weiler, INTERNATIONAL CRIMES, *supra* note 494; Nina H.B. Jørgensen, THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES: STATE RESPONSIBILITY FOR THE COMMISSION OF CRIMES AGAINST INTERNATIONAL LAW (2000); Shabtai Rosenne, *State Responsibility and International Crimes*: *Further Reflections on Article 19 of the Draft Articles on State Responsibility*, 30 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 145 (1998).

[656] Gowlland-Debbas, *Security Council Enforcement Action*, *supra* note 259, at 58. However, she goes on to state the following: "[t]his link which has been made by the International Law Commission between Charter mechanisms for peace maintenance and the regimes of responsibility may appear to be both novel and controversial. For after all, the condition for the application of such mechanisms is not the existence of an internationally wrongful act, and they are not subjected to the conditions said to govern unilateral countermeasures." See *Ibid*, at 61.

[657] In fact, the Commentary accompanying Article 41 solely refers to cooperation amongst states. Judge Kooijmans emphasized this idea in his Separate Opinion in *Wall Advisory Opinion*, *supra* note 521. See also Gattini, *A Return Ticket*, *supra* note 499, at 1186-1187.

[658] Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 249. See also Giorgio Gaja, *Do States Have a Duty to Ensure Compliance with Obligations Erga Omnes by Other States?*, in Ragazzi, INTERNATIONAL RESPONSIBILITY, *supra* note 50, at 31, 34. However, on whether the

Finally, the Council has imposed particularly strict sanctions aiming at bringing violations of international law to an end,[659] such as the severance of relations (diplomatic, consular, military) with the wrongful state,[660] along with embargo-type measures.[661] In light of the Council's imposition of economic (and other) sanctions, the increasingly intractable problem of non-state actors, such as terrorist organizations, comes into sharp relief. Indeed, it might prove difficult to sanction 'abstract entities' linked to terrorism, aside from obvious sources of support and funding, whilst the indiscriminate imposition of sanctions upon sanctuary states could engender devastating effects on their populations.[662] Implicit in this proposition is the need to further circumscribe the role of host-states in counterterrorism strategies, thereby bolstering the case for a state responsibility-expanding regime premised on *prevention*, as argued in Part I. Similarly, the imposition of sanctions in the context of counterterrorism may also require that a state wield extraterritorial control over abstract entities, such as

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violation of *erga omnes* obligations brings about substantive obligations on third parties, see Judge Higgins' Separate Opinion in *Wall Advisory Opinion*, *supra* note 521, at para. 37 (holding that, while there are 'certain rights in which, by reason of their importance, "all States have a legal interest in their protection"', this 'has nothing to do with imposing substantive obligations on third parties to a case'.).

[659] On this issue, see Combacau, LE POUVOIR DE SANCTION, *supra* note 608, at 17-24 (positing that UN sanctions are inherently infused with coercive character towards the end of compelling wrongful states to put an end to their unlawful behaviour).

[660] See, e.g., Resolution 277 of 18 March 1970 (purporting to bring an end to racial discrimination in Southern Rhodesia). These types of sanctions should be read in tandem with Article 41 of the *UN Charter*, *supra* note 527, which reads as follows:

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

[661] See, *inter alia*, examples of sanctions against: Southern Rhodesia (Resolutions 232 of 16 December 1966 and 253 of 29 May 1968); South Africa (Resolution 418 of 4 November 1977); Iraq (Resolutions 661 of 6 August 1990, 665 of 25 August 1990, 670 of 25 September 1990 and 687 of 3 April 1991); Yugoslavia (Serbia and Montenegro) (Resolutions 757 of 30 May 1992, 787 of 16 November 1992 and 820 of 17 April 1993); Libya (Resolutions 748 of 31 March 1992 and 883 of 11 November 1993); Rwanda (Resolution 918 of 17 May 1994).

[662] The language is borrowed from Gowlland-Debbas, *The Functions*, *supra* note 543, at 292 (speaking of Security Council-imposed economic and financial measure and stressing that whilst "[d]irected against abstract entities, these measures also have far-reaching effects on the populations of sanctioned States, despite the problematic Security Council practice of including so-called humanitarian exceptions (exempting, for example, medical supplies and foodstuffs 'in humanitarian circumstances').").

terrorist groups, another problematic facet engendered by the pervasiveness of ever-so-present transnational phenomena.[663] This requirement of state 'control' over non-state actors, a notion all so central in the ILC's *Articles*, will be thoroughly canvassed, *infra*, in Chapter 4.

It follows that the execution of such measures (i.e. sanctions in the counterterrorism context) necessarily entails the breach (or suspension) of international obligations owed to the concerned state, and could rest upon the initial unlawful act on which the Council has ruled in its resolutions.[664] In this light and if one accepts this line of argument, Council-imposed sanctions and measures could be potentially construed as 'countermeasures', a veritable staple of modern state responsibility.[665] In other words, the Council would preside over a three-tiered legal process, somewhat redolent of syllogistic thinking, which would first take into account the existence of an unlawful act and, ultimately, be followed by the establishment of responsibility and the determination *and* application of available/adequate remedies. As Gowlland-Debbas rightly notes, there is ample evidence pointing to the fact that the Council already engages in this type of reasoning: "[a] number of the Security Council resolutions adopted under Chapter VII contain all the legal elements which are familiar to international lawyers when they deal with the responsibility of States for breaches of international law: the finding of a prior breach, imputability, and the application of legal sanctions."[666] Whilst this view constitutes a considerable affront to the preferred model of inter-state countermeasures, it nonetheless

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[663] See *Ibid*, at 293 (speaking to the bindingness of Security Council resolutions and noting that "[t]hey require the exercise of control over the activities of private parties, even extraterritorially, which raises major problems today in view of the non-territorial nature of financial and other transactions.").

[664] Consider Xue Hanquin's remarks in *The State of State Responsibility*, 96 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 168, 175-176 (2002).

[665] One must bear in mind that this argument is very difficult to countenance given that the validation of state-led 'countermeasures' is found in the law of state responsibility, while the adoption of Security Council measures is supported by Chapter VII of the *UN Charter*. Thus, this regime compartmentalization constitutes a significant conceptual stumbling block to the line of argument advanced above.

[666] *The Functions*, *supra* note 542 at 288. See also Gowlland-Debbas, *Security Council Enforcement Action*, *supra* note 259, at 53; Gowlland-Debbas, *The Limits*, *supra* note 601, at 364. See also, generally, Gowlland-Debbas, COLLECTIVE RESPONSES TO ILLEGAL ACTS IN INTERNATIONAL LAW: UNITED NATIONS ACTION IN THE QUESTION OF SOUTHERN RHODESIA (1990).

signals innovative but challenging ways to attain the objectives of counteracting unlawful behaviour and ensuring return to legality in terrorism settings.

Finally, with a view to invoking "all necessary means" in implementing its resolutions under the aegis of the UN, the Council has also permitted states to use force. Such was the case in the situation pertaining to Iraq and Kuwait, in which the Council authorized "Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the above-mentioned resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area".[667] As will be discussed in subsequent sections, especially in Chapter 4, this categorical type of language is increasingly present in Council resolutions dealing with counterterrorism, most notably in the oft-cited Resolution 1373 following the attacks of 9/11. Scholars debate whether such authorizations to use force turn on the notion of collective security, pursuant to Article 42 of the *UN Charter* or Chapter VII, generally, or if they should rather be framed within the inherent right of collective self-defence, which exceptionally accrues following Council intervention.[668]

From the above considerations, it becomes clear that the Council can, in some circumstances, play a role in the implementation of state responsibility. The outstanding question remains: to what extent? One inference can be drawn from the Council's extensive practice vis-à-vis state responsibility, in that the Council has the capacity to play an active role in promoting counterterrorism, based on its tendency to interpret its powers in a liberal fashion. However, the impact and influence its resolutions can wield on the development of state responsibility law remains to be ascertained. In the field of collective interests, for instance, several

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[667] Resolution 678 of 29 November 1990, at para. 2. [Emphasis added.]

[668] See, e.g., Christian Dominicé, *La sécurité collective et la crise du Golfe*, 2 EUROPEAN JOURNAL OF INTERNATIONAL LAW 97-105 (1991); Christopher Greenwood, *New World Order or Old? The Invasion of Kuwait and the Rule of Law*, 55 THE MODERN LAW REVIEW 165-171 (1992); Yves Le Bouthillier and Michel Morin, *Réflexions sur la validité des opérations enterprises contre l'Iraq en regard de la Charte des Nations Unies et du droit canadien*, 29 CANADIAN YEARBOOK OF INTERNATIONAL LAW 142-184 (1991); Weckel, *Le chapitre VII*, *supra* note 608, at 188-192; Burns H. Weston, *Security Council Resolution 678 and Persian Gulf Decision Making*: *Precarious Legitimacy*, 85 AMERICAN JOURNAL OF INTERNATIONAL LAW 516-535 (1991).

impediments militating against the argument that liability can effectively be implemented under the auspices of the Council can be readily enumerated: unclear designation of the responsible state(s), ambiguous establishment of the violated obligation(s), indirect or equivocal proclamation of ensuing legal consequences, and fuzzy nexus between the imposition of measures and secondary norms.[669] One could further posit that Council practice vis-à-vis a slew of situations is not always conclusive in terms of the implementation of state responsibility, such as the examples of Somalia, where rebels were carrying out humanitarian law violations, Liberia, Haiti and Sierra Leone.[670] It becomes clear that additional academic discussion is needed on the relationship between secondary rules of responsibility and the functions of the Council. Moreover, as will be discussed subsequently, the elucidation of this question will most likely turn on identifying compatibility areas between the application of Chapter VII objectives and the mechanics of state responsibility. As a corollary, it will also be useful to shed more light on the relationship between the Council's own decision-making and the application of secondary rules of state responsibility.

As it stands now, and as evidenced by Council practice canvassed above, there is little conceptual or practical impediment to claiming that certain Council resolutions are at least partly predicated on the idea of international responsibility and, in turn, set in motion the principle of return to legality and the deployment of countermeasures. The confusion, however, persists in that it remains unclear whether the Council actually relies on the mechanics of state responsibility in reaching those decisions, or if the determination of the violation of an obligation

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669 Villalpando, L'ÉMERGENCE DE LA COMMUNAUTÉ, *supra* note 78, at 443. But *Cf.* Crawford's comments, in INTERNATIONAL LAW COMMISSION, *supra* note 228, at 251 (invoking Security Council resolutions and inferring that "[t]he same obligations are reflected in Security Council and General Assembly resolutions").

670 Villalpando, L'ÉMERGENCE DE LA COMMUNAUTÉ, *supra* note 78, at 443 n. 1534 (expounding that "la détermination des conditions d'existence du fait internationalement illicite et de ses conséquences ne résulte pas de manière univoque du texte des résolutions du Conseil: par exemple, au sujet de l'attribution d'actes terroristes à la Libye, de l'identification des Etats responsables d'ingérences dans le territoire de la Bosnie-Herzégovine ou de la qualification juridique de l'invasion du Koweït par l'Iraq (le Conseil ayant évité de se référer à un <<acte d'agression>>"). See also Gowlland-Debbas, *The Functions*, *supra* note 543, at 288 n.38.

flows organically by the very virtue of its existence and purpose,[671] namely without the need to invoke secondary norms (i.e. are Council measures independent and, therefore, divorced from the ideology underpinning the concept of 'countermeasure'?). The elements required to better understand this relationship will come into focus when addressing more substantial issues linking state responsibility to Council operations, such as the determination of responsibility and restraints on Council action. In the interim, a brief overview of the scholarly reactions to the extensive practice of the Council proves instructive in securing building blocks towards better circumscribing the Council's role in advancing state responsibility law.

It is apparent from the foregoing that the Council has interpreted its powers in a broad fashion.[672] More importantly, the potential role of the Council in implementing state responsibility has generated considerable academic debate. Although discussion addressing this theme has essentially polarized influential voices within academia, from these scholarly accounts emerges a clear postulate: there is an inherent compatibility between the law of state responsibility and the Council's activities in a wide array of areas. In fact, several commentators have already initiated a rapprochement of classical state responsibility rationale with Council powers and decision-making. Whilst some fine-tuning is required with regard to the specific challenges posed by counterterrorism, possible avenues in addressing this difficult question will be considered in due course.

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[671] Although not dispositive when contrasted with other scholarly accounts, Georg Nolte's remarks are far from encouraging with regard to any attempt at reconciling state responsibility with Council powers. See *The Limits*, *supra* note 545, at 323 (2000) (cautioning against expanding the Council's treatment of humanitarian law/recourse to force violations as tantamount to permutations of the attribution of liability).

[672] For support of this proposition, see also Thomas M. Franck, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 218 and *seq*. (1995); Koskenniemi, *The Police in the Temple*, *supra* note 535, at 325-348.

For a first group of authors,[673] the afore-discussed extensive Council practice – along with its broad interpretation of the maintenance of international peace and security and general Chapter VII powers – might be indicative of an ongoing, or completed, shift of the Council's functions towards a more active implementation of international responsibility. According to this school of thought, such power could be derived from the *UN Charter* or from general international law. Under this structure, Council action would be framed within known international law logic, thereby making the Council's discretionary margin of interpretation contingent on the application of secondary rules of responsibility, and simultaneously co-extensive with the notions of assurance of legality and protection of collective interests.[674] Consequently, a proponent of this view would infer that UN member-states could even derogate from otherwise legally enforceable obligations, including flouting human rights treaties (as long as the rights contained therein do not qualify as *jus cogens* undertakings), through a Council resolution based on the wording of Article 103 of the *UN Charter*. However, should these obligations or treaties acquire a 'special status' (i.e. *jus cogens*) under international law, the Council's action would then be correspondingly restrained.[675] This construction further reinforces the ideas that international law does act as a check on Council action, that the secondary rules of responsibility are set in motion and govern the legal situation following the

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[673] See, *inter alia*: Enzo Cannizzaro, *The Role of Proportionality in the Law of International Countermeasures*, 12 EUROPEAN JOURNAL OF INTERNATIONAL LAW 889-916, 913-915 (2001); Bernhard Graefrath and Manfred Mohr, *Legal Consequences of an Act of Aggression*: *The Case of the Iraqi Invasion and Occupation of Kuwait*, 43 AUSTRIAN JOURNAL OF PUBLIC AND INTERNATIONAL LAW 109-138 (1992) (discussing aggression); Brigitte Stern, *La responsabilité internationale aujourd'hui…demain…*, in André Castagné *et al.* (eds.), PERSPECTIVES DU DROIT INTERNATIONAL ET EUROPÉEN: RECUEIL D'ÉTUDES À LA MÉMOIRE DE GILBERT APOLLIS 75-103, 94-96 (1992); Paul Tavernier, *Harmonie et contradictions dans l'évolution du droit de la responsabilité internationale*, in Rafâa Ben Achour and Slim Laghmani (eds.), HARMONIE ET CONTRADICTIONS EN DROIT INTERNATIONAL 224-226 (1997); Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, 241 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 195-374, 368-369 (1993-IV). Generally, these authors also agree with the premise that Security Council powers do not preclude individual states from unilaterally invoking responsibility against wrongful states.

[674] For a discussion of this issue, see Gowlland-Debbas: *The Functions*, *supra* note 543, at 304-306; *UN Sanctions*, *supra* note 532, at 5-12.

[675] See Gowlland-Debbas, *The Functions*, *supra* note 543, at 305.

determination of a breach by the Council, and that the safeguarding of collective interests remains a determinant element for the study at hand.

It should be noted, however, that Article 39, as envisioned in the 1996 first reading of the ILC Draft Articles, provided the following specifications: "[t]he legal consequences of an internationally wrongful act of a State set out in the provisions of this Part are subject, as appropriate, to the provisions and procedure of the Charter of the United Nations relating to the maintenance of international peace and security."[676] During his tenure as Special Rapporteur, Arangio-Ruiz was a particularly staunch objector to Draft Article 39, judging that it conferred disproportionate discretion to the Council in interpreting the legal consequences of a wrongful act.[677] It is likely that Arangio-Ruiz's posture was informed – perhaps even triggered – by a strong majority within the ICJ in the *Lockerbie* case, which confirmed the bindingness of Council resolutions irrespective of their congruence with other international legal standards.[678] Arangio-Ruiz's claim, therefore, targeted what he perceived to be an unnecessarily broad ""constitutional" interpretation of the UN Charter of the main UN Charter-based institutions at the expense of a more strict, statutory construction approach favoured by jurists of the positivist school of law."[679] For this Special Rapporteur, implicit in the argument was the fact that the adoption of Draft Article 39 would "seriously jeopardize the integrity of international law."[680] It would appear that Arangio-Ruiz's lobbying against over-extending the Council's role in determining the consequences of a wrongful act fell on sympathetic ears within the ILC. As such, his suggestion was ultimately embodied in the

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[676] International Law Commission: First reading Draft Articles (1996) Part Two Content, Forms and Degrees of International Responsibility, Chapter 1, General Principles.

[677] See, e.g., Gaetano Arangio-Ruiz, *On the Security Council's 'Law-Making'*, 83 RIVISTA DI DIRITTO INTERNAZIONALE 609-725, 615 (2000).

[678] See *infra* note 699 and accompanying text.

[679] Edward McWhinney, *Codifying International Law in Periods of Extreme Ideological and Culturual Conflict*: *Lessons From the ILC Mandate on State Responsibility*, in Koufa, THESAURUS ACROASIUM, *supra* note 202, at 109-160, 144.

[680] For support of this proposition, see Edward McWhinney, *Separation or Complementarity of Constitutional Law-Making Powers of United Nations Security Council, General Assembly, and International Court of Justice*, in Andrea Giardina and Flavia Lattanzi (eds.), STUDI DI DIRITTO INTERNAZIONALE IN ONORE DI GAETANO ARANGIO-RUIZ 903 (2004).

reformulated, open-ended final Draft Article 59, which now reads as follows: "These articles are without prejudice to the Charter of the United Nations."[681]

Therefore, it is no surprise that a second contingent of scholars discards the rapprochement between state responsibility and Council powers, rather opining that the latter is entrusted with an autonomous and truly *sui generis* mission. Amongst the more radical detractors of state responsibility implementation through Council action, some expound that such implementation, paired with the determination of applicable secondary rules of responsibility, falls outside the ambit of Chapter VII.[682] However, a third and more nuanced strand of scholarship acknowledges that the Council may engage in the determination of unlawful acts and their resulting consequences, along with the imposition of measures or sanctions to compel compliance. However, they also maintain that Council action remains subject to the provisions found in the *UN Charter* and that its primordial role is to ensure the maintenance of international peace and security, an objective that, they argue, differs from the implementation of state responsibility.[683]

Although a strong current supporting the thesis of state responsibility implementation through Council action exists, a brief examination of specific

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[681] *ILC Articles on State Responsibility*, *supra* note 76.

[682] For instance, Gaetano Arangio-Ruiz was a vocal proponent of this view. Whilst his stances were sometimes categorical, they concomitantly embodied some degree of analytical nuance in that the Council's role could be perceived as co-extensive with more traditional means of implementation of international responsibility. See, e.g., *Fifth Report* – Arangio-Ruiz, *supra* note 504, at para. 103-105; *Seventh Report* – Arangio-Ruiz, *supra* note 504, at para. 95-96; *On the Security*, *supra* note 677, at 631 and 695. See also Claudia Annacker, *The Legal Regime of Erga Omnes Obligations in International Law*, 46 AUSTRIAN JOURNAL OF PUBLIC AND INTERNATIONAL LAW 131-166, 158-159 (1994).

[683] See, *inter alia*: in the ILC debates of 1976, the positions of Jorge Castañeda (in *Yearbook of the International Law Commission*, 1976, Vol. I, at 240-243) and Paul Reuter (in *Ibid*, at 245); Dupuy, *The Constitutional Dimension*, *supra* note 543, at 16 (offering a more focused analysis); in the debates in Cassese, Spinedi and Weiler, INTERNATIONAL CRIMES, *supra* note 494, see the remarks of Sir Ian Sinclair (at 224) and Marina Spinedi (at 243-246) (describing this view without taking position); Rosalyn Higgins, *International Law and the Avoidance, Containment and Resolution of Disputes*, 230 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 9-342 (1991-V); Alain Pellet, *Le nouveau projet de la CDI sur la responsabilité de l'Etat pour fait internationalement illicite*: *Requiem pour le crime?*, in Lal Chand Vohrah *et al.* (eds.), MAN'S INHUMANITY TO MAN: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE 655-683 (2003).

questions related to Council resolution-making is nonetheless warranted so as to better identify its role within the broader proposed framework.

### 3. Determination of Responsibility and Surrounding Issues

It is now clear that the Council can play a role (perhaps in a limited set of circumstances) in determining the international responsibility of states. By way of example and as discussed extensively above in Section B)2., it has done so in the case of Iraq's invasion of Kuwait through the adoption of Resolution 687 (1991), which proceeded to articulate the existence of a series of additional violations and obligations flowing from Iraq's 'original sin'.[684] Subsequent Council resolutions on this situation also expanded on the original responsibility attaching to Iraq and, in laying out their rationale, relied upon a series of well-established treaty obligations stemming, *inter alia*, from the 1961 and 1963 *Vienna Conventions on Diplomatic and Consular Relations* and on the *Fourth Geneva Convention*.[685] Hence, the determination that Iraq's invasion of Kuwait conflicted with its obligations under the *UN Charter* "was followed by a series of resolutions which referred to Iraq's additional violations of international law…although the initial illegal act, i.e. the unlawful invasion and occupation of Kuwait, continued to serve as the basis for State responsibility".[686] Interestingly, when framed in state responsibility terms, such scenario easily qualifies as an ongoing breach of an obligation and is, simultaneously, governed by Article 14(3) of the ILC's *Articles*.[687]

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[684] The language is borrowed from Gowlland-Debbas, *Security Council Enforcement Action*, *supra* note 259, at 65. For further discussion on the background of Resolution 687 and its repercussions, see Lawrence D. Roberts, *United Nations Security Council Resolution 687 and Its Aftermath*: *The Implications for Domestic Authority and the Need for Legitimacy*, 25 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 593 (1993).

[685] See, e.g., Resolutions 664, 667 and 670 (1990), and 687 (1991). See also Gowlland-Debbas, *The Functions*, *supra* note 543, at 289 n.40 (noting that this string of resolutions was the first to cite the *Fourth Geneva Convention* within the framework of Chapter VII).

[686] Gowlland-Debbas, *The Functions*, *supra* note 543, at 289.

[687] The temporal element of an international breach, as it pertains to international terrorism specifically, will be explored in Chapter 4, under heading B)3. On the concept of time in the context of international state responsibility, see Wolfram Karl, *The Time Factor in the Law of State Responsibility*, in Spinedi and Simma, UNITED NATIONS, *supra* note 244, at 95-114; Eric Wyler, *Quelques réflexions sur la réalisation dans le temps du fait internationalement illicite*, 95 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 881-914 (1991). On time and the law,

Thus, it is clear that the Council sometimes takes part in establishing state responsibility and, in some cases, in identifying a prior breach upon which subsequent determinations of unlawful behaviour are juxtaposed. But it is still unclear whether this practice truly hinges on state responsibility rationale or, conversely, if it invariably remains framed in Chapter VII terms. One thing is certain: the Council has identified unlawful acts and imposed sanctions "based not only on a finding of fact but also on one of law."[688] More compellingly, and writing about the determination of illegality of Iraq's invasion of Kuwait and subsequent resolutions, and highlighting that Council practice "has been fairly innovative in qualifying some acts as illegal", Marc Perrin de Brichambaut argues that "[t]he Council drew a number of consequences for international responsibility from this qualification."[689] He further posits that the Council's reasoning in Resolutions 705 of 15 August 1991 and 715 of 11 October 1991 laid relevant groundwork in identifying "conditions for the fulfilment of Iraq's legal responsibility",[690] a conclusion that, ostensibly, could be deemed congruent with the deployment of secondary norm-derived obligations. In reasoning highly redolent of the considerations set out above in section A)3.b), de Brichambaut goes as far as arguing that, by venturing upon this scheme of resolution-making, the Council actually conferred 'quasi-judicial powers' upon itself, a position that has fallen under trenchant criticism in that context.[691]

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generally, see Rosalyn Higgins, *Time and the Law*, 46 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 501 (1997).

[688] Gowlland-Debbas, *The Functions*, *supra* note 543, at 288 (also excluding the cases of Liberia and Haiti (see Resolutions 788 of 1992 and 841 of 1993) as inconclusive for the purposes of this statement). See also Resolution 1132 of 1997 (lamenting the military coup of 25 May 1997 in Sierra Leone and calling for the restoration of the democratically elected government and a return to constitutional order). See also Brichambaut, *The Role*, *supra* note 599, at 273-274 (discussing Resolution 674 of 29 October 1990, which declared Iraq's invasion of Kuwait to be illegal under international law, and inferring that "[t]his qualification was made by reference to existing law."); Gowlland-Debbas, *Security Council Enforcement Action*, *supra* note 259, at 63-64 (noting the same exceptions as above and expounding that the Council "has not limited itself to a finding of fact, but has linked its determinations under Article 39 to determinations of the alleged existence of a violation of international law, either explicitly, or by parallel determinations in the same resolution, for the purpose of extending to such breaches the special regime of Chapter VII.").

[689] Brichambaut, *The Role*, *supra* note 599, at 273.

[690] *Ibid*.

[691] See Nolte, *The Limits*, *supra* note 545, at 323.

Conversely, this idea also ties into the notion that the Council can effectively be construed as implementing state responsibility, regardless of one's perception of the legal delivery of its powers, be it grounded in political, quasi-judicial or executive undertones. For some commentators, therefore, a determination of unlawful activity by the Council actually rests on its intrinsic executive function and brings about specific implications for the interplay between the application of secondary rules of responsibility, the obligations flowing to involved states after a breach, and the role of the Council within the broader scheme of international responsibility.[692]

At any rate, de Brichambaut's conclusion carries, with it, significant implications for a possible rapprochement of state responsibility rationale within the framework of Chapter VII powers: the reaction to the Iraq-Kuwait scenario[693] seems to depart from previously established practice insofar as it clearly draws in state responsibility considerations within the furrow of 'international peace and security'. His remarks seem apposite here: "[t]his was a major innovation because an evaluation by the Security Council on the basis of Article 39 of the Charter normally has no consequences in terms of State responsibility. Indeed, Article 39 only mentions situations which may affect international peace and security."[694] However, it is fair to subject the reading of de Brichambaut's arguments to one caveat, in that he does not endorse the proposition that the Council grants itself unfettered jurisdiction and creativity. In fact, he sees the Council solely as a creator of rights and obligations, i.e. an organ that "simply interprets and applies existing law", but considers its response to Iraq's invasion of Kuwait as a particularly striking, creative and far-reaching exercise of these powers.[695] He ultimately concludes that "[t]he Security Council was equally innovative in its settlement of the border dispute between Iraq and Kuwait, which

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[692] See Villalpando, L'ÉMERGENCE DE LA COMMUNAUTÉ, *supra* note 78, at 447 n.1544.

[693] For a variety of legal views on the Gulf War and its aftermath from the standpoint of collective security, particularly, see, e.g., Christian Dominicé, *La Sécurité collective*, *supra* note 668; Benedetto Conforti, *Non-Coercive Sanctions in the United Nations Charter*: *Some Lessons From the Gulf War*, 2 EUROPEAN JOURNAL OF INTERNATIONAL LAW 110 (1991); Peter Malanczuk, *The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War*, 2 EUROPEAN JOURNAL OF INTERNATIONAL LAW 114 (2002).

[694] Brichambaut, *The Role*, *supra* note 599, at 273.

[695] See Brichambaut, *The Role*, *supra* note 599, at 270 and 275-276.

it accomplished in Resolution 773 of 26 August 1992. This, along with the other resolutions concerning Iraq mentioned above, is probably the furthest it has reached in stretching its powers within the legal domain."[696]

Two preliminary conclusions emerge from the foregoing. On one hand, there seems to be relatively little resistance to the argument that Council resolutions constitute a source of rights and obligations, which, to use state responsibility parlance, would potentially accrue to both victim and implementing states. Interestingly, one commentator underscores that, in this setting, "[a]pplications of an existing set of rules to particular facts inevitably result in the creation of a new, more specific rule, following the model of common law development in Anglo-American law", but ultimately mitigates this observation by arguing that the Council's 'soft' characterizations cannot be construed as binding on member-states in the face of considerable recalcitrance to the idea that this political organ can generate positive law.[697] Nevertheless, it inexorably follows that the Council can also override previously existing obligations upon states, based on the logic of Article 103 of the *UN Charter*.[698] When read in tandem with the *Lockerbie* decision and Security Council Resolution 748, this provision allows us to draw vital inferences for the purposes of the debate at hand, namely that the Council can trump existing international obligations (similarly to the effect of Resolution 748 on the *Montreal Convention* in the *Lockerbie* case), and that it can set out general obligations in international law,[699] much to the dismay of certain commentators. Indeed, some authors categorically reject the possible creation and imposition of new international legal obligations upon states by the Council.[700] In fact, this issue was very much alive in the *Lockerbie*

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[696] *Ibid*, at 273.

[697] See Provost, INTERNATIONAL HUMAN, *supra* note 207, at 315.

[698] Article 103 of the *UN Charter*, *supra* note 527, reads as follows:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

[699] For a discussion of these aspects, see Franck, FAIRNESS, *supra* note 672, at 242-244; Edward McWhinney, *International Law-Based Responses to the September 11 International Terrorist Attacks*, 1 CHINESE JOURNAL OF INTERNATIONAL LAW 280-286, 283 (2002).

[700] See, e.g., Dominicé, *The International Responsibility*, *supra* note 534, at 366 (labelling certain Council sanctions as 'injunctions' and inferring that "such injunctions are legal when the State is

litigation[701] and has received strong academic support, often in scholarly accounts or excerpts discussing Libya's involvement in the *Lockerbie* situation.[702]

Moreover, implicit in this discussion is the fact that the Council is capable of setting general obligations in international law. In fact, according to Georg Nolte this ability would actually delineate the boundaries of the Council's powers, as it would be, he argues, barred from creating 'law' or 'sources of law'.[703] At any rate, the obligations stemming from certain Council resolutions remain binding not only on states involved at both ends of a specific internationally wrongful act, but also on other member and non-member states alike. This trend has been particularly prominent in non-proliferation and counterterrorism matters, with the Council's resolutions binding *all* states and extending obligations considerably further than the prescriptions enshrined in both the *International Convention for the Suppression of the Financing of Terrorism* and the *Treaty on the Non-Proliferation of Nuclear Weapons*.[704] Interestingly, some commentators explain the bindingness of Council resolutions on non-member states by reference to the principle of sovereign equality.[705] At the end of the day, this asymmetrical power dynamic between members of the international community and the Council

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called upon to respect or implement international obligations which actually exist in its regard. However, they are unlawful when they create new obligations, because the Security Council does not have the authority of a legislator, allowing it to modify treaty provisions, or rules or general international law."). See also Arangio-Ruiz, *On the Security*, *supra* note 677, at 609-725 (especially the heading 'Egregious Examples of Recent Security Council Questionable Infringements of States' Rights', at 701-724); Christian Dominicé, *Le Conseil de sécurité et le droit international*, 43 REVUE YOUGOSLAVE DE DROIT INTERNATIONAL 197, 203 (1996).

[701] For instance, see Judge Shahabuddeen's Separate Opinion in *Lockerbie*, *supra* note 537, at 32 and 142.

[702] See, e.g., Brichambaut, *The Role*, *supra* note 599, at 270-273 and 275; Gowlland-Debbas, *The Functions*, *supra* note 543, at 293.

[703] *The Limits*, *supra* note 545, at 317.

[704] See, e.g., Security Council Resolution 1540 of 28 April 2004, S/RES1540 (2004) (obliging all states to adopt domestic legislation banning proliferation of WMDs, thwarting their delivery to non-state actors, to implement border/export controls and to protect the materials involved); *Resolution 1373*, *supra* note 71. See also Nobuyasu Abe, *Existing and Emerging Legal Approaches to Nuclear Counter-Proliferation in the Twenty-First Century*, 39 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 929, 930 (2007).

[705] As Bardo Fassbender posits, "[i]t is not by virtue of Article 2(6) that the Charter is binding on non-member states. Rather the Charter is binding because of the overriding principle of sovereign equality. Accordingly, non-member states are not only bound by the principles of Article 2, but the Charter as a whole. This means that binding decisions of the Security Council can be addressed to a non-member state--be it a law-breaker or a state expected to assist the U.N. in the performance of preventive or enforcement action." See *The United Nations Charter as Constitution of the International Community*, 36 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 531, 584 (1998).

epitomizes what Gowlland-Debbas terms a 'vertical relationship' between the Council and all states; by virtue of Article 25 of the *UN Charter*, therefore, binding Council decisions "create duties for all member States (and arguably non-member States)" and concomitantly actuate this relationship.[706] This rapport stands in sharp contrast with a situation involving the unilateral implementation of state responsibility by a victim state against a wrongful state, a legal relationship better defined as embodying a 'horizontal' character.[707] The driving force behind this distinction hinges, to a large extent, on the so-called added value of institutionalized and collective enforcement of international obligations, typically operationalized through Council sanctions purporting to vindicate collective rights and, as a corollary, the interests of the international community as a whole. Yet, past analyses of the value of collective enforcement through UN mechanisms have, at times, been deeply cynical.[708] Conversely and, perhaps in response to this reticence in relegating the task of enforcement of international legal obligations to the Council, it is fair to contend that states retaliating in international settings after they have been wronged are not necessarily guided by any overarching legal or philosophical guidelines.[709]

This course of action (i.e. through the Council) evidently differs considerably from the more traditional, synallagmatic, conception of the unilateral implementation of responsibility: "in other words, one form of countermeasures undertaken on the basis of a collective and institutionalised decision of an international organisation, in the defence of fundamental community interests, as distinct from those "horizontal" reactions taken by an injured State or States within a bilateral context to international wrongful acts considered to violate

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[706] See Gowlland-Debbas, *The Functions*, *supra* note 543, at 293.

[707] See, e.g., *Ibid* ("They thus differ from unilateral countermeasures, which are based on a right and create a 'horizontal' relationship between the States applying the countermeasures and the violating State."). For more background on the concept of unilateral countermeasures, generally, see, *inter alia*, Laurence Boisson de Chazournes, LES CONTRE-MESURES DANS LES RELATIONS INTERNATIONALES ÉCONOMIQUES (1992); Sicilianos, LES REACTIONS DÉCENTRALISÉES, *supra* note 514.

[708] See, *inter alia*, M.S. Daoudo and M.S. Dajani, ECONOMIC SANCTIONS, IDEALS AND EXPERIENCE 159 (1983); Margaret P. Doxey, ECONOMIC SANCTIONS AND INTERNATIONAL ENFORCEMENT 142-148 (1980). See also Charney, *Third State Remedies*, *supra* note 551, at 241.

[709] See, e.g., Nicholas Greenwood Onuf, REPRISALS: RITUALS, RULES, RATIONALES 11 (1974).

subjective rights."[710] Thus, the idea that state responsibility rests primarily on a (perhaps dated) bilateral typology comes into relief when analyzing the violation of multilateral obligations, especially those infringing *jus cogens* norms.[711] Hence, "if a victim state is left to face the responsible state alone, a legal relationship based on multilateral obligations is effectively converted to a bilateral relationship at the level of its implementation."[712] Whilst the violation of *erga omnes* obligations appears to simultaneously convert all states into 'passive' (i.e. obligated vis-à-vis the international community to dissociate themselves from the wrongful act and to attempt to attenuate its adverse effects) and 'active' (i.e. affected by the wrongful act and entitled to invoke state responsibility flowing from it) subjects in the newly-formed, secondary legal relationship, classical theoretical constructions of state responsibility remain confined to predominantly bilateral conceptions.[713]

This simultaneously constitutes an attractive argument militating in favour of the thesis that the Council can, and does, implement state responsibility in some instances, and a setback in the same debate, in that it reduces, or limits, the Council's role to an inherently political exercise in determining responsibility. Indeed, "[i]t is evident that collective responses by a political organ to violations of international law can be neither automatic nor impartial, depending as they do for their motivation on the existing political consensus within that body and on various configurations of power and State interests."[714] This obviously entails that the Council's distinct role, coupled with its particularly extensive panoply of

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[710] Gowlland-Debbas, *Security Council Enforcement Action*, *supra* note 259, at 58. This line of argument expands on Gowlland-Debbas' previous thoughtful account in COLLECTIVE RESPONSES, *supra* note 666.

[711] See, e.g., Pisillo Mazzeschi, *The Marginal Role*, *supra* note 5, at 39-40 (decrying the fact that the ILC's *Articles* predominantly focus on inter-state responsibility, operate on a 'bilateral', 'individualistic' and 'privatistic' conception of international law and, ultimately, fail in ascribing a better defined role to the individual in establishing the international responsibility of states).

[712] See Denis Alland, *Countermeasures of General Interest*, 13 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1221, 1236 (2002). See also *Third Report* – Crawford, *supra* note 515, at pp.18-20, paras 400-402. But *Cf.* Yamada, *Revisiting*, *supra* note 150, at 121.

[713] See, generally, Proulx, *International Responsibility*, *supra* note 384. On the 'passive'/'active' dichotomy in the context of breaches of *erga omnes* obligations, see Villalpando, L'ÉMERGENCE DE LA COMMUNAUTÉ, *supra* note 78, at 383, 466.

[714] Gowlland-Debbas, *Security Council Enforcement Action*, *supra* note 259, at 63.

binding measures, remains somewhat foreign to the horizontal discipline that has characterized traditional state responsibility thus far.

This argument becomes even more compelling when framed in a comparative light, especially when delving into the commonalities and differences of state responsibility and regional trade agreement or political structures, for example. Through the lens of Community law, Joseph H.H. Weiler highlights the mechanisms of state responsibility as conducive to a particularly distinctive brand of supremacy. He notes that "[i]nternational law is as uncompromising as Community law in asserting that its norms are supreme over conflicting national norms. But, international law's horizontal system of enforcement, which is typically actuated through the principles of state responsibility, reciprocity, and counter-measures, gives the notion of supremacy an exceptionally rarefied quality, making it difficult to grasp and radically different from that found in the constitutional orders of states with centralized enforcement monopolies."[715] Granted that Weiler was probably invoking state responsibility here to illustrate the EU's *sui generis* character, the argument also works the other way in that it consecrates the truly horizontal nature of traditional unilateral implementation of state responsibility under international law. This approach would, therefore, preclude the designation of the Council's action as one of true implementation in the field of state responsibility, as it shares more commonalities with centralized (or 'vertical' to use Gowlland-Debbas' language) enforcement mechanisms found in traditional constitutional orders, albeit drawing on collective perspectives and resources in applying the law.[716]

Speaking about the relationship between state responsibility and terrorism in the post-9/11 era, Pierre-Marie Dupuy also significantly contributes to the

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[715] See THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION 25 (1999). [Emphasis added.]

[716] See *Ibid*, at 29 (arguing that "[t]he combined effect of constitutionlization and the evolution of the system of remedies results, in my view, in the removal from the Community legal order of the most central legal artefact of international law: the notion (and doctrinal apparatus) of exclusive state responsibility with its concomitant principles of reciprocity and counter-measures."). But *Cf.* Gowlland-Debbas, *Security Council Enforcement Action*, *supra* note 259, at 73 (speaking to the Council's involvement in responding to violations of international law: "[w]e are not therefore speaking of a *centralized* system to determine whether reactions to alleged violations of international law are indeed legitimate, but of the collective reaction itself.") [Emphasis added.]

debate at hand. According to his reasoning – which invokes specific language extracted from ILC Article 48 – state responsibility for terrorism should, indeed, be actuated through the prism of an institutionalized setting. He notes, "[c]ountermeasures are by their very nature decentralised, whereas violations of the international public order and reactions thereto, need, respectively, to be evaluated and managed by a centralised authority, legitimately representing the community. This is why international reactions to terrorism remain bound by the framework of the United Nations, as the sole structure securing collective interest of States "other than the injured one"."[717] As one author similarly queries, these considerations also share an intimate connection with the second preliminary conclusion alluded to earlier: "[t]his leads one to enquire into the nature of the link between Charter mechanisms for international peace maintenance and the legal institution of State responsibility, and as to whether indeed it may be said that the Council's function in this respect is a political one as opposed to the legal function exercised by the Court."[718]

On the other hand, the second conclusion being inextricably intertwined with the first, it becomes apparent that the scholarly elucidation of the relationship between state responsibility and Council action has been perhaps unnecessarily predicated on the prior conceptual disentanglement of the overarching legal/political dichotomy animating this debate. As argued above, the Council sometimes anchors its decisions on findings of law, as opposed to strict determinations of fact. Yet, this does not signal that the political dimension is excised altogether from the equation. More importantly, these innovative legal incursions by the Council seem to adhere to what the ICJ has termed "operational design", in that they entail definitive and pervasive legal effects for the parties at hand, while also subtracting any unlawful act from legal protection or recognition.[719]

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[717] Dupuy, *State Sponsors*, *supra* note 29, at 15-16. [Emphasis added.]
[718] Gowlland-Debbas, *Security Council Enforcement Action*, *supra* note 259, at 57.
[719] *Namibia Advisory Opinion*, *supra* note 361, at 50. See also the Separate Opinion of Judge Onyeama in *Ibid*, at 147 (ruling that the Council's determination was declaratory rather than legislative: "[t]he declaration of the illegality of the continued presence of South Africa in Namibia did not itself make such presence illegal; it was…a statement of the Security Council's

Consequently, "[i]t is by virtue of an operation of law, not of fact, that the member States agree to carry out the Council's decisions and to subject their international agreements to the overriding effects of the Charter."[720] At the same time, it has also been demonstrated that political considerations pervade the Council's deliberations and thought-process, a dominant component of international decision-making in this case that seems hardly dissociable from the Council's input in state responsibility.[721] Also implicit in this proposition is the notion that the Council can perhaps play a role in implementing state responsibility on a political level but remains limited by the terms and the framework of the *UN Charter*. In fact, as discussed above the ICJ has confirmed this principle, stating that the "political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment."[722] However, the flipside to this argument begs the question of whether this role is limited to a truly political function. This tension was very much present in the Dissenting Opinion of Judge Bedjaoui in the *Lockerbie* case, in which he remarked that "the first dispute concerns the extradition of two Libyan nationals and is being dealt with, legally, by the Court…whereas the second dispute concerns…*State terrorism as well as the international responsibility of the Libyan State* <u>*and is being dealt with,*</u>

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assessment of the legal quality of the situation created by South Africa's failure to comply with the General Assembly's resolution…it was in fact a judicial determination"). The ICJ also found that these determinations have effect under international law, and that they are "opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law." The Court further stated: "[a] binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence…This decision entails a legal consequence, namely that of putting an end to an illegal situation." *Ibid*, at 56 and 54. See also Gowlland-Debbas, *The Functions*, *supra* note 543, at 291.

[720] Gowlland-Debbas, *The Functions*, *supra* note 543, at 304.

[721] Ironically, this constitutes one of the dominant tenets of the neo-conservative legal agenda in identifying the limits of international law. See, e.g., Jack L. Goldsmith and Eric A. Posner, THE LIMITS OF INTERNATIONAL LAW 104, 192 (2005). For a contrary view, see Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE LAW JOURNAL 2599 (1997), especially at 2603, 2634 and 2646. See also, generally, Louis Henkin, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 47 (1979). For a critique of Koh's point of view, see Eric A. Posner, *International Law and the Disaggregated State*, 32 FLORIDA STATE UNIVERSITY LAW REVIEW 797, 800-802 (2005).

[722] *Conditions of Admission of a State*, *supra* note 541, at 64.

*politically, by the Security Council*".[723] This line of inquiry clearly brings into relief the tension between the Council's political function, on one hand, and its *potential* judicial function, on the other.[724] As discussed above in section A)3.b), certain authors construe select Council incursions into the realm of state responsibility as a clear testament to the fact that the Council has, on occasion, granted itself quasi-judicial powers. Conversely, legal scholarship has traditionally and adamantly rejected the conferral of purely judicial functions upon the Council, and rightly so.[725] Moreover, influential scholarly voices have rightly advanced that the Council is not bound by ordinary judicial proceedings, such as the production of evidence and witnesses, cross-examinations, and so on.[726] Despite her forceful arguments on Council-implemented state responsibility, these impediments ultimately lead Gowlland-Debbas to conclude that "[t]he Council is a political organ: it is composed of governmental representatives which cannot even be said, in contrast to the General Assembly, to represent the international community as a whole."[727] Therefore, there is no way around the argument that Council action is largely driven by political considerations. However, and for several reasons advanced above, this reality should not completely disable the thesis that the Council can play some role in the implementation of state responsibility or, at least, in advancing that body of law. Gowlland-Debbas sums it up perfectly as follows: "from the lack of a legal process to conclude that the Council's role in issues involving State responsibility

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[723] *Lockerbie*, *supra* note 537, at pp. 34, 144. Similarly, see the Dissenting Opinion of Judges Ajibola in *Ibid*, at pp. 79, 184, and El-Kosheri at pp. 96, 201.

[724] For a thoughtful discussion on the articulation of the relationship between political and judicial organs, see Gowlland-Debbas, *The Functions*, *supra* note 543, at 306-311. See also, generally, Vera Gowlland-Debbas, *The Relationship Between Political and Judicial Organs of International Organizations*: *The Role of the Security Council on the New International Criminal Court*, in Laurence Boisson de Chazournes *et al.* (eds.), INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL DISPUTE SETTLEMENT: TRENDS AND PROSPECTS 195-240 (2002).

[725] See, e.g., Kelsen, THE LAW, *supra* note 574, at 476-477; Christian Tomuschat, *The Lockerbie Case Before the International Court of Justice*, 48 THE INTERNATIONAL COMMISSION OF JURISTS REVIEW 38, 41 (1992); Gowlland-Debbas, *Security Council Enforcement Action*, *supra* note 259, at 71. See also the Dissenting Opinions of Judge Weeramantry in *Lockerbie*, *supra* note 537, at 56 and 166, and of Judge el-Kosheri, in *Ibid*, at 96 and 201.

[726] See, e.g., Elihu Lauterpacht, ASPECTS OF THE ADMINISTRATION OF INTERNATIONAL JUSTICE 42-43 (1991).

[727] *Security Council Enforcement Action*, *supra* note 259, at 71.

is purely political, as opposed to the Court's legal one, does not shed light on the Council's true function in such matters."[728]

It is probably inaccurate to contend that all dimensions of all disputes involving the implementation of state responsibility for the violation of counterterrorism obligations will be inherently and/or solely political in nature, so that the Council should necessarily deal with them. By the same token, there is no reason why both the Council and the ICJ cannot concomitantly deal with similar or different aspects of a given dispute, as both bodies have at times made incursions into the other's jurisdiction.[729] Although this possibility has been expressly acknowledged, the rigid dichotomy between political and judicial decision-making has also been perpetuated by Judges of the ICJ on occasion: "[t]he Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events."[730] This is undoubtedly what leads René Provost to proclaim that, when characterizing situations as states of emergency or international armed conflicts, the Council is carrying out a political function. In his view, no equivalent legal weight should be ascribed to that decision compared to the deference that would conversely be accorded a purely judicial body in similar circumstances.[731] Interestingly, some scholars take issue with this line of reasoning, opining that "the view that there is a clear division of functions between the Court and the Council along the lines of a political/legal dichotomy is not really tenable."[732] Some reconcile this discrepancy by expounding that, in the cases explored above, the Council operated in a predominantly 'legal', as opposed to 'political', framework. In so doing, it has brought the discipline of international responsibility – namely the prior determination of a breach upon which are predicated the application of

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[728] *Ibid*, at 72.

[729] See, e.g., Gowlland-Debbas, *The Functions*, *supra* note 543, at 310 (observing that "a determination of an act of aggression is clearly a matter of international law and…the ICJ has not considered itself debarred from making such a finding.").

[730] Declaration of Judge Ni in *Lockerbie*, *supra* note 537, at 22 and 134 (citing *Nicaragua Case (Jurisdiction & Admissibility)*, at 434-435, para. 95).

[731] Provost, INTERNATIONAL HUMAN, *supra* note 207, at 312.

[732] Gowlland-Debbas, *The Functions*, *supra* note 543, at 307.

attribution, along with the imposition of countermeasures – into the purview of Article 39. In addition, it has extended this scheme to non-state entities.[733]

A particularly vocal proponent of this view is Gowlland-Debbas, who ultimately resolves this tension by doing away with the strict division between political and legal decision-making, as it pertains to both the ICJ and the Council. She further grounds her theory on the notion that both the ICJ and the Council serve different, but not mutually inimical, roles in the international legal process, whilst placing particular emphasis on the afore-discussed cardinal principle of return to legality. Therefore, under the scheme of state responsibility both bodies would ultimately work simultaneously towards the same objectives, albeit through different means. It follows that the Court's role – which may crop up at an earlier stage in the place of countermeasures or as a predicate for their adoption, or at a later stage in order to review the legality of unilaterally adopted countermeasures – is synonymous with peaceful settlement procedures. Conversely, the Council's role is synonymous with institutional countermeasures and remains confined to enforcement, which signals that this organ does not act as an impartial arbitrator but rather in lieu and place of the aggrieved states, given that the obligations at play concern the international community as a whole.[734]

With this in mind, Gowlland-Debbas points out two inherent limitations in maintaining the extant structure. First, whilst the respective processes guiding both the Court and the Council remain distinct, they both involve, at a minimum, the exercise of quasi-judicial findings in culminating towards a resolution, whilst also affecting the rights and legal positions of the concerned states.[735] Indeed, this

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[733] See, e.g., *Ibid*, at 307-308 (stating that "the Council has clearly been operating not within a political, but a legal framework. It has linked its determinations under Article 39 to a finding that a State (or non-State entity in some cases) has breached a fundamental international obligation. Such determinations have been followed by measures which have temporarily divested States and individuals of legal rights, with definitive legal effect and extensive legal consequences.").

[734] *Security Council Enforcement Action*, *supra* note 259, at 73. See also Gowlland-Debbas, *The Functions*, *supra* note 543, at 308; Gowlland-Debbas, *The Limits*, *supra* note 601 (positing that electing collectively authorized over unilateral measures constitutes an attempt to escape regression to unilateral decisions involving community interests).

[735] *Security Council Enforcement Action*, *supra* note 259, at 73 ("whilst judicial settlement of disputes over questions of responsibility and institutionalised countermeasures are two distinct processes, they are both premised on the same kind of quasi-judicial findings and the outcome in both cases affects the legal position of the States concerned.").

argument comes full circle with the preliminary remarks proferred at the beginning of this chapter, especially under Section A)3.b). In particular, it further reinforces the idea that, when the Council is involved in implementing state responsibility, that body of law provides an environment facilitating its political decision-making process. Yet, it does not seek to replace or supplant the political nature of the Council's decision-making, nor should the resolution of this debate inexorably pit the Council against the Court under the binary of 'political' versus 'judicial'. Rather, both organs are called upon to make political decisions – the main difference is that the Court does so entirely by way of a judicial process, which seeks to alleviate some of the more problematic political dimensions of international disputes. Whilst the Council's process is inherently more political and seeks to achieve a political consensus, as opposed to a politically-executable judicial determination, it does not preclude it from straddling quasi-judicial terrain in formulating some of its decisions. Whilst not entirely supportive of the previous proposition, Provost's characterization seems apposite in this light: "[i]t would be an exaggeration to say that the Security Council and General Assembly ignore international law completely in their decision-making; they both fulfil political functions within the international legal order rather than making legal decisions in accordance with international law."[736] Second, although collective measures might palliate the more intrinsic problems associated with unilateral implementation of responsibility, this very implementation is subject to potential judicial review by a judge or arbitrator, whilst Council action eludes such oversight.[737] Needless to say, this view has been sharply criticized by other prominent scholars,[738] rather judging that "[t]hese processes are not equivalent:

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[736] Provost, INTERNATIONAL HUMAN, *supra* note 207, at 310.

[737] Gowlland-Debbas, *Security Council Enforcement Action*, *supra* note 259, at 73 ("whilst collective responses are to be preferred to the more arbitrary, anarchic and possibly more destabilizing unilateral ones, the problem is that whilst the qualification of an act as a prior condition to the application of unilateral countermeasures by a State may eventually (though not necessarily) be opened to challenge by the judge or arbitrator, those taken by the Council in connection with its primary responsibility in peace maintenance are authoritative and binding and when linked to determinations under Article 39 not subject, *as such*, to judicial review.").

[738] For a critique of Gowlland-Debbas' work, see, e.g., Nolte, *The Limits*, *supra* note 545, at 322-324.

one is preliminary, the other is final".[739] In the same vein, Nolte calls into question Gowlland-Debbas' distinction between 'declaratory' determinations by the Council, on one hand, and 'constitutive' determinations by courts, on the other, and cautions that it "may incur the misunderstanding that both kinds of determinations can legally coexist even if they engender different conclusions."[740]

In light of these considerations, a compelling parallel might be found in the municipal law distinction between a judicial appeal and a pardon granted by the executive branch. More specifically, whilst the appellate court might rule one way on a given matter – having, at its disposal, specific and circumscribed means of enforcing its decision – the pardoning authority rather circumvents much of the legal tapestry surrounding the judicial process and, quite similarly to Security Council action, emits a binding determination. In particular, the pardon fails to operate within an established corpus of rules and procedures but rather hinges on what can be construed as a unilateral political decision, a reality that may be readily analogized to the Council's role in applying state responsibility. This is not to say, however, that the Council's decision-making is necessarily unilateral, as some degree of multilateral checks and balances pervades its structure and process in reaching a political consensus. Yet, similar checks and balances are also in place within executive branches of municipal legal orders. In addition, this is not to say that the pardoning authority's decision is entirely deprived of any legal consideration whatsoever. Quite to the contrary, and similarly to the role of a domestic appellate court, it may well be that the decision to pardon a certain individual seeks to address concerns of fundamental justice or restore favourable public perception of the legal system, thereby striving towards an equilibrium between broader social and policy objectives and compliance with the law.[741] Ultimately, both bodies may have radically opposed means and outcomes in supporting their thought processes. In sum, one is predominantly political whilst

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[739] *Ibid*, at 324.
[740] *Ibid*, at 324.
[741] Similar parallels falling within the Council's scope of activites can be drawn, e.g. "a power on the part of the Security Council to initiate or block a prosecution for aggression [which] constitutes a traditional executive function in which considerations of public order play a legitimate role." See *Ibid*, at 323.

the other is predominantly legal, at least from a procedural standpoint. Yet, both decision makers remain unsheltered from both political and legal considerations seeping into their respective processes from a substantive perspective, not unlike the Security Council in reconciling factual transgressions of international law with Chapter VII, or the ICJ in remedying equally factual breaches of international law within the broader international legal order.[742]

Before briefly turning to the more concrete case of Libya, it is important to register an initial conclusion on the debate at hand. It is apparent that discussion surrounding the role of the Council has been unnecessarily framed in terms of 'Security Council versus ICJ', along with an attempt to better articulate the political and judicial functions surrounding the UN's apparatus. In response to this posture, and whilst it has been acknowledged above that the Council can sometimes exert its functions in 'quasi-judicial' fashion,[743] it is suggested that the elucidation of the Council's role in implementing state responsibility might be better served by looking at the traditional alternative, namely the unilateral implementation of state responsibility by victim states, themselves. As one commentator notes, it should be recalled that modern state responsibility relies largely on the mechanisms of self-help: "[a]s a result of state reluctance to accept the jurisdiction of a neutral third party, the state injured by an internationally wrongful act often has no other choice but to rely on self-help measures to persuade the wrongdoing state to offer reparation."[744] Furthermore, whilst ILC Article 33 provides that the codified rules of state responsibility are "without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State", it is equally important to bear in mind that, traditionally, the implementation of state responsibility amounts to an executive function, which typically falls within

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[742] Although not fully supportive of this specific proposition, consider the thoughtful discussion on the nature and effect of legal characterizations by international political bodies in Provost, INTERNATIONAL HUMAN, *supra* note 207, at 304 and *seq*.

[743] See *supra* Section A)3.b).

[744] Provost, *Introduction*, *supra* note 77, at XV. See also, generally, Mary Ellen O'Connell, *Controlling Countermeasures*, in Ragazzi, INTERNATIONAL RESPONSIBILITY, *supra* note 50, at 49-62.

states' discretionary margin of power and competence.[745] In this light, it follows that "la valeur ajoutée du mécanisme institutionnel réside dans sa capacité d'assurer une action collective."[746]

Granted, the Council's function is primarily political but, then again, the very idea of implementing state responsibility, when left to inter-state devices, is inherently political in nature. Similarly to the Council's own decision-making, which operates against a legal backdrop that facilitates its political thought-process, an aggrieved state will ultimately also rely on political considerations when implementing responsibility against a wrongdoing state. In a recent book chapter, Karl Zemanek speaks to this idea. Whilst revisiting the spirit of Kelsen's view that international law exists as a coercive order,[747] with others finding it to be absent from the ILC's *Articles*,[748] he essentially argues that the existing scheme of state responsibility, coupled with its embedded notion of countermeasures, fosters disparate power dynamics between states but nonetheless remains the primary reason why states comply with their international obligations.[749] Whilst acknowledging that UN-mandated embargos seldom achieve their purported objectives, he further construes state responsibility as a particularly poignant tool

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[745] But *Cf.* Weiss, *Invoking State Responsibility*, *supra* note 518, at 809 (remarking that the articles "should have done more to recognize the expanded universe of participants in the international system entitled to invoke state responsibility"); Christian Tomuschat, *Individual Reparation Claims in Instances of Grave Human Rights Violations*: *The Position Under General International Law*, in Albrecht Randelzhofer and Christian Tomuschat (eds.), STATE RESPONSIBILITY AND THE INDIVIDUAL: REPARATION IN INSTANCES OF GRAVE VIOLATIONS OF HUMAN RIGHTS 1-25, 2-4 (1999).

[746] Villalpando, L'ÉMERGENCE DE LA COMMUNAUTÉ, *supra* note 78, at 426.

[747] See, e.g., Hans Kelsen, GENERAL THEORY OF LAW AND STATE 118-120 (1945); Hans Kelsen, GENERAL THEORY OF LAW AND STATE 330 (1961); Kelsen, PRINCIPLES, *supra* note 198, at 6 ("[t]he law is a normative order, and since legal norms provide for coercive acts as sanctions, the law is a coercive order."); Hans Kelsen, PRINCIPLES OF INTERNATIONAL LAW 22 (2nd Edition, 1966); Hans Kelsen, PRINCIPLES OF INTERNATIONAL LAW 3-39 (Revised 2nd Edition, 1967); Hans Kelsen, *Théorie générale du droit international public*, 84 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 1, 9-46 (1953-III). But *Cf.* Wolfgang Friedmann, *General Course on Public International Law*, 127 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 39-246, 65 (1969) ("[l]egal philosophers are far from united on the question whether enforceability is an essential element of law.").

[748] See, e.g., Julio Barboza, *Legal Injury*: *The Tip of the Iceberg in the Law of State Responsibility*, in Ragazzi, INTERNATIONAL RESPONSIBILITY, *supra* note 50, at 7, 10.

[749] Zemanek, *Does the Prospect*, *supra* note 50, at 125-134.

in inducing compliance, primarily because of the idea of *reciprocity*.[750] As a corollary, that reciprocity – translated here as a "shared interest in the maintenance of predictable patterns of conduct" – stabilizes asymmetrical power dynamics engendered by the scheme of responsibility and countermeasures.[751] It follows that the originally aggrieved state may actually incur more damage than the wrongdoing state, should the former take it upon itself to impose countermeasures on the latter and thereby disrupt a previously established pattern of predictable reciprocal international relations. From the perspective of international law and justice, generally, the deployment of state responsibility-derived countermeasures can bring about various abuses and inequities. This reality is further reinforced when such sanctions are contextualized within the framework of the international community, namely amongst a highly decentralized, global society that cannot impose itself as the warrantor of mandatory international justice.[752]

Political undertones undeniably pervade this exercise and, by this very fact, make it directly transposable to the study at hand: in deciding whether or not to follow up on an internationally wrongful act and impose countermeasures, a victim state will undoubtedly engage in a cost-benefits analysis entailing a careful evaluation of potential political disadvantages and tradeoffs related to all available courses of action. Presumably, there is no reason to discard this reasoning when analyzing Council decision-making. One should note, however, that, contrarily to Council resolutions (which are, arguably, insulated from such an exercise),

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[750] This type of argument has certainly been advanced before in a wide array of areas under international law. For a variety of views on the topic, see, e.g., Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in International Conflicts*, 93 AMERICAN JOURNAL OF INTERNATIONAL LAW 361, 369-370 (1999); Jeffrey L. Dunoff and Joel P. Trachtman, *The Law and Economics of Humanitarian Law Violations in Internal Conflict*, 93 AMERICAN JOURNAL OF INTERNATIONAL LAW 394, 403 (1999); Richard A. Falk, *What Future for the UN Charter System of War Prevention?*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 590, 594 (2003). For a thoughtful discussion on the concept of reciprocity in the fields of human rights and humanitarian law, see René Provost: INTERNATIONAL HUMAN, *supra* note 207, at 121–238; *Reciprocity in Human Rights and Humanitarian Law*, 65 BRITISH YEARBOOK OF INTERNATIONAL LAW 383-454 (1995).

[751] Zemanek, *Does the Prospect*, *supra* note 50, at 128-129.

[752] For support of these propositions, see, e.g., Constantin P. Economides: *La Responsabilité de l'Etat*, *supra* note 628, at 226; *L'Obligation de règlement pacifique des différends internationaux*: *Une norme fondamentale tenue à l'écart*, in Boutros Boutros-Ghali (ed.), AMICORUM DISCIPULORUMQUE LIBER 405 and *seq*. (Vol. I, 1998).

unilateral implementation of state responsibility by a state is potentially subject to judicial review. However, the strong likelihood of concerned states failing to agree to the jurisdiction of the ICJ or an arbitrator in settling their dispute strongly militates against excising the inherent political character of state responsibility from the inquiry. We must, therefore, work within the system as it currently stands: politics are sometimes inseparable from law, especially in any area involving international relations, such as the global fight against terrorism.[753] More importantly, addressing the question of state responsibility through the Council might also alleviate the more intrinsic concerns usually associated with the unilateral implementation of responsibility by states, such as the blind and naked pursuit of self-interests. With this in mind, one commentator notes that "la réaction institutionnalisée à l'illicite répond à des objectifs d'impartialité et d'efficacité qui permettraient de résoudre les problèmes inhérents à la mise en œuvre unilatérale de la responsabilité internationale par les Etats."[754] Whilst the purported goal of increasing the efficacy of responses to wrongful acts can perhaps be persuasively defended, it is more doubtful that institutionalizing the implementation of state responsibility would enhance impartiality in state responsibility-related decision-making. Rather, one of the overarching objectives of such reform would be to ensure some level of coordination of those responses with a view to providing an additional – or perhaps a single – check on unilateralism so as to strike a balance between redressing violations of international law and respecting the sovereign equality of states. Yet, as argued above in Section A)3.b), the Council would still be making political decisions in this setting but whilst simultaneously working within a legal environment, hence sometimes straddling quasi-judicial terrain.

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[753] This notion can be traced back to Cicero and Isocrates' teachings. See, e.g., Eileen A. Scallen, *Evidence Law As Pragmatic Legal Rhetoric*: *Reconnecting Legal Scholarship, Teaching and Ethics*, 21 QUINNIPIAC LAW REVIEW 813, 845 (2003). For a more modern application of this view, see, e.g., Sir Basil Markesinis, *Understanding American Law by Looking at It Through Foreign Eyes*: *Towards a Wider Theory for the Study and Use of Foreign Law*, 81 TULANE LAW REVIEW 123, 181 (2006) (arguing "that law, especially public law, and politics are inseparable"). For a thought-provoking essay on the relationship between politics and international law, see Martti Koskenniemi, *The Politics of International Law*, 1 EUROPEAN JOURNAL OF INTERNATIONAL LAW 4-32 (1990).

[754] Villalpando, L'ÉMERGENCE DE LA COMMUNAUTÉ, *supra* note 78, at 424.

This line of argument also ties into a second relevant consideration for the purposes of this dissertation, in that it highlights the need to rethink the traditional bilateral model of state responsibility implementation. As noted earlier, one of the most limitative problems of modern state responsibility can be readily encapsulated: this body of law responds largely to a unitary typology and rests upon a predominantly bilateral conception of legal relationships.[755] In the same book chapter, for instance, Zemanek seeks to redefine some tenets of Kelsen's theory by expounding that coercion is not an end in itself on the international plane, but rather facilitates enforcement of a primary obligation, thereby disabling the dominant inter-state model of enforcement and compliance: "[i]f one follows the theory that sanctions are necessarily a determinant element of law, it should not matter that such sanctions or, more precisely, the coercion behind it, does not come from another State but from a non-governmental source, as long as it forces the object State to fulfill a hitherto unfulfilled international obligation."[756]

Zemanek's approach also benefits when contrasted with Schwarzenberger's writings on the topic, which also partially align with Kelsen's theory, subject to a few variations. Whilst Schwarzenberger's inquiry does not focus on sanctions, *per se*, he does posit that consistently violated rules of international law do not amount to law, as such. However, he does not go as far as advocating that the very existence of international law is contingent on the corresponding existence of sanctions.[757] Therefore, according to these merged theories it would seem that the vital element resides in the actual enforcement of counterterrorism obligations to ensure their coherence in the international legal order, irrespective of the character, nature or origin of the enforcer. However, this argument is considerably offset by the fact that the debate over whether unenforced rules can

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[755] See *Ibid*, at 466-467. See also, generally, Nolte, *From Dionisio*, *supra* note 381.

[756] Zemanek, *Does the Prospect*, *supra* note 50, at 134. See also, *Ibid*, at 132 (inferring that the application of extant state responsibility rules to the traditional state-to-state model remains ill-suited in ensuring compliance with obligations). *Cf.* generally Simma, *From Bilateralism*, *supra* note 514, at 217-384.

[757] See, e.g., Georg Schwarzenberger: THE MISERY AND GRANDEUR OF INTERNATIONAL LAW (1963); A MANUAL OF INTERNATIONAL LAW (5th Edition, 1967); THE INDUCTIVE APPROACH TO INTERNATIONAL LAW (1962).

amount to international law no longer generates considerable polemic and is usually discarded by scholars.[758]

But coming back to the fact that these considerations seem to pave the way for possible Security Council involvement in applying the law of state responsibility, can the same be said about the character, nature or origin of the legal tools, i.e. regime or scheme, invoked to provide such enforcement? In other words, this hybrid theory does militate in favour of implicating the Council but, in the event that it is seised of an issue involving the violation of counterterrorism obligations, can/does it apply state responsibility as a matter of course? Or does it solely remain fettered by political considerations, thereby only invoking and applying international law arbitrarily or randomly? In the event that it applies or develops that body of law, does it do so only by way of incidental censure?[759] And in this event, does it really matter, for the purposes of the present inquiry, that the Council's application of state responsibility is idiosyncratic and incidental?

Given the fact that the very notion of unilaterally implementing state responsibility under traditional international law is inherently political, idiosyncratic and ultimately subject to the individual whims of the concerned states, the answer to this last question would appear to be manifestly negative. The main distinction here is that, as opposed to an individual state applying a self-interested and unilateral vision of the rules of state responsibility, the Council's action will be tantamount to the same exercise albeit in a collective setting, subject to all the inherent pitfalls and shortcomings of that system (of which corresponding concerns may also be identified in the case of unilateral, state-led implementation of state responsibility).[760] The debate, therefore, might be more fructuously couched as 'individual' versus 'collective' – and the legal mechanics applied as 'unilateral' versus 'institutionalized' – as both processes ostensibly

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[758] See, e.g., Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter and Duncan Snidal, *The Concept of Legalization*, 54 INTERNATIONAL ORGANIZATION 401, 402, 418 (2000).

[759] See Gaetano Arangio-Ruiz, *Article 39 of the ILC First-reading Draft Articles on State Responsibility*, 83 RIVISTA DI DIRITTO INTERNAZIONALE 747, 765 n.31 (2000).

[760] Not to mention that, unlike that of the Council, a state's self-characterization is necessarily provisional.

emanating from different enforcers might very well produce different results, but remain characterized by sometimes-arbitrary, almost invariably political and idiosyncratic legal reasoning.

At any rate, it becomes clear from the foregoing that, as certain areas of international law shift away from a state-centric conception towards an increasingly transnational paradigm, the idea of international responsibility must be reexamined in light of recent events and trends. This problem is further compounded by the contemporaneous emergence of transnational violence and human rights abuse, and brings about specific implications for *erga omnes* obligations.[761] These considerations will become pivotal in subsequent sections. In the interim, it is fair to infer that, despite its largely political function, the Security Council's action has some incidence (at times direct, at times more diffused) on the shaping and application of state responsibility law.

This, however, does not satisfactorily resolve the question of whether the Council can, and does, implement state responsibility. Even if one accepts this premise, much of the confusion stems from the manner in which the Council applies the mechanics of state responsibility. For instance, it has certainly not applied the concept of attribution uniformly or consistently.[762] Although highly

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[761] For the moment, suffice it to mention that the violation of *erga omnes* obligations signify that "any State whether or not directly injured, would have the right to take countermeasures, including reprisals otherwise illegal." See Tullio Scovazzi, *Some Remarks on International Responsibility in the Field of Environmental Protection*, in Ragazzi, INTERNATIONAL RESPONSIBILITY, *supra* note 50, at 209, 218 n.32. For general support of this proposition, see, e.g., Maurizio Ragazzi, THE CONCEPT OF INTERNATIONAL OBLIGATIONS *ERGA OMNES* (1997); Oscar Schachter, INTERNATIONAL LAW IN THEORY AND PRACTICE 381 (1991). In bolstering his view that international law exists as a coercive order, Kelsen believed that armed reprisals, too, whilst proscribed by the *UN Charter*, were not theoretically excluded. See *Théorie générale du droit*, *supra* note 747, at 33 and 49. See also Paul Guggenheim, TRAITÉ DE DROIT INTERNATIONAL PUBLIC: AVEC MENTION DE LA PRATIQUE INTERNATIONALE ET SUISSE 92 (1967). In a broader sense, it should be noted that Kelsen essentially equated the concept of 'sanction' with 'reprisal'. See, e.g., *Théorie générale du droit*, *supra* note 747, at 12-15 and 18-19. For analogous applications or defintions falling outside of the 'théorie de la contrainte', see, e.g., Josef Kunz, *Sanctions in International Law*, 54 AMERICAN JOURNAL OF INTERNATIONAL LAW 324-347 (1960); Hans Morgenthau, *Théorie des sanctions internationales*, 16 REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE 478-483 (1935).

[762] See, e.g., Gowlland-Debbas, *Security Council Enforcement Action*, *supra* note 259, at 67 (invoking the example of Rhodesia and expounding that the "resolutions therefore appeared to hold the European minority regime responsible as a non-State collectivity for violations of the right of self-determination, whilst at the same time, the United Kingdom as the administering power, was held to have a parallel responsibility for ultimate return to legality").

relevant for present purposes, the case of Libya is a puzzling example of the Council's confused application of attribution and stands in sharp contrast with one author's view that "the Security Council plays a key role in grey areas where the applicability of principles of attribution is unclear."[763] Whilst "alleged Libyan responsibility for international terrorism" was "brought within the ambit of the Charter, in Resolution 748(1992), by being linked to Article 2(4) of the Charter",[764] it remains unclear how, exactly, the Council imputed responsibility to Libya, or whether it circumvented the whole process of attribution altogether. Before venturing upon a more focused analysis, it is useful to briefly recall the background facts of this scenario, which concurrently made its way before the ICJ in the *Lockerbie* case.[765]

In this controversial case, two Libyan nationals were accused of participating in the bombing of Pan Am flight 103, in which a number of American nationals were killed.[766] Following a U.S. Grand Jury indictment, the Libyan government categorically refused to extradite its nationals, as it argued that the U.S. was trying to curtail its obligations under the *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*.[767] According to Libya, the U.S. seemed more interested in recovering the culprits and preventing Libya from establishing jurisdiction than in fulfilling their treaty obligations.[768] Indeed, this case raised an interesting tension between two crucial concepts that can certainly have a direct impact on the political dimensions of

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[763] Nolkaemper, *Attribution*, *supra* note 248, at 139.
[764] Gowlland-Debbas, *Security Council Enforcement Action*, *supra* note 259, at 66.
[765] See *Lockerbie*, *supra* note 537, at 3 (detailing the events surrounding the bombing of a commercial airline flight over Scotland). For a recent study of certain aspects of the relationship between the *Lockerbie* scenario and state responsibility, see Sadri Bentchikou, *Les Modes de réparation du préjudice subi résultant d'un acte de terrorisme étatique*: *Le cas Lockerbie*, in Koufa, THESAURUS ACROASIUM, *supra* note 202, at 313-326.
[766] *Lockerbie*, *supra* note 537, at 4 (explaining that the primary issue of in the case was the application of the *Montreal Convention*).
[767] *Ibid*, at 5 (listing some of the provisions of the *Montreal Convention*, which includes mechanisms allowing states to prosecute their own nationals for crimes committed against civil aviation).
[768] *Ibid*, at 11 (noting that the United States joined with the United Kingdom in strongly deploring the Libyan government for not taking effective measures to prevent terrorism).

state responsibility, as they do on international justice, more broadly: trust and impunity.[769]

From the Libyan perspective, it was uncertain what treatment the U.S. would afford the suspected terrorists.[770] Consequently, Libyan leader Muammar el-Qaddafi did not trust the U.S. to prosecute nationals from his country.[771] He clearly did not believe that the judiciary of the U.S. or the U.K. could afford the suspected terrorists an impartial hearing.[772] In addition to red-flagging significant due process concerns, Libya was of the view that the accused were actually considered guilty until proven innocent, a reality standing in sharp contradiction with the usual presumption of innocence accorded all charged individuals in domestic criminal law.[773] As a result, Libya harboured doubts that the U.S. would grant a fair trial to these individuals.[774] From the American perspective, impunity remained the dominant concern.[775] Should the suspected terrorists dodge extradition to the U.S., there would be a significant risk that those individuals would face national sanctions disproportionately minimal to the crimes committed or, worse yet, no punishment at all.[776]

Amidst this heated political situation, the Security Council issued Resolution 748,[777] which, *inter alia*, instituted specific measures against Libya and, more importantly, laid out the following in the preambular:

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[769] Proulx, *Rethinking the Jurisdiction*, *supra* note 31, at 1015-1018.

[770] *Lockerbie*, *supra* note 537, at 13 (commenting on the UN Security Council resolution calling for Libya to cease participation with all forms of terrorist activity).

[771] *Ibid*, at at 5 (noting that there is no extradition treaty between the United Kingdom and Libya, and that Libyan law prohibits the extradition of Libyan nationals).

[772] See, e.g., Eric Zubel, *The Lockerbie Controversy*: *Tension Between the International Court of Justice and the Security Council*, 5 ANNUAL SURVEY OF INTERNATIONAL AND COMPARATIVE LAW 259, 261 (1999) (noting the huge outcry against this particular bombing, and suggesting that it is not surprising that impartiality might come into question).

[773] See, e.g., *Ibid* (quoting George J. Church in TIME magazine, who posed the question, "how can [Qaddafi] and his regime be punished?", which implies that they were presumed guilty).

[774] *Ibid*, at 265 (reiterating Libya's reservations in dealing with the United States after it bombed Libya's capital city, military installations, and airports following the Berlin nightclub bombing).

[775] See *Lockerbie*, *supra* note 537, at 10 (detailing that the United States joined the United Kingdom in a joint declaration demanding Libya hand over the men suspected of bombing Pan Am Flight 103).

[776] See, e.g., Zubel, *The Lockerbie Controversy*, *supra* note 772, at 260 (commenting on the outcry from the Western press calling for the accused to be brought before U.S. and Scottish courts).

[777] See Security Council Resolution 748 of 31 March 1992.

> *Reaffirming* that, in accordance with the principle in Article 2, paragraph 4, of the Charter of the United Nations, every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when such acts involve a threat or use of force,
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> *Determining* in this context that the failure by the Libyan Government to demonstrate, by concrete actions its renunciation of terrorism and in particular its continued failure to respond fully and effectively to the requests in resolution 731 (1992), constitute a threat to international peace and security,[778]

Acting under Chapter VII of the *UN Charter*, the Security Council supplemented its resolution with the following legal prescriptions:

> 1. *Decides* that the Libyan Government must now comply without any further delay with paragraph 3 of resolution 731 (1992) regarding the requests addressed to the Libyan authorities by France, the United Kingdom of Great Britain and Northern Ireland, and the United States of America,[779]
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> 2. *Decides also* that the Libyan Government must commit itself definitely to cease all forms of terrorist action and all assistance to terrorist groups and that it must promptly, by concrete actions, demonstrate its renunciation of terrorism;[780]

The main confusion surrounding this so-called application of state responsibility by the Council lies in its reliance on documents submitted by three of its members (U.S., France and the U.K.), without providing any clear rationale for doing so. In one sweeping, indiscriminate stroke of the pen, the Council appeared to be

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[778] *Ibid*, in the preamble.

[779] These documents are found in S/23306, S/23308 and S/23309. As Gowlland-Debbas underscores, "[t]hese documents emanating from the governments of France, the United States and the United Kingdom, respectively, request Libya, *inter alia*, to accept responsibility for the actions of what are designated as "Libyan officials", i.e. agents of the Libyan State, and require it to surrender these persons and to pay appropriate compensation, thereby pre-empting conclusions relating to responsibility." See *Security Council Enforcement Action*, *supra* note 259, at 68.

[780] Security Council Resolution 748 of 31 March 1992, at para. 1-2.

endorsing, at least impliedly, the contentions put forth by those members.[781] As a corollary, the Council also short-circuited the usual exercises of sorting out legal responsibility and engaging attribution, and rather seemed to internalize extraneous findings of responsibility without providing any correspondingly habilitating legal exegesis. From this approach, it would seem plausible that the Council departed from politically and state-driven unilateral determinations of individual criminal responsibility, and ultimately extrapolated these findings within the realm of state responsibility. As Gowlland-Debbas notes, "the Council appears to make the leap from individual to State responsibility for international terrorism (which, in Resolution 748 of 1992, is brought within the ambit of the Charter by being linked to Article 2(4) relating to the prohibition of the threat or use of force), through a simple reference to a set of document numbers to which Libya is required to give a 'full and effective response.'"[782]

Aside from the clearly nebulous application of state responsibility concepts, this case also exhibited profound and fundamental legal discrepancies, as the Council's decision appeared predicated on the assumption that both individuals were actually guilty of the crimes charged therein.[783] Although Gowlland-Debbas resolves this incongruity by positing that "[i]t remains within the framework of State responsibility, leaving the member States concerned to adjudge the issue of individual criminal responsibility",[784] a trenchant critique of this line of reasoning emerges from the Dissenting Opinion of Judge Ajibola in *Lockerbie*. Indeed, he proclaimed that, "[*a*] *fortiori* the allegation that the State of Libya is involved in terrorism cannot hold legally until such a time as judgment is

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[781] Gowlland-Debbas, *Security Council Enforcement Action*, *supra* note 259, at 68 ("The Council, in referring to these documents without further specification, therefore appears to make its own the findings made by individual States.").

[782] Gowlland-Debbas, *The Functions*, *supra* note 543, at 290. She further adds, in *Ibid*, that "[f]rom this may be inferred that the Council is implicitly endorsing the proposition of two of its permanent members who had imputed the actions of two Libyan suspects to Libya, in requiring Libya to accept responsibility for the actions of what are designated as 'Libyan officials', to surrender these persons and pay appropriate compensation." See also *supra* note 764 and accompanying text.

[783] See, e.g., Gowlland Gowlland-Debbas, *The Functions*, *supra* note 543, at 290 (noting that "any accustations of Libyan responsibility would have to presume the guilt of two individuals who had not yet been brought to trial").

[784] *Security Council Enforcement Action*, *supra* note 259, at 68.

given against the two Libyans and it is proved that they were acting for and on behalf of the State of Libya."[785] In response to this criticism, and in an attempt to dissipate the commonly held view that the Council's decision was premised on an assumption of guilt, the U.S. presented two major arguments: i) the Council was not actually rendering such a legal judgment, but was rather operating within a broader framework; and ii) at any rate, declarations pertaining to Libya's responsibility made publicly by the U.S. would remain inadmissible in a judicial setting.[786]

Regardless of one's interpretation of the Council's treatment of the facts involved in the *Lockerbie* situation, it is instructive on two grounds. On one hand, it confirms that the Council can wield some influence and input into the law of state responsibility, although the nature and extent of that contribution still remains unclear. The *Lockerbie* example certainly fails to provide any meaningful or dispositive insight into this question. On the other hand, this case remains a microcosmic encapsulation of a generalized confusion, or lack of unified interpretation, within the Council when implementing state responsibility. As demonstrated above in Chapter 2, a strong majority of the Council's (purportedly) law-creating incursions in state responsibility remain confused or, at least, fact-specific, especially in cases involving recourse to self-defence. The absence of any reference to generally accepted principles of state responsibility from its decision-making or organizing principles under Chapter VII also militates against designating the Council as a particularly apt organ in implementing state responsibility across the board. This is not to say, however, that its practice is not, at times, extremely illuminating or helpful in further delineating the relevant body of law. With an aim of further exploring this phenomenon, the dissertation now ventures upon some final considerations in this debate.

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[785] *Lockerbie*, *supra* note 537, at 86 and 191. See also the Dissenting Opinion of Judge el-Kosheri in *Ibid*, at 97 and 202; Tomuschat, *The Lockerbie Case*, *supra* note 725, at 43; Mark Weller, *The Lockerbie Case*: *A Premature End to the 'New World Order'?*, 4 AFRICAN JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 302-324 (1992).

[786] See *Lockerbie Case (Preliminary Objections)*, Public Sitting, 15 October 1997, CR 97/19, at 18-20.

### 4. Elucidating the Relationship: Identifying Commonalities

Up until this point, it has been thoroughly argued that there is, and can be, a rapprochement between the implementation of state responsibility and traditional Security Council functions in some instances. This section will briefly query whether this parallel can yield interesting payoffs for the global fight against terrorism, while keeping in mind that certain inherent limitations preclude the Council from making more significant inroads into the field of state responsibility.

#### a) Expanding Chapter VII to Include State Responsibility

The idea that the purview of Chapter VII powers can sometimes be widened, so as to include a range of new scenarios involving determinations by the Council of responsibility, attribution of wrongful conduct to states, and the imposition of countermeasures/sanctions, has pervaded previous sections. This line of argument carries distinct resonance for the possible implementation of state responsibility by the Council in cases where governments fail to prevent terrorist attacks emanating from their territory. The purpose here is not to dwell on this argument, but simply to briefly remind the reader of its importance in the debate at hand.

In a recent book chapter dealing with state responsibility and terrorism, Pierre-Marie Dupuy convincingly argues that terrorist attacks, such as those perpetrated on 9/11, effectively fall within the scope of Chapter VII.[787] Building on his prior suggestion that applicable legal standards pertaining to subjects of international law should be expanded in light of the ICJ's Advisory Opinion on *Certain Reparations (1949)*,[788] he further queries how the Council could potentially address this rapprochement under Chapter VII. From the perspective of transnational activity, Dupuy sees no difficulty in extending the extant rules of state responsibility through UN mechanisms. Embracing both the direct and

[787] Dupuy, *State Sponsors*, *supra* note 29, at 7-8.

[788] See, e.g., *L'unité de l'ordre juridique international*: *Cours général de droit international public*, 297 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 9-489, 106-118 (2003) (arguing that these aspects should be reviewed from *functional* and *teleological* standpoints). See also *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, [1949] ICJ REPORTS 174 [hereinafter *Reparation for Injuries Advisory Opinion*].

indirect responsibility paradigms explored in Chapter 2, he infers that state responsibility in these cases "can be triggered at the occasion of the commission of acts spreading terror throughout a civilian population for political purposes, either on the basis of commonly accepted principles of attribution (because the act was committed by State agents) or because the State may be harbouring terrorist groups."[789] This line of reasoning reinforces an overarching conclusion that has animated much of the discussion above: the current structure of state responsibility may actually fit under the scheme of Chapter VII *Charter* powers in limited circumstances, albeit with a few adjustments.

A second general conclusion may be drawn with regard to counterterrorism, particularly, and the resolutions of the Council in this field. As pointed out earlier, although there is an inherent compatibility between state responsibility for the failure to prevent terrorist attacks and the maintenance of international peace and security under Chapter VII in several cases, a rapprochement between both areas is not achieved without some innovative exercise in legal interpretation and application. In other words, whilst not necessarily co-extensive with the objectives of Chapter VII upon first glance, certain scenarios brought before the Council patently fall within its mandate, once subsumed under the heading of 'international peace and security'. As one commentator highlights, "whilst not all of the obligations infringed which are referred to in Council resolutions may appear to fall within the scope of the Charter, *by being linked* to the fundamental norms of self-determination, human rights or the prohibition of the use of force*, they become attached to Charter principles*."[790] The aforementioned rapprochement, therefore, is better actuated through the logical incorporation of a given case under the principles enshrined in the *UN Charter*. This argument becomes particularly compelling when considering recent counterterrorism efforts, especially when linked to use of force principles, as terrorist attacks frequently amount to threats to international peace

[789] Dupuy, *State Sponsors*, *supra* note 29, at 8.
[790] Gowlland-Debbas, *Security Council Enforcement Action*, *supra* note 259, at 66. [Emphasis added.]

and security.[791] Interestingly, whilst on the topic of terrorism and writing more specifically about the *Lockerbie* situation, Marc Perrin de Brichambaut observes that "the Security Council *has been careful*, in all its resolutions concerning *terrorism*, *to assert a link with the preservation of international peace and security*."[792]

This, again, underscores the inherent compatibility between the objectives underlying the fight against terrorism, the corresponding (and potential) responsibility of sanctuary states, and the broader objectives of the *UN Charter* in certain circumstances. How, exactly, these elements can be brought together, or in which manner can the Council actually implement responsibility, remains to be clarified. Before suggesting a solution for the strict application of counterterrorism, the next section will briefly canvass and acknowledge other aspects restraining the argument that the Council can serve as an intermediary through which state responsibility can be implemented.

**b) The Security Council's Power in Relation to Secondary Rules**

In recent scholarship, it has been argued that the Council's powers cannot be analyzed through the lens of state responsibility repertoire for two reasons: i) their respective conceptual scheme does not align with the corpus of secondary rules of responsibility; and ii) their overarching objective does not necessarily translate into the implementation and rectification of the consequences of unlawful activity.[793] If one were to accept this argument without quarrel, it would obviously follow that the Council could not be construed as an organ capable of implementing state responsibility.

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[791] It should be noted that some scholars have attempted to analyze the reaction to 9/11 through the lens of use of force principles, rather than through the ILC's vision of state responsibility. See, e.g., Beard, *America's New*, *supra* note 73, at 578-583; Barry Feinstein, *Operation Enduring Freedom*: *Legal Dimensions of an Infinitely Just Operation*, 11 JOURNAL OF TRANSNATIONAL LAW AND POLICY 201, 271, 279 (2002). But *Cf.* Marcelo Kohen, *The Use of Force by the United States After the End of the Cold War and Its Impact on International Law*, in Michael Byers and Georg Nolte (eds.), UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 197-231, 207 (2003). For a discussion of these theories, see Becker, TERRORISM AND THE STATE, *supra* note 2, at 227-229.

[792] Brichambaut, *The Role*, *supra* note 599, at 271. [Emphasis added.]

[793] See, e.g., Milanović, *State Responsibility*, *supra* note 78, at 603-604 (framing the argument in the context of genocide prevention).

Speaking to the application of Council powers, Giorgio Gaja points out that the bulk of scenarios resulting from Article 39 of the *UN Charter* (as defined by the Council itself), along with the violation of *jus cogens* obligations as regimented by secondary rules of state responsibility, appear to be significantly disjointed.[794] This conceptual cleavage foreshadows the possibility that such breaches may not attract the designation of 'threats to international peace' by the Security Council,[795] whilst this determination may, in such circumstances, hinge on objective (i.e. it is foreseeable that a military invasion could be repelled via recourse to self-defence prior to Council intervention) or political motivations (i.e. it is plausible that certain members within the Council would reject such designation). If one accepts a rather formalistic and rigid application of the ILC's codified rules of responsibility, it is probable that the scope of the heading 'threat to international peace' could preclude factual scenarios failing to meet the corresponding standards of attribution vis-à-vis the sanctuary state, which undoubtedly includes acts perpetrated by entities falling outside of the control of said state.

This sweeping postulate would seem, at first, to exclude the institutionalized implementation of a model of indirect responsibility for the failure to prevent terrorist attacks, but its validity will be challenged in subsequent sections. In fact, whilst certain threats against international peace and security can stem from acts carried out by rogue or rebel groups that are non-imputable to the host-states in the traditional sense – such as was the case in the situations prevalent in Somalia or Angola – recent academic advances have called for the casting of a "wider net by allowing heretofore non-attributable private acts to be blamed on states."[796] This situation is obviously exacerbated when the state in which the terrorist-like events take place lacks any central authority, fails to wield any sort of effective control over the territory in question, or falls under the rubric of what some have termed 'failed states', a phenomenon that will be canvassed subsequently in Chapter 4, Section B)6.b). A case in point would undoubtedly be

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[794] *Réflexions sur le rôle*, *supra* 538, at 306-307.
[795] See, e.g., *Fourth Report* – Crawford, *supra* note 500, at para. 73.
[796] Nissel, *Tal Becker, Terrorism and the State*, *supra* note 21, at 248.

that of Somalia, where "the collapse of state authority means that there is no functioning government to fulfill an essential condition of sovereignty, on the one hand, and that the violence, instability, and disorder can spill over from that failed state to others, on the other."[797] As a result, transnational terrorist networks are actively pursuing the establishment of safe havens within Somalia's borders, which poses intractable legal and conceptual problems for the purposes of applying state responsibility, including in institutionalized settings.[798]

Keeping in mind the spirit of the above criticisms, it must be recalled that the objectives of Council powers exclusively aim at maintaining or restoring international peace and security. In response, it should be noted, however, that certain scholars construe Council implementation of responsibility in cases involving violations of *erga omnes* obligations as falling outside of the framework of the *UN Charter* and, more precisely, away from the notion of maintaining or restoring international peace and security. In other words, when the Council counteracts such breaches, it draws its powers and jurisdiction from general international law and is, in turn, vested with those functions by states under international law.[799]

Although it has been demonstrated throughout this chapter that the Council's function has been construed rather largely, namely by extending its operations considerably above the 'police' role traditionally associated with it, a rapprochement between state responsibility and the Council's powers is not necessarily complete by sole reference to the maintenance and/or return to legality, or by the implementation of responsibility through UN mechanisms. In this light and with the purpose of maintaining international peace, the Council may intervene in situations where no violation of international law can be

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[797] Ramesh Thakur, *Humanitarian Intervention*, in Thomas G. Weiss and Sam Daws (eds.), THE OXFORD HANDBOOK ON THE UNITED NATIONS 387-403, 390 (2007).

[798] See, e.g., Robert D. Sloane, *More Than What Courts Do*: *Jurisprudence, Decision, and Dignity – In Brief Encounters and Global Affairs*, 34 YALE JOURNAL OF INTERNATIONAL LAW 517, 523 (2009).

[799] See, e.g., Paolo Picone, *Interventi delle Nazioni Unite e obblighi erga omnes*, in Paolo Picone (ed.), INTERVENTI DELLE NAZIONI UNITE E DIRITTO INTERNAZIONALE 517-578, 554-560 (1995). See also, generally, Summary of Remarks by Annalisa Ciampi in *The Academic as Cosmopolite*: *Legal Visions of International Governance in the Twentieth Century*, 93 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 325, 328-329 (1999).

ascertained, or, alternatively, in a preventive fashion (i.e. prior to the emergence of a given violation). As Brunno Simma expounds, violations of international law *may* "amount to, lead to, contribute to, or [be] accompanied by" a threat to the peace,[800] but this interrelationship is, by no means, mandatory or always fulfilled by the circumstances of a given scenario. Conversely, when confronted with a specific internationally wrongful act, the Council may determine that its quest for the maintenance of international peace and security calls for the imposition of altogether different measures than those enshrined in state responsibility instruments (thereby circumventing the application of secondary rules altogether in favour of amicable dispute resolution), or that a given situation warrants no action whatsoever from the Council.[801]

More importantly, considerable academic resistance remains to the effect that the Council should not rule or pronounce on issues of state responsibility "except by way of incidental censure".[802] In fact, Judge Schwebel's Dissenting Opinion in the *Nicaragua* case attracts attention to the fact that the Council "may take legal considerations into account, but, unlike a court, it is not bound to apply them", and further reinforces the idea that political considerations often override legal sensibilities in the context of Council decision-making.[803] Yet, whilst acknowledging that the Council "n'a jamais pensé qu'il pourrait être ainsi honoré"[804] given that Chapter VII of the *UN Charter* "n'a pas été écrit pour donner au Conseil de Sécurité une compétence dans n'importe quelle matière",[805] some authors deliver a more nuanced view of this state of affairs, rather opining that every time the Council "fait découler la qualification d'un constat d'une atteinte à la légalité, il franchit le fragile rubicon vers la mise en cause d'une

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[800] Simma, *Does the UN Charter*, *supra* note 500, at 142.
[801] See, e.g., Klein, *Responsibility*, *supra* note 501, at 1248-1249.
[802] Arangio-Ruiz, *Article 39 of the ILC*, *supra* note 759, at 765 n.31.
[803] Dissenting Opinion of Judge Schwebel in *Nicaragua*, *supra* note 119, at 290, para. 60. See also Kurt Herndl, *Reflections on the Role, Functions and Procedures of the Security Council of the United Nations*, 206 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 289, 385 (1987-VI). On the pervasive political considerations characterizing the Council's decision-making, see Gowlland-Debbas, *Security Council Enforcement Action*, *supra* note 259, at 71.
[804] Ambassador Leprette, former Member of the Security Council, in Société Francaise pour le Droit International, COLLOQUE DE RENNES : LE CHAPITRE VII DE LA CHARTE DES NATIONS UNIES 114 (1995).
[805] Gaja, *Réflexions sur le rôle*, *supra* note 538, at 301.

responsabilité et un système de sanctions."[806] In sharp contrast with the views expressed above aiming to eradicate all Council involvement in state responsibility, detractors such as Kirgis rather believe that such law-making incursions fall well within the ambit of the Council's roles and powers.[807] In fact, José Alvarez most poignantly sets the stage for the arguments to come and summarises Kirgis' views in the following terms: "some Council "lawmaking" is inescapable. Making law, both in interpreting the Charter and in developing the doctrine of state responsibility, has always been part of the Council's job."[808]

Although not dispositive of the issue, these concerns do weigh considerably in the balance when attempting to identify and better circumscribe the role of secondary rules with regard to the potential implementation of state responsibility by the Security Council. The invocation of secondary norms will also, once again, play a central role when speaking specifically to the particularities of a possible rapprochement between the law of state responsibility and Council functions in the context of counterterrorism.

**c) The Rights of States Vis-à-vis Implementation Notwithstanding Security Council Involvement**

Regardless of the eventual resolution of whether the habitual functions of the Council also encompass the implementation of state responsibility, it is clear that states primarily retain all privileges thereunto appertaining, as dictated by the secondary rules of customary international law. As a corollary, it follows that a proper organizing principle would be articulated along the lines of "les fonctions de maintien de la paix internationale et de mise en oeuvre de la responsabilité doivent être tenues distinctes."[809]

Consequently, it seems unlikely that the ordinary, unilateral implementation of state responsibility by states could be disabled by Council

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[806] Marc Sorel, *L'élargissement de la notion de menace contre la paix*, in COLLOQUE DE RENNES : LE CHAPITRE VII DE LA CHARTE DES NATIONS UNIES 3-57, 52 (1995). See also Weckel, *Le chapitre VII*, *supra* note 608, at 170 (arguing that the unlawful nature of a given international act "sera donc *déterminant* dans l'appréciation de la situation à laquelle se livre le Conseil de Sécurité.").

[807] See, e.g., Frederic L. Kirgis, Jr., *The Security Council's First Fifty Years*, 89 AMERICAN JOURNAL OF INTERNATIONAL LAW 506 (1995).

[808] Alvarez, *Judging the Security Council*, *supra* note 544, at 22. [Emphasis added.]

[809] Villalpando, L'EMERGENCE DE LA COMMUNAUTE, *supra* note 78, at 448.

action, especially given the importance of maintaining peace in contemporary inter-state relations.[810] Indeed, the UN's existing and particularly binding scheme of collective security, supplemented by the pre-eminence of *Charter* obligations over conventional obligations contracted by states, and by its general prohibition on recourse to force in international relations, adequately consecrate the primacy of maintaining or restoring peace and security. Thus, it seems unnecessary, and potentially undesirable, to set aside a well-calibrated model of state responsibility in order to pave the way for a mechanism (i.e. the Council) that, on its face, appears ill-suited in protecting certain aspects of collective interests across the board, as embodied in the schemes of *erga omnes* and *jus cogens* obligations.[811]

However, general principles of state responsibility also indicate that, in any given case, the unilateral reaction by states towards the implementation of responsibility must also adopt a holistic approach in taking stock of all surrounding circumstances resulting from an internationally wrongful act.[812] It follows that states' actions and claims will be directly impacted, or influenced, by Council intervention under the aegis of Chapter VII, whenever such incursion would prove pertinent for the application of secondary rules.[813]

Therefore, the determination by the Council of the breach of an international obligation, along with its legal consequences (e.g. the corresponding obligation of reparation), may have an incidence on the victim state's appraisal of the prospect of invoking responsibility against the wrongful state. In this regard, scholarly accounts underscore the different consequences flowing from a recommendation or a decision emanating from the Council under Article 39 of the *UN Charter*. According to some, the Council's recommendation carries, with it, a

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[810] See, e.g., Wellens, *The UN Security*, *supra* note 513, at 48-50.

[811] See, e.g., Czaplinski, *Concepts of Jus Cogens*, *supra* note 595, at 93-94; Dupuy, *The Constitutional Dimension*, *supra* note 543, at 15-16; Pellet, *Le nouveau projet de la CDI*, *supra* note 683.

[812] See, generally, Weiss, *Invoking State Responsibility*, *supra* note 518. This holistic approach has also proved challenging in specific issue-areas, such as extraordinary rendition. See, e.g., Jillian Button, *Spirited Away (Into a Legal Black Hole?)*: *The Challenge of Invoking State Responsibility for Extraordinary Rendition*, 19 FLORIDA JOURNAL OF INTERNATIONAL LAW 531 (2007).

[813] It is interesting to contrast this position with other scholarly views. See, *inter alia*, Arangio-Ruiz, *On the Security¸ supra* note 677, at 626; Klein, *Responsibility*, *supra* note 501, at 1254.

presumption of legality with regard to any measure(s) undertaken by states in conformity with that recommendation.[814] For others, this type of activity would merely constitute a warning, although states could not subsequently deny the existence of the legal or factual situation determined therein.[815] It has also been advanced that the determination of the existence of a situation anticipated in the scheme of Article 39, in the context of a Council decision, would itself amount to a binding decision on states pursuant to Article 25 of the *UN Charter*.[816]

Whilst academic accounts might be somewhat divided on this issue, it is probably fair to conclude that, in their requests to wrongful states, unilaterally implementing states will also have to take into account any concurrent requests already put forth by the Council (e.g. requests of cessation), along with any *ad hoc* mechanisms instituted by the Council in order to assess the harm to be redressed, for example. Similarly, in determining the legality of states' requests when unilaterally implementing responsibility (including requests for reparation and assurances of non-repetition), considerable deference will have to be given, *inter alia*, to the requests already formulated by the Council. Furthermore, it may well be that pending Council action precludes the application of state responsibility law in some cases.[817]

It follows that Council action will significantly govern certain aspects of this process, and act as a sort of *toile de fond* for the unilateral implementation of responsibility by individual states in some circumstances. For instance, at the stage of canvassing and evaluating available countermeasures so as to compel the wrongful state to fulfill its (primary) international obligation(s), the implementing state will have to take stock of applicable and relevant Council resolutions.[818] On

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[814] See, e.g., Jochen Frowein, *Reactions by Not Directly Affected States to Breaches of Public International Law*, 248 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 347-437, 382-383 (1994-IV).

[815] See, e.g., De Hoogh, OBLIGATIONS *ERGA OMNES*, *supra* note 499, at 125.

[816] See, e.g., Simma, *Does the UN Charter*, *supra* note 500, at 138-139. In the same vein, see also Gowlland-Debbas, *The Functions*, *supra* note 543, at 293. Villalpando resolves this debate by acknowledging that unilateral implementation of state responsibility remains distinct from Chapter VII powers, and by ultimately connecting states' subjective appreciation of Security Council determinations with the application of secondary rules of responsibility. See Villalpando, L'ÉMERGENCE DE LA COMMUNAUTÉ, *supra* note 78, at 449 n.1548.

[817] See, e.g., Skordas, *Hegemonic Intervention*, *supra* note 139, at 449.

[818] See Proulx, *International Responsibility*, *supra* note 384, at 587 and authorities cited therein.

the one hand, involved states might be called upon to comply with certain obligations or institute certain measures set out by the Council in those resolutions.[819] On the other hand, and in light of available courses of action within the UN framework, it remains clear that future unilateral countermeasures will have to be measured against the well-established, but poorly defined,[820] principles of necessity, proportionality[821] and cooperation.[822]

Based on the foregoing considerations, it remains difficult to assert that the Council plays an active role in implementing state responsibility in all scenarios. In certain clearer cases, it ostensibly uses language and reasoning reminiscent of state responsibility repertoire. Certitude that the Council grounds its findings solely on the arsenal of custom and instrument-driven responsibility across the board, however, does not emerge so clearly from the same conclusion. In all likelihood and as suggested above, the sporadic and inconsistent implementation of state responsibility by the Council might be better explained by the existence of conceptual and practical overlaps between that body of law and Chapter VII powers. As will be argued below, this overlap comes into sharp relief when reviewing Council action in the field of counterterrorism.

Conversely, this is not to say that state responsibility considerations cannot inform Council decision-making and vice-versa. In fact, the arguments set forth above attempted to demonstrate that these two facets are far from insulated from each other, and a concrete manifestation of this interrelationship, predominantly

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[819] See, e.g., Arangio-Ruiz, *On the Security¸ supra* note 677, at 626.

[820] Karl Zemanek's searing indictment of the ILC's codification of Article 51 on the concept of proportionality of countermeasures comes to mind. See, e.g, Zemanek, *Does the Prospect*, *supra* note 50, at 127-128 (taking issue with the formulation of Article 51 of the *Articles* and with the principle commonly extracted from the now notorious *Naulilaa Award* – and essentially expounding that this amounts to an empty formula unless a court or tribunal weighs in on the matter). Along similar lines, consider also Cançado Trindade, *Complementarity*, *supra* note 455, at 263. For a contrary view, see Cannizzaro, *The Role*, *supra* note 673, at 916.

[821] See *Naulilaa Award ('Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du sud de l'Afrique (Sentence sur le principe de la responsabilité)')*, 1928, *RIAA*, II, at 1011.

[822] Some argue that, by virtue of the overarching principle of necessity, the obligation accruing to states of adopting measures set out by the Security Council also precludes those states from undertaking *uti singuli* countermeasures. See, e.g., Ripol Carulla, *El Consejo*, *supra* note 500, at 73-74. In a similar vein, Giorgio Gaja posits that Security Council action should effectively engender a restraining, or constraining, effect on the admissibility of individual reactions. See *Réflexions sur le rôle*, *supra* note 538, at 309.

grounded in Council reaction to terrorism, warrants further exploration. In a broader sense, it follows that "les résolutions du Conseil de sécurité peuvent avoir une influence considérable sur la mise en œuvre unilatérale de la responsabilité communautaire par les Etats, en application des règles secondaires du droit international général : elles peuvent autant guider la qualification juridique de la situation dans le cas d'espèce qu'être prises en compte dans l'appréciation de la conformité au droit des demandes formulées et des contre-mesures."[823] Along similar lines, it is foreseeable that eventual Council action or measures may, in certain circumstances, preclude the legality of any potential unilateral countermeasures undertaken by individual states.[824] Therefore, the relationship between Council action and state responsibility remains thorny and becomes particularly relevant when the wrongful behaviour impugned fits neatly under Chapter VII's heading of "international peace and security". Such scenario not only blurs Council powers and state responsibility repertoire, but also makes a clear determination of the legal basis underlying the Council's action increasingly intractable, especially when the Council, itself, melds both branches of law or indiscriminately subsumes state responsibility considerations under an expansive concept of threat preemption/eradication.

### d) A Straddling of Objectives: The *Sui Generis* Case of Counterterrorism[825]

It becomes clear that the relationship between Security Council practice and the creation, interpretation and application of rules of state responsibility remains largely underexplored, especially in the field of counterterrorism.[826] Amongst recent accounts and building on existing scholarship,[827] some commentators deliver a thoughtful discussion of this relationship, judging that the

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[823] Villalpando, L'ÉMERGENCE DE LA COMMUNAUTÉ, *supra* note 78, at 450.
[824] See, e.g., Skordas, *Hegemonic Intervention*, *supra* note 139, at 449.
[825] The premises of what follows significantly expand on *International Responsibility*, *supra* note 384.
[826] See, e.g., Pasquale De Sena, *Book Review*, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW 863, 864 (2006) (reviewing a book chapter by Pierre-Marie Dupuy and calling for further research on the relationship between Security Council resolutions dealing with terrorism and international responsibility).
[827] See, e.g., Brichambaut, *The Role*, *supra* note 599, at 272-274; Gowland-Debbas, *The Functions*, *supra* note 543, at 288-294; Nolte, *The Limits*, *supra* note 545, at 322-326.

Council interprets certain aspects of state responsibility practice in specific fields.[828] In the same vein, the arguments advanced above have underscored relevant doctrinal currents for and against the proposition that the Council frequently spearheads certain law-shaping incursions into the realm of state responsibility. Regardless of one's stance on this debate, it remains fair to contend that Council decision-making informs – to some extent – the unilateral implementation of responsibility by states, along with the application of secondary rules of responsibility. In that regard, it must be recalled that Council decisions are, indeed, binding on states. Council resolutions can also be particularly instructive in determining the legal characterization of a given situation or act as a benchmark in ensuring the legality of requests or countermeasures adopted by states.

More significantly, it follows that meaningful parallels and interrelationships may be drawn between the Council's traditional functions and the implementation of state responsibility. More important to the question at hand is the notion of overlap between the Council's powers and the implementation of state responsibility, especially in the case of transnational terrorism, which carries with it significant implications for the interplay between the concepts of 'threats to international peace and security', state responsibility and return to legality. In light of the practice of terrorism – which, like genocide, *apartheid* and massive human rights violations, constitutes a threat against the peace – it follows that "on ne saurait ignorer les chevauchements entre l'action du Conseil de sécurité et la mise en œuvre de la responsabilité."[829] As argued extensively above, the determinant element in resolving this debate not so much resides in acknowledging that the Council can spill over, and out of, the ambit of Chapter VII powers when faced with an internationally wrongful act. It rather rests upon the fact that the Council can 'read in', or 'bring in', state responsibility rationale and mechanisms within the furrow of its Charter-based powers, especially in controversial cases involving use of force-based violations (i.e. terrorism) and

[828] Villalpando, L'ÉMERGENCE DE LA COMMUNAUTÉ, *supra* note 78, at 434-450 and 438-439.
[829] *Ibid*. [Emphasis added.]

self-defence as a possible response to those breaches.[830] After all, several leading scholars construe the *UN Charter* as a living instrument of quasi-constitutional character, which should, correspondingly, adapt to modern realities and circumstances.[831] As one commentator notes, "a dynamic-objective understanding, free from historical perceptions, of treaties such as the Charter and other statutes of international organizations is necessary".[832]

As a corollary, we are thus not strictly talking about the Council exceeding its powers or extending its action to spheres not traditionally falling under its jurisdiction. Quite to the contrary, the present line of reasoning merely recognizes that there exists an inherent compatibility between the Council's traditional functions and modern phenomena/threats to peace and international security – such as transnational terrorism – that were not envisaged by the framers of the *Charter*, at least in terms of scope, reach and magnitude. In addressing these fast-evolving scenarios, the Council does not necessarily, or automatically, draw upon state responsibility repertoire or act as an implementing organ for the purposes of international responsibility, *per se*.[833] However, whilst still using its Chapter VII tools, it can at times, *simultaneously*, delve into state responsibility logic in cases that clearly warrant it so as to apply the traditional syllogistic model of responsibility to wrongful states: international breach – attribution – consequences/countermeasures. The interface that emerges from this joint application of *Charter*-based principles and state responsibility is far from uniform or consistent, but it reinforces the idea that Council practice can, and does, sometimes set precedents for the purposes of state responsibility and informs the development of that body of law.

It follows that the Council could then, in certain cases, characterize the breach of an international obligation (i.e. the failure to prevent a terrorist attack)

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[830] See, e.g., Gowlland-Debbas, *Security Council Enforcement Action*, *supra* note 259, at 65.
[831] See, e.g., Franck, RECOURSE, *supra* note 120, at 5-9.
[832] George Ress, *The Interpretation of the Charter*, in Brunno Simma *et al*. (eds.), THE UNITED NATIONS CHARTER: A COMMENTARY 13, 27 (Vol. 1, 2002).
[833] See, generally, the reports of Roberto Ago, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1976, Vol. II, First and Second Parts, and Gaetano Arangio-Ruiz, A/CN.4/469 and 476, as to the "rightness of considering measures under Chapter VII as forms of international responsibility". The language is borrowed from Gowlland-Debbas, *The Limits*, *supra* note 601, at 364 n.6.

as a 'threat to international peace and security', and thereby connect its overarching objective of peacekeeping to the implementation of responsibility. Whilst the Council itself has not done so explicitly in this particular context, certain scholars nonetheless infer that the 9/11 attacks can be attributed to Afghanistan on the basis of several Council resolutions connecting the use of Afghan territory with terrorist activity.[834] Consequently, whilst remaining within a strict legal framework, these situations (i.e. the determinations made by the Council by virtue of this principle) would clearly be governed by secondary rules of responsibility.[835] At any rate, the Council could not take away rights from states or impose -- upon them -- sanctions beyond what is required to maintain or restore peace and security in any given situation, at the risk of exceeding its powers and potentially opening up its *ultra vires* action to eventual judicial condemnation.[836] In a recent study exploring the relationship between collective security and international responsibility, Mathias Forteau echoes a similar viewpoint, albeit with particular emphasis on the fact that the respective scopes of state responsibility and collective security are distinct. This is not to say, however, that both bodies of law have not been progressing, at times hand in hand, towards the consecration of certain fundamental community priorities, to which one should add the repression and eradication of transnational terrorism.[837] Although the primary/secondary dichotomy will ultimately resolve this situation, Forteau ultimately acknowledges the existence of a conceptual overlap between all relevant elements in a fashion reminiscent of the premises explored above.[838]

In response to the sceptics and drawing from these bodies of work, it can be argued that the Council can play an important role, sometimes determinant, in shaping and applying the law of state responsibility to counterterrorism as an

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[834] See, e.g., Alex Conte, SECURITY IN THE 21ST CENTURY 48-51 (2005).
[835] Villalpando, L'ÉMERGENCE DE LA COMMUNAUTÉ, *supra* note 78, at 447.
[836] For support of this proposition, see, e.g., Arangio-Ruiz, *On the Security*¸ *supra* note 677, at 627.
[837] See, e.g., Gowland-Debbas, *The Limits*, *supra* note 601, at 365. It should be noted that the questions of norm-creation and enforcement, as they pertain to fundamental community norms, have generated considerable anguish within international legal scholarship. See, e.g., Luigi Condorelli, *À propos de l'attaque américaine contre l'Irak du 26 juin 1993*: *Lettre d'un professeur désemparé aux lecteurs du JEDI*, 5 EUROPEAN JOURNAL OF INTERNATIONAL LAW 134-144 (1994).
[838] Forteau, DROIT DE LA SÉCURITÉ, *supra* note 601, at 370.

alternative avenue, albeit an imperfect one, to the sometimes-problematic unilateral implementation of responsibility by states. The prospect of carving out a role for the Council in advancing the law of state responsibility would seem desirable even if only to provide a sort of system of checks and balances on both the adoption of disproportionate unilateral countermeasures and diplomatic impasses on the application of state responsibility, should the concerned states refuse to consent to the jurisdiction of the ICJ. In fact, transnational terrorism and the legal tools to suppress it epitomize a truly *sui generis* phenomenon, in that they offer a unique opportunity for the Council to advance the law of state responsibility without overstepping its more fundamental and intrinsic boundaries. Although its findings can sometimes be predicated on a prior declaration of responsibility, it is fair to argue that the Council does not directly rule on the question of state responsibility, *per se*, rather framing its reasoning within the furrow of Chapter VII powers. However, it becomes clear that there exists a significant conceptual and practical straddling of Chapter VII objectives and the suppression of terrorist acts, which are often tantamount to threats against international peace and security, and even more so since 9/11.[839] In fact, starting with Resolution 748 of 1992 dealing with Libya's non-extradition of suspected terrorist bombers,[840] the Council produced a slew of resolutions expressly linking terrorism with international peace and security. Subsequent resolutions followed suit and reiterated this important nexus, be it in the context of the failed assassination attempt of Egypt's President Mubarak[841] or the bombings of American embassies in Kenya and Tanzania.[842] It was to no surprise, therefore (except for some scholars like Dupuy), that the Council resolutions adopted in reaction to 9/11 unequivocally consecrated the connection between terrorism and

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[839] For a recent discussion of acts of international terrorism as threats to international peace and security, see Rosa Giles-Carnero, *Terrorist Acts as Threats to International Peace and Security*, in Pablo Antonio Fernández-Sánchez (ed.), INTERNATIONAL LEGAL DIMENSION OF TERRORISM 55-71 (2009).

[840] Security Council Resolution 748 (1992), 31 March 1992, UN Doc. S/RES/748 (1992) (noting that "the suppression of acts of international terrorism, including those in which States are directly or indirectly involved, is essential for the maintenance of international peace and security.").

[841] Security Council Resolution 1044 (1996), 31 January 1996, UN Doc. S/RES/1044 (1996).

[842] *Resolution 1267*, *supra* note 386.

international peace and security, a legal construction recently acknowledged in Judge Kooijmans' Separate Opinion in the *Wall Advisory Opinion*.[843]

At the outset, the very nature of terrorism seems to engage Chapter VII considerations and, in dealing with threats to international peace and security, the Council has sometimes ventured upon an analytical terrain that melds its executive functions with state responsibility undertones. In recent years, the Council has increasingly tackled terrorism by invoking state responsibility-like language, thereby signalling that the seemingly indelible chasm between that body of law and the restoration of international peace and security can blur on occasion. This is not to suggest, however, that, by straddling each other, both of these areas are necessarily mutually interpenetrating. But this phenomenon surely extends beyond the mere borrowing from one branch's vernacular by the other, and foreshadows the payoffs of undertaking more substantial and horizontal incursions into the commonalities of both regimes, so as to better address the threats of terrorism and the legal responses thereto.

[843] *Resolution 1368*, *supra* note 402; *Resolution 1373*, *supra* note 71. For Judge Kooijmans' Separate Opinion, see *Wall Advisory Opinion*, *supra* note 521, at 229-230, para. 35. For Pierre-Marie Dupuy's reaction, see *State Sponsors*, *supra* note 29, at 9 (remarking that "the initial universal and quasi-spontaneous assertation that terrorism amounts to a threat to international peace and security" is "striking").

## CONCLUSION TO PART II

One overarching conclusion emerges after canvassing the potential input of UN institutions in implementing state responsibility: whilst these organs seem suited, upon first glance, to contribute to some extent to the development of the law of state responsibility, there is considerable reluctance to do so, both motivated by political factors and limited by the relevant institutional frameworks. For instance, the ICJ frequently sidesteps the application of state responsibility when it could have made some stand-alone determinations of internationally wrongful acts, a posture at least partially informed by concerns of political appeasement and/or expediency. On the other hand, the Council's mandate is not primarily couched in international legal terms but rather focuses on the maintenance/restoration of international peace and security. Whether a specific situation involving transnational terrorism can be subsumed within that furrow for the purposes of state responsibility remains a question contingent on factual and legal appreciation, always subject to case-by-case assessments. This chapter has argued that, in some cases of transnational terrorism, the Council can decidedly pronounce on matters of state responsibility, although the scope of that function remains limited.

Whilst the international responsibility of host-states has been invoked in a few cases of terrorist-like operations involving state support of this activity, a model premised on the institutional implementation of the resulting legal accountability is by no means a hard-set rule. As a corollary, certain relevant international disagreements have also triggered classical applications of the law of state responsibility involving the appraisal of the ensuing claims by an impartial third-party without, nonetheless, invoking the concept of 'terrorism' when such a determination could arguably have been put forth. This reality ties into a crucial observation that may be gleaned from the foregoing considerations. Indeed, it becomes clear that the Council is reticent to issue doctrinal formulations of relevant principles on issues of state responsibility, rather opting to frame its reasoning within the mandate of maintaining international peace and security and

to resolve each situation on an individual basis.[844] For the purposes of this project, this argument is perhaps best understood in tandem with the functional equivalent of that reluctance within the ICJ's own decision-making, that is to say its reticence to qualify internationally wrongful acts as amounting to 'terrorism' in cases involving the responsibility of host-states. Not to mention the ICJ's own reluctance to brand states as violators of public international law. Setting aside the fact that certain important state responsibility cases have been resolved outside of international judicial channels (e.g. *Lockerbie*, *Rainbow Warrior*), whilst the ICJ has sometimes set in motion the rules of international responsibility no causal link was ever formally established by it between state support for terrorism and state responsibility.[845]

As such, two key cases in the field of state responsibility, namely *Tehran Hostages* and *Nicaragua*, reveal the Court's reluctance to qualify internationally wrongful acts as acts of 'terrorism'.[846] For example, one commentator opines that, in *Tehran*, the Court eschewed the question whilst, in *Nicaragua*, it flirted with the topic of classifying the wrongful acts under the rubric of 'terrorism'.[847] Whilst it can be argued that those cases did not deal with terrorism *per se*, as Gilbert Guillaume does, this characterization is certainly debatable.[848] Consequently, on two distinct occasions the ICJ held that the sequestration of American hostages and property by private individuals could be attributed to Iran through the channel of official state endorsement and *ex post facto* ratification, and lamented U.S. support of Nicaraguan *Contras* by way of indirect state responsibility. Interestingly, some experts construe *Tehran Hostages* as

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[844] See, e.g., Nolkaemper, *Attribution*, *supra* note 248, at 168; Christine Gray, INTERNATIONAL LAW AND THE USE OF FORCE 95-101 (2nd Edition, 2004); Franck, RECOURSE, *supra* note 120, at 53-68.

[845] For support of this proposition, see, e.g., Martin, LES RÈGLES INTERNATIONALES, *supra* note 1, at 465.

[846] More recently, the Court also sidestepped this debate in the *Armed Activities* case, where the ICJ held that Uganda could not invoke a right to self-defence against the Democratic Republic of the Congo because it had harboured an armed militia on its territory. This case will be further discussed in Chapter 5.

[847] See Jean-Marc Sorel, *Existe-t'il une definition universelle du terrorisme*, in Karine Bannelier *et al.*, LE DROIT INTERNATIONAL, *supra* note 475, at 35-68, 44 (invoking the terms 'évite' and 'effleure le sujet').

[848] Guillaume, *Terrorisme*, *supra* note 81, at 306.

l'"événement qui symbolise le mieux l'apparation du terrorisme soutenu par un État, pour en faire une arme ou un instrument de politique étrangère".[849] In its 1980 judgment, the ICJ imputed the sequestration and hostage-taking carried out by student militants to Iran by way of official state endorsement, found that the host-state was internationally responsible[850] and imposed upon it the duties of cessation of the wrongful act and of reparation of the harm to the victim state.[851] Noting that, at the time the judgment was rendered, no international convention in force actually prohibited state support of terrorism, one author expounds that "[l]a Cour internationale de Justice aurait pu combler ce silence. L'affaire des otages de Téhéran lui offrit cette occasion, qu'elle écarta."[852]

Conversely, as discussed *supra* in Chapters 1 and 2, in *Nicaragua* the U.S. provided considerable support to the *Contras* in their perpetration of multiple humanitarian law violations during the armed conflict in Nicaragua. In its judgment on the merits of 27 June 1986, the Court deemed the abovementioned state support unlawful[853] and held that the U.S. had a duty to ensure the cessation of thoses breaches of international law[854] and to make reparation for any injury flowing from its internationally wrongful acts.[855] However, it must be stressed that the Court's holding on this issue against the U.S. does not expressly stem from the prohibition on providing support to terrorism.[856] Rather, the Court cast the U.S.' support of the *Contras* guerrillas as a breach of the "obligation under customary international law not to intervene in the affairs of another State"[857] and, additionally, deemed that the field manual on guerilla warfare circulated to the

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[849] Bruce Hoffman, LA MÉCANIQUE TERRORISTE 230 (1999).
[850] *Tehran Hostages*, *supra* note 67, at 44-45 ("[T]he violations of these obligations engage the responsibility of the Islamic Republic of Iran towards the United States of America under international law").
[851] See items 3-5 of the *dispositif* in *Ibid*.
[852] Henri Labayle, *Droit international et lutte contre le terrorisme*, 32 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 105-138, 126 (1986).
[853] See items 3 and 9 of the *dispositif* in *Nicaragua*, *supra* note 119, at 146 and 148.
[854] See item 12 of the *dispositif* in *Ibid*, at 149.
[855] See item 13 of the *dispositif* in *Ibid*, at 149.
[856] See, e.g., Martin, LES RÈGLES INTERNATIONALES, *supra* note 1, at 466.
[857] See item 3 of the *dispositif* in *Nicaragua*, *supra* note 119, at 146.

*Contras* by the U.S. encouraged them to commit acts contrary to IHL. Yet, the ICJ refused to directly attribute the ensuing wrongful acts to the U.S.[858]

Similarly, it is useful to recall that, while the ICJ was technically seized of the *Lockerbie* case, it was not called upon to pronounce on the matter of international responsibility but rather on Libya's right not to extradite its nationals pursuant to the 1971 Montreal Convention. In addition, the respondent states, the U.S. and the U.K., did not submit a counter-claim pursuant to Article 80 of the *Rules of Court* in order to raise the question of Libyan responsibility.[859] As a result, this case was eventually stricken from the Court's docket before the ICJ could pronounce on its merits following an amicable resolution of the disputes opposing Libya to the U.S. and the U.K.[860] As discussed extensively in this chapter, the Council's treatment of the matter was instrumental in facilitating the application of state responsibility law and Libya ultimately acknowledged its international civil responsibility in the destruction of flight PanAm 103. This conclusion undoubtedly bolsters the argument that the Council can play an important role in the implementation of state responsibility for failing to prevent terrorism in a limited set of circumstances.

However, the Council will not usually issue formal declarations of unlawful behaviour and correspondingly attribute acts of private actors to host-states. Instead, it rather frames it reasoning within the furrow of international peace and security, as opposed to assigning blame and ensuring the application of attribution under state responsibility.[861] Moving away from this rigid dichotomy, this chapter has argued that counterterrorism policy epitomizes a *sui generis* character and, in certain cases, its objectives straddle Chapter VII terrain. Given that the Council has sometimes expressly handed down findings of illegality and

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[858] See item 9 of the *dispositif* in *Ibid*, at 148.

[859] Adopted on 14 April 1978 and entered into force on 1 July 1978, available online at http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0 (last visited on 1 December 2008), Article 80.

[860] Upon mutual notification by the Parties, the President of the ICJ ordered that the two disputes be removed from the Court's List on 10 September 2003. See Press Release 2003/29, available online at http://www.icj-cij.org/presscom/index.php?pr=168&pt=1&p1=6&p2=1 (last visited on December 1, 2008).

[861] See, e.g., Gray, INTERNATIONAL LAW, *supra* note 844, at 96-97; Derek W. Bowett, SELF-DEFENCE IN INTERNATIONAL LAW 263-265 (1958).

state responsibility,[862] it logically follows that the law of state responsibility should act as a guide in the Council's assessment of the connection between non-state actors and host-states, particularly attribution principles. This thinking prompts one commentator to opine that "it may well be argued that the nature and function of the acts of the Security Council are closely related to the function of the law of state responsibility… in many cases the Council will respond to an act that is in violation of international law."[863] In fact, it must be recalled that the Council has sometimes ventured very far upon state responsibility terrain. Its treatment of Iraq's invasion of Kuwait remains a striking example. As discussed in this chapter, the implementation of Iraq's responsibility by the Council undoubtedly consecrated its ability to impose secondary obligations upon wrongful states flowing from the violations of primary international legal norms. Amongst particularly severe secondary obligations imposed by the Council in this context were the institution of an indemnification fund and the delimitation of an international border.[864] More recently, the adoption of Resolution 1368 by the Council in the wake of 9/11 has certainly generated some queries about whether the Council mounted further incursions into the law of state responsibility. In particular, some ponder whether the Council's resolution operated on the premise that sufficient connections were ascertained between Al Qaeda and the government of Afghanistan to impute the 9/11 attacks to the host-state.[865]

In addition to the elaboration of secondary rules, the Council has also recently dabbled in the creation -- or perhaps in the reaffirmation -- of primary

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[862] See, e.g., Security Council Resolution 362, UN Doc. S/RES/362 (1974), at para. 4 (on the situation in the Middle East); Security Council Resolution 687, UN Doc. S/RES/687 (1991) (on Iraq's invasion of Kuwait); Security Council Resolution 1304, UN Doc. S/RES/1304 (2000), at para. 14 (on the situation in the Democratic Republic of Congo). For an exploration of the conformity of such determinations with the *UN Charter*, see Lauterpacht, ASPECTS, *supra* note 726, at 42-43.

[863] Nolkaemper, *Attribution*, *supra* note 248, at 168-169 (stating that the Council engages secondary rules).

[864] See, e.g., paras. 16 and 18 of Security Council Resolution 687, UN Doc. S/RES/687 (1991). For more background on these issues, see Alexandros Kolliopoulos, LA COMMISSION D'INDEMNISATION DES NATIONS UNIES ET LE DROIT DE LA RESPONSABILITÉ INTERNATIONALE (2001); Pierre d'Argent, LES RÉPARATIONS DE GUERRE EN DROIT INTERNATIONAL PUBLIC: LE DROIT DE LA RESPONSABILITÉ INTERNATIONALE À L'ÉPREUVE DE LA GUERRE (2002).

[865] See, generally, Mary Ellen O'Connell, *Evidence of Terror*, 7 JOURNAL OF CONFLICT AND SECURITY LAW 19 (2002); Stahn, *Nicaragua is Dead*, *supra* note 147, at 827-877.

counterterrorism obligations, which has a direct incidence on the mechanics of state responsibility. The adoption of Resolution 1373, which is discussed *infra* in Chapter 4, Section B)5.a), is particularly relevant because it marks the first time that the Council has set general and far-reaching obligations upon *all* states, not limited to any geographical area or specific timeframe. The Council's pre- and post-9/11 pronouncements on terrorism, along with similar formulations by the General Assembly, lead certain influential scholars to infer that "[n]umerous other resolutions from both the United Nations General Assembly and the United Nations Security Council leave no doubt that harboring or supporting terrorist groups violates a state's responsibility under international law."[866] Yet, one would be hard pressed to attribute the acts of 9/11 to Afghanistan, even when relying on precedents hinging on the institutional implementation of responsibility through UN channels. The basis for state responsibility, therefore, must stem from elsewhere, namely from the failure to prevent the excursions – a separate duty falling short of casting the terrorist attacks as 'acts of state' – and an obligation actuated through the new indirect responsibility paradigm advocated in Chapter 2.[867]

In the aggregate, whilst the Council's application of international law remains predominantly arbitrary and selective, it has nevertheless provided a significant set of rules and precedents – whether by promulgating primary counterterrorism norms or by applying specific secondary rules to instances of transnational terrorism flowing from the law of state responsibility. However, whilst the input of UN institutions in the development of state responsibility and the contribution of the Council, more specifically, will undoubtedly inform the subsequent analysis, one must bear in mind that the ILC's *Articles* operate on a preferred model of inter-state implementation of responsibility, without ostensibly relying on the intercession of international organizations at any stage of the process. Therefore, any proposed reform of state responsibility for failing to prevent terrorism will have to grapple with the inherent limitations associated

[866] Travalio and Altenburg, *Terrorism*, *supra* note 146, at 100.
[867] Arai-Takahashi's remarks seem apposite here. See *Shifting Boundaries*, *supra* note 414, at 1099 (applying analogous reasoning to Afghanistan's role in the 9/11 attacks).

with the infrequent and idiosyncratic treatment of that body of law by the Council. Needless to say, institutionalizing the implementation of state responsibility could certainly generate some fruitful results, primarily by striving to eliminate unilateralism, self-judging and autoqualification.[868] However, short of incepting a third-party independent institution mandated with applying state responsibility to breaches of counterterrorism obligations, so as to steer away from the inevitable political pitfalls associated with the Council's decision-making -- a proposal itself ripe for considerable political resistance -- international law must contend with the dominant inter-state model of implementation in most circumstances.[869] Part III of the dissertation does heed these reservations and proceeds to revisit post-9/11 state responsibility law from a *lex ferenda* standpoint.

[868] These concerns are addressed at length, *infra*, in Chapter 5, Section A)1.

[869] The fact that a dispute is not adjudicated upon by an international judge or arbitrator does not, in any way, preclude it from pertaining to the law of state responsibility. See, e.g., *Reparation for Injuries Advisory Opinion*, *supra* note 788, at 177-178. Furthermore, mediation and diplomacy can lead to the peaceful settlement of international disputes in the same fashion that judicial settlement of disputes seeks to operate. In fact, the Permanent Court of International Justice construed the judicial settlement of international disputes as "an alternative to the direct and friendly settlement of such disputes between the Parties". See *Free Zones of Upper Savoy and the District of Gex* case, Order of 19 August 1929, PCIJ REPORTS, Series A, No. 22 [hereinafter *Free Zones of Upper Savoy*], at 13.

# PART III – RETHINKING STATE RESPONSIBILITY AFTER 9/11: DEFINING THE SCOPE OF STATES' COUNTERTERRORISM OBLIGATIONS AND IMPLEMENTING A MODEL TO ENSURE COMPLIANCE WITH THOSE OBLIGATIONS

## INTRODUCTION

The first two parts of the dissertation have attempted to shed some light on the modern development of state responsibility law in the context of counterterrorism. Part I framed some of the potential contributions of international law to counterterrorism policy within the formal rules of state responsibility. Picking up on that thread, the latter portion of the first part identified a recent paradigm shift towards a law of indirect state responsibility, a trend supported both by recent state and Security Council practice. That analysis will undoubtedly act as a preliminary gloss through which Part III of the dissertation should be read, as the project now moves on to the more sophisticated task of revisiting state responsibility law from a *de lege ferenda* perspective. Equally important to the discussion to follow are the conclusions gleaned from Part II of the project. In particular, whilst the previous part focused on both the potential contributions and limits of the actions originating from key international organizations in the field of state responsibility for terrorism, institutional sensibilities should always guide the analysis and, Security Council practice specifically, should act as somewhat of a benchmark in developing policy-based revisions to that body of law.

Whilst there are clear divisions within the literature about the proper legal interpretation of the relevant facts, the 2001 international campaign against Afghanistan certainly shocked the legal community and propelled the issue of international state responsibility to the forefront of academic debate. Since 9/11 and as discussed above, much has been written on the legality of U.S. action in Afghanistan, with particular emphasis on the parameters of use of force and the corresponding shift in the law of *jus ad bellum*. Unfortunately, the precise question of indirect state responsibility for failing to prevent terrorist attacks

remains somewhat elusive to this day. Building on both the historical and legal review of recent trends and relevant concepts of the first part of the dissertation, along with the exploration of international responsibility mechanics and potential implementation models of the second part, this third section of the project purports to prescriptively delineate the parameters of the specific regime of indirect responsibility, given that the literature and jurisprudence are far from dispositive on the matter.

Although little consensus has been achieved on this issue, it is widely recognized that host-states have a duty to prevent terrorist attacks emanating from their territory and injurious to other states. However, the contours of this obligation of prevention are far more problematic, both in terms of legal content and policy. Therefore, in order to better define the application of secondary obligations of state responsibility, one must first consider better circumscribing primary counterterrorism obligations. In fact, there has been acute confusion in identifying how, exactly, the rules of state responsibility would apply to the violation of international obligations related to transnational activity, such as global warming and transnational pollution.[870] Whilst this legal uncertainty is undoubtedly exacerbated by a "multiplicity of actors, different types of damages and non-linear causation", the existence of "vague primary rules" also further complicates the post-breach equation.[871] Alternatively, as will be explored in this chapter, those primary obligations might, in fact, acquire better traction and clarity through a revamping of secondary obligations and trans-substantive rules of state responsibility. In addition, this approach would facilitate circumventing difficult policy debates and definitional impasses and/or political deadlocks -- exemplified by the lack of consensus in defining the concept of 'terrorism' on the international plane, for example -- typically associated with the further elaboration of contentious primary obligations. In fact, this type of reasoning is precisely what animated Roberto Ago's decision to shift the focus of the ILC away from the

[870] For a brief comparison of the application of state responsibility law to both global warming and transnational terrorism, see *infra* Chapter 5, Section A)3.a).

[871] See Christina Voigt, *State Responsibility for Climate Change Damages*, 77 NORDIC JOURNAL OF INTERNATIONAL LAW 1-22 (2008).

development of substantive rules related to the protection of aliens, a seemingly intractable exercise initially triggered by Special Rapporteur García-Amador, to the adoption of general rules of state responsibility formulated at a high level of abstraction.[872] As such, "Ago created a politically safe space within which the ILC could work and largely avoid the contentious debates of the day about expropriation and valuation of property."[873] As such, this section of the project seeks to espouse this vision and, perhaps, to refine it with a view to further delineating those secondary obligations in order to generate more effective accountability mechanisms and deterrence models for governmental failures in preventing transnational terrorism.

Thus, the analysis expands and builds on the brief overview of the direct/indirect responsibility dichotomy presented above, while bearing in mind ways to integrate and, ultimately, resolve the reservations associated with the concept of attribution in international law (which have cropped up in Part I and, perhaps, more prominently in the chapter dealing with institutional implementation of state responsibility, and which will be addressed squarely in further detail below). Along similar lines, whilst a significant shift in international law towards a model of indirect state responsibility, evidenced by recent Security Council and state practice, has been demonstrated, an important question remains: what policy and legal standards do we apply to support this regime of indirect responsibility and how, exactly, is this responsibility triggered between sovereign states?

As discussed above, along with *Corfu Channel* three significant developments are instrumental in ascertaining this evolution: international jurisprudence, which includes the *Nicaragua*, *Tehran Hostages* and *Tadić* decisions, the adoption of the *ILC Articles on State Responsibility* in 2001, and the U.S.-led international response against Afghanistan. Yet, additional discussion is needed to determine how these elements come together and inform an effective

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[872] See, e.g., Yoshiro Matsui, *The Transformation of the Law of State Responsibility*, 20 THESAURUS ACROASIUM 1, 55 (1993).

[873] Daniel Bodansky and John R. Crook, *Introduction and Overview (Symposium*: *The ILC's State Responsibility Articles)*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 773, 780 (2002).

and, hopefully preventive, model of state responsibility. In so doing, this chapter considers difficult but related questions, such as the involvement, or lack thereof, of 'failed' states in preventing terrorism, the overemphasis on the notions of control and interdependence between host-states and non-state actors under the ILC's *Articles*, evidentiary impediments engendered by the extant scheme of international responsibility, and so on. Ultimately, the chapter gravitates towards a proposal putting forth the notion that the concept of attribution should be excised altogether from the equation of state responsibility in the context of modern terrorism or, alternatively, replaced by a model of automatic attribution. Drawing on the discussion of previous chapters, this third part of the project proposes the implementation of a two-tiered strict liability-infused model in assessing the responsibility of sanctuary states. The discussion, which is pervaded by a tension between upholding sovereignty and combating terrorism efficiently, ultimately leads to a critical exploration of the obligation of prevention with a view to bolstering prevention and promoting multilateralism and transnational cooperation on counterterrorism policy. The ensuing analysis is replete with policy dimensions, which considerably inform and shape the *lex ferenda* approach contained therein. Ultimately, the chapter strives to better integrate non-state actors within the purview of international liability mechanisms, whilst concomitantly striking a balance between devising effective deterrence models rooted in the logic of state responsibility – especially in the face of enhanced transnational terrorist capacity – and developing a legal narrative that is sensible to the realities facing the developing world while also promoting the sovereign equality of states, to the extent possible.

Before turning to the potential benefits that may be derived from a strict liability-infused approach, the chapter first takes stock of other advances that have been made in identifying models for engaging the international responsibility of states that tolerate terrorists on their territory. In particular, one hypothesis recently put forth promotes a model of state responsibility based on causality, a proposal that, for the reasons explored immediately at the beginning of the chapter, poses some problems. The next section thus attempts to situate and

assess the proposal advocated in the present project against this model of causation and, after canvassing other scholarly incursions into the relationship between state responsibility and transnational terrorism, sets the stage for an exploration of strict liability and other relevant policy considerations.

## CHAPTER 4: THE OBLIGATION TO PREVENT TERRORISM IN INTERNATIONAL LAW: RETHINKING THE RATIONALE UNDERLYING STATE RESPONSIBILITY FOR THE FAILURE TO PREVENT TERRORIST ATTACKS

> 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.
>
> – Tal Becker[874]

### A) Alternative Response: Causation

In identifying ways to harness international legal norms with a view to preventing and suppressing transnational terrorism, the present study has elected the realm of state responsibility as an incubator for potential deterrence models. In so doing, it will weigh the possibility of implementing a mechanism of strict liability that is nonetheless balanced out by the principles of due diligence and consideration for the obligation of result/conduct dichotomy (themselves often shaped by political considerations and moral imperatives), whilst also entertaining some measures of institutional implementation of secondary obligations under international law (mostly through the Security Council). In short, the project's overarching philosophy is guided by the idea that revisiting secondary rules of state responsibility – especially attribution – is a desirable process when attempting to balance out the principle of non-intervention in public international law against the need to root out transnational terrorist networks.

That being said, this approach is, by no means, the sole possible interpretation or recasting of the rules of state responsibility. Indeed, a multiplicity of theoretical insights could be brought to bear upon the difficult questions of enhancing transnational cooperation on counterterrorism and reducing governmental involvement in terrorism, be they envisaged through the New Haven School's emphasis on the importance of a global perspective, a

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[874] Becker, TERRORISM AND THE STATE, *supra* note 2, at 258.

leading French vision of state responsibility law or more recent theoretical insights, for example.[875] Whether inspired by causation, strict liability or complicity theories, these rich theoretical explorations pave the way for fruitful discussion on accountability mechanisms and appear united by their disdain for the onerous attribution standards developed in the ICJ's *Nicaragua* decision.[876] Of particular interest is the model advocated in a recent book by Tal Becker, a work often referenced throughout the present study.[877] Whilst the purpose here is not to exhaustively review all of Becker's contributions, it is nonetheless useful to briefly canvass the major points of rapprochement with the present study. Particularly relevant to a diversified and critical exploration of state responsibility is that author's reliance on causation and causally-inspired models from municipal law in crafting his proposal for legal reform. After all, under some lights attribution can be construed as a "surrogate for causation".[878]

The thrust of Becker's argument is that the traditional application of state responsibility law for seemingly private conduct remains unnecessarily grounded in principles of agency, a relatively uncontroversial proposition if one subscribes to the major argumentative tenets of the present study.[879] Indeed, as is also the driving force behind this dissertation, Becker calls for a rethinking and revamping of the rules of state responsibility so as to adapt that body of law to the polymorphic and transnational nature of modern terrorism. Ostensibly seeking inspiration from a tortfeasor's duty of care under domestic law, he advocates the implementation of a causation-based model of state responsibility, a structure ripe, he argues, for better connecting privately-inflicted international wrongful acts to host-states. Delving into both international and comparative case law,

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[875] Compare the approaches advanced in Reisman, *International Legal Responses*, *supra* note 64, at 56-57; Dupuy, *State Sponsors*, *supra* note 29, at 3-16; Becker, TERRORISM AND THE STATE, *supra* note 2, at 332.

[876] See, e.g., Rachael Lorna Johnstone, *State Responsibility*: *A Concerto for Court, Council and Committee*, 37 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY 63, 90 (2008) (citing works by Tal Becker, José Alvarez, Vincent-Joël Proulx and Eduardo Savarese).

[877] Becker, TERRORISM AND THE STATE, *supra* note 2.

[878] David J. Bederman, *Contributory Fault and State Responsibility*, 30 VIRGINIA JOURNAL OF INTERNATIONAL LAW 335, 347 (1990).

[879] But Eric *Cf.* De Brabandere, *Non-State Actors, State-Centrism and Human Rights Obligations*, 22 LEIDEN JOURNAL OF INTERNATIONAL LAW 191, 203 (2009).

Becker proposes a four-tiered methodological inquiry in applying state responsibility to host-states, which are as follows: i) on a factual basis, was the internationally wrongful act caused by the host-state (thereby encompassing previously unattributable state conduct within the scope of that category)?; ii) from a legal perspective, did the state behaviour constitute a breach of the state's international obligation(s)?; iii) from a causal standpoint, what is the ensuing damage that may be included within the purview of state responsibility?; and iv) from a policy standpoint, do non-causal factors militate in favour of attenuating or increasing responsibility?[880]

As amply discussed throughout the present study, the *ILC Articles on State Responsibility* predominantly rest on notions of control and interdependence between the state apparatus and private actors when triggering the mechanics of state responsibility.[881] As acknowledged in the introductory chapters, modern-day terrorism largely differs from transborder excursions carried out in the 60s, 70s and 80s. In that context, namely where hijacking was prevalent and incontestably constituted the dominant terroristic model, "the concern may have been that States would control private terrorist groups, transforming them into a threat of international dimension".[882] By contrast, the dynamic has drastically changed in today's world, undoubtedly exacerbated by the advent of modern technology, the multiplication of integrated and transnational networks, the development of new and broad-reaching weaponry and the importance of the Internet.[883] Consequently, "the concern is that these groups operate outside State control: that they endanger human security on a global scale, but offer no fixed global address towards which principles of legal accountability, reciprocity or deterrence can be directed".[884]

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[880] For the theoretical framework of this inquiry, see Becker, TERRORISM AND THE STATE, *supra* note 2, at 285-330. For an application of the proposed model to terrorism, see *Ibid*, at 331-360.
[881] See, e.g., *infra* Chapter 4, Section B)2.a).
[882] Becker, TERRORISM AND THE STATE, *supra* note 2, at 252.
[883] It is no surprise that the Internet and the broad-reaching options it offers terrorists, poses significant challenges to international law. See Ugo Draetta, *The Internet and Terrorist Activities*, in Bianchi, ENFORCING, *supra* note 1, at 453-464; Richard Garnett and Paul Clarke, *Cyberterrorism*: *A New Challenge for International Law*, in *Ibid*, at 465-490.
[884] Becker, TERRORISM AND THE STATE, *supra* note 2, at 252.

More importantly, Becker's argument becomes more compelling when considering the extent to which post-9/11 state practice has been constitutive of a shift in international law. In fact, if there was ever a moment to recognize the crystallization of state practice or, perhaps, even the formulation of instant custom,[885] the international legal response to 9/11 might be as good a contender as any other. Indeed, in the *North Sea Continental Shelf* cases the International Court of Justice declared that "the passage of only a short period of time is not . . . a bar to the formation" of a customary rule of international law.[886] As a corollary, whether the response to 9/11 was, in fact, constitutive of instant custom will depend, to a large extent, on how much weight will ultimately be accorded to the 'state practice' component of customary international law.[887] Whilst state practice on this front is rather heterogeneous, select states and commentators have nonetheless openly endorsed a general rule permitting the invocation of self-defence against states harbouring or supporting terrorists.[888] For instance, Christine Gray has argued that state support for the U.S.' campaign in Afghanistan could be tantamount to instant custom and, correspondingly, signal a revolutionary interpretative reframing of the *UN Charter*.[889] However, even if the

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[885] See, e.g., Benjamin Langille, *It's "Instant Custom"*: *How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001*, 26 BOSTON COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW 145-156 (2003). More generally, see also Alberto Székely, *Compliance with International Environmental Treaties*, 91 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 234, 236 (1997) (emphasizing that as "a purported new source of international law," the notion of instant custom "has remained a hotly debated issue").

[886] *Continental Shelf*, *supra* note 254, at 44, para. 74. For a variety of views on the formation process of, and source materials for, instant custom, see Thomas M. Franck and Michael J. Glennon, FOREIGN RELATIONS AND NATIONAL SECURITY LAW: CASES, MATERIALS AND SIMULATIONS 283 (2nd Edition, 1993); Mark E. Villiger, CUSTOMARY INTERNATIONAL LAW AND TREATIES 28-29 (1985); Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUMBIA LAW REVIEW 1110, 1129 (1982).

[887] See Andrew T. Guzman, *Saving Customary International Law*, 27 MICHIGAN JOURNAL OF INTERNATIONAL LAW 115, 157-159 (2005). It follows that the creation of instantaneous custom would hinge on a variety of "policies, principles, precedents, analogies and considerations of fairness". See Myres S. McDougal, *Editorial Comment*: *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 AMERICAN JOURNAL OF INTERNATIONAL LAW 356, 359 n.10 (1955). But *Cf*. Gilbert Guillaume, *Terrorism and International Law*, 53 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 537, 546-547 (2004). For a general critique of the creation of instant custom, see Godefridus J.H. Van Hoof, RETHINKING THE SOURCES OF INTERNATIONAL LAW 86 (1983).

[888] See, e.g., Nolkaemper, *Attribution*, *supra* note 248, at 136-137 and authorities cited therein.

[889] *The Use of Force and the International Legal Order*, in Malcolm D. Evans (ed.), INTERNATIONAL LAW 589, 604 (2003). See also Byers, *Terrorism*, *supra* note 30, at 409-410;

response to 9/11 is construed as a single, isolated precedent violating international law, it does not necessarily follow that it has necessarily prompted a change in the relevant primary rules.[890] More radically, even if that precedent is shown to be heeded and repeated by a varied number of states – thereby signalling that the rule in question is consistently violated – a corresponding shift in the law can only be crystallized by a genuine belief by the relevant objectors and by third states that the bindingness of the norm has begun to wane. For example, in *Nicaragua* the fact that the prohibition of the use of force and the intervention in the internal affairs of another state was frequently violated did not sway the ICJ to discredit the customary character of the rule under study.[891]

Nevertheless, because of state and Security Council practice canvassed above, it can be cogently argued that the U.S.' initial posture clearly supports the paradigm shift identified and explored *supra* in Chapter 2: "[i]n the wake of those attacks, not only did the United States regard the Tablian 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 any 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".[892] More importantly, the international reaction to the U.S.' position certainly provided a strong indication of state practice on the application of state responsibility. Even prior to 9/11, American political rhetoric clearly forewarned Afghanistan and Sudan that they would be held directly responsible for Al Qaeda attacks emanating from their territory.[893] As discussed earlier, the response to 9/11 was unprecedented in scope, both legally and politically, with the Security Council, the Organization of American States, the European Union, NATO and various

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Schmitt, *Preemptive Strategies*, *supra* note 35, at 538; Harold H. Koh, *The Spirit of the Laws*, 43 HARVARD INTERNATIONAL LAW JOURNAL 23, 28 (2002); Ruth Wedgwood, *Responding to Terrorism*: *The Strikes Against Bin Laden*, 24 YALE JOURNAL OF INTERNATIONAL LAW 559, 564 (1999).

[890] See, e.g., Duffy, THE 'WAR ON TERROR', *supra* note 133, at 8; Jonathan Charney, *Universal International Law*, 87 AMERICAN JOURNAL OF INTERNATIONAL LAW 529, 543-545 (1993).

[891] See *Nicaragua*, *supra* note 119, at para. 186.

[892] Becker, TERRORISM AND THE STATE, *supra* note 2, at 208.

[893] See Nissel, *Tal Becker, Terrorism and the State*, *supra* note 21, at 247.

national actors and communities all contributing to mounting a constituency of conscience leading to the condemnation of Afghanistan's harbouring of Al-Qaeda on its territory. In fact, this reaction signalled, for the first time, the international community's conviction that "[i]t was the act of "allowing" Al-Qaeda to operate in its territory that rendered the Taliban directly accountable".[894] This posture was also endorsed in some of the post-9/11 legal literature.[895]

In many ways, therefore, Becker's analysis aligns with the arguments espoused in the present dissertation. For instance, some of the factual mitigating or attenuating components of the second tier inquiry explored below in Chapter 4 undoubtedly evoke some connection with the principle of causation. Yet, many of the considerations invoked at that stage of the analysis do not solely rest on issues of causation but also find grounding in various policy dimensions, whilst simultaneously attempting to: i) strike a balance between respecting sovereignty and combating terrorism efficiently with a view to upholding the sovereign equality between states in the face of disparate power dynamics on the world stage; ii) protect developing states from the imposition of any unrealistic or disproportionate legal standard that would indiscriminately open them up to attack or outside interference; iii) enhance and promote transnational cooperation and multilateralism; and iv) recognize the role of non-state actors not only in norm-creation but also in norm-enforcement.[896] Interestingly, this last policy ground has also been brandished in recent scholarly enterprises vindicating acutely sceptical appraisals of the benefits of state responsibility in repressing international crimes. Of particular relevance is Frédéric Mégret's treatment of the

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[894] Becker, TERRORISM AND THE STATE, *supra* note 2, at 218.

[895] Ratner, *Jus ad Bellum*, *supra* note 266, at 905; Milanović, *State Responsibility*, *supra* note 78, at 583*ss*.

[896] Compare with Becker, TERRORISM AND THE STATE, *supra* note 2, especially at 281 (essentially arguing that responsibility should be synonymous with capacity and emphasizing that a legal analysis assessing state responsibility for terrorism should be cognizant 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".). Becker's approach nonetheless leaves some questions up for debate. For instance, some scholars query "[w]hen can it be shown incontrovertibly that the victim state has satisfied its burden of putting forward a 'necessary link between the terrorist attack and the host State'". Robert P. Barnidge, Jr., *Tal Becker, Terrorism and the State*: *Rethinking the Rules of State Responsibility*, 12 JOURNAL OF CONFLICT & SECURITY LAW 331, 331-332 (2007) (citing Becker, TERRORISM AND THE STATE, *supra* note 2, at 343).

question – also distinctly redolent of critiques advancing that state responsibility logic responds to seemingly immutable bilateral typology – which levels an important charge against the *Articles on State Responsibility*. More specifically, Mégret's contention is that, in light of state responsibility's entrenched inter-state inclination, such body of law fails in providing an apt incubator for the deployment of purely *erga omnes* reactions to international crimes, a scheme of recourses that should presumably encompass a role for individuals in the author's view.[897] Ultimately, Mégret resolves this conceptual disparity by transposing the impugned bilateralism pervading inter-state relations under the lens of state responsibility to an individualized setting, expounding that "[p]erhaps a better ground is the idea that, if crimes are committed by individuals, then other individuals should also be allowed to stop their perpetration."[898] Not only are these observations on the propensity of international resistance movements to shed light on the limits of state responsibility enforcement helpful for the purposes of the present analysis, they also bring the recurrent theme of adapting state-centric legal schemes to meet the challenges of counterterrorism back into sharp relief. As seen in Chapter 1 and will be seen in Chapter 5, host-states have some role to play in deterring transnational terrorism but they do not bear the sole burden of enforcing international law. A legally pluralistic structure seeking to integrate a multiplicity of actors against a multipolar political backdrop must absolutely be emphasized.

Vital to justifying the policy crux of both studies is the notion that the world is now different and that state responsibility must be envisaged in a different light in order to ensure any kind of effective enforcement of counterterrorism obligations. As a corollary, it becomes clear that "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".[899] It follows that the law of state responsibility should accommodate modern realities -- either by

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[897] Frédéric Mégret, *Beyond "Freedom Fighters" and "Terrorists": When, if Ever, Is Non-State Violence Legitimate in International Law?*, Unpublished Paper, available online at http://ssrn.com/abstract=1373590 (last visited on 30 July 2009), at 10 n.45.
[898] *Ibid*.
[899] Becker, TERRORISM AND THE STATE, *supra* note 2, at 361.

loosening its standards on attribution or by envisaging a more ambitious regime overhaul -- an eventuality that was not contemplated by the ICJ when handing down its *Genocide* judgment in 2007, much to the chagrin of the proponents of a responsibility-expanding scheme of liability.[900] Interestingly, after arguing that the ICJ could not possibly have gone as far as to revisit its test on attribution in the *Genocide* case, now enshrined in the ILC's Article 8, others rather expound that "it is precisely the Court's silence on the matter than can allow state practice to develop unimpeded, and perhaps eventually produce new tests of attribution."[901]

Becker's searing indictment of the ILC's *Articles* comes into sharp focus when contemplating the rigid dichotomy between the private and public sphere that seems to underpin the modern law of state responsibility.[902] Despite the warnings issued by feminist scholars such as Chinkin, Mackinnon and Olsen against this (perhaps antiquated) distinction when exposing the Victorian roots of Anglo-American public law,[903] it nonetheless found its way -- and in a very central fashion -- in the ILC's finalized project. As Becker ultimately points out, the ILC's standard of agency is ill-suited to adequately tackle and depict the *real* interrelationships connecting terrorist elements and the host-states that harbour them. In short, agency miscasts most prevalent arrangements between host-states

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[900] Jörn Griebel and Milan Plücken lament the Court's failure to take stock of the events of 9/11 when assessing the rules of state responsibility in the *Genocide Case*. See *New Developments Regarding the Rules of Attribution? The International Court of Justice's Decision in Bosnia v. Serbia*, 21 LEIDEN JOURNAL OF INTERNATIONAL LAW 601-622, 618 (2008). Conversely, other scholars resisted the need to alter the extant scheme of public international, even prior to the *Genocide Case*. See, e.g., Georges Abi-Saab, *There Is No Need to Reinvent the Law*, A DEFINING MOMENT – INTERNATIONAL LAW SINCE SEPTEMBER 11: THE MAGAZINE, available online at http://www.crimesofwar.org/sept-mag/sept-abi.html (last visited on 11 February 2009).

[901] Marko Milanović, *State Responsibility for Acts of Non-State Actors*: *A Comment on Griebel and Pluecken*, 22 LEIDEN JOURNAL OF INTERNATIONAL LAW 307-324, 321 (2009). Interestingly, Becker rather frames the issue of imputability in a different light, expounding that "[t]he 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". See Becker, TERRORISM AND THE STATE, *supra* note 2, at 324.

[902] This distinction is also tackled throughout the present study, particularly in the present chapter: Section B)1.c) (through the lens of the primary/secondary obligations dichotomy), and Section B)6.a) (through the lens of limiting governmental interference in the private sphere in combating terrorism).

[903] See Nissel, *Tal Becker, Terrorism and the State*, *supra* note 21, at 247. For a sampling of the feminist approach vis-à-vis this rigid dichotomy, see, e.g., Christine Chinkin, *A Critique of the Public/Private Dimension*, 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW 387 (1999).

and terrorists, save in clear-cut cases of direct state involvement in such activity.[904] As such, "agency suggests a joint endeavour 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".[905] Yet, as the present dissertation demonstrates, recent events and an increasingly prevalent deterritorialized and decentralized model of terrorism evince that state involvement in such activity is often "more about acquiescence than direction and control".[906] These concerns also fit neatly within the framework advanced in this dissertation, especially in the spirit of the paradigm shift towards indirect responsibility identified in Chapter 2, and further bolster the impetus for devising new or more flexible rules of responsibility.

Ultimately, the present study shares several points of rapprochement with Becker's own recasting of state responsibility rules, a crucial one being that both studies allow for the consideration of policy factors in increasing or decreasing the responsibility of host-states. Whilst this portion of the inquiry is inextricably intertwined with evidentiary issues and remains unquestionably compatible with the attenuating or mitigating factors explored below, in Section C)2.b), Becker acknowledges that "[r]elevant 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."[907]

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[904] Whilst certain scholars, such as Antonio Cassese argue for the adoption of *Tadić*'s overall control standard, it is not even certain that Afghanistan would have been found responsible for the 9/11 attacks on the basis of that rule. Given the relevant facts, it is interesting to ponder whether the less exacting standard of 'harbouring and supporting' could produce that legal result. On the agency standard's miscasting of real host-state/terrorists relationships in the context of Becker's treatment of the topic, see Joshua Rosenthal, *Book Annotations*, 39 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 141, 147 (2006) ("[b]y misunderstanding the nature of public involvement in the private sphere of terrorism, the agency paradigm mistakenly absolves states of responsibility when the true nature of their support, often in the form of a persistent failure to prevent private wrongs, allows terrorist activity to succeed.").

[905] Becker, TERRORISM AND THE STATE, *supra* note 2, at 258.

[906] *Ibid*.

[907] *Ibid*, at 150.

One of the main points of contention between both accounts undoubtedly resides in the fact that Becker's analysis goes a step further in extending what was conceived, in the earlier stages of this dissertation, as 'direct state responsibility' to host-states.[908] In other words, his argument operates on the possibility of imputing hitherto unattributable private conduct to host-states; contrary to the analysis advocated throughout the present study, however, he doesn't entirely focus the inquiry on the distinct obligation to prevent terrorism, but rather expounds that, in certain scenarios of mere toleration and acquiescence of terrorists, a host-state can be found responsible for the internationally wrongful act itself (i.e. the terrorist attack), via causation. In short, the host-state can be seen as having *caused* the act of terrorism and is, therefore, responsible. Admittedly, whilst the underlying objectives of his model undoubtedly oscillate between promoting deterrence and ensuring that states take their counterterrorism obligations seriously, similar policy goals are ultimately vindicated through the *prima facie* presumption of indirect responsibility and the corresponding shift in onus suggested below. However, after attempting to somewhat neutralize asymmetric power dynamics and produce a levelled playing field, the proposed model triggers the assessment of various policy and factual considerations, discussed in Section C)2.b). That is not to say that Becker's approach does not also incorporate policy and 'non-causal' factors in the fourth tier of the inquiry so as to determine whether the ensuing responsibility should be increased or decreased. However, the thrust of the present study consistently couches the proposed legal reform at the level of the obligation to prevent terrorism and within the purview of international responsibility. In so doing, it sometimes analytically merges elements of the relevant jurisprudential tests with the new 'harbouring and supporting' standard and/or promotes automatic attribution or circumventing attribution in certain cases, or perhaps ultimately challenges the rigid private/public sphere dichotomy enshrined in the ILC's *Articles*. But it has never sought to effectively conflate terrorists and their host-states on the basis of

[908] See, particularly, *supra* Chapter 2, Section B).

causation, save in flagrant cases of direct state involvement in terrorism.[909] At any rate, when there is egregious direct state involvement in transnational terrorism or, alternatively, *ex post facto* endorsement by the governing apparatus of the internationally wrongful act, international responsibility may be established by way of normative operation under the *Articles*, that is to say by virtue of the principle of attribution and not through the concept of causation. For every situation in between, new rules of international responsibility are direly needed.

Interestingly, and reconnecting with the arguments explored above, feminist legal scholars have inexorably pitted Becker's own vision of a fructuous reform of the law of state responsibility against what constituted the initial theoretical articulations of the present study. The ensuing analysis, therefore, is cast at the level of indirect versus direct, as a theory working within the classical international legal paradigm versus a reconceptualization of the rules involving a radical overhaul of the public/private dichotomy. As highlighted above and as acknowledged by those same scholars, this is not to say that the present study -- or previous accounts relating to it -- has eschewed a critique of the public/private dimension of state responsibility. In fact, this line of contestation invariably amounts to one of the recurrent unifying threads amongst all recent progressive scholarly endeavours advocating a reformulation of the rules of state responsibility.[910] Indeed, one would be hard-pressed to call for the adoption of truly innovative legal mechanisms in this field without challenging the rigid conceptual and analytical barrier that flows from the agency paradigm underpinning the mechanics of the ILC's *Articles*. Nevertheless, one feminist

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[909] In that light, this position stands in sharp contrast with the model of indirect state responsibility advocated in the present dissertation. Put another way, Becker's approach allows – through the mechanism of causation – for the attribution of conduct that would not ordinarily trigger direct state responsibility under the classical rules to nonetheless (and perhaps 'artificially') meet that threshold. See Becker, TERRORISM AND THE STATE, *supra* note 2, at 335 ("[t]he principal benefit of the causality based approach is that it 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.").

[910] See Rachael Lorna Johnstone, *Unlikely Bedfellows*: *Feminist Theory and the War on Terror*, 9 CHICAGO-KENT JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 1, 28 (2009) (invoking the works of Greg Travalio and John Altenberg, Vincent-Joël Proulx, and Tal Becker).

reading of the policy reforms put forth ultimately identifies two distinct shifts in perspectives along the following lines: whilst the central argument advanced herein most likely "works within the classical framework with a greater focus on the positive obligations of states to prevent terrorism and a higher degree of due diligence", Becker's own treatment of the topic "questions the entire basis of the public/private dichotomy, insists that terrorists cannot be distinguished from the states in which they are permitted to operate, and that state responsibility for terrorist activities should be direct."[911]

Conversely, the present study elected to focus squarely on shifts towards more indirect modes of international responsibility, an approach predicated on governmental failures to intervene, which, in turn, translate into failures to prevent transnational terrorism. As explored above in Chapter 2, the U.S.-led response against Afghanistan after 9/11 seems to have effectively collapsed the conceptual barrier once erected between direct and indirect responsibility, perhaps better exemplified by international responsibility for actions versus omissions. In contrast with Travalio and Altenberg's view that this reality necessarily reflects the state of contemporary international law, the crux of the policy argument espoused herein is rather one "where there remains a distinction between direct responsibility (for organs and agents who fail to respect international law) and indirect responsibility (for the failure of due diligence to prevent non-state violations of international law)."[912] In that light, the contentions advanced throughout the present dissertation seem redolent of the arguments espoused within the pragmatic feminist scholarly canon, perhaps best spearheaded by Rebecca Cook, which stresses an important focus on enlarging the scope of international responsibility for omissions whilst simultaneously casting policy recommendations within a framework that can be reconciled with the ethos of public international law.[913] Under both approaches, therefore, it is clear that the

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[911] *Ibid*, at 18 (contrasting the works of Vincent-Joël Proulx and Derek Jinks with those of Tal Becker and Greg Travalio and John Altenberg).
[912] *Ibid*, at 29.
[913] See, e.g., the following works: *State Accountability Under the Convention on the Elimination of All Forms of Discrimination Against Women*, in Rebecca Cook (ed.), WOMEN'S INTERNATIONAL HUMAN RIGHTS LAW: THE WAY FORWARD 228-257 (1994); *Accountability in*

notion of indirect responsibility becomes paramount in the analysis, thereby dictating a call for greater protection of women's human rights within Cook's own scholarship, on one hand, and for renewed analytical emphasis on governmental failures to prevent terrorism (i.e. omissions under state responsibility) herein in Chapters 2 and 4, on the other.[914] Both visions likely strive towards a more egalitarian and legitimate application of international legal rules, whilst concomitantly signalling the limitations of adopting a purely causal responsibility model under the aegis of the framework proposed throughout the present study.

Another more significant problem with Becker's thesis is his assertion that state responsibility is only contingent on the eventuality that the host-state *could have* thwarted a terrorist attack in question, should it had fulfilled the due diligence standard.[915] In other words, only in the case where an attack can be averted via diligent conduct will the host-state be held to its international obligation to prevent terrorism on the basis of direct responsibility. Needless to say, Becker frames the thrust of his argument in causal terms; everything hinges on the host-state having somehow contributed to the triggering of a chain of events leading to the internationally wrongful act, a prospect seemingly far removed from the rationale of indirect responsibility, which acknowledges the fact that governments will sometimes be held responsible irrespective of any clear, contributory cause-and-effect participation in the impugned act. More controversially, the analysis becomes one of causal apportionment and blame allocation, which can, in turn, obfuscate the establishment of clear legal postulates governing accountability mechanisms: is mere toleration of terrorists sufficient to legally *cause* a terrorist attack or can it just contribute incrementally to the perpetration of the terrorist act – let's arbitrarily say 20%? Or are there other

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*International Law for Violations of Women's Rights by Non-State Actors*, in Dorinda G. Dallmeyer (ed.), RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 93-116 (1993). Along similar lines, see also Kenneth Roth, *Domestic Violence as an International Human Rights Issue*, in Rebecca Cook (ed.), WOMEN'S INTERNATIONAL HUMAN RIGHTS LAW: THE WAY FORWARD 326-340 (1994).

[914] For further analysis on this point, see Johnstone, *Unlikely Bedfellows*, *supra* note 910, at 29-30.

[915] Becker, TERRORISM AND THE STATE, *supra* note 2, at 334.

relevant non-governmental *causes* that may have facilitated the commission of the internationally wrongful act? For instance, can we consider the breakdowns in U.S. intelligence as amounting to contributory negligence in respect of the 9/11 attacks? How do we decipher which cause contributed to what percentage of the wrongful act? Etc. This debate inexorably steers us back to the problematic -- and sometimes circuitous -- fact-finding mission embodied in the ILC's Article 47(1).[916] There is serious doubt as to whether this model would be sustainable in cases where several preparatory terrorist acts span over different territories; for instance, how would one apportion international liability for the 9/11 attacks based on a causal model (e.g. 60% for Afghanistan, 10% for Saudi Arabia and 20% for Germany)? Similarly, how would we determine the level of participation and, consequently, of liability of both Yemen and the Netherlands in failing to foil the actions of Umar Farouk Abdulmutallab (aka the 'Underwear Bomber')? Similar concerns are applicable to the *Lockerbie* attack, which entailed at least the passive involvement of several states such as Cyprus and Germany. In all of these scenarios, it is clear that there is some due diligence failure at every step but it is less clear how a causation-based model of state responsibility would address such failures.

Nevertheless, Becker illustrates his conception of this norm by way of example: "[s]uppose that 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."[917] It must be recalled, here, that Becker is seeking to extend the discipline of state responsibility to the act *itself*, so as to cast the host-state as 'directly' responsible for the terrorist attack (i.e. as though it had, itself, carried out the attack). More importantly, Becker's posture comes into sharper focus in his treatment of the question of capacity,

[916] For further discussion on Article 47(1), see *infra* Section C)2.b); Chapter 5, Section A)2.
[917] Becker, TERRORISM AND THE STATE, *supra* note 2, at 334.

which he views as depending "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. 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."[918]

This line of argument seems to misfire on two counts. On a general level, by equating due diligence solely with the fact that failure of its exercise would have caused the attack is not only extremely difficult to prove, but it cannot escape the impression of somehow missing the mark. Revamping state responsibility law so as to devise a more efficient method of ensuring state accountability and, as corollary, of bolstering deterrence models, is not just about ascertaining that governments were somehow involved in terrorist attacks. It also constitutes an acknowledgment that those actors should take their counterterrorism obligations seriously with a view to also promoting transnational cooperation and multilateralism in combating terrorism. This might entail adopting more stringent mechanisms of responsibility -- which the *prima facie* presumption of indirect responsibility and corresponding shift in onus advocated below seem to heed, at least partially -- so as to increase accountability and shift the focus squarely on prevention. Indeed, this might prove to be an effective way to uphold the content and integrity of primary rules, no matter how vaguely they may be formulated. Without enforcement or the threat of incurring international liability, broad and sweeping obligations are essentially eviscerated of any real binding power. We must find a way to instill some traction into Resolution 1373 and similar documents; otherwise, primary counterterrorism obligations will be relegated to pure form. Therefore, in order to promote substance over form, the present study, along with Becker's own analysis, have attempted to achieve this objective via a rethinking of state responsibility.

On a more specific level, by equating due diligence solely with the fact that failure of its exercise would have caused the attack, Becker's treatment of the

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[918] *Ibid*.

subject-matter seems to conflict with the ICJ's recent *Genocide* judgment. As amply discussed throughout this dissertation, in that case the Court focused its inquiry on the obligation to prevent in the context of the Convention on the Prevention and Punishment of the Crime of Genocide. Indeed, the Court opined that responsibility is not solely contingent on the host-state failing to exercise due diligence in preventing genocide if doing so would have averted the internationally wrongful act. In short, the Court rejected the creation of an escape clause enabling states to claim that full compliance with due diligence would have fallen short in preventing the unlawful act, and moves toward a multilateral expectation that several states – "each complying with its obligation to prevent" where the efforts of a single nation might have failed – can perhaps bring about the desired result.[919] It should be recalled that the ICJ's reasoning was framed exclusively within the furrow of the Genocide Convention.[920] However, there is every indication that this logic could easily carry over to counterterrorism duties, especially to the obligation to prevent terrorism explored in the present chapter.[921] Consequently, additional writing on the application of the due diligence standard to transnational terrorism -- which is explored below in Section C)2.b) -- is undoubtedly required.[922]

In sum, even if one accepts that state responsibility law can play some role in the prevention and suppression of transnational terrorism, considerable obstacles still impede the full deployment of any effective enforcement and/or coercive scheme pursuant to that body of law. The dissertation now turns to some of those more intractable obstacles by advocating a perhaps more radical policy shift towards a strict liability-infused model.

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[919] *Genocide Case*, *supra* note 100, at para. 430.
[920] *Ibid*, at para. 429.
[921] For a similar argument, see Barnidge, Jr., *Tal Becker, Terrorism and the State*, *supra* note 896, at 332.
[922] Certain scholars have recently delved into this difficult topic and offer a thought-provoking foundation for the further development of due diligence analyses in the context of transnational terrorism. See, e.g., Barnidge, Jr., NON-STATE ACTORS, *supra* note 7.

## B) Doing Away with Attribution: Toward a Model of Strict Liability?[923]

Given the international community's will to eradicate terrorism, coupled with the Council's emphatic condemnation of terrorist acts and its resolve to eliminate threats to peace and security "by all necessary means",[924] it is imperative to rethink the underlying tenets of indirect responsibility. Although it is also important to address the substantiality of a state's obligation to prevent terrorist attacks, the trans-substantive rules of state responsibility must also be revisited in light of the paradigm shift described above. The thrust of the policy argument advanced in this chapter, therefore, is that the interests and priorities of the international community, especially with regard to combating terrorism, would be better achieved by circumventing certain trans-substantive rules, namely attribution. This line of reasoning seems reminiscent or on par with certain precursory statements articulated in legal scholarship prior to 9/11, as some authors emphasized the need to rethink some of the underlying tenets of state responsibility. In a somewhat premonitory statement with regard to the current debate, Gordon Christenson raised the possibility of rethinking attribution in order to better reflect modern reality. He noted that "[t]he tradition of civil society with intermediate institutions that are neither market nor State offers a form of pluralism to rethink the international legal order's attention to attribution theory. Allocating supervisory responsibility and control to conduct of modern States in relation to non-State actors in an exclusive system of territorial States will revise attribution theory to reflect the new realities of power."[925]

As demonstrated in Chapter 1, particularly in sections C) and D), the extant scheme of state responsibility remains marred by several limitations when

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[923] Some of the premises of what follows significantly expand on the remarks found in *Babysitting Terrorists*, *supra* note 163.

[924] It is interesting to note that, in the context of Iraq's invasion of Kuwait, Security Council Resolution 660 authorized "member states cooperating with the government of Kuwait to use all *necessary means* to uphold and implement Resolution 660." See Security Council Resolution 660, 2 August 1990, UN Doc. S/RES/660 (1990). [Emphasis added.] In addition, the "'*all necessary means*' language, while a euphemism, is universally understood in the diplomatic context as synonymous with the authorization of necessary force. See Duffy, THE 'WAR ON TERROR', *supra* note 133, at 175. However, see *Ibid*, at 175 n.142 ("By contrast…the absence of such language in the post-September 11 resolutions was critical to their being broadly considered not to authorize the use of force in Afghanistan.").

[925] Christenson, *Attributing Acts*, *supra* note 115, at 369.

the traditional rules of attribution are applied uncritically. The defect, therefore, is one of adaptability of a state-centric legal system to transnational phenomena, such as terrorism, so as to best integrate a multiplicity of actors within a multipolar political reality. Having now identified these conceptual and legal shortcomings -- along with a potential paradigm shift in both state and institutional practice towards mustering the requisite political will to move towards more indirect modes of international responsibility[926] -- the dissertation now turns to more tangible policy recommendations. In so doing, it remains challenged by the hard cases canvassed above, namely where the host-state's involvement is sufficiently divorced from the private perpetration of transnational terrorism to eschew the classical rules of attribution. For instance, the scenario explored above whereby Lebanon fails to control the southern portion of its territory, which is, in turn, used as a launch pad for attacks carried out by Hezbollah factions remains a quintessential encapsulation of the legal 'grey area' that the present project seeks to elucidate.[927] In response to such scenarios, some commentators have rightly called for a rethinking of the rules of attribution so as to better address the modern challenges of terrorism.[928] Yet, too little scholarly emphasis has been placed – or, conversely, has been misplaced in some cases – on critically appraising and reconceptualizing the rules of state responsibility. With this vital concern in mind, this first section will therefore canvass the key points of contention triggered by post-9/11 scholarly shortcomings warranting further consideration in order to fully set out a proposal for policy reform. As a corollary, this primary exploration of doctrinal shortcomings will also pave the way for the chapter to attempt to redress the dearth in the literature dealing with state responsibility and terrorism. Thus, once these limitations have been firmly established, subsequent portions will move towards the precise task of revisiting

[926] A paradigm shift towards a law of indirect state responsibility for failing to prevent transnational terrorism was explored, *supra*, in Chapter 2. The potential institutionalization of the implementation of state responsibility for terrorism through UN mechanisms was also extensively canvassed in Chapter 3.
[927] See *supra* Chapter 1, Section C)4.
[928] See, e.g., Becker, TERRORISM AND THE STATE, *supra* note 2.

trans-substantive rules, especially attribution, and propose the implementation of a strict liability-inspired deterrence model.

### 1. Limited Scholarly Advances in Devising Potential Deterrence Models

Both before and after 9/11, several commentators highlighted the inadequacy of the prevalent scheme of state responsibility in dealing with terrorism while placing significant emphasis on the shortcomings of the *Nicaragua* and *Tadić* formulations of attribution, especially in light of host-states waging surrogate warfare via subterfuges or wilful blindness.[929] Among similar lines and after canvassing some of the conceptual problems related to the response to 9/11, some have argued that the current state-to-state scheme of responsibility is "inadequate to assure the observance of international law."[930] Others have flat-out questioned the authority of *Nicaragua*, *Tehran Hostages* and *Tadić*.[931] Conversely, following 9/11 some of the criticism pertaining to the possible shift in the law of state responsibility deplored the revision of trans-substantive rules of responsibility over the primary rules of international law. In other words, some critics believed that revisiting secondary rules of state responsibility, such as attribution, was ineffective and that the policy objectives of the international community would be better vindicated through the reaffirmation of the primary obligations of host-states.[932] For reasons explored previously, the present section of the study elects to cast part of its proposal for reform at the level of secondary norms and, as prefaced above, starts by briefly canvassing the shortcomings of existing post-9/11 literature so as to identify the specific areas in need of further academic consideration.

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[929] See, e.g., Dinstein, WAR, AGGRESSION, *supra* note 125, at 182-183; Reisman, *International Legal Responses*, *supra* note 64, at 39. See also Brownlie, *International Law*, *supra* note 417, at 718; Dinstein, *The International*, *supra* note 125, at 140, 142.

[930] Zemanek, *Does the Prospect*, *supra* note 50, at 132.

[931] Becker, TERRORISM AND THE STATE, *supra* note 2, at 268.

[932] See, e.g., Jinks, *State Responsibility*, *supra* note 315, at 83; Milanović, *State Responsibility for Acts*, *supra* note 901, at 323-324. For a more nuanced argument dealing with the flexibility of secondary norms of state responsibility, see Värk, *State Responsibility*, *supra* note 12, at 186.

**a) Rethinking Trans-substantive Rules**

For various policy reasons explored in subsequent pages, the utility of the principle of attribution in the context of counterterrorism will be thoroughly revisited in the present chapter. Whilst the debate surrounding the interrelationship between transnational terrorism and state responsibility has undoubtedly generated some academic writing, the validity of attribution as a concept altogether does not seem to have been called into question. This is not to say that, historically, the ILC's treatment of attribution has not generated its share of controversy. For instance, before 2001 there had been significant concern over the distinction between the mechanism of attribution and whether there should be fault on behalf of a state to trigger its international responsibility vis-à-vis a wrongful act.[933] Although the possible inclusion of fault and strict liability is not an original idea in state responsibility scholarship, and conventional wisdom does not preclude the implementation of such features, a proposal aiming at excising the concept of attribution altogether from the equation seems novel. That is part of the politico-legal impetus underpinning the present study. Moreover, this is also not to say that attribution has not generated some scholarly attention in post-9/11 legal literature, with some authors calling for substantial rethinking of the rules of responsibility.[934] However, considerable shortcomings exist in the literature and significantly impede the prospect of advancing new proposals for reform via scholarly output.

Whilst this brief review of those legal opportunity areas does not claim to be exhaustive, it nonetheless strives to represent the symptomatic lack of critical thinking surrounding the treatment of attribution in this new era of terrorism. More importantly, it attempts to specifically direct the reader to contentious conceptual areas within state responsibility scholarship that will, in turn, become

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[933] See, e.g., Mohammed Bedjaoui, *Responsibility of States, Fault and Strict Liability*, 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 358-362 (1987); Andrea Gattini, *La Notion de faute à la lumière du projet de convention de la Commission du Droit International sur la responsabilité internationale*, 3 EUROPEAN JOURNAL OF INTERNATIONAL LAW 253-84 (1992); Pavel Sturma, *Some Problems of Strict Liability in International Law*, in RESPONSIBILITY OF STATES: THESAURUS ACROASIUM, VOL. XX 369, 373-376 (1993).

[934] See, e.g., Becker, TERRORISM AND THE STATE, *supra* note 2.

fertile breeding grounds for policy reforms aimed at better integrating non-state actors and host-states within a liability framework so as to combat impunity and surrogate warfare. The most recurrent areas warranting further clarification hinge on a combination of factors surrounding, on one hand, the importation of domestic legal analogies within state responsibility repertoire and the notion of 'control' as promulgated under the *ILC Articles on State Responsibility*, and, on the other, the better definition of both primary and secondary obligations under international law. Both of these strands of scholarship are briefly analyzed sequentially below before moving on to an exploration of the need to develop general guidelines in this international legal area, an exercise that is conceptually hampered by the primary/secondary dichotomy under the *Articles*, as discussed subsequently.

**i) Shortcomings on Domestic Legal Analogies and the Notion of 'Control'**

Under the first general strand of scholarship, certain commentators run through the general motions of linking state responsibility to counterterrorism without offering much in the way of critique or legal reform with regard to the accountability of host-states for the terrorist acts of private individuals.[935] For instance, the first portion of Helen Duffy's recent book, which explores the framework of international legal rules vis-à-vis terrorism, concludes by discussing the possible responsibility of states for terrorist activities emanating from their soil, whilst also acknowledging the viability of individual responsibility mechanisms.[936] Although Duffy does not completely dispel the lack of analytical nuance that has plagued recent state responsibility scholarship, especially with regard to the fading legal bases of attribution when faced with unconventional actors, she delivers a thoughtful account of what could be termed the agency paradigm or, alternatively, of what could be designated a control-based

[935] This principle was also very much alive at the Hague Codification Conference of 1930. See, e.g., YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, A/CN.4/SER.A/1975/Add.1, Volume II, at p. 76, paras. 19-21 (1975). On the lack of critical analysis regarding the concept of attribution and state responsibility for terrorism, see, generally, Vincent-Joël Proulx, *The "War on Terror" and the Framework of International Law*, 40 CANADIAN JOURNAL OF POLITICAL SCIENCE 278 (2007).

[936] See Duffy, THE 'WAR ON TERROR', *supra* note 133, at 47-70.

application of state responsibility. Ultimately, her account of post-9/11 state responsibility rests on the premise that, in order to engage that body of law for acts of terrorism, any legal assessment should solely seek to determine whether the standards on attribution developed in international jurisprudence and mirrored in the ILC's *Articles* have been satisfied.[937] Implicit in this approach and in contrast to the arguments advanced in the present dissertation, especially in Chapter 2, is the fact that no substantive change or challenge to the law of state responsibility – a paradigm shift in the application of this branch of international law, for example – seems to derive from the response to 9/11.

Initial concerns that come to mind also include Duffy's failure to unequivocally recognize the direct/indirect responsibility dichotomy, which underlies many of the difficulties related to holding states accountable for failing to prevent transborder terrorist activity.[938] The author does make reference to 'vicarious liability' only to highlight that that term has engendered controversy, a reality that is endorsed below in the ensuing analysis. Yet, this stands in sharp contrast with the categorical views expressed by other influential scholars who reserve a very central role for vicarious liability in correlating the law of state responsibility with current counterterrorism efforts. For example, writing about the attacks of 9/11, Harold Koh argues that "[w]ithin the U.N. Charter framework, forceful actions against states within whose territory such actors may be found can only be justified on the grounds of vicarious state responsibility."[939] Similarly, it would appear that the mere harbouring of known terrorists -- perhaps coupled with the failure to extradite or punish them once they have launched an attack -- could also trigger state responsibility through the channels of this conception of 'vicarious liability'.

Whilst domestic law analogies may be drawn from vicarious liability schemes by seeking inspiration from the Canadian experience, for example, the transplantation of that strand of liability remains severely limited when applying

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[937] *Ibid*, at 48.
[938] But see her thoughtful discussion on what could be termed 'direct' and 'indirect' international criminal responsibility in *Ibid*, at 94-95.
[939] Koh, *The Spirit*, *supra* note 889, at 28.

state responsibility to counterterrorism.[940] This is not to say that such analogies are not helpful; in many ways, they allow the inquiry to test out the limits of agency – by reference to informal employer/employee relations being transposed to host-state/terrorist dynamics in this instance – a worthwhile exercise for the purposes of this project, which rests at the periphery of agency/state negligence with the ensuing analysis being interstitially situated between direct/indirect responsibility. By way of mere example, consider Article 1463 of the *Civil Code of Québec*, which provides that "[t]he principal is liable to reparation for injury caused by the fault of his agents and servants in the performance of their duties; nevertheless, he retains his recourses against them."[941] Transposing this line of thinking to state responsibility would be limited to flagrant, clear-cut cases of direct responsibility, namely where a sanctuary state clearly controls a terrorist organization or when this faction is subsumed under, or subject to, the official state's hierarchy of commands. In practical terms, such would have been the case of the 2004 Islamic Movement of Uzbekistan-Taliban operations in Central Asia orchestrated by Tahir Yuldashev. As part of a vast, Islamist expansionist military campaign that reportedly relied heavily on ties with Al Qaeda, Yuldashev's regime proceeded to institute a profoundly oppressive Wahabbist state and proclaimed the Islamic Emirate of Uzbekistan.

What is more, the offensive culminated in 2005 when a group of Yuldashev-backed irregulars convened in Tashkent to devise a strategy to extirpate American presence from the 'Muslim land', and carried out a series of terrorist attacks against American and international targets based in Central Asia. As a result, American embassies in Tashkent, Astana, Kazakhstan and Turkmenistan as well as the offices of the Amoco Oil Company in Astana and Dushanbe, Tajikistan, the offices of the World Bank and the U.N. Development Program in Fergana City and the headquarters of the 10th Mountain Division at its base in Khanabad, Afghanistan were all attacked and 5000 people killed,

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[940] See, e.g., the Supreme Court of Canada's analysis in two important decisions: *Bazley* v. *Curry*, [1999] 2 S.C.R. 534; *E.B.* v. *Order of the Oblates of Mary Immaculate in the Province of British Columbia*, [2005] 3 S.C.R. 45.

[941] *Civil Code of Québec*, R.S.Q. ch. 64, Article 1463.

including high-ranking directors of both the CIA and the FBI. In response to the attacks, the U.S. government requested that "the Yuldashev regime either extradite a list of suspects, including Usama bin Laden, or else accept responsibility for their actions on the theory of vicarious state responsibility".[942]

Another example where we can apply this type of rationale to clear-cut and relatively uncontroversial cases of direct responsibility is that of Iranian support of Hezbollah in its 2006 conflict with Israel. Indeed, the mechanics of state responsibility operate smoothly and liability flows organically, as "Iran is thought to continue to exercise such a degree of control over Hezbollah that the country is considered to have been calling the shots in this conflict – in the most literal sense: it is thought that the use of longer-range missiles by Hezbollah would have required…approval by Teheran…the troops on the ground are likely to have needed "direct Iranian help in the field to fire" the rockets."[943] Perhaps difficult to substantiate conceptually because falling more convincingly under the indirect responsibility paradigm, similar reasoning could arguably also extend to Lebanon's failure to prevent Hezbollah attacks emanating from its territory, with certain commentators remarking that "Israel held Lebanon directly responsible".[944] Ultimately, if one were to subscribe to the propositions espoused in this dissertation, it would seem that this last scenario rather falls under the indirect state responsibility paradigm. Nevertheless, the more traditional type of instructions-based, agency-derived direct responsibility model poses relatively little conceptual and practical problems in straightforward situations, at least in

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[942] William Bradford, *Barbarians at the Gates*: *A Post-September 11th Proposal to Rationalize the Laws of War*, 73 MISSISSIPPI LAW JOURNAL 639, 790 (2004). [Reference omitted.] See also Michael Lacey, *Self-Defense or Self-Denial*: *The Proliferation of Weapons of Mass Destruction*, 10 INDIANA INTERNATIONAL AND COMPARATIVE LAW REVIEW 293, 305 (2004) (arguing that 'vicarious state responsibility' governs situations where host-states allow terrorists to operate within their borders).

[943] Kirchner, *Third Party Liability*, *supra* note 138, at 778-779. See also *Ibid*, at 783-784 (noting the high degree of control exerted by Tehran over virtually all significant activities carried out by Hezbollah factions and inferring attribution of those acts to both Iran and Syria). See also Hussein Dakroub, *Hezbollah Says It Fired New Rocket in Strike on Israeli City South of Haifa*, ASSOCIATED PRESS WORLDSTREAM, 28 July 2006, 4:46 PM GMT.

[944] Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction*: *Terrorism and the Intersection of National and International Law*, 48 HARVARD INTERNATIONAL LAW JOURNAL 121, 145 n.153 (2007). [Emphasis added.] See also, Greg Myre and Steven Erlanger, *Clashes Spread to Lebanon as Hezbollah Raids Israel*, NEW YORK TIMES, July 13, 2006, at A1.

theory.[945] But this standard cannot be integrally transferred to challenging cases – such as that of the government of Afghanistan vis-à-vis the 9/11 attacks – especially bearing in mind that the notion of 'control' under the ILC's *Articles* "requires a degree of dependency and a lack of autonomy on the part of the private actor being controlled, in particular regarding the damaging activity."[946] This description remains undoubtedly foreign to the situation prevalent on Afghan soil prior to 9/11. Quite to the contrary, the publicly available facts indicate that the relationship between Al-Qaeda and Afghanistan was anything but one of inter-dependency.[947] In fact, the public record rather convincingly evinces that the Al-Qaeda network enjoyed a high level of autonomy within the Afghan state, that its membership comprised mostly non-Afghani nationals,[948] and that the government of Afghanistan provided, at best, only logistical support to the organization. As will be discussed below, the limits of 'vicarious liability' and other direct modes of international liability also come into sharp relief when confronted with more mixed models of compliance and toleration, such as the situations prevalent in Yemen and Pakistan.

This type of situation therefore seems hardly reconcilable with straightforward and direct support of terrorists – i.e. the arming, training and funding of irregular factions – as embodied by current Iran-Hezbollah relationships. In fact, "it turns out that the state's responsibility in the case of infringement on an international legal norm may result not only from controlling irregular units, but also from the lack of sufficient control over them, or failure to act, or negligence, including the failure to comply with legally binding resolutions of the Council."[949] It follows that the occasional merging of state responsibility and use of force repertoire, at least in some of the post-9/11 legal literature, ultimately shifts the focus of inquiry from full control to relative control, to the

[945] See, e.g., Zemanek, *Does the Prospect*, *supra* note 50, at 131.
[946] Kirchner, *Third Party Liability*, *supra* note 138, at 783.
[947] Yet, some commentators still call into question the nature of this relationship. See, e.g., Slaughter and Burke-White, *An International Constitutional*, *supra* note 43, at 20.
[948] See, e.g., Mofidi and Eckert, *Unlawful Combatants*, *supra* note 342, at 75.
[949] Kranz, *The Use of Armed Force*, *supra* note 130 at 80.

duty to maintain due diligence and, ultimately, to the presumption of absolute responsibility.[950]

However, at the other end of the spectrum, certain jurists reject the notion of indirect responsibility, which has sometimes also been construed as vicarious responsibility, perhaps erroneously.[951] A famous passage discarding the concept of indirect responsibility, as construed in the modern state responsibility paradigm, emanated from Justice Ago's separate opinion in the *Nicaragua* decision, which essentially equated indirect responsibility with the transfer of responsibility flowing from one state to another, when the latter exercises control over the former.[952] Regardless, in straightforward cases, namely where a terrorist organization can be clearly construed as forming part of the state's structure, Article 4 will govern these *de jure* relationships.[953] If the terrorist organization cannot be formally linked to the state apparatus, it may nevertheless become a *de facto* agent of the state, pursuant to the 'complete dependence' standard consecrated by the *Nicaragua* decision and recently applied by the ICJ in the *Genocide* case.[954] In such cases, we are faced with *de facto* state officials -- which can be construed as employees, 'agents or servants' to invoke *Civil Code of Québec* parlance -- and this construction can, in turn, facilitate analogies with Canadian common law and Québec civil law or with other cognate jurisdictions. At the other end of the continuum, however, when dealing with cases of indirect

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[950] See *Ibid.*

[951] See, e.g., Brown, *Use of Force*, *supra* note 148, at 13. See also Hersch Lauterpacht (ed.), OPPENHEIM'S INTERNATIONAL LAW: A TREATISE § 145, at 502 (7th Edition, 1952).

[952] See Justice Ago's Separate Opinion in *Nicaragua*, *supra* note 119, at 189-190. See also Christenson, *Attributing Acts*, *supra* note 115, at 350 and 364; Kevin A. Bove, *Attribution Issues in State Responsibility*, 84 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 51, 56 (1990) (citing remarks by Gordon A. Christenson).

[953] Article 4 provides the following:

> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

*ILC Articles on State Responsibility*, *supra* note 76.

[954] *Genocide Case*, *supra* note 100, at pp. 140-141.

responsibility whereby a sanctuary state merely allows terrorists to seek refuge on its territory (e.g. Pakistan, Yemen), the vicarious liability connection becomes more tenuous. Aside from the terrorists' use of the state's territory, no evident relationship of inter-dependence can be ascertained and the bases of liability, as enshrined in Article 1463 of the *Civil Code of Québec* above, start to wane. More importantly, vicarious liability is typically not predicated on any wrongdoing by the responsible party in domestic settings, thereby making a rapprochement challenging in those cases of indirect responsibility. At any rate, those host-states are nonetheless -- and legally -- responsible for some level of wrongdoing, namely failing to prevent transnational terrorism and/or to exercise due diligence.

Thus, in a broader sense, Duffy's chapter dealing with international responsibility and terrorism offers a quintessential illustration of the rhetorical and conceptual problems related to the notion of "control", which rests at the centre of the ILC's *Articles* and unnecessarily breaks down and, ultimately, obfuscates international obligations vis-à-vis terrorism.[955] This question will be addressed in greater detail under heading B)2.a).

Along similar lines within this first strand of scholarship, Jean-Christophe Martin's recent book partly explores legal responses to terrorism relying on state responsibility repertoire. Whilst his contribution delves slightly deeper into the conceptual and legal impediments related to linking state responsibility and terrorism than Duffy's chapter, it ultimately fails in advancing any proposal for legal reform in the targeted area and concludes that reactions grounded on state responsibility are generally "erratic".[956] Although true in some instances, this finding steers the reader away from any concrete suggestion vis-à-vis the elaboration of general guidelines or organizing principles when exploring state-based accountability issues related to terrorism.

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[955] For a recent discussion of Duffy's chapter, see Becker, TERRORISM AND THE STATE, *supra* note 2, at 219 (terming the account a "classical expression" of the agency paradigm).
[956] See Martin, LES RÈGLES INTERNATIONALES, *supra* note 1, at 451-498.

### ii) Shortcomings on Defining the Content of Primary and Secondary Obligations

Under the second general strand of scholarship, some scholars investigate whether the concept of attribution can adapt to modern realities with specific focus, or lack thereof, on the content of the involved rules. This line of thinking must always be framed within the prism of Oscar Schacter's visionary remarks prior to the adoption of the ILC's *Articles*. Indeed, he rightly opined that the ILC's codification of responsibility would be subject to necessary evolution, while also remaining vulnerable to modification or to a complete overhaul as dictated by practice and custom: "[w]e can be quite sure that the articles and commentary will acquire added authority through their practical application and the accompanying accretion of *opinio juris* even if in some cases they might be modified (or overridden) as a consequence of practice."[957]

In a recent collection of essays in honour of Schachter, several high-profile international jurists weigh in on the matter and provide a solid foundation for revisiting the concept of attribution or, at least, give credence to the idea that attribution is by no means immutable and should be looked at with some degree of flexibility when dealing with unconvential actors. Varying dicta on attribution animate the discussion and ultimately fuel an enriching horizontal dialogue. For instance, Chittharanjan Amerasinghe queries, from the standpoint of semantics, whether 'attribution' should be translated into a general principle, while David Caron suggests that attribution should be revisited so that it would vary depending upon whether ordinary or criminal state responsibility was engaged.[958] Whilst addressing the context of international organizations, Chusei Yamada argues that

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[957] Oscar Schachter, *Dispute Settlement and Countermeasures in the International Law Commission*, 88 AMERICAN JOURNAL OF INTERNATIONAL LAW 471-477, 477 (1994).

[958] See Chittharanjan F. Amerasinghe, *The Essence of the Structure of International Responsibility*, in Ragazzi, INTERNATIONAL RESPONSIBILITY, *supra* note 50, at 3-6, 5 (querying "why should a general principle be made of 'attribution' of the act or omission to the State. It is sufficient to point out that the act or omission must be *by* a State. All that is necessary then is that what is meant by this be explained in the section which is now Chapter II of the Commission's articles", and further asking, at footnote 6, *in fine*, "[w]hy has the term been jettisoned in the International Law Commission's draft?"); David D. Caron, *State Crimes*: *Looking at Municipal Experience with Organizational Crime*, in Ragazzi, INTERNATIONAL RESPONSIBILITY, *supra* note 50, at 23-30, 30.

attribution should be fragmented into two distinct branches, one dealing with conduct and the other with responsibility.[959] Similarly, Rosalyn Higgins discusses attribution through the lens of the burden of proof while contrasting a crucial distinction between what could be termed a 'whodunit' model of imputation -- pursuant to the *Oil Platforms* case -- and more substantial bases for attribution.[960] Finally, Stefan Talmon cites Annex IX to the *United Nations Convention on the Law of the Sea* as an example embodying attribution of responsibility rather than attribution of conduct, and explores whether its provisions turn on *allocation* of responsibility, as opposed to *attribution* of responsibility.[961] However, before even tackling the issue of attribution, some attention must be paid to the actual juridical obligations that trigger the mechanics of attribution.

Aside from specific illuminating passages,[962] too little emphasis is placed on the actual role of the content of primary obligations across all canvassed fields in actuating liability schemes, thereby signalling a need to better define the extant scheme of state responsibility for private actors. For instance, "considerable doubt remains as to the content of customary rules defining the obligations of states in the fight against international terrorism" and this situation "is compounded by relative uncertainty surrounding the meaning to be attributed, for

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[959] Yamada, *Revisiting*, *supra* note 150, at 121-122 (also providing the example of United Nations peace-enforcement initiatives and the attribution of responsibility to its members in support of his position).

[960] Higgins, *The International Court of Justice*, *supra* 208, at 272-275.

[961] Stefan Talmon, *Responsibility of International Organizations*: *Does the European Community Require Special Treatment?*', in Ragazzi, INTERNATIONAL RESPONSIBILITY, *supra* note 50, at 405-421, 410-414 . It should be noted that 'allocation' of responsibility refers to the actual mathematical apportionment of liability under the treaty regime, which, in this case, is based on a division of obligations under the *United Nations Convention on the Law of the Sea*. 'Attribution' of responsibility refers to the normative operation that seeks to link the actions of non-state actors or of official agents to the governing apparatus for the purposes of establishing international liability. The latter does not necessarily follow from the former. In short, even within a party's 'allocated' area of responsibility, Talmon points out that state responsibility would only ensue if an internationally wrongful act can be attributed to that member-state.

[962] See, e.g., Scovazzi, *Some Remarks*, *supra* note 761, at 210-212 (discussing the character of obligations pertaining to the prevention of transboundary environmental damage and drawing a distinction between prohibited conduct and prohibited result); Roucounas, *Non-State Actors*, *supra* note 376, at 401-402 (discussing the idea of strict liability in environmental law and underlining that there are "unresolved questions on primary rules expressing concepts such as the precautionary principle, sustainable development, common but differentiated responsibilities").

instance, to the concept of 'harbouring and supporting' terrorism."[963] This is particularly relevant with regard to abovementioned counterterrorism obligations. Granted, the Security Council has imposed several obligations upon states in its quest to eradicate terrorism, ranging from the criminalization of terrorism and of its support or endorsement, to the freezing of terrorist assets. However, little focus has been directed to the actual role of the content of these obligations in triggering international responsibility, whilst the ensuing confusion is further exacerbated by the lack of consensus on the definition of 'terrorism'.[964]

Perhaps the best way to sidestep this political and conceptual impediment would be to align with Rosalyn Higgins' view of terrorism, and acknowledge that "'[t]errorism' is a term without legal significance. It is merely a convenient way of alluding to activities, whether of states or individuals, widely disapproved of and in which the methods used are either unlawful, or the targets protected, or both."[965] Conversely, it should be mentioned that other influential scholarly voices opine that the concept of 'terrorism' is sufficiently circumscribed to find grounding in international criminal law. In particular, Article 4 of the Statute of the ICTR includes 'terrorism' as a crime under the jurisdiction of the Court, thereby also acknowledging that the term has acquired the requisite legal and conceptual significance in order to qualify as an international crime and to substantiate international prosecutions.[966] Some commentators also advance similar arguments with regard to the International Criminal Court, albeit advocating a constructive application or extension of 'terrorism' under the Rome Statute.[967]

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[963] Duffy, THE 'WAR ON TERROR', *supra* note 133, at 57-58. She further adds, at 58, that the "concept appears to import a degree of intentionality, but it is unclear, for example, whether weak states would also be deemed to harbour terrorist groups if they prove unable to control their activity within its territory."

[964] *Ibid*, at 37-38 and 70.

[965] Higgins, *The General International Law*, *supra* note 25, at 28.

[966] See Cassese, INTERNATIONAL, *supra* note 42, at 120-121. See also Duffy, THE 'WAR ON TERROR', *supra* note 133, at 39 (discussing Article 4 of the Statute of the ICTR and in this context). Others opine that terrorism amounts to a customary law crime. See, e.g., Cassese, INTERNATIONAL, *supra* note 42, at 139; Paust, *Addendum*: *Prosecution of Mr. Bin Laden*, *supra* note 42.

[967] See, e.g., Arnold, THE ICC, *supra* note 41, at 202-272; Proulx, *Rethinking the Jurisdiction*, *supra* note 31. But *Cf.* Duffy, THE 'WAR ON TERROR', *supra* note 133, at 39 (but see also pp. 95,

Yet, sticking to her original posture and writing about the 1954 Draft Code of Offences Against the Peace and Security of Mankind, Higgins once again asserted that the inclusion of 'terrorism' under the rubric of state aggression was tantamount to a "term of convenience".[968] This inference led her to further conclude that the law of state responsibility is sufficiently circumscribed to cover acts of terrorism – both through the channels of direct and indirect responsibility – without the need to resort to superfluous reference to the (undefined) language of 'terrorism'.[969] As Higgins previously wrote, a similar line of argument entails that less attention should be paid to the content of international obligations when looking at state liability scenarios, along with their connection with the general corpus of state responsibility.[970] Rather, the focus of the analysis should simply hinge on the application of state responsibility mechanisms (attribution, reparation, countermeasures, etc.) once a breach has been determined.

However, one reading of Higgins' work in the area even more categorically suggests that the exploration of the latter concepts (e.g. detailing reparation, countermeasures, etc.) should be curtailed in favour of the breach-attributability-duty-to-make-reparation relationship. In other words, state responsibility is not interchangeable with, nor constitutes an incubator for, the further delineation of international obligations.[971] Along similar lines, Brownlie underscores that "too much attention is focused upon uninformative or superficial categories such as 'mob violence'. The focus should be upon the incidence of the

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100 and 118, arguing that there should be little controversy in stating that the acts of 9/11 qualify as crimes against humanity); Ciara Damgaard, INDIVIDUAL CRIMINAL RESPONSIBILITY FOR CORE INTERNATIONAL CRIMES: SELECTED PERTINENT ISSUES 393 (2008).

[968] Higgins, *The General International Law*, *supra* note 25, at 27. Ben Saul rather invokes the term 'political expediency' when discussing Higgins' work. See DEFINING TERRORISM, *supra* note 26, at 177.

[969] Higgins, *The General International Law*, *supra* note 25, at 26. See also Saul, DEFINING TERRORISM, *supra* note 26, at 177 (discussing this position and observing that, "Higgins' analysis is accurate to the extent that there is no normative void in international law in relation to responsibility for the acts of States envisaged by Article 2(6). The law of State responsibility and law on the use of force undoubtedly already apply to unlawful acts committed in these circumstances.").

[970] See her discussion in PROBLEMS & PROCESS, *supra* note 49, at 159-165.

[971] See *Ibid*, at 161-163. See also Philip Allott, *State Responsibility and the Unmaking of International Law*, 29 HARVARD INTERNATIONAL LAW JOURNAL 3-26, 13 (1988).

particular rules and standards of the law."[972] This strand of reasoning is also conceptually analogous to his subsequent claim against unduly partitioning the realm of state responsibility. In particular, he levels staunch criticism against the creation of analytically distinct categories of responsibility for private acts, environmental damages or judicial transgressions. Rather, he believes that all these scenarios remain united under the umbrella of the law of state responsibility, which should be applied accordingly to the fact scenario at hand – as the situation warrants – and be informed by the specific primary obligation dictated by international law.[973] Therefore, this canon of scholarship certainly generates traction towards greater unity of application of secondary norms of responsibility – whilst arguably also lobbying for the elaboration of general guidelines in order to provide greater clarity in the area – as opposed to focusing on primary norms. Ironically, this line of argument lends some level of credence to the idea of achieving unity through vagueness.

**b) Need for the Development of General Rules or Guidelines**

Much in the spirit of certain post-9/11 accounts and in light of the two major strands of scholarship explored above, there is certainly a need to establish general parameters/principles applicable to all international breaches and, more importantly, vis-à-vis unconventional actors. After all, it is no secret that "the law of State responsibility is applied inconsistently".[974] Whilst some partly defend the ILC's decision not to cover new actors or the novel/complex legal situations they engender under the aegis of the ILC's *Articles*, "[t]he result is, nevertheless, that the respective conduct is not guided by firm legal rules but left to political *ad hoc* decisions with an uncertain and varying outcome, in the hope that one day custom might fill the gap."[975] This line of thought remains redolent of Cassese's remarks almost 12 years before 9/11, whereby he cautioned that analyzing modest governmental involvement in the facilitation of terrorism "is clearly an area where

[972] SYSTEM, *supra* note 205, at 160.
[973] *Ibid*, at 163.
[974] Nakatani, *Diplomacy and State Responsibility*, *supra* note 406, at 37.
[975] Zemanek, *Does the Prospect*, *supra* note 50, at 134.

it is difficult to formulate generalized rules."[976] Judging that this field of unsettled law amounts to a 'grey' area, he further opined that governmental input may take on various forms, including "the entire training, moving lodging and equipping of an insurgent army, assistance which should engage the State's responsibility for attacks by the troops."[977] At the opposite end of the spectrum, governmental participation in terrorism "may involve merely permitting insurgents to sleep in disused huts in remote border areas, assistance which should not of itself engage the State's responsibility for an armed attack."[978] The fact that no general principles can, at present, be convincingly or uniformly applied to the latter cases further reinforces the need to better explore possible deterrence models grounded in international responsibility.

Conversely, a liberal dose of scepticism can be applied the other way in that, even if generalized rules can be developed in the field of secondary obligations, the phenomenon of transnational terrorism can be difficultly generalized for the purposes of establishing a dominant model across the board. Whilst this reality will be explored in a subsequent chapter,[979] the present inquiry will remain focused on opportunity areas arising specifically in the field of state responsibility. In particular, and in complementarity with other scholarly shortcomings identified above, whilst there is acknowledgement of a need to elaborate general rules and guidelines, the widespread deficiency in state responsibility literature is also compounded by the primary/secondary dichotomy under the ILC's *Articles*. The treatment of this problematic dimension must be addressed briefly in order to better frame the related issues in the subsequent policy analysis and, as a corollary, to identify the areas warranting further consideration.

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[976] Cassese, *The International Community's*, *supra* note 81, at 599. But *Cf. Ibid*, at 600 (arguing that, in cases of indirect or 'passive' governmental involvement, "the rules are far from clear and States still have plenty of room for manoeuvre. While this element of flexibility may be seen as an advantage, it can ever yield only short-term gains. In the long run clear, rigorous legal restraints on the use of force are needed, for, without them, we can all too easily descend into a whirlpool of spiraling violence").

[977] *Ibid*.

[978] *Ibid*. On the various levels of state involvement in terrorism, see *supra* Chapter 1, Sections C)1.-5.

[979] See *infra* Chapter 5, Section A)2.

### c) Complicating the Equation under the *Articles on State Responsibility*: The Primary/Secondary Dichotomy

Needless to say, the distinction between primary and secondary rules, which has been persuasively defended recently,[980] permeates the discussion above and remains a widely discussed issue, including in recent scholarly accounts.[981] It is not surprising, therefore, that the primary/secondary dichotomy has occupied a central place in the discussion thus far and will continue to drive the analysis.[982] More importantly, although this distinction has generated its share of controversy in legal scholarship,[983] it becomes clear that the interplay between primary and secondary norms hinges, to a large extent, on the level of governmental involvement in an international breach. As evidenced by the observations put forth in Chapter 2, the assertion that indirect responsibility for acts carried out by private persons is contingent on a primary obligation to intervene upon the state brings the relationship between direct and indirect responsibility into sharp relief.[984]

Yet, too little discussion in contemporary studies elucidates the consequences and implications of these distinctions in the hard cases, namely where governmental input is virtually indecipherable or where private actors subvert and challenge traditional rules of responsibility, at least through their actions.[985] As a corollary, since unconvential actors can potentially obfuscate the prescriptions laid out by the ILC's *Articles* by their actions, there is a pressing need to rethink, or better adapt, existing rules of state responsibility.[986] In the

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[980] See, e.g, Milanović, *State Responsibility*, *supra* note 78. Villalpando's treatment of the primary/secondary dichotomy remains very persuasive, as he advances a series of arguments for upholding extant state responsibility structures. See L'ÉMERGENCE DE LA COMMUNAUTÉ, *supra* note 78, at 139-141, 333-334 and 384.

[981] See, e.g., Treves, *The International*, *supra* note 78, at 223-234, 227; Thirlway, *Injured*, *supra* note 79, at 323. See also L.A.N.M. Barnhoorn and Karel C. Wellens (eds.), DIVERSITY IN SECONDARY RULES AND THE UNITY OF INTERNATIONAL LAW (1995); James Crawford, *First Report on State Responsibility*, United Nations Document A/CN.4/490 (1998), at 4-6; International Law Commission, *Report of the International Law Commission on the Work of Its Fifty-Second Session*, United Nations Document A/55/10, 2000, at 18.

[982] See, e.g., *supra* Chapter 1, Section B) and Chapter 2, Section D)2.

[983] See, e.g., Bodansky and Crook, *Introduction*, *supra* note 873, at 781.

[984] See, e.g., Wolfrum, *State Responsibility*, *supra* note 229, at 423-434, 425, 430-431 and 434.

[985] See, e.g., Battaglini, *War Against Terrorism*, *supra* note 426, at 138-139.

[986] See, e.g., Zemanek, *Does the Prospect*, *supra* note 50, at 132-133.

wake of the adoption of the *Articles*, two commentators were directly on point: "[t]he degree to which states should be held responsible for conduct involving private actors is an increasingly significant contemporary issue, as nonstate actors such as Al Qaeda, Somali warlords, multinational corporations, and nongovernmental organizations play greater international roles."[987] As discussed throughout this dissertation, transnational terrorism is without doubt a case in point and recent academic contributions supplement existing post-9/11 scholarship exploring its link with state responsibility.[988] It should be mentioned, at the outset, that there has been some scholarly output on specific issues dealing with state responsibility and terrorism after 9/11. Aside from Tal Becker's recent book, however, recent contributions remain, in large part, too superficial or cursory, thereby indicating the need for further academic writing on the matter.[989]

Because of the sometimes convoluted legal interface that derives from overlapping international obligations and juxtaposed sources of law (e.g. concurrent treaty law and custom), coupled with the *erga omnes* nature of counterterrorism norms, new rules on attribution and state responsibility could significantly enhance efficiency. Consequently, mindful of the sometimes-elusive distinction between primary and secondary norms and critical of the private sphere/public sphere dichotomy that underlies modern state responsibility, Christine Chinkin queries whether attribution, as now encapsulated in the ILC's *Articles*, is unnecessarily reductive in its treatment of private conduct. Noting that state responsibility is a "legal construct that allocates risk" for wrongful acts "to the artificial entity of the state", she further posits that the "human link is provided by the doctrine of attributability, but this maintains the fiction of public and private actions". This prompts her to call into question the rationale behind non-attribution of private conduct and to ponder whether such rule seeks to protect

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[987] Bodansky and Crook, *Introduction*, *supra* note 873, at 782. See also Wolfrum, *State Responsibility*, *supra* note 229, at 424.

[988] See Battaglini, *War Against Terrorism*, *supra* note 426, at 137-149; Zemanek, *Does the Prospect*, *supra* note 50, at 130-132 and 134.

[989] See Becker, TERRORISM AND THE STATE, *supra* note 2. Before 9/11, very little scholarship existed on the specific relationship between terrorism and state responsibility. One noteworthy account can be found in McCredie, *The Responsibility*, *supra* note 70, at 69-97. Although not directly on point, also consider Dinah Shelton, *Private Violence, Public Wrongs, and the Responsibility of States*, 13 FORDHAM INTERNATIONAL LAW JOURNAL 1 (1989-1990).

"the state, individual freedom of action, or the most powerful who are able to remain outside the scope of international regulation". Ultimately, Chinkin delivers an immensely pertinent hypothesis in light of a state's primary obligation to control its territory advocated in Part I, expounding that "it might therefore be appropriate to assert responsibility for all wrongful acts emanating from it, or from nationals subject to its jurisdiction."[990]

This line of reasoning is easily transposable to counterterrorism, as the focus of inquiry now shifts to the prevention of terrorism – irrespective of whether the governmental apparatus is involved or not – which also signals a marked departure from overemphasis on the distinction between public and private conduct. In fact, current counterterrorism efforts are not so concerned with labelling terrorist acts with regard to their institutional (private or public) origins or affiliations,[991] but rather with actually forestalling them, an exercise that will turn, to a large extent, on the formulation of potential deterrence models. In turn, the articulation of such schemes should operate a corresponding increase in government accountability, which, for the purposes of state responsibility, would translate into a more fluid or flexible application of attribution to terrorist acts, regardless of whom the authors of the impugned actions are. As Chinkin pointed out before the adoption of the ILC's *Articles*, and bearing in mind that the international community should attempt to prevent rather than cure, it might be useful to resort to the artificial screen of statehood as a sort of legal common denominator, so as to apply a primary obligation of preventing terrorism across the board, i.e. to a wide array of types of conduct, be they private or public.[992]

It should be noted, however, that ILC Special Rapporteur Crawford discarded this line of argument, rather emphasizing that accountability mechanisms vis-à-vis primary rules could accommodate a much wider panoply of

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[990] *A Critique*, *supra* note 903, at 395 (also noting that "[s]uch questions require nuanced and contextual responses that are little assisted by too much emphasis on a distinction between public and private spheres of action.")

[991] For a thoughtful and recent discussion of the private/public dichotomy with regard to terrorism and state responsibility, specifically, see Becker, TERRORISM AND THE STATE, *supra* note 2, at 272-276.

[992] But *Cf.* Zemanek, *Does the Prospect*, *supra* note 50, at 133.

wrongful private conduct.[993] This position could undoubtedly find support in the *Tehran Hostages* case[994] and in the implementation of "environmental agreements that require states to limit national emissions of pollutants, including those by private entities",[995] whilst arguably steering international law towards the realization that "the rules of attribution set forth in the articles represent only the tip of the iceberg as to when private acts can create state responsibility. Most such responsibility arises as a result of primary rules – for example, to prevent or limit particular types of private conduct."[996]

In tackling this complex legal question after 9/11, some authors fall short in their attempts at further delineating the elusive mechanics of international responsibility. For example, Santiago Villalpando's recent treatment of the topic ultimately fails in adapting to the abovementioned reality and is symptomatic of the conceptual and practical challenges associated with breaking down the structure of secondary rules of responsibility. Although he recognizes the newly formed legal relationship resulting from the breach of an obligation as a pervasive component of state responsibility,[997] his construction of the actual contents and contours of this relationship is challenged by a widely-held view within the ILC, to which the present study, in turn, here subscribes, namely that secondary rules empower and determine which states may protect collective interests vis-à-vis a breach.[998] This clash of positions will have a direct and significant impact on the application of counterterrorism obligations and, in turn, on the responses to breaches of such obligations. Villalpando ultimately resists and discards this theory, opting for a more homogenous application of state responsibility, and infers that whatever legal situation is prevalent at the level of the primary norm

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[993] James Crawford, *Revising the Draft Articles on State Responsibility*, 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW 435, 439 (1999).
[994] *Tehran Hostages*, *supra* note 67.
[995] Bodansky and Crook, *Introduction*, *supra* note 873, at 781.
[996] *Ibid*, at 783. See also, generally, Christenson, *Attributing Acts*, *supra* note 115. It logically follows that the observance of primary international obligations, such as counterterrorism duties or environmental obligations, will also depend on the actions of private parties. See, e.g., Bodansky and Crook, *Introduction*, *supra* note 873, at 783.
[997] See Villalpando, L'ÉMERGENCE DE LA COMMUNAUTÉ, *supra* note 78, at 132.
[998] For a recent and thoughtful account on collective rights and interests, see Dwight G. Newman, *Collective Interests and Collective Rights*, 49 AMERICAN JOURNAL OF JURISPRUDENCE 127 (2004).

necessarily carries over to the relationship generated by the secondary level of the breach.[999] Implying a potential overlap of norm partners at all stages, he posits that the major actors involved in the newly formed, secondary legal relationship must correspond to those who may claim an interest in having the primary obligation upheld.[1000] This construction inexorably reverts back to the involvement of the international community as a whole at both the primary and secondary levels of international breaches, and remains predicated on Villalpando's assertion that the cohesion characterizing that community rests upon the solidarity of its members in safeguarding certain collective interests.[1001] Thus, his approach conceptualizes state responsibility in terms of a binary continuum, involving individual interests and collective interests at opposite poles, while also identifying a common regime of responsibility and a community regime of responsibility.[1002] The latter is also subdivided into a common regime (covering all violations of *erga omnes* obligations) and an aggravated regime (applicable to the most serious violations).[1003]

Nevertheless, and against the criticism purporting to disable the primary/secondary distinction,[1004] it is submitted that further defining secondary norms of responsibility would actually shed a new light and, perhaps, better circumscribe primary obligations. This argument becomes particularly compelling when faced with terrorism and the corresponding lack of consensus on both its definition and on what states are actually expected to do to repel it, i.e. the primary obligation.[1005] These impediments, which are partially caused by unclear legal language and largely driven by politics, could be addressed by revisiting certain aspects of the current law, thereby making the case for a responsibility-

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[999] Villalpando, L'ÉMERGENCE DE LA COMMUNAUTÉ, *supra* note 78, at 313-314.
[1000] *Ibid*, at 247.
[1001] *Ibid*, at 25-29.
[1002] *Ibid*, at 224, 242, 246, 251 and 254.
[1003] *Ibid*, at 246-259. For an equally relevant discussion on these matters, *cf.* generally Simma, *From Bilateralism*, *supra* note 514.
[1004] For a recent discussion of this distinction, along with the new legal relationship formed by the application of secondary rules, see Roucounas, *Non-State Actors*, *supra* note 376, at 398-399.
[1005] It should be emphasized that this confusion has also been acute in other areas of transnational activity, such as global warming and climate change. See, generally, Voigt, *State Responsibility*, *supra* note 871, at 1-22. Further consideration will be given to these issues, *infra*, in Chapter 5, Section A)3.

expanding regime more attractive. Equally interesting is the idea of debating whether attribution is adequately suited to address these volatile situations and whether the notion of control, which remains inextricably connected to the concept of attribution in the ILC's *Articles*, should be excised altogether in certain cases involving non-state actors. Although met with some resistance, this exercise remains a valid one and the academic pronouncements canvassed above evidence the need for more scholarly writing on the concept of attribution and its relevance to present-day concerns.[1006] In fact, this project undoubtedly strives to expand upon previous scholarly accounts attempting to elucidate the thorny relationship between non-state actors and international responsibility.[1007] With this in mind, the next section turns to the task of calling into question the validity of attribution under the present field of analysis with a view to devising specific policy proposals and deterrence models.

**2. Revisiting Trans-substantive Rules**

The reasoning underpinning the present study takes issue with the claim that revising trans-substantive rules, especially attribution, would not yield effective results. The global effort against terrorism is an exercise in risk assessment.[1008] As explored above and elsewhere, the philosophical questions raised by the "war" on terror definitely have Kantian roots and lend themselves to several ethical, social, and philosophical considerations.[1009] Kant's theory that a human being should not be used as a means toward the collective well-being comes to mind and bolsters the proposition that we should not balance human lives in the name of collective security, for instance.[1010] As a corollary to this

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[1006] See, generally, Proulx, *International Responsibility*, *supra* note 384.

[1007] See, e.g., García-Mora, INTERNATIONAL RESPONSIBILITY, *supra* note 200.

[1008] See also, generally, Vincent-Joël Proulx, *If the Hat Fits Wear It, If the Turban Fits Run for Your Life*: *Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists*, 56 HASTINGS LAW JOURNAL 800-901, 804-805 (2005).

[1009] See also Martti Koskenniemi, *Constitutionalism As Mindset*: *Reflections on Kantian Themes About International Law and Globalization*, 8 THEORETICAL INQUIRIES IN LAW 9-36, 14-15 (2007).

[1010] See Immanuel Kant, FOUNDATIONS OF THE METAPHYSICS OF MORALS WITH CRITICAL ESSAYS (Robert Paul Wolff (ed.) and Lewis White Beck (trans.), Bobbs-Merrill Co. 1969) 52, 54 (1785). See also Immanuel Kant, GROUNDWORK OF THE METAPHYSIC OF MORALS 36-37 (H.J. Paton (trans.), Harper Torchbooks 1964). On the question of Kantian elements, as found in state responsibility, see Christenson, *Attributing Acts*, *supra* note 115, at 319-20 and authorities cited

categorical imperative, it follows that the present legal reform exercise inexorably touches upon the struggle between collective rights and individual rights,[1011] and further reinforces the need to rethink the scheme of state responsibility in that light. Furthermore, it follows that "[t]he increase in individuals' human rights is inevitably accompanied by an increase in their responsibility for human wrongs, even when committed under the color of state authority."[1012] Starting from that premise, there are no ideal scenarios or perfect solutions. Hence, mitigation of the disparity in political and economic power between states, coupled with the essential goal of saving lives, remains a noble objective. For instance, the prevalent scheme of state responsibility, or rather the implications of its application to terrorist activity and/or war-time activities, should always bear in mind essential principles of international law, such as the protection of civilians and the sovereign equality between states.

As such, the idea of revisiting trans-substantive rules of responsibility operates on the premise that the underlying assumptions associated with that body of law should be challenged and ultimately aims at making international accountability mechanisms for failing to prevent terrorism more effective. An apt starting point for this endeavour is without question the notion of 'control', a central component of the ILC's *Articles* in triggering responsibility. Indeed, following the academic outcry in response to the ICJ's recent decision in the *Genocide* case, there appears to be renewed emphasis on ascertaining what standard of 'control', exactly (i.e. 'effective' versus 'overall'), is required in order

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therein. This phenomenon has carried over to other areas of the "war" on terrorism, especially in national jurisdictions, where various decision-makers are called upon to balance security and civil liberties. Hints of Kant's theory are present in Alan Gewirth, *Are There Any Absolute Rights?*, 31 PHILOSOPHICAL QUARTERLY 1, 8-16 (1981) and in Ronald Dworkin, *Terror & the Attack on Civil Liberties*, NEW YORK REVIEW OF BOOKS, Nov. 6, 2003, at 37.

[1011] See, e.g., Martti Koskenniemi, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960 99 (2002) (discussing this in the context of sovereignty, civilization, international lawyers, and imperialism from 1870 to 1914). For a recent application of this principle to the war on terror, see, e.g., Tracey Topper Gonzales, *Individual Rights Versus Collective Security*: *Assessing the Constitutionality of the USA Patriot Act*, 11 UNIVERSITY OF MIAMI INTERNATIONAL AND COMPARATIVE LAW REVIEW 75 (2003).

[1012] Franck, FAIRNESS, *supra* note 672, at 264. On the emergence of public responsibility and enforceable accountability in international law, see, e.g., Philip Allott, *The True Function of Law in the International Community*, 5 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 391, 412 (1997-1998).

to attribute private acts to the state.[1013] Yet, few advances have been made in calling into question the actual notion of 'control', itself, as an overarching or organizing principle in attributing some types of conduct to the state that, ostensibly, obfuscate traditional intra-state hierarchies and typical command structures. Terrorism is certainly a case in point -- at least when the focal point of inquiry shifts away from state terrorism to the more grey areas of modest or passive state support of terrorist activity -- and leads some scholars to put forth proposals advocating alternate legal bases for attributing responsibility, such as causation.[1014] Subsequent sections also proceed with a view to vindicating similar policy considerations, albeit via a perhaps more radical route.

### a) The Notion of 'Control' Under the *Draft Articles on State Responsibility*

As seen in Chapter 2, indirect responsibility is now the rule of thumb in terms of counterterrorism and will often supplant a course of action involving direct responsibility, given the inherent difficulty in substantiating the latter. Indeed, "a transparent relationship between terrorist actors and the state is predictably uncommon."[1015] In other words, the response to 9/11 has provided aggrieved states with the opportunity to elect indirect responsibility over direct responsibility as the preferred mechanism in establishing the liability of the host-state. In this regard, it is interesting to note that, even in the context of the Armistice Agreements in Arab-Israeli relations, the parties expressed the wish to implement a mechanism of indirect responsibility by making the territorial state accountable for the excursions of irregular forces outside its territory.[1016] However, as mentioned earlier, Article 2 of the ILC's text now requires that a breach of an international obligation be attributable to the wrongful state in order for responsibility to attach.[1017] However, given the recent paradigm shift towards

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[1013] See the discussion under Section C) in Chapter 2.
[1014] See, generally, Becker, TERRORISM AND THE STATE, *supra* note 2.
[1015] Schiedeman, *Standards of Proof*, *supra* note 481, at 262.
[1016] See Proulx, *Babysitting Terrorists*, *supra* note 163, at 631 n.83.
[1017] This principle has also been consecrated in international jurisprudence. See, e.g., *Phosphates in Morocco*, *supra* note 250, at 10 and 28; *Tehran Hostages*, *supra* note 67, at paras. 56 and 90; *Nicaragua*, *supra* note 119, at para. 226; *Gabčíkovo-Nagymaros*, *supra* note 250, at para. 78; *Dickson Car*, *supra* note 250, at 678.

indirect responsibility, Article 2 seems somewhat superfluous in the context of counterterrorism.[1018] Alternatively, an argument has been advanced above with a view to bridging the divide between increasingly prevalent modes of indirect responsibility under international legal frameworks and the prescritptions enshrined in the ILC's *Articles*. With this in mind, it was suggested that a disjunctive reading of Article 2 might cater to this objective by emphasizing analytical focus on a host-state's *failure to prevent* terrorism rather than on the intricacies of attribution.[1019] Furthermore, and in light of recent state and Security Council practice, maintaining a rationale of attribution vis-à-vis indirect responsibility appears to rely predominantly on poor semantics. One only has to look at the precedent set in *Nicaragua* to infer that the notions of control and attribution should be, in most circumstances, excised altogether from the equation of indirect state responsibility. For instance, the fashion in which the ICJ framed the central question in that case clearly associates the concept of attribution with *direct* state involvement: "[w]hat the Court has to investigate is not the complaints relating to alleged violations of humanitarian law by the *contras*, regarded by Nicaragua as imputable to the United States, but rather unlawful acts for which the United States may be responsible directly in connection with the activities of the *contras*."[1020]

If the objective is truly, as the Council declared it, to eradicate terrorism using "all necessary steps", international mechanisms should remain unfettered by secondary rules and the case for a responsibility-expanding regime should be more radical. In that vein, several commentators rightly argue that the "war" on terror should attract new rules.[1021] With this in mind, the recent trend in state responsibility for failing to prevent transnational terrorism should be governed solely by Article 12 of the ILC's *Articles*, as a matter of hermeneutics alone:

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[1018] For a recent and brief discussion of Article 2, see Vratislav Pechota, *The Limits of International Responsibility in the Protection of Foreign Investments*, in Ragazzi, INTERNATIONAL RESPONSIBILITY, *supra* note 50, at 170-182, 176.

[1019] See *supra* Chapter 2, Section D)1.

[1020] *Nicaragua*, *supra* note 119, at para. 116. [Emphasis added.] See also Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 110-111, who confirms that this question "was analyzed by the Court in terms of the notion of "control"."

[1021] See, e.g., Slaughter and Burke-White, *An International Constitutional*, *supra* note 43, at 2.

"[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."[1022] It follows that the "essence of an international wrongful act lies in the non-conformity of the State's actual conduct with the conduct it ought to have adopted in order to comply with a particular international obligation."[1023] Although the traditional approach has been to attribute a wrongful act to a state, even when it failed to prevent a given attack in some instances, this method should be revisited. Contrary to what certain commentators might anticipate, the idea of circumventing attribution altogether may prove efficient in the "war" on terror and eschew the main criticisms aimed at preventing the revision of trans-substantive rules.

At first glance, this posture would seem paradoxical when contemplated within the furrow of the ILC's *Articles* – almost anti-state responsibility under some lights – because it shifts much of the focus away from secondary rules of responsibility, which make up the bulk of the actual law in this field. So, in many ways, this argument amounts to a call to return to the substantiality of primary rules, without placing so much emphasis on sometimes-burdensome secondary rules. After all, as Prosper Weil proclaimed, "[l]a fonction ultime de la responsabilité internationale est d'assurer le respect des règles primaires".[1024] This is not to say that secondary norms are always superfluous in and of themselves, but rather that they can flow more organically from an international breach (e.g. their application logically derives from the breach of a primary obligation and, in that regard, they strive to achieve some level of coherence in the international legal order following the breach-attribution-consequence/remedy syllogism). In fact, in most cases the primary and secondary rules are, for all intents and purposes, inseparable.[1025] Moreover, it is fair to query whether some

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[1022] *Supra* note 76.

[1023] Pechota, *The Limits of International Responsibility*, *supra* note 1018, at 176.

[1024] Prosper Weil, ÉCRITS DE DROIT INTERNATIONAL: DROIT DES TRAITÉS ET DROIT DE LA RESPONSABILITÉ (2000), cited in Alina Miron, *La Responsabilité de l'Etat pour violations des droits de l'homme par des acteurs non-etatiques*, in Koufa, THESAURUS ACROASIUM, *supra* note 202, at 417-436, 434 n.61.

[1025] For support of this proposition, see, e.g., Treves, *The International*, *supra* note 78, at 227. He further adds, at *Ibid*, that "[t]he consequences of a breach – the main subject of the articles –

of the provisions contained in the ILC's *Articles* dissimulate primary rules, themselves, or whether the application of secondary rules can sometimes straddle 'primary rule' terrain.[1026] As a corollary, by excising or adapting those secondary and trans-substantive rules that are unnecessarily cumbersome, we may not only achieve greater clarity in the elaboration of primary rules but also bridge the divide between primary and secondary stages of international breaches in a more coherent fashion.

As previously discussed, the traditional rule is that a state is not responsible for the actions of private persons or groups.[1027] In that light, it is obvious that the language surrounding attribution is somewhat dissonant with the new paradigm shift toward indirect responsibility. For example, Article 8 of the ILC's *Articles* characterizes the conduct of private persons as an "act of state", as long as the non-state individuals are acting "on the instructions" or "under the direction or control" of the host-state.[1028] Hence, prior to 9/11 the debate ineluctably reverted back to the question of control in a circuitous fashion, as found in both *Nicaragua* and *Tadić*.[1029] Implicit in this reality was the fact that the state had to wield influence over the irregular factions and activities at hand, a notion that has predominantly carried over to the formulation of the *Articles* in order to substantiate the vehicle of responsibility running through the screen of

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cannot in most concrete disputes be determined without ascertaining whether there has been a breach, namely without considering the primary rule." See also, generally, Jean Combacau, *Obligations de résultat et obligations de comportement*: *quelques questions et pas de réponse*, in Daniel Bardonnet *et al*. (eds.), MÉLANGES OFFERTS À PAUL REUTER: LE DROIT INTERNATIONAL: UNITÉ ET DIVERSITÉ 181-204, 192 (1981).

[1026] See, e.g., Alan Nissel, *The ILC Articles on State Responsibility*: *Between Self-Help and Solidarity*, 38 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 355, 361 (2005-2006). See also James Crawford, *Counter-Measures As Interim Measures*, 5 EUROPEAN JOURNAL OF INTERNATIONAL LAW 65, 66 (1994).

[1027] See Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 110, para. 1.

[1028] See Article 8 of the *ILC Articles*, *supra* note 76. For a recent discussion of this provision, see Wolfrum, *State Responsibility*, *supra* note 229, at 424-425 and 427-433 (amply discussing the notion of 'control' under the *Articles*). See also Higgins, PROBLEMS & PROCESS, *supra* note 49, at 150. But *Cf.* Brownlie, SYSTEM, *supra* note 205, at 164 (labelling the classification of 'acts of state' as 'esoteric' and as a "theoretical question of 'essence' without any practical significance".).

[1029] As mentioned above, the Armistice Agreements in Arab-Israeli relations did reflect the parties' intent to implement a mechanism of indirect responsibility. However, in a subsequent resolution dealing with the truce, the UN Security Council unequivocally brought back the terms of the agreements within the ambit of the "effective/overall" control scheme. See the language in S/RES/983 of 19 August 1948. For a quintessential control-based application of state responsibility law, see also Duffy, THE 'WAR ON TERROR', *supra* note 133, at 50-51.

statehood.[1030] Moreover, the state additionally had to be capable of issuing orders or instructions directly to the actors on the field.[1031] Prior to 9/11, influential scholarly voices also expressed this idea, albeit through a possible dichotomy of eventualities susceptible of triggering the responsibility of sanctuary states for failing to prevent harm emanating from private actors. In short, whilst a host-state would not usually be held responsible for such privately caused harm unless attributable to it, it could become accountable for a failure of due diligence in preventing the harmful activity[1032] or, alternatively, if it exerted a certain degree of *control* over the private actors.[1033]

An interesting case in point could logically flow from the potential state responsibility of Lebanon for allowing Hezbollah factions to operate within parts of its territory and launch terrorist strikes into Israel. As discussed previously,[1034] such determination would evidently stem from Lebanon's 'lack of sufficient control' over the irregular factions and could potentially engage its international responsibility. Indeed, analogous claims as to Lebanon's international responsibility for the role it played leading up to its 2006 war against Israel may be cast simultaneously as a violation of its obligation not to harbour or support terrorists, and as an unwillingness or inability to perform its due diligence duties.[1035] Concomitantly, this legal categorization would also derive from Lebanon's failure to comply with Council resolutions urging it to stamp out Hezbollah factions operating within its borders.[1036] Some even go as far as opining that the failure of a state to comply with binding Council resolutions and, by the same token, to repel the terrorist threat within its territory is tantamount to

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[1030] See, e.g., *Schering*, *supra* note 118, at 370; Roucounas, *Non-State Actors*, *supra* note 376, at 392.
[1031] *Ibid*. On the required issuing of orders, see, e.g., *Flexi-Van Leasing Inc.* v. *Islamic Republic of Iran*, 12 IRAN-U.S. CLAIMS TRIBUNAL 335, 349 (1986).
[1032] See, e.g. *Velásquez Rodríguez*, *supra* note 17, at paras. 171-172.
[1033] See, e.g., Brownlie, INTERNATIONAL LAW, *supra* note 283, at 371-372. See also Saul, DEFINING TERRORISM, *supra* note 26, at 197.
[1034] See the discussion and analysis *supra* in Chapter 1, Sections C)2., C)3. and C)4. For a concrete application of the mechanics of state responsibility, as applied to the Lebanon scenario within the broader deterrence model advanced in this dissertation, see *infra* notes 1656-1660 and accompanying text.
[1035] See, e.g., Bottoms, *When Close Doesn't Count*, *supra* note 140, at 48-50.
[1036] See, e.g., Security Council Resolution 1559, U.N. Doc. S/RES/1559 (2 September 2004).

the adoption, by that state, of the terrorist's conduct (e.g. for the purposes of Article 11's criteria for state responsibility via endorsement).[1037] Moreover, this proposition would appear to align with certain eminent jurists' view that the failure to prevent an internationally wrongful act might, in fact, be equivalent to having caused the harmful activity itself.[1038] This would essentially signal that, barring any clear and compelling evidence to the effect that the state either attempted to repress the terrorist activity in vain or, alternatively, that it lacked the sufficient means to do so, its failure to thwart an excursion emanating from its territory would be perceived as having been engendered by it. As one commentator observes, in those instances "[w]hat generates the responsibility of a given State and exposes it to the remedies permitted by international law, including when applicable the exercise of self-defence, is the conduct that conclusively reveals its unwillingness to stop the terrorist activities from being carried out within its territory, and a fortiori its support for them. A formal endorsement of the acts of the terrorist is not necessary."[1039]

But reverting back to the 9/11 precedent for a moment, this is not to say, however, that the notion of control was completely irrelevant in the Afghanistan scenario. In fact, if one were to establish a claim of responsibility against the government of Afghanistan, that allegation would most likely be predicated on the fact that the governmental organization wielded quasi-exclusive control over the Afghan *territory*. Implicit in this proposition is the idea that government control over a territory remains intimately tied to a sanctuary state's eventual failure in preventing terrorist attacks. Interestingly, as will be discussed later on, some eminent publicists connect the idea of due diligence with the control that a host-sate is *supposed* to exert over its territory in order to prevent it from becoming a

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[1037] Tarcisio Gazzini, *The Rules on the Use of Force at the Beginning of the XXI Century*, 11 JOURNAL OF CONFLICT & SECURITY LAW 319, 333-334 (2006).

[1038] See, e.g., Roberto Ago, *Le délit international*, 68 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 415-554, 502 (1939-II); Quincy Wright, *The Prevention of Aggression*, 50 AMERICAN JOURNAL OF INTERNATIONAL LAW 514, 527 (1956). This would also disable a large part of Becker's thesis on causation-based state responsibility for terrorism. See the discussion, *supra* Section A).

[1039] Gazzini, *The Rules on the Use of Force at the Beginning of the XXI Century*, *supra* note 1037, at 334.

launch pad for activities injurious to third states.[1040] At this juncture, it should also be recalled that actual territorial control – not sovereignty or legitimacy of the ruling authority – constitutes the determinant factor in establishing state responsibility. The ICJ's holding in the seminal *Namibia Advisory Opinion* is quite instructive in this regard. After confirming South Africa's responsibility for creating an unlawful situation, the Court held that the liable state was obligated to withdraw its administration from Namibia and that "[b]y maintaining the present illegal situation, and occupying the Territory without title, South Africa incurs international responsibilities arising from a continuing violation of an international obligation." More importantly, the Court went on to proclaim that, "[*t*]*he fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States*."[1041] Whilst some aspects of the *Namibia* ruling can be distinguished in the face of modern terrorist activity,[1042] this swift judicial stroke of the pen would seem to lay all debates pertaining to the Taliban's status as a *de facto* governmental authority to rest. This holding undoubtedly prompted Luigi Condorelli to infer that, "according to international law, the State concerned has the same duties of territorial control in the protection of other States' interests, notwithstanding the persistent illegal character of its presence on the territory in question."[1043]

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[1040] See, e.g., Bennouna, *Réflexions*, *supra* note 8, at 373.

[1041] *Namibia Advisory Opinion*, *supra* note 361, at p. 54. [Emphasis added.] See also Jan Hendrik Willem Verzijl, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE: PART 6: JURIDICAL FACTS AS SOURCES OF INTERNATIONAL RIGHTS AND OBLIGATIONS 712-715 (1973).

[1042] See, e.g., Brownlie, SYSTEM, *supra* note 205, at 181.

[1043] Condorelli, *The Imputability*, *supra* note 125, at 241. This reality was also very much in play in the ICJ's recent *Armed Activities* case, albeit in the context of belligerent occupation. In particular, the Court concluded that Uganda had been an occupying power in the Congolese province of Ituri and, as a corollary, was under an obligation to undertake all measures to restore and ensure public order and safety in the occupied zone, while also upholding the laws in force in the Democratic Republic of the Congo. In light of the factual circumstances, the Court found that Uganda's responsibility was engaged both for the acts of its military that violated international undertakings and for its lack of diligence in preventing IHL and human rights violations. See *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, [2005] I.C.J. REPORTS 116 (19 December) [hereinafter *Armed Activities*], at paras. 166-180.

Bringing the argument full circle in relation to contemporary events, it now appears unquestionable that the Taliban government indeed constituted the "controlling socio-political entity throughout most of Afghanistan" during the relevant periods.[1044] In establishing the possible responsibility of the government of Afghanistan in the 9/11 attacks, the sole fact that it controlled the territory on which Al-Qaeda's bases of operations and training camps were located, coupled with its failure to exercise due diligence, would suffice in establishing the requisite nexus between the impugned non-state acts and the state machinery. This argument is, of course, only palatable if one accepts the emergence of the recent paradigm shift toward indirect state responsibility in cases of transnational terrorism. At the other end of the spectrum, it should be relatively uncontroversial to declare that a host-state that openly supports,[1045] endorses[1046] or authorizes[1047] a transborder excursion by a terrorist organization – that is to say provides direct or active support to the group, to invoke state responsibility parlance – will be held accountable under the same model.

Ultimately, through its delivery of the *Articles on State Responsibility*, the ILC seems to have narrowed the language of attribution to a more traditional model of state-condoned or state-sponsored insurgency, thereby eschewing isolated attacks or massive one-time strikes such as 9/11, especially when they are premised on failures to act. The commentary on aforementioned Article 8 constitutes a salient example of the narrow application of the concept of attribution before 9/11. After underscoring that circumstances may arise where seemingly private conduct may be attributable to the state "because there exists a

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[1044] Aya Gruber, *Who's Afraid of Geneva Law*, 39 ARIZONA STATE LAW JOURNAL 1017, 1026 n.54 (2007).

[1045] This reality was recognized long before 9/11. See, e.g., Baker, *Terrorism*, *supra* note 275, at 36; Alberto R. Coll, *The Legal and Moral Adequacy of Military Responses to Terrorism*, 81 PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 297, 305 (1987); Murphy, STATE SUPPORT, *supra* note 298, at 99-109; Higgins, PROBLEMS & PROCESS, *supra* note 49, at 146-168.

[1046] See Brown, *Use of Force*, *supra* note 148, at 10-12. It must be noted that part of the responsibility imputed to Iran in *Tehran Hostages* was predicated on the fact that state organs subsequently endorsed the attack and ransacking on the U.S. embassy. See, *Teheran Hostages* case, *supra* note 67, at 33-35.

[1047] International jurisprudence has long recognized that wrongful conduct may be attributed to a host-state, if the state authorized such conduct. See, e.g., *Zafiro*, *supra* note 277; *Stephens*, *supra* note 277; at 267, *Lehigh Valley*, *Black Tom* and *Kingsland*, *supra* note 277, at 458.

specific factual relationship" between its author and the state, ILC Special Rapporteur Crawford then solely identifies two examples: that of "persons acting on the [state's] instructions" and where "private persons act under the State's direction or control."[1048] When transposed to the current "war" on terror, the commentaries appear to make attribution dependent on some level of control by the host-state over a terrorist organization, or on a patent factual nexus between both. It is clear that the provision does not extend to situations where terrorist organizations are acting independently or autonomously from the state organs, as was the case in Afghanistan.[1049] Puzzlingly, and expressing a minority view, some scholars contend that Al Qaeda members were state agents controlled by the Afghan state, also amounting to an armed band determined to attack the U.S., pursuant to the pronouncements developed in the *Nicaragua* decision.[1050] Irrespective of the possible endorsement of this tenuous argument, it becomes clear that the threshold of control seems ill-suited to respond to factually intractable scenarios, whereby sanctuary states wield little or no actual control over terrorist factions operating within their borders. In that regard, Steven Ratner rightly underscores that the "orthodox view of state responsibility has effectively vanished, a victim, in part, of its origins in customary law and its seeming inability to address the current challenges of transnational terrorist networks."[1051] In fact, coupled with the very central question of *knowledge* investigated in the *Corfu Channel* decision, the evidence of state control is, in many instances, impossible to demonstrate following a terrorist strike. This problem is further compounded when the host-state's structure or makeup is antithetical to Westphalian democratic ideals, or simply hostile to openness,

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[1048] Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 110.

[1049] However, in a very rare stroke of the pen, some commentators ponder whether Al Qaeda members could be considered *de facto* state agents of Afghanistan. See, e.g., Giorgio Gaja, *In What Sense Was There an "Armed Attack"?*, in *The Attack on the World Trade Center*: *Legal Responses*, EUROPEAN JOURNAL OF INTERNATIONAL LAW, available online at http://www.ejil.org/forum_WTC/ny-gaja.html (last visited on 20 August 2007).

[1050] See, e.g., Pierre-Michel Eisemann, *Attaques du 11 septembre et exercice d'un droit naturel de légitime défense*, in Karine Bannelier *et al.*, LE DROIT INTERNATIONAL, *supra* note 475, at 243-244. On Osama bin Laden's status as a state agent, see Quigley, *International Law Violations*, *supra* note 325, at 826.

[1051] See Ratner, *Jus ad Bellum*, *supra* note 266, at 920.

thereby making any inquiry into the factual link between the state apparatus and terrorists much more complex or unfeasible due to political or military impediments. It is no surprise, therefore, that "the assertion of State responsibility for violations by non-State actors rests upon assumptions of knowledge and control that in many cases States simply do not possess."[1052]

This is not to say, however, that the notion of control should be excised altogether from the range of considerations governing the establishment of indirect responsibility for terrorism. Rather, the determinant factor should turn on the host-state's *failure* to control its territory and, as a corollary, any harmful terrorist activities emanating from its soil. Similarly to the reasoning underlying *Corfu Channel*, the question of knowledge might become pivotal in establishing the state's responsibility: "where the loss complained of results from acts of individuals not employed by the state, or from activities of licensees or trespassers on the territory of the state, the responsibility of the state will depend on a *failure to control*. In this type of case questions of knowledge may be relevant in establishing the omission or, more properly, responsibility for failure to act."[1053] It must pertinently be recalled that, in *Corfu Channel*, the Court predicated Albania's knowledge of the presence of the minefield in its territorial waters on the fact that the governement closely and routinely monitored the area where the mines were laid.[1054] Again, this viewpoint must be carefully balanced out by the error in translation found in the *Corfu Channel* judgment described above, which may have opened the door to a logic of indirect, no-knowledge state responsibility.[1055]

Thus, it is fair to assume that attribution will likely be an appropriate mechanism "only if the nonstate actor was "in fact acting on the instructions of, or under the direction or control of, that State in carrying out the [wrongful]

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[1052] Christine Chinkin, *Human Rights and the Politics of Representation*: *Is There a Role for International Law?*, in Byers, THE ROLE OF LAW, *supra* note 543, at 131-147, 146.
[1053] Brownlie, SYSTEM, *supra* note 205, at 45.
[1054] *Corfu Channel*, *supra* note 67, at 19.
[1055] See, e.g., *supra* Chapter 1, Section C)1., notes 87-91 and accompanying text

conduct.""[1056] Furthermore, based on the reasoning developed in *Tehran Hostages*, attribution can also be triggered by subsequent acknowledgment and adoption of the wrongful conduct by the state as its own. In fact, this legal device has been expressly incorporated in Article 11 of the ILC's *Articles*, which states the following: "[c]onduct 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."[1057] Needless to say, this aspect of the *Tehran Hostages* decision, which is premised on direct responsibility, is not particularly helpful for the further development of indirect modes of state responsibility.[1058] Thus, the logic of attribution is to be understood primarily in conjunction with the notion of control, and as semantically adjacent to the direct participation by the host-state to the attack in some way, shape or form. In other words, the work of the ILC prior to 9/11 expounded that control exerted by a host-state constituted the linchpin -- or catalytic device -- of the mechanism of attribution (at least with regard to the dominant approach to state responsibility law for private acts, namely the 'agency paradigm').[1059] But now that contemporaneous realities have challenged the law of state responsibility, it is appropriate to ponder whether the threshold of 'control' remains adequately suited to govern situations involving terrorist activity. Starting from the Afghanistan scenario or the situation prevalent in Yemen, it would appear that terrorist organizations sometimes operate with a large degree of autonomy within state territories. Therefore, the possible issuing of instructions and/or the exercise of control over the organizations by the official

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[1056] Jinks, *State Responsibility*, *supra* note 315, at 88. There are also hints of this idea in the following ILC Report: UN Doc. No. A/56/10 at 121, para. 5.

[1057] Article 11 of the *Articles*, *supra* note 76. On the question of responsibility by endorsement, see previous comments, *supra* notes 221-222 and accompanying text, along with Brown, *Use of Force*, *supra* note 148, at 10-13. On the specific question of the endorsement of the 9/11 attacks, see *Ibid*, at 11 (rejecting a rationale of endorsement with regard to Afghanistan's role in the 9/11 attacks). But *Cf.* Dupuy, *State Sponsors*, *supra* note 29, at 11. See also, generally, Baker, *Terrorism*, *supra* note 275, at 36.

[1058] Not to mention that a more general application of *Tehran Hostages* to terrorism can appear limited in light of the fact that the obligation at play in that case was conventional, as opposed to broad-reaching.

[1059] Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 110.

state apparatus is not always a viable mechanism for engaging the application of the law of state responsibility.

Writing specifically about the precedents set forth by the 9/11 attacks and the 2004 Madrid bombings, Karl Zemanek astutely calls into question the relevance of the concept of 'control' over irregular groups, thereby echoing the above views by querying whether a state possessing information about a terrorist organization part of a broader network using its territory as a base incurs liability if it fails to share the information with potentially affected states.[1060] This scenario is certainly compounded by the possible planning and/or carrying out of terrorist agendas on the soil of 'failed' or ineffective states, an argument that will be addressed at length below. In the interim, some degree of attention must be paid to how such queries affect the deployment of primary obligations.

**b) Defining Primary Counterterrorism Obligations**

The main argument against revisiting attribution is that the international community should instead focus on delineating and defining primary rules of international law more clearly. As will be discussed below, it is now recognized that all states have an obligation to prevent an attack emanating from their territory and injurious to other states.[1061] To challenge this principle would seem futile and unnecessarily circuitous for reasons of legal language or characterization.

In terms of legal language, it should be noted, briefly, that there is still no consensus within the international community as to an accepted universal definition of terrorism.[1062] Particular resistance has been felt from several Arab states, which do not agree on what actually constitutes an act of terrorism. Yet, the concept is sufficiently circumscribed to entail international responsibility,

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[1060] Zemanek, *Does the Prospect*, *supra* note 50, at 131.

[1061] See Saul, DEFINING TERRORISM, *supra* note 26, at 213 (speaking about UN General Assembly practice in the law of counterterrorism and grounding the obligation of preventing terrorism in customary law).

[1062] On the difficulty in adopting a definition of terrorism, see Reisman, *International Legal Responses*, *supra* note 64, at 9-13. For recent and thoughtful accounts on the definition of terrorism in international law, see Saul, DEFINING TERRORISM, *supra* note 26; Ben Saul, *Attempts to Define "Terrorism" in International Law*, 52 NETHERLANDS INTERNATIONAL LAW REVIEW 57 (2005).

when coupled with the well-established principle that states will have to answer for attacks emanating from their territory. This legal scheme clearly illustrates that the shortcomings of the international community will not preclude the application of overriding principles of law, such as the prohibition to use force and the obligation to prevent injuries to neighbouring states.

With regard to legal characterization of terrorist attacks, the question of retaliation – be it forcible or legal/diplomatic – against a host-state has always been a thorny one, especially when attempting to label the original wrongful act. In short, before 9/11 an aggrieved state would often run into legal and diplomatic problems in characterizing the original attack so as to justify a reprisal against the host-state. These concerns were highlighted in the context of Arab-Israeli relations in the following terms: "[e]ven a policy of reprisal which might seek to avoid condemnation because of its "reasonableness" encounters the initial difficulty of demonstrating the illegality of the activities against which it is directed. This is amply illustrated by the Arab-Israeli situation. Apart from using emotive terms such as "terrorists", Israel has sought to have the guerilla activities condemned as illegal and has done so on a variety of grounds."[1063] Whilst not directly on point for the purposes of this study, which operates on the availability of non-forcible countermeasures, it is nonetheless important to emphasize that Israel has often asserted, before the Council, that 'passive' assistance by states to terrorists – namely through the providing of sanctuary to irregular factions – is sufficient to trigger a right to use forceful response against the host-state.[1064] Invoking this rationale on numerous occasions, Israel attempted to target Lebanon and other Arab states without being able to sway the Council in this direction,[1065] whilst influential scholarly voices also endorsed Israel's posture.[1066] Yet, one reading of the response to 9/11 seems to have done away with these evidentiary

[1063] Bowett, *Reprisals*, *supra* note 422, at 17.
[1064] But *Cf.*, generally, Richard J. Erickson, LEGITIMATE USE OF MILITARY FORCE AGAINST STATE-SPONSORED INTERNATIONAL TERRORISM (1989).
[1065] See, e.g., the following Security Council resolutions: 228 (1966), 248 (1968), 256 (1968), 262 (1968), 265 (1969), 270 (1969), 316 (1972) and 332 (1973).
[1066] See, e.g., Dinstein, *The International*, *supra* note 125, at 146. Implicit in this proposition is the prior establishment of state responsibility of the host-state for its failure to comply with its obligation to refrain from recourse to force in international relations.

problems. For the distinct purposes of state responsibility, once a terrorist attack is carried out, one possible approach is to look at it in the abstract, namely as an attack emanating from another territory, and focus on how the host-state could have limited (or avoided altogether) its responsibility.

As discussed above, the concept of 'harbouring' and 'supporting' terrorists seems to have achieved international precedence over the general concept of attribution. It is clear that this kind of language pervaded much of the post-9/11 legal speech, having been invoked in both international politico-legal rhetoric and domestic legislation. In fact, a significant policy impetus relying on this phenomenon is readily perceptible and can be best explained by the desire to criminalize certain (sometimes otherwise lawful) behaviours under domestic law, pursuant to Council Resolution 1373.[1067] Particularly striking is the parallel with domestic criminal law, especially when considering recurrent evidentiary hurdles in national counterterrorism settings relating, *inter alia*, to the identification of individuals or suspects and the treatment of evidence, more generally. In response to these challenges, states have increasingly begun to criminalize what used to merely constitute evidentiary elements – i.e. restricting access to certain literature, monitoring access to bomb making-related activities, monitoring flight/pilot school enrolments, prohibiting membership in certain organizations, freezing the assets of individuals associated with certain organizations and blocking certain charitable donations – as one of the ways to crack down on homegrown terrorism. For example, according to its authorities the U.S. has acquired significant evidence against Najibullah Zazi, a legal immigrant from Afghanistan and Denver airport shuttle driver, in what is considered one of the

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[1067] In the Canadian context, see, e.g., *Anti-Terrorism Act 2001* (Bill C-36), entered into force on 24 December 2001, available online at http://www2.parl.gc.ca/content/hoc/Bills/371/Government/C-36/c-36_4/c-36_4.pdf (last visited on 10 July 2007); Irwin Cotler, *Does the Anti-Terror Bill Go Too Far?*, GLOBE AND MAIL, 20 November 2001, at p. A17. Article 83.23 of the bill provides the following:

> Every one who knowingly harbours or conceals any person whom he or she knows to be a person who has carried out or is likely to carry out a terrorist activity, for the purpose of enabling the person to facilitate or carry out any terrorist activity, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

most important terrorist plots since 9/11. Absolutely crucial to mounting the case against Mr. Zazi was the U.S.' enhanced monitoring of bomb-making activities and, consequently, the indictment weighing against him suggests that he purchased chemicals required to build a bomb, including hydrogen peroxide, acetone and hydrochloric acid. Amongst other germane allegations, it is believed that Mr. Zazi attended an Al Qaeda training camp in Pakistan, underwent training in explosives and dissimulated in his laptop computer nine pages of bomb-making directions.[1068]

Whilst such policy inclination certainly bolsters the enforceability of domestic criminal law, it also carries resounding implications for the present study. In particular, by criminalizing such behaviour states are simultaneously accruing due diligence capital for the purposes of mitigating state responsibility engagement and, more importantly, as a way to comply with primary counterterrorism obligations (e.g. most particularly the prescriptions stemming from Resolution 1373).[1069] As a result, international law is now countenancing a series of shifts towards indirect forms of responsibility as bases for engaging accountability both at the national and international levels, and both at the individual and state levels.[1070] In addition, as discussed above,[1071] in increasing their diligent efforts in meeting counterterrorism obligations through the adoption of more exacting domestic criminal standards, host-states might, in fact, be signalling that they consider their potential liability on the international scene as one of the factors governing and shaping the allocation of their (sometimes scarce) resources in combating terrorism. What is more, by shifting their domestic policy infrastructures towards accommodating indirect rationales for

[1068] For more details on the case of Mr. Zazi, see David Johnston and Scott Shane, *Terror Case Called One of Most Serious in Years*, NEW YORK TIMES, September 24, 2009; William K. Rashbaum and Dan Frosch, *Terrorism Suspect Held Without Bail in Colorado*, NEW YORK TIMES, September 22, 2009; David Johnston and William K. Rashbaum, *Terror Suspect Had Bomb Guide, Authorities Say*, NEW YORK TIMES, September 21, 2009. See also Liz Robbins, *Judge Orders Terror Suspect to New York for Trial*, NEW YORK TIMES, September 26, 2009.

[1069] The scope of the Council's pronouncements in this regard will be explored *infra*, in Section B)5.a).

[1070] For a recent exploration of these issues, see Lehto, INTERNATIONAL RESPONSIBILITY, *supra* 48.

[1071] See *supra* Chapter 1, Section A).

accountability, those states might not only be able to actually thwart specific transnational terrorist excursions, but also to preempt the application of the law of state responsibility altogether by successfully fulfilling their primary international obligations and by diverting the policy focus squarely on prevention.

Interestingly, the now widely and domestically criminalized notion of 'harbouring' terrorists or people who are likely to engage in terrorism has macrocosmically manifested itself through various other permutations striving at better elucidating the relationship between Afghanistan and Al-Qaeda. Allegations that the government of Afghanistan "protected" the Al-Qaeda network come to mind,[1072] with others calling for greater accountability of those states "compromised by terror"[1073] or "allies of terror".[1074] As mentioned earlier, the bulk of the U.S.' claim against Afghanistan hinged on the assertion that the attacks had been "made possible by the decision of the Taleban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation."[1075] However, in a thrust that arguably confuses intent and effect, certain commentators have inferred that, although the letters from the U.S. and the U.K. to the Council charged Afghanistan with harbouring terrorists, "they stopped short of alleging that Afghanistan was, as a matter of international law, responsible for the attacks themselves."[1076] Nevertheless, in rhetoric seemingly compatible with the logic of indirect responsibility, although the U.S.' initial

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[1072] See Statement by NATO Secretary-General, Lord Robertson, 2 October 2001, available online at http://www.nato.int/docu/speech/2001/s011002a.htm (last visited on 12 June 2007).

[1073] See, e.g., *National Security Strategy of the United States*, September 2002, available online at http://www.whitehouse.gov/nsc/nss.pdf (last visited 2 June 2007). On this strategy, see Sofaer, *On the Necessity*, *supra* note 355, at 209. See also Dupuy, *State Sponsors*, *supra* note 29, at 3. Some authors criticize the U.S.' National Security Strategy as overly 'unilateralist'. See, e.g., Duffy, THE 'WAR ON TERROR', *supra* note 133, at 212.

[1074] See Press Release, *President Bush Speaks to United Nations*, 10 November 2001, available online at http://www.whitehouse.gov/news/releases/2001/11/20011110-3.html (last visited on 15 July 2007) [hereinafter *President Bush Speaks to United Nations*]; Jinks, *State Responsibility*, *supra* note 315, at 85.

[1075] *October 7th Letter*, *supra* note 364 (also highlighting that the U.S. has obtained 'clear and compelling evidence' to that effect). See also Wren, *US Advises*, *supra* note 364, at B5.

[1076] Christopher Greenwood, *International Law and the "War Against Terorrism"*, 78 INTERNATIONAL AFFAIRS 301, 311-312 (2002). In addition, "there has been no serious suggestion by states involved in the Afghanistan intervention that that state was legally responsible for the September 11 attacks". See Duffy, THE 'WAR ON TERROR', *supra* note 133, at 253.

posture did not initially attribute the actions of Al Qaeda to Afghanistan,[1077] it ultimately accused the Afghan authorities of committing murder by supporting and harbouring terrorists,[1078] and made it abundantly clear that it would no longer distinguish between terrorists and their sanctuary states.[1079] As one commentator highlights, "President George W. Bush has advanced a doctrine of enemy status and state responsibility…loosely based on a traditional law concept of "aiding and abetting" and this posture "is summarized in President Bush's statement that the United States would consider as enemies "terrorists and those who harbor them.""[1080] Other influential voices, such as that of Tal Becker, rather opine that, whilst Afghanistan was 'held directly responsible' for the 9/11 attacks -- a policy that seemed to encounter little or no resistance amongst key international actors -- this determination is nonetheless difficult to countenance when contemplated through agency standards traditionally found under state responsibility repertoire.[1081]

### c) The 9/11 Precedent: The Consecration of the 'Harbouring and Supporting' Rule

Similarly, certain scholars argue that the response to 9/11 has crystallized a shift in international law, or at least somewhat tempered the standard of attribution,[1082] an approach that has been perceived as predicated on the attribution of the attacks of 9/11 to Afghanistan via a *renvoi* to the "harbouring and supporting" rule.[1083] At the end of the day, it is also relevant to query "to

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[1077] In establishing its claim against Afghanistan, the U.S. arguably opted for the logic of indirect responsibility. See, e.g., *October 9th Letter*, *supra* note 346, at para. 1.

[1078] See, e.g., *A NATION CHALLENGED*; *supra* note 347, at B6; *President Bush Speaks to United Nations*, *supra* note 1074.

[1079] See Jinks, *State Responsibility*, *supra* note 315, at 84-85; *President Bush Speaks to United Nations*, *supra* note 1074. Hence, use of force against Afghanistan was authorized by Congress. See Authorization for Use of Military Force, Public Law No. 107-40, 115 Stat. 224 (2001).

[1080] Major Joshua E. Kastenberg, *The Use of Conventional International Law in Combating Terrorism*: *A Maginot Line for Modern Civilization Employing the Principles of Anticipatory Self-Defense & Preemption*, 55 AIR FORCE LAW REVIEW 87, 88 (2004).

[1081] Becker, TERRORISM AND THE STATE, *supra* note 2, at 5.

[1082] See, e.g., Kranz, *The Use of Armed Force*, *supra* note 130 at 80; Proulx, *Babysitting Terrorists*, *supra* note 163. But *Cf.* Duffy, THE 'WAR ON TERROR', *supra* note 133, at 54 n.44. See also Jinks, *State Responsibility*, *supra* note 315, at 92.

[1083] See, e.g., Marco Sassòli, *State Responsbility for Violations of International Humanitarian Law*, 84 INTERNATIONAL REVIEW OF THE RED CROSS 401, 409 (2002); Jinks, *State Responsibility*, *supra* note 315, at 85-88.

what extent the allegations levelled against the Taleban of harbouring and supporting terrorists amount to a legal (as opposed to political) claim at all."[1084] It should be mentioned, however, that the U.S.' initial posture in relation to the attacks on the World Trade Center, the Pentagon, and in Pennsylvania – which has been described by some as "rhetorically bellicose, but practically cautious" in generating international support and legitimacy[1085] – ultimately garnered support from the Security Council. In fact, the U.S.' initial reaction presumably stemmed from the need to build a viable coalition and to increase and foster multilateral cooperation in combating terrorism.[1086] More importantly, it is widely thought that the Council actually authorized recourse to force against Afghanistan following those attacks and, in one sweeping precedent, effectively reversed decades of Council restraint in allowing retaliatory use of force vis-à-vis transborder excursions.[1087] Conversely, such shift might also be explained by what amounted to an exceptional reaction to exceptional events.

Nevertheless, the consecration of the 'harbouring and supporting' rule on the international plane is particularly significant when considering that both *Nicaragua*[1088] and *Tadić*[1089] rejected financial and military assistance as a sole

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[1084] Duffy, THE 'WAR ON TERROR', *supra* note 133, at 55. But *Cf.* Miriam Hall, *Is the Present Military Action Against the Taleban and the Al Qaeda Network in Afghanistan Lawful?*, EUROPEAN JOURNAL OF INTERNATIONAL LAW, *Forum*, available online at http://www.ejil.org/forum_WTC/messages/52.html (last visited on July 25, 2006) (substantiating Afghanistan's responsibility for the 9/11 attacks on the basis of the ILC's *Articles on State Responsibility*).

[1085] Stephen J. Toope, *Powerful but Unpersuasive? The role of the United States in the Evolution of Customary International Law*, in Michael Byers and Georg Nolte (eds.), UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 287-316, 291-292 (2003).

[1086] See, e.g., Patrick E. Tyler and Jane Perlez, *World Leaders List Conditions on Cooperation*, NEW YORK TIMES, September 19, 2001, at A1. Similar comments may be applied to the early stages of the Iraq crisis. See, e.g., Andreas Paulus, *The War Against Iraq and the Future of International Law*: *Hegemony or Pluralism?*, 25 MICHIGAN JOURNAL OF INTERNATIONAL LAW 691, 719 (2004).

[1087] See Jinks, *State Responsibility*, *supra* note 315, at 85-86. In response to 9/11, Jinks argues that "the Security Council impliedly endorsed, without expressly authorizing, the use of force against Afghanistan." *Ibid*, at 86. On this issue, see also Rostow, *Before and After*, *supra* note 474, at 475-490. On the Council's role in combating international terrorism, see Ward, *Building Capacity*, *supra* note 474, at 289-305.

[1088] The ICJ also added, *supra* note 119, at para. 115, that the participation by the host-state, "even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself…for the purpose of attributing to the United States the acts committed by the *contras*". See also *Ibid*, at para. 110.

basis for imputing direct responsibility to a state,[1090] even if such aid proved "preponderant or decisive."[1091] Taking this finding as one of the only consistent points between those two decisions,[1092] coupled with the fact that terrorists need assets to operate and that governments across the globe have been trying to forestall their financial autonomy,[1093] it seems evident that the response to 9/11 has dug an entirely novel furrow for state responsibility vis-à-vis terrorist attacks. As Ratner notes, "it seems clear, on the issue of state responsibility, that none of the tests cited above-those of the ICJ, the ICTY, or the ILC-supports the harboring theory of the United States. That position, stated by President Bush, effectively imputes responsibility based on the toleration of such acts by the government."[1094]

In response, however, it should also be cautioned that, in some instances, armed reprisals or other extreme countermeasures against state toleration of terrorist activities would have no impact on that host-state's toleration of these activities. In that eventuality, any initiative undertaken by the sanctuary state to eradicate terrorist activity on its soil would only bring about its own demise via mutiny, insurrection or national unrest.[1095] Perhaps more intriguingly, some commentators persist in asserting that the *Tadić* jurisprudence was vindicated by the international response to 9/11.[1096] Venturing a step further, others suggest that Afghanistan wielded 'effective control' over the Al Qaeda network, thereby

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[1089] *Supra* note 108, at para. 130 ("it is not sufficient for the group to be financially or even militarily assisted by a State").

[1090] For a recent discussion of these aspects, see Wolfrum, *State Responsibility*, *supra* note 229, at 428-429.

[1091] See also Cassese, *The International Community's*, *supra* note 81, at 599.

[1092] It should be recalled that the *Tadić* judgment had little to do with actual state responsibility, rather evoking problems legally and philosophically adjacent to individual criminal responsibility. Yet, given the circumstances of the case, the Court chose to address the question of state responsibility rather extensively. See *supra* Chapter 2, heading C).

[1093] Much has been written on international efforts to freeze terrorist assets and to obstruct fundraising channels of organizations such as Al Qaeda. See, e.g., Engel, *Donating "Blood Money"*, *supra* note 32; Zagaris, *The Merging*, *supra* note 32, at 123-157.

[1094] Ratner, *Jus ad Bellum*, *supra* note 266, at 908. This possibility had long been recognized before 9/11. See, e.g., Baker, *Terrorism*, *supra* note 275, at 718.

[1095] On this point, see Bowett, *Reprisals*, *supra* note 422, at 20. Although not directly on point, also consider T.S. Rama Rao, *State Terror As a Response to Terrorism and Vice Versa*: *National and International Dimensions*, 27 INDIAN JOURNAL OF INTERNATIONAL LAW 183-193 (1987).

[1096] For instance, see Jan Arno Hessbruegge, *The Historical Development of the Doctrines of Attribution and Due Diligence in International Law*, 36 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 265, 305-306 (2004).

framing their investigation upon *Nicaragua*-esque terrain.[1097] Whether this appraisal of the facts and legal analysis surrounding the events of 9/11 is accurate seems highly questionable. As discussed earlier, the involvement of the Afghan state in the preparation and perpetration of the attacks would aptly be characterized as a hard case. As Brigitte Stern underscores, no one has maintained the claim that Afghanistan was directly or indirectly involved in the preparation and carrying out of the 9/11 excursions.[1098] More importantly, it becomes apparent that the law governing these difficult situations, along with even more passive types of state involvement in terrorism, "is not entirely clear."[1099] Or perhaps it *was* not entirely clear before 9/11, the response to those events having now set a new precedent in the application of state responsibility.

Even thinking back to the *Nicaragua* precedent, it should be recalled that Judges Schwebel's and Jennings' respective dissenting opinions militated in favour of a responsibility-expanding analysis of governmental assistance to armed bands.[1100] In contrast, their views clearly consecrated the principle that "providing insurgents with logistical support, or at least logistical support coupled with weapons, will generally be sufficient to render the assisting State responsible for an armed attack carried out by the insurgents",[1101] a proposition that received subsequent academic support.[1102] Borrowing from this second line of thought, the objective now focuses on determining to what extent the precedent set by U.S.-led international action in Afghanistan has affected the law of state responsibility and,

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[1097] See, e.g., Mark A. Drumbl, *Victimhood in Our Neighborhood*: *Terrorist Crime, Taliban Guilt, and the Assymetries of the International Legal Order*, 81 NORTH CAROLINA LAW REVIEW 1, 36 (2002). For a contrary opinion, the alternative argument being that Osama bin Laden – not the Taliban – controlled Al Qaeda, *Cf.* Jeffrey Bartholet, *Inside the Mullah's Mind*, NEWSWEEK, October 1, 2001, p. 30, at 32; Jeffrey Bartholet, *Method To the Madness*, NEWSWEEK, October 22, 2001, p. 54, at 58; Nicholas Lemann, *What Terrorists Want*, THE NEW YORKER, October 29, 2001, p. 36, at 38. See also George M. Travalio, *Terrorism, International Law and the Use of Military Force*, 18 WISCONSIN INTERNATIONAL LAW JOURNAL 145, 153 (2000) (extrapolating similar reasoning to the failures of impotent host-states).

[1098] Stern, *La Responsabilité*, *supra* note 262, at 686.

[1099] Cassese, *The International Community's*, *supra* note 81, at 599.

[1100] See *Nicaragua*, *supra* note 119, at pp. 346-347 (Judge Schwebel) and p. 543 (Judge Jennings). See also the discussion of the case in Travalio, *Terrorism*, *supra* note 1097, at 265.

[1101] Cassese, *The International Community's*, *supra* note 81, at 599.

[1102] See, e.g., John Norton Moore, *The Nicaragua Case and the Deterioration of World Order*, in *Appraisals of the ICJ's Decision*: *Nicaragua v. United States (Merits)*, 81 AMERICAN JOURNAL OF INTERNATIONAL LAW 77, 151-159 and especially at 154 (1987).

as a corollary, whether alternate liability models can build on this account so as to enhance the compliance pull and prevent future terrorist excursions.

One thing is certain: the response to 9/11 has undoubtedly challenged modern international law, as we know it.[1103] As seen in Chapter 2, notable developments have also been emphasized within the law of recourse to force, often occurring in tandem with the evolution in the law of state responsibility.[1104] However, it is not always clear if this paradigm shift amounts to a loosening of the application of self-defence standards or whether it can be best explained by the emergence of a new rule of state responsibility (or whether those two categories should necessarily be linked). In the latter case, compelling arguments do bolster the proposition that the law of state responsibility has been significantly affected by 9/11 and, even potentially, revised by this contemporaneous reality. Indeed, "[t]he legal response to the terrorist attacks (and other recent developments) strongly suggest that the scope of state liability for private conduct has expanded…the response to the September 11 attacks may signal an important shift in the law of state responsibility"[1105] However, a caveat should be registered here with deference to those scholars who caution against assessing government sponsorship or toleration of armed bands/terrorists through the framework of state responsibility. This criticism is due, in part, to the fact that current ILC structure only provides for the deployment of peaceful or non-forcible countermeasures.[1106]

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[1103] Several commentators generally conclude that U.S.-led military action in Afghanistan has fundamentally challenged international law. See, e.g., Asli Bâli, *Stretching the Limits of International Law*: *The Challenge of Terrorism*, 8 ILSA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 403-416 (2002); Nico J. Schrijver, *Responding to International Terrorism*: *Moving the Frontiers of International Law for 'Enduring Freedom'?*, 48 NETHERLANDS INTERNATIONAL LAW REVIEW 271-291 (2001); Nico J. Schrijver, *September 11 and Challenges to International Law*, in J. Boulden and T.G. Weiss (eds.), TERRORISM AND THE UN: BEFORE AND AFTER SEPTEMBER 11, 55-73 (2004).

[1104] For different views on this debate, see O'Connell, *Lawful and Unlawful Wars*, *supra* note 337, at 79-96; Paust, *Use of Armed Force*, *supra* note 38, at 533-557.

[1105] Jinks, *State Responsibility*, *supra* note 315, at 83-84.

[1106] See, e.g., *Corfu Channel*, *supra* note 67, at 22-23. See also Jutta Brunnée and Stephen J. Toope, *The Use of Force*: *International Law After Iraq*, 53 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 785, 794-795 (2004) (rejecting the ICJ's requirement of agency in the *Nicaragua* case "because it chose to assess the use of force within a framework of Sate-responsibility"); Jutta Brunnée, *The Security Council and Self-Defence*: *Which Way to Global Security?*, in Niels Blokker and Nico Schrijver (eds.), THE SECURITY COUNCIL AND THE USE OF FORCE: THEORY AND REALITY – A NEED FOR CHANGE? 107-132, 123 (2005); Gowlland-Debbas, *The Limits*, *supra* note 601, at 363.

In fact, these commentators suggest that, "a shift away from this framework may already have taken place, if one evaluates state practice and opinio juris since 11 September 2001."[1107] In sum, whilst such authors contemplate the problem of state-sponsored global terrorism through the lens of self-defence, they discard the requirement of agency but fall short of fully endorsing the 'harbouring and supporting' rule as sole justification for use of force: "in establishing the necessary link between terrorists and a state for the purposes of self-defence, while proof of agency should no longer be required, one would need to show more than that terrorists are found on the state's territory."[1108] In order to make the main argument palatable, it would seem, upon first glance, that one would have to accept that the reaction to 9/11 may be concomitantly framed within state responsibility and recourse to force frameworks.[1109] Coming back to international liability exclusively for a moment, if one accepts the premise that a shift in the law has taken root in the response to 9/11 and that both *Nicaragua* and *Tadić*, coupled with the ILC's *Articles*, are no longer dispositive of international responsibility for the conduct of non-state actors, additional legal anchors and academic writing would presumably be required to substantiate this claim.[1110]

Drawing from one possible area propitious for legal reform, it follows from these propositions that trans-substantive rules of state responsibility could be revamped accordingly, namely that the international community must decide whether to lower the test of imputation or to forego attribution altogether in the context of modern terrorism. Some scholars resolve the discrepancy engendered by the blurring of use of force standards and state responsibility rules by

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[1107] Brunnée and Toope, *The Use of Force*, *supra* note 1106, at 795 (citing Ratner, *Jus ad Bellum*, *supra* note 266, at 908-910).

[1108] Brunnée, *The Security Council*, *supra* note 1106, at 123. See also Nico Schrijver, *Responding to International Terrorism*, *supra* note 1103, at 283. Brunnée further adds, in *Ibid*, that "'[h]arbouring' terrorists should not be a reason to invoke self-defence unless it amounts to at least tacit approval of terrorist attacks." On this issue, see also Travalio and Altenburg, *Terrorism*, *supra* note 146, at 111-113.

[1109] For a concise review of the nebulous and confused relationship between terrorist attacks, use of force and countermeasures through the lens of the ILC's *Articles*, see Franck, RECOURSE, *supra* note 120, at 53-55. See also, generally, Gowlland-Debbas, *Security Council Enforcement Action*, *supra* note 259, at 56.

[1110] See, e.g., José E. Alvarez, *Hegemonic International Law Revisited*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 873, 879-880 n.34 (2003).

expounding that the U.S.-Afghanistan precedent has substantially relaxed the test of attribution under the law of state responsibility.[1111] At any rate, and as evidenced by the foregoing considerations, the latter scenario seems better tailored to fit within current international frameworks.

### 3. The Temporal Element of the Breach of an International Obligation

The relationship between time and state responsibility is of vital importance in reassessing the parameters of indirect state responsibility. Central to the inquiry that lies ahead is the notion of an ongoing, or continuing, violation of a state's obligation of prevention. In fact, the ILC's *Articles* specifically provide for this interrelationship and signal that transnational terrorist strikes can either be subsumed under a 'single strike' theory or under an 'overall relationship' theory, at least on one level.[1112] In the former scenario, a state's responsibility can be confined to a one-time failure to prevent an isolated terrorist strike, barring any additional attacks or subsequent endorsement by the governmental apparatus of internationally wrongful acts (e.g. the 2008 Mumbai terrorist attacks carried out by Pakistani irregulars). In the latter situation, the host-state's history indicates ongoing or repeated private transborder subversion originating from within its borders, a record that may be contemplated through the paradigm of an ongoing relationship between that state and, typically, a single victim-state (e.g. Hezbollah-driven terrorist attacks launched from Lebanon against Israel). The very nature of this transnational subversive activity, coupled with potentially devastating human and economic losses that may ensue, lends a particularly compelling character to the notion of prevention and, in turn, brings the interplay between 'instantaneous' and 'continuing' violations of international law into sharp relief. On a broader level, the relationship between time and state responsibility warrants further elucidation because, as argued above, a state also violates its obligation to prevent terrorism as long as it fails to control its national

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[1111] See, e.g., Jinks, *State Responsibility*, *supra* note 315, at 89. Similarly, see also Stahn, *Terrorist Acts*, *supra* note 147, at 37; Wolfrum, *The Attack of September*, *supra* note 147, at 1-78.

[1112] These theories were first explored above, *supra* Chapter 2, Section E) (see, particularly, note 458 and accompanying text), and will be discussed in further detail below.

territory or harbours terrorists on its soil. Thus, in theory, there is no need for a completed terrorist strike to materialize for the obligation of prevention to come into play; it is an ongoing duty, which may trigger accountability mechanisms. A contrary stance would signal that that obligation is absolute, which, in the spirit of prevention, would be counterproductive. As such, further consideration must be given to the temporal dimension of the breach of the specific international obligation under study.

**a) Article 14(3): The Distinction Between Instantaneous and Continuing Breaches**

The case for circumventing attribution prefaced in the previous section becomes particularly compelling when considering the temporal component of breaches of international obligations. The central theme underlying ILC's Article 14 is the distinction "between a breach which is continuing and one which has already been completed."[1113] The distinction between instantaneous and continuing breaches was explored in the *Rainbow Warrior* arbitration. In that case, the Tribunal was confronted with France's failure to detain two individuals, pursuant to an agreement between it and New Zealand. In finding that the breach had a continuous character, the Tribunal delivered an important statement on the nature of the continuous breach, opining that "this classification is not purely theoretical, but, on the contrary, it has practical consequences, since the seriousness of the breach and its prolongation in time cannot fail to have considerable bearing on the establishment of the reparation which is adequate for a violation presenting these two features."[1114] Yet, the distinction between instantaneous and continuing breaches has not, so far, been thoroughly applied to terrorism *per se*. In fact, it has only been central in cases involving contractual matters,[1115] forced or involuntary disappearances,[1116] expropriation or wrongful

[1113] Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 135.
[1114] *Rainbow Warrior*, *supra* note 461, at p. 264, para. 101.
[1115] See, e.g., *Rainbow Warrior*, *Ibid*., along with pp. 265-266, para. 105-106 and the Dissenting Opinion of Sir Kenneth Keith, at 279-284. See also *Gabĉíkovo-Nagymaros*, *supra* note 250, at p. 54, para. 79.
[1116] See, e.g., *Blake* v. *Guatemala, Inter-Am.Ct.H.R., Series C*, No. 36 (1998), at para. 67.

taking of property,[1117] treaty obligations,[1118] jurisdictional issues,[1119] and the loss of social status.[1120]

More importantly, the portion of Article 14 dealing with continuing breaches of international obligations, premised on a state's obligation to prevent a given event, could plausibly extend to situations of repeated cross-border attacks and reprisals.[1121] This argument, however, does not suggest that a single terrorist attack, such as the one perpetrated on 9/11, would not engender long-lasting consequences or ripple effects.[1122] Nevertheless, such attacks would *a priori* fall within the realm of instantaneous breaches, as the one-time failure to prevent the terrorist act itself indicates a breach by the host-state, without having a continuing effect for the purposes of the ILC's. Put another way, all of the surrounding repercussions, whether characterized by collateral damage to civilians and property or ensuing deaths of targeted individuals, fall within the ambit of the consequences of a terrorist attack, without confirming, *per se*, that the failure to prevent the attack has a continuing character.[1123]

Conversely, it is also interesting to note that the *in fine* portion of the same provision is couched in negative terms, which does not preclude the application of the *Articles* to a series of terrorist attacks, such as the acts of Al-Qaeda when taken in the aggregate and, thus, including the bombing of the Khobar Towers, the U.S. Embassy bombings in Africa, the bombing of the U.S.S. Cole, and the events of 9/11. When contemplated through this lens and compared to situations involving Hezbollah or the PLO, these accounts might fit within what has been termed the 'overall relationship' theory above. However, setting aside the Arab-Israeli context for a moment, a state's duty to prevent terrorist attacks may entail

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[1117] See, e.g., *Papamichalopoulos and Others* v. *Greece*, *E.C.H.R., Series A*, No. 260-B (1993) [hereinafter *Papamichalopoulos*] and *Loizidou* v. *Turkey*, *Merits*, *E.C.H.R. Reports* 1996-VI, p. 2216 [hereinafter *Loizidou*].

[1118] See, e.g., *Tehran*, *supra* note 67, at 145.

[1119] See, e.g., *Papamichalopoulos* and *Loizidou*, *supra* note 1117.

[1120] See, e.g., *Lovelace* v. *Canada*, decision of 30 July 1981, *G.A.O.R.*, Thirty-sixth Session, Supplement No. 40, (A/36/40), p. 166, at 172, paras. 10-11.

[1121] See the text of the provision, namely Article 14(3) of the ILC's *Articles*, *supra* note 459.

[1122] See, e.g., Reisman, *International Legal Responses*, *supra* note 64, at 6-7.

[1123] For a discussion of breaches' continuing character, see Brownlie, SYSTEM, *supra* note 205, at 193-198.

the analysis of an altogether different temporal dimension. Unlike situations of contractual breaches or continued disappearances (where the international harm can be redressed in real-time but after the fact), the primary objective of the duty to prevent attacks is to actually stop them from occurring. In sum, scenarios involving continuing violations of counterterrorism duties entail a wrongful state perpetrating an ongoing violation of international law, and do so as long as that state fails to bring its conduct in conformity with its obligation to prevent the given event. It should also be mentioned that, in cases of continuing violations vis-à-vis transnational terrorism, the impugned actions would have to be continuously linked to the same host-state or series of host-states for the logic of Article 14(3) to be cogently engaged. On this front, the Afghan case presents relatively little controversy, as the Security Council had repeatedly deplored the government of Afghanistan's harbouring and protection of Al Qaeda operatives on its territory, along with its toleration of training camps and bases.

Furthermore, given the international community's involvement and obvious resolve in combating terrorism, one could persuasively argue that every state has an interest in preventing terrorist attacks, albeit uneven in scope.[1124] In fact, terrorism strikes at the very core of human dignity and security, and it would prove illusory to assert that a state has no interest whatsoever in preventing a terrorist attack involving two other states. Based on that logic, the obligation to prevent terrorism most likely qualifies as an obligation *erga omnes*.[1125] Should this characterization of the obligation hold, it would entail a significant consequence under the ILC's *Articles*: third states could raise the failure to fulfill that duty when an excursion is launched from a state onto another's territory.

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[1124] Indeed, this argument should be appreciated with caution. *Cf.* Martin, LES RÈGLES INTERNATIONALES, *supra* note 1, at 490 ("l'obligation de ne pas soutenir le terrorisme s'inscrit dans un cadre multilatéral, mais tous les États n'ont pas un intérêt égal à son observation."). For similar reasoning in the context of the ICJ's decision in the *Genocide* case, see *supra* Section A), note 919 and accompanying text.

[1125] For more background on obligations *erga omnes*, see the *obiter dictum* in *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment*, [1970] ICJ REPORTS 3 [hereinafter *Barcelona Traction*], at 32, paras. 33-34. See also *East Timor* case, *supra* note 644, at 102, para. 29; *Wall Advisory Opinion*, *supra* note 521, at 199, para. 157. For a concise review of obligations *erga omnes*, with particular emphasis on the ICJ's pronouncements on the issue, see De Hoogh, OBLIGATIONS *ERGA OMNES*, *supra* note 499, at 49-56; Maurizio Ragazzi, THE CONCEPT OF INTERNATIONAL, *supra* note 761, at 7-12.

This recourse would hinge on ILC Article 48(1)(b), which provides that "[a]ny State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: …(b) the obligation breached is owed to the international community as a whole."[1126] Certain commentators espouse this legal construction and ground the *erga omnes* character of the obligation of prevention both in widespread state acquiescence and in Council Resolutions 1368 and 1373.[1127] Similarly, other scholars logically assert that *jus cogens* obligations also fall within the ambit of Article 48 of the *Articles* in that they are "owed to the international community as a whole", which may or may not encompass the obligation to prevent transnational terrorism.[1128] It is not clear, however, that the law of state responsibility would immediately legalize, or legitimize, any recourse or countermeasure adopted by third states under the aegis of Article 48, by sole virtue that the remedy in question was implemented in response to an internationally wrongful act with a view to protecting the interests of the international community.[1129]

More controversially, the violation of an *erga omnes* counterterrorism obligation could, arguably, impose new legal duties not only upon the wrongful state, but also upon all other states to cooperate to bring the internationally wrongful act to an end by virtue of ILC Article 41.[1130] Whether this classification

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[1126] Article 48(1)(b) of the *Articles on State Responsibility*, *supra* note 76. Should this position be endorsed, the obligation of preventing terrorist attacks would fit within the framework and reasoning of *Barcelona Traction*, *supra* note 1125, at 32, para. 33. For more background on the interplay between Article 48(1)(b) and obligations *erga omnes*, see Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 278; Linos-Alexander Sicilianos, *The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility*, 13 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1127, 1136-1138 (2002); Marina Spinedi, *From One Codification to Another*: *Bilateralism and Multilateralism in the Genesis of the Codification of the Law of Treaties and the Law of State Responsibility*, 13 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1099, 1113-1114 (2002).

[1127] See, e.g., Dupuy, *State Sponsors*, *supra* note 29, at 12.

[1128] See, e.g., Dupuy, *A General Stocktaking*, *supra* note 508, at 1061. On the mechanism of Article 48 and the invocation of responsibility, see Weiss, *Invoking State Responsibility*, *supra* note 518, at 803-806; Peirano, *International Responsibility*, *supra* note 365, at 190; Thirlway, *Injured*, *supra* note 79, at 311-328.

[1129] See, e.g., Denis Alland, *Les contremesures d'intérêt général*, in Pierre-Marie Dupuy, OBLIGATIONS MULTILATÉRALES, DROIT IMPÉRATIF ET RESPONSABILITÉ INTERNATIONALE DES ÉTATS 167 (2003).

[1130] For a general discussion of this possibility, see Gaja, *Do States Have*, *supra* note 658, at 34-35. For the text of Article 41, see *supra* note 654 and accompanying text. Some scholars also describe 'the obligation of States to cooperate with each other' as having attained the status of *jus*

garners adequate traction and practice to become authoritative remains highly debatable; the ILC's own pronouncement on the matter decidedly entertains this eventuality.[1131] Conversely, Judge Higgins' Separate Opinion in the recent *Wall Advisory Opinion* seems to point in the opposite direction, as she expounded that, whilst there are "certain rights in which, by reason of their importance, "all States have a legal interest in their protection"", this "has nothing to do with imposing substantive obligations on third parties to a case."[1132] Ultimately, the confirmation of the characterization of the obligation to prevent terrorism as *erga omnes* will depend largely on the evolution of international law in the upcoming years. Until that time, a single argument remains immutable: to expect the international legal order to countenance a claim that preventing terrorist attacks does not constitute a concern for the international community as a whole is probably unrealistic.

Coming back to the temporal dimension of the obligation at hand, it can be argued that an obligation such as the one faced by Afghanistan on 9/11 belonged to the realm of instantaneous breaches. This is not to say, however, that the ILC's *Articles* preclude the breach of an obligation to prevent a given event from having a continuing character; quite to the contrary, as seen above the failure to comply with the obligation of prevention can constitute a continuing wrongful act.[1133] Yet, once an attack is successfully launched from a state, the threat has not been thwarted and the primary object of the obligation is defeated. It is imperative to remember that this context is sometimes very different from non-lethal transboundary environmental damage, for example.[1134] Here, the international community is not just concerned with containing the threat if the initial harm is unavoidable. The policy impetus is rather to forestall the initial wrongful act before it can come into existence, thereby pitting the prospect of containment

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*cogens* norms, without providing further clarification or background on the implications of such designation. See, e.g., Peirano, *International Responsibility*, *supra* note 365, at 192-193.

[1131] See Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 249.

[1132] Separate Opinion of Judge Higgins in *Wall Advisory Opinion*, *supra* note 521, at 216, para. 37.

[1133] See Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 140.

[1134] Although it should be stressed that prevention also seems to infuse many of the policy objectives under the aegis of international environmental law. See, e.g., Scovazzi, *Some Remarks*, *supra* note 761, at 212.

against the reality of prevention. As a result, the failure to prevent the specific event may potentially entail far more serious consequences than the emission of toxic pollutants: human beings are killed and the primary object of the obligation is defeated.[1135] Hence, more stringent regimes of responsibility should be imposed, as we are sometimes confronted with situations that signal a departure from the Arab-Israeli record and, consequently, preclude the application of ILC Article 14(3). If we adopt the consensus that 'one [terrorist] attack is too much', which generally aligns with the laws of war[1136] and international law, generally, we must necessarily impose a heavier burden of precaution upon states. Moreover, it follows that "[s]tate liability is peculiarly relevant concerning crimes of omission, which imply that someone had the power and the duty to interfere."[1137] This is unquestionably the case in respect of the failure to comply with counterterrorism obligations and shifts the focus of the inquiry towards a rationale of strict liability.

**b) A Rationale of Strict Liability**

Once a state fails to fulfill its obligation of prevention, thereby defeating the principal purpose for which it existed in the first place, that state should not be able to escape scrutiny for not having acted on the right incentives, save in specific circumstances. For instance, if a primary obligation dictates that specific information not be divulged, "the whole point of the obligation is defeated" once the information is published, thereby stripping the obligation of a continuing character.[1138] If we want the "war" on terror to have a preventive rather than curative character, we must tackle the problem at its roots and provide the

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[1135] Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 140 (distinguishing between cases where "the breach may be progressively aggravated by the failure to suppress it" and obligations of prevention "only concerned to prevent the happening of the event in the first place", in which case "there will be no continuing wrongful act").

[1136] It is no secret that the protection of civilians is paramount in the context of the laws of war. See, e.g., *Basic Rules of the Geneva Conventions and Their Additional Protocols* (International Committee of the Red Cross, 1988 ref. 0365), available online at http://www.icrc.org/WEB/ENG/siteeng0.nsf/htmlall/p0365?OpenDocument&style=Custo_Final.4&View=defaultBody2 (last visited on 25 October 2004). The ICJ also pronounced on the importance of protecting civilian life. See, e.g., *Nuclear Weapons Advisory Opinion*, *supra* note 465, at 827, para. 78 (classifying the non-targeting of civilians as a 'cardinal principle' of humanitarian law).

[1137] Rigaux, *International Responsibility*, *supra* note 179, at 83.

[1138] See Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 140 n.270.

adequate impetus to governments. In fact, the law of state responsibility offers great propensity for prevention, as it can generate serious counterterrorism incentives for governments.[1139] Moreover, recent law enforcement initiatives are certainly indicative of this broader trend of international law incentivizing governments to comply with their counterterrorism obligations. An apt case in point undoubtedly resides in the U.K.'s recent prevention of what has been envisaged as the largest transnational terrorist strike since 9/11. In particular, the U.K.'s due diligence led to the conviction of three individuals -- Abdulla Ahmed Ali, Assad Sarwar, and Tanvir Hussain -- who had conspired to blow up at least seven airliners headed for Canada and the U.S. by using liquid explosives dissimulated in soft drink containers.[1140]

In the grander scheme of things, the objective is to efficiently forestall terrorism using, as the Council declares, 'all necessary steps', whilst also preventing an abusive application of state responsibility and upholding the sovereign equality of states, to the extent possible. It should be recalled that the precise content of 'all necessary steps' is far from being determined and hinges, in all circumstances, on questions of fact; it remains to be seen, exactly, what standard is to be ascribed to the Council's prescriptions in its post-9/11 resolution-making.[1141] Based on this objective, coupled with the considerations raised above and the paradigm shift toward indirect responsibility, it would nonetheless seem helpful to forego attribution altogether in the context of modern terrorism. Besides, it is clear that the mechanism of indirect responsibility has become a sort of 'safety net' to pin liability on the host-state, should an aggrieved state endeavor to establish direct responsibility but fail to do so for various reasons, ranging from

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[1139] See, e.g., Stern, *La Responsabilité*, *supra* note 262, at 692; Pierre-Marie Dupuy, *The Law After the Destruction of the Towers*, in *The Attack on the World Trade Center*: *Legal Responses*, EUROPEAN JOURNAL OF INTERNATIONAL LAW, available online at http://www.ejil.org/forum_WTC/ny-dupuy.html (last visited on 20 August 2007).

[1140] See, e.g., *3 U.K. Men Convicted in Airline Bomb Plot*, CBC NEWS, September 7, 2009, available online at http://www.cbc.ca/world/story/2009/09/07/british-muslims-convicted007.html (last visited on 3 October 2009).

[1141] Certain scholars puzzlingly infer that "[w]hat is clear is that the duty "to take necessary steps" does not impose anything more stringent than the requirement of 'due diligence' under customary international law", without further substantiating this claim. See Hamid, *Maritime Terrorism*, *supra* note 175, at 16.

evidentiary obstacles to scrambled factual ties between terrorists and governments.[1142] As a logical, subsequent line of inquiry in a different context, some scholars ponder if "the conduct of those responsible for terrorist atrocities committed in post-occupation Iraq cannot be attributed to Iran as a matter of State responsibility, can it be shown that Iran has violated a due diligence rule through its actions or omissions?"[1143]

With this in mind, it is submitted that counterterrorism policy objectives would be better served by a regime of responsibility inspired by a rationale of strict liability.[1144] Whilst much has been written on the notion of fault under state responsibility[1145] and, traditionally, "states are not strictly responsible for wrongs orchestrated on or emanating from their territory",[1146] it should nonetheless be cautioned that conventional wisdom does not preclude the implementation of a mechanism of strict liability in this legal area.[1147] In fact, influential scholarly voices note the "growing contemporary tendency for certain categories of obligations to entail 'strict liability' – that is to say, responsibility by reference to

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[1142] It should be noted that recent scholarly accounts also embody the essence of the terms 'direct responsibility' and 'indirect responsibility', albeit using different language. See, e.g., Battaglini, *War Against Terrorism*, *supra* note 426, at 141 (invoking the notions of *active* and *passive* positions of sanctuary states).

[1143] Barnidge, Jr., NON-STATE ACTORS, *supra* note 7, at 152 and 152 n.77.

[1144] But *Cf*. Becker, TERRORISM AND THE STATE, *supra* note 2, at 269-272; Alan Schwartz, *The Case Against Strict Liability*, 60 FORDHAM LAW REVIEW 819 (1992) (arguing that the foundational assumptions of strict liability law are false or misguided); Sienho Yee, *The Responsibility of States Members of an International Organization for its Conduct as a Result of Membership of their Normal Conduct Associated with Membership*, in Ragazzi, INTERNATIONAL RESPONSIBILITY, *supra* note 50, at 435-454, 441. See also Duffy, THE 'WAR ON TERROR', *supra* note 133, at 52 and 57 (arguing that counterterrorism obligations do not embody a strict liability character).

[1145] Some of the most eminent publicists have explored the role of fault in the framework of state responsibility. See, e.g., Hersch Lauterpacht, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW (WITH SPECIAL REFERENCE TO INTERNATIONAL ARBITRATION) 134-143 (1927).

[1146] Duffy, THE 'WAR ON TERROR', *supra* note 133, at 49. See also *Ibid*, at 52. Ultimately, the field of international responsibility is probably not endowed with a system of pure strict liability vis-à-vis terrorism. See, e.g., Saul, DEFINING TERRORISM, *supra* note 26, at 94; Christine Van den Wyngaert, *The Political Offence Exception to Extradition*, 19 ISRAEL YEAR BOOK ON HUMAN RIGHTS 297, 302 (1989).

[1147] Besides, when invoking traditional state responsibility logic, it is clear that "states are responsible for conduct over which they exercised effective control." Duffy, THE 'WAR ON TERROR', *supra* note 133, at 49. See also Jennings and Watts, OPPENHEIM'S, *supra* note 323, at 501; Hersch Lauterpacht, INTERNATIONAL LAW (VOL. I) 337-338, 341 (8th Edition, 1955); Kelsen, PRINCIPLES (2nd Ed.), *supra* note 747, at 199-200, all referring to 'vicarious responsibility', although Ian Brownlie calls into question this characterization. See PRINCIPLES OF PUBLIC INTERNATIONAL LAW 431 (6th Edition, 2003); SYSTEM, *supra* note 205, at 36.

events, with *culpa* as much an irrelevance as the due-diligence test. This is clearly a growing phenomenon in the international environmental field".[1148]

For example, Andrea Gattini explored the significance of the concept of fault in relation to both the law of state responsibility and the ILC's *Articles* before their final adoption.[1149] In his response to Professor Gattini, ILC Special Rapporteur Crawford agreed that "it is a serious error to think that it is possible to eliminate the significance of fault from the Draft Articles."[1150] However, Crawford opened the door to the possible transplantation of strict liability therein by contending that it would be equally erroneous to adopt a one-size-fits-all approach to the role of fault in this debate, as primary responsibility-generating normative content dictates the formula, and expounded that "different primary rules of international law impose different standards, ranging from 'due diligence' to strict liability".[1151] It inevitably follows that, given the urgency of combating terrorism, coupled with the object and purpose of actually preventing attacks, the regime of indirect responsibility could transform into a mechanism of strict liability or, at least, into a working model drawing inspiration from such standard. As a corollary, the determination of the breach of an obligation, especially a duty of prevention such as the one mirrored in counterterrorism, remains largely interdependent with a contextual assessment of the contents of the primary norm under study. Indeed, "[w]hether a particular obligation is breached forthwith upon a failure to act on the part of the responsible State, or whether some further

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[1148] Higgins, PROBLEMS & PROCESS, *supra* note 49, at 161. See also Nathalie Horbach, LIABILITY VERSUS RESPONSIBILITY UNDER INTERNATIONAL LAW: DEFENDING STRICT STATE RESPONSIBILITY FOR TRANSBOUNDARY DAMAGE (1996); Louis F.E. Goldie, *International Principles of Responsibility for Pollution*, 9 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 283, 306-309 (1970); Valentina O. Okaru, *The Basel Convention*: *Controlling the Movement of Hazardous Wastes to Developing Countries*, 4 FORDHAM ENVIRONMENTAL LAW REPORT 137, 155 (1993).

[1149] *Smoking/No Smoking*: *Some Remarks on the Current Place of Fault in the ILC Draft Articles on State Responsibility*, 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW 397-404 (1999).

[1150] *Revising the Draft Articles*, *supra* note 993, at 438.

[1151] *Ibid*. [Emphasis added.] See also Chittharanjan F. Amerasinghe, STATE RESPONSIBILITY FOR INJURY TO ALIENS 45 (1967); Higgins, PROBLEMS & PROCESS, *supra* note 49, at 160.

event must occur depends on the content and interpretation of the primary obligation and cannot be determined in the abstract."[1152]

### 4. Drawing on Legal Traditions and Domestic Law Analogies to Inform the Law of State Responsibility

Given that this project's policy thrust will gravitate towards the possible importation of strict liability undertones into state responsibility repertoire, a preliminary discussion on the role and place of domestic legal analogies seems apposite here.

#### a) The Impenetrability of International Law

As mentioned previously, some scholars view the sphere of international law, and state responsibility specifically, as an impenetrable, overarching fortress insulated from domestic law transplantations.[1153] According to this line of reasoning, the autonomy of international law precludes a state from pleading "principles of municipal law, including its constitution, in answer to an international claim".[1154] Others caution against being selective in the transplantation process, in order to avoid importing a private law analogy without the corresponding procedural safeguards. This reasoning is redolent of Professor Crawford's own scholarly writings on the matter -- calling for the incorporation of the procedural safeguards of democracy into the realm of public international law -- an idea that has, puzzlingly, remained absent from his works as Special Rapporteur on state responsibility.[1155] Indeed, the "war" on terror constitutes a

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[1152] Report of the International Law Commission on the Work of its Fifty-third Session, *General Assembly Official Records*, Fifty-sixth Session, Supp. No. 10 (Doc.A/56/10), Commentary on Draft Article 2, at para. 9. See also Barboza, *Legal Injury*, *supra* note 748, at 8.

[1153] See, e.g., Brownlie, SYSTEM, *supra* note 205, at 36 (arguing that the domestic law notion of 'vicarious responsibility' should not be imported into the law of state responsibility).

[1154] *Ibid*, at 141. This principle is also grounded in Article 27 of the Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27, reprinted in Barry E. Carter, Phillip R. Trimble and Curtis A. Bradley (eds.), INTERNATIONAL LAW: SELECTED DOCUMENTS 49, 57 (2003). This idea somewhat originates from the theory of Hans Kelsen, one of the most prominent proponents of the monist conception of international law. See, Kelsen, PRINCIPLES (2nd Ed.), *supra* note 747, at 553-588 (expounding that all rules of international law are supreme over rules of municipal law). See also Malanczuk, AKEHURST'S, *supra* note 165, at 63-64 and n.2 (citing Hans Kelsen, *Die Einheit von Völkerrecht und staatlichem Recht*, 19 ZAÖRV 234-248 (1958), and discussing Kelsen's notion of a basic rule or 'Grundnorm' from which derives all law).

[1155] See, e.g., James Crawford, *Democracy and International Law*, 64 BRITISH YEARBOOK OF INTERNATIONAL LAW 113 (1994); James Crawford and Susan Marks, *The Global Democracy*

propitious breeding ground for juridical analogy – legal challenges engendered by novel law enforcement practices, for example, raise concerns for the protection of fundamental human rights. For instance, the practice of targeted killing of suspected terrorists poses intractable challenges to the human rights project. In particular, domestic legal schemes prevalent in most Western nations do not countenance the extrajudicial killing of individuals and there is no intelligible reason why ordinary due process standards afforded all citizens should fail to be mirrored in international law.[1156] Others advocate similar concerns of caution and adaptation of domestic concepts in the international context, albeit through more favourable assessment of international environmental law.[1157]

It must be recalled that the practice of domestic law transplantations is ripe for abuse, especially in a field as highly volatile and politically sensitive as counterterrorism. Indeed, the substantive and procedural overhaul of state responsibility must not translate into another hegemonic outlet for imposing Western-derived ideologies and concepts upon the rest of the world,[1158] with little regard for the scarcity of resources in combating terrorism amongst developing countries and the diversity of worldviews underpinning their relationships to the international legal order. Besides, most states will ultimately reject a rule of state responsibility -- or a construction of that body of law -- that would subject them to indiscriminate or unconditional intervention for harbouring terrorists.[1159]

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*Deficit*: *An Essay in International Law and its Limits*, in Daniele Archibugi *et al.* (eds.), RE-IMAGINING POLITICAL COMMUNITY: STUDIES IN COSMOPOLITAN DEMOCRACY 72 (1998). See also Nissel, *The ILC Articles*, *supra* note 1026, at 369.

[1156] For support of this proposition, see, e.g., Peter Margulies, *Making "Regime Change" Multilateral*: *The War on Terror and Transitions to Democracy*, 32 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY 389, 410-11 (2004); Proulx, *If the Hat Fits*, *supra* note 1008, at 875-891 and authorities cited therein.

[1157] See generally Jonathan B. Wiener, *Something Borrowed from Something Blue*: *Legal Transplants and the Evolution of Global Environmental Law*, 27 ECOLOGY LAW QUARTERLY 1295 (2001).

[1158] Similar arguments have been made in other branches of international law. See, e.g., Mark A. Drumbl, *Toward a Criminology of International Crime*, 19 OHIO STATE JOURNAL ON DISPUTE RESOLUTION 263, 271-272 (2003) (applying similar reasoning to the importation of Western criminal law standards into international law); Benedict Kingsbury, *"Indigenous Peoples" in International Law*: *A Constructivist Approach to the Asian Controversy*, 92 AMERICAN JOURNAL OF INTERNATIONAL LAW 414, 455 (1998); Makau wa Mutua, *Politics and Human Rights*: *An Essential Symbiosis*, in Byers, THE ROLE OF LAW, *supra* note 543, at 150.

[1159] See, e.g., Byers, *Terrorism*, *supra* note 30, at 408.

The resistance to domestic law transplantations in international law[1160] has also carried over to other spheres, such as the law of international organizations[1161] and international criminal law.[1162] Granted, in the latter case this resistance has considerably waned and paved the way for international criminal law to be considerably shaped and influenced by domestic criminal law. Nevertheless, whilst some commentators contend that the horizontal transplantation of judicial precedents between common law and civil law jurisdictions generates viable results,[1163] others quarrel with this argument and maintain that transplantation impedes innovation.[1164] Regardless of one's stance on the debate, it is safe to say that ongoing transnational judicial dialogue and cross-fertilization now actuate the process of legal borrowing: international law, civil law, and common law may, in fact, be mutually instructive systems, hinging on a reciprocal flow of influences, information and value sharing, a sort of horizontal integration.[1165] In sum, by analyzing the possible contribution of certain legal traditions to state responsibility, the present dissertation is guided by a simple precept: "[the] borrowing of law is the primary instrument of law's

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[1160] Legal transplants from one domestic system to another are usually referred to as 'horizontal integration'. For an assessment of the viability of legal transplantation projects, see, e.g., Julie Mertus, *From Legal Transplants to Transformative Justice*: *Human Rights and the Promise of Transnational Civil Society*, 14 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 1335, 1377-1384 (1999).

[1161] See, e.g., Dan Sarooshi, *The Essentially Contested Nature of the Concept of Sovereignty*: *Implications for the Exercise by International Organizations of Delegated Powers of Government*, 25 MICHIGAN JOURNAL OF INTERNATIONAL LAW 1107, 1121-1122 (2004) (citing Rosalyn Higgins, *Final Report of the Legal Consequences for Member States of the Non-Fulfilment by International Organizations of their Obligations Towards Third Parties*, 66-I ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 251, 287 (1995)); Evangelos Raftopoulos, THE INADEQUACY OF THE CONTRACTUAL ANALOGY IN THE LAW OF TREATIES 201 and *seq*. (1990).

[1162] See, e.g., Drumbl, *Toward a Criminology*, *supra* note 1158, at 268-272.

[1163] See Robert B. Ahdieh, *Between Dialogue and Decree*: *International Review of National Courts*, 79 NEW YORK UNIVERSITY LAW REVIEW 2029, 2067 n. 155 (2004) (citing John V. Orth, *The Secret Sources of Judicial Power*, 50 LOYOLA LAW REVIEW 529 (2004)).

[1164] For general support of this statement, see, e.g., Ahdieh, *Between Dialogue*, *supra* note 1163, at 2067 n. 155. On the view that horizontal judicial transplantations or 'extrinsic judicial review' constrain innovation, see Paul B. Stephan, *Redistributive Litigation -- Judicial Innovation, Private Expectations and the Shadow of International Law*, 88 VIRGINIA LAW REVIEW 789, 792 (2002).

[1165] See, e.g., Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARVARD INTERNATIONAL LAW JOURNAL 191, 193 (2003) (citing Claire L'Heureux-Dubé, *The Importance of Dialogue*: *Globalization and the International Impact of the Rehnquist Court*, 34 TULSA LAW JOURNAL 15, 16 (1998)); Anne-Marie Slaughter, A NEW WORLD ORDER 69-79 (2004).

development."[1166] In other words – and in stark contrast with the view that an independent international legal order can only export its components vertically into the civil/common law divide – the law of state responsibility undoubtedly amounts to a mixture of different legal influences, particularly when deploying its fundamental mechanisms. Thus, it is no surprise that "[i]n theory and in practice, the international law of responsibility is applied across the field of international obligations. It comprises areas that -- in terms of domestic analogies -- may be seen as like those of contract and tort, and others that might be seen as analogous to public law."[1167]

Similarly, the notion of vertical integration of international law into domestic systems has been explored in legal scholarship, whether in ascertaining the role of that law in domestic judicial settings,[1168] or in assessing and defining its place and importance in legal education.[1169] However, it must be recalled that this project is more concerned with the vertical integration or transplantation of domestic legal concepts into international law, rather than the other way around. Although not directly on point and bearing in mind the ever-important enforcement component surrounding the state responsibility debate, when taken in its broader scope it could be argued that this line of reasoning amounts to an inversed interpretation of the doctrine of enmeshment as a theory of

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[1166] H. Patrick Glenn, LEGAL TRADITIONS OF THE WORLD 204 (2nd Edition, 2004) (citing Alan Watson, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2nd Edition, 1993)).

[1167] James Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts*: *A Retrospect*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 874, 878 (2002).

[1168] For varied views under the Canadian experience, see Jutta Brunnée and Stephen J. Toope, *A Hesitant Embrace*: *The Application of International Law by Canadian Courts*, 40 CANADIAN YEARBOOK OF INTERNATIONAL LAW 3 (2002); René Provost, *Judging in Splendid Isolation*, 56 AMERICAN JOURNAL OF COMPARATIVE LAW 125-172 (2008); Stéphane Beaulac, *Arrêtons de dire que les tribunaux au Canada sont 'liés' par le droit international*, 38 REVUE JURIDIQUE THÉMIS 359-387 (2004). More generally, see Constantin P. Economides, LES RAPPORTS ENTRE LE DROIT INTERNATIONAL ET LE DROIT INTERNE: COLLECTION SCIENCE ET TECHNIQUE DE LA DÉMOCRATIE (1993). To a lesser extent and on the American experience, see Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law As Federal Common Law*: *A Critique of the Modern Position*, 110 HARVARD LAW REVIEW 815 (1997).

[1169] See, e.g., M.C. Mirow, *Globalizing Property: Incorporating Comparative and International Law Into First-Year Property Classes*, 54 JOURNAL OF LEGAL EDUCATION 183 (2004); Dianne Otto, *Handmaidens, Hierarchies and Crossing the Public-Private Divide in the Teaching of International Law*, 1 MELBOURNE JOURNAL OF INTERNATIONAL LAW 35 (2000); Catherine Valcke, *Global Law Teaching*, 54 JOURNAL OF LEGAL EDUCATION 160 (2004).

compliance.[1170] Indeed, enmeshment shares several points of rapprochement with the importation of domestic legal transplants into international law, thereby suggesting that a state might conclude that this area mirrors its owns interests, a notion building on the works of several scholars.[1171] Hence, under that lens it is perhaps more accurate to speak about the transplantation of national 'interests' on the international scene, as opposed to the importation of domestic law. Ultimately, importing select municipal analogies into the law of international responsibility will prove helpful in elaborating new interpretive guidelines or theoretical insights when assessing appropriate legal responses to terrorism, irrespective of the impact of that exercise on states' interests.

In addition, we must also remember that the realm of state responsibility is endowed with a *sui generis* scheme of enforcement, reciprocity, and countermeasures,[1172] a dominant feature not mirrored in domestic systems.[1173] Although it has been cogently argued that the law of state responsibility is neither common law nor civil law-derived – but "purely and simply international" in character[1174] – the success of importing common law and civil law-inspired concepts into this area will be commensurate with the legal community's effort to preserve the integrity of the rules being transplanted. For instance, if one attempts to import the contractual notion of efficient breach into international law, it must

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[1170] For a recent and thoughtful account on enmeshment, see Claire R. Kelly, *Enmeshment As a Theory of Compliance*, 37 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 303 (2005). For an application of Koh's "transnational legal process", see William S. Dodge, *The Helms-Burton Act and Transnational Legal Process*, 20 HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW 713, 723-728 (1997). On the mutual interpenetration of domestic law and international law, along with a discussion on competing monist and dualist theories, see Malanczuk, AKEHURST'S, *supra* note 165, at 63-71.

[1171] See, e.g., Abram Chayes and Antonia Handler Chayes, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995); Ryan Goodman and Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STANFORD LAW REVIEW 1749 (2003); Harold Hongju Koh, *The 1998 Frankel Lecture*: *Bringing International Law Home*, 35 HOUSTON LAW REVIEW 623, 626-627 (1998); Koh, *Why Do Nations*, *supra* note 721, at 2645-2658 (1997); Harold H. Koh, *Transnational Legal Process*, 75 NEBRASKA LAW REVIEW 181 (1996); Wendt, *Collective Identity*, *supra* note 603, at 384-385.

[1172] See Alland, *International Responsibility*, *supra* note 493, at 143-197.

[1173] Although not directly on point, similar arguments have been advanced in European Community Law. See previous comments *supra* notes 715-716 and accompanying text (in Chapter 3, under heading B)3.)

[1174] See, e.g., Rao, *International Crimes*, *supra* note 210, at 67 (also citing James Crawford, *First Report on State Responsibility*, Add. 1, Doc.A/CN.4/490/Add.1, at para. 60(iv)).

be stressed that common law courts have correspondingly developed the notion of promissory estoppel to shield economically disadvantaged parties, and its objectives should also be taken into account and ultimately reflected in the transplantation process.[1175] Similarly, before importing the rationale underlying certain domestic tort claims in this realm – be it by analogizing terrorism to tort law or otherwise – one must also keep in mind that courts frequently engage in social policy analysis when adjudicating alleged violations. In other words, domestic legal systems contain countervailing norms, fictions or practices that ultimately offset the negative aspects engendered by the abusive or misplaced application of legal rules in specific circumstances. This approach should also inform the rethinking of state responsibility after 9/11 and, similarly to the protection of economically disadvantaged parties in municipal law, aligns with the broader objective of protecting weaker states.[1176] Whilst it is commonplace for certain municipal importations to be transformed throughout the course of transplantation,[1177] a caveat should be issued to the effect that such importations can lead to spectacular miscarriages of legal borrowing. As discussed in subsequent sections, a salient exemple of a massive failure to transplant the proper meaning of a municipal legal dichotomy resides in the much-decried inversion of obligations of conduct and obligations of result into state responsibility law, as originally spearheaded by Roberto Ago (and ultimately discarded by the ILC in its finalized text).[1178]

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[1175] For background discussion on estoppel, also termed 'detrimental reliance', see Michael B. Metzger and Michael J. Phillips, *Promissory Estoppel and the Evolution of Contract Law*, 18 AMERICAN BUSINESS LAW JOURNAL 139 (1989). The possible importation of the 'efficient breach' doctrine into the realm of state responsibility for failing to prevent transnational terrorism will be fully engaged below, *infra*, Section 5.b).

[1176] This objective is also mirrored in the "no-harm" principle as articulated by the ILC. For support of this proposition, see Cari Votava, *The Non-Navigational Uses of International Watercourses*, 84 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 228, 235-236 (1990) (noting that the ILC declared "that there is such a rule, which is that one state shall not cause harm to another state" and expounding that "it perhaps is not such a bad idea for the no-harm rule to prevail over equitable utilization, in order to protect weaker states and states in vulnerable positions from the exercise of power by larger states", and also extending this principle to long-lasting transborder pollution).

[1177] See, e.g., Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 21.

[1178] See, e.g., International Law Commission, Report of the International Law Commission on the Work of Its Fifty-First Session (1999), United Nations Document A/54/10, at 119-134; Combacau, *Obligations*, *supra* note 1025, at 194, 198 and 202; Provost, *Introduction*, *supra* note 77, at XIII.

As discussed above, rules should not be selectively displaced and distorted into the international context simply to cater to policy objectives in the "war" on terror, without any regard for procedural or substantial safeguards, surrounding legal devices, and inextricable features underlying the rules in question. However, it should be mentioned with some degree of caution, at the outset, that some commentators highlight the difficulty of importing domestic law analogies into the sphere of state responsibility, especially those rooted in municipal contract and tort law.[1179] This discrepancy has sometimes been explained by reference to state responsibility's "non-jurisdictional" nature, which entails that – unlike under structures found in domestic legal orders – the application /enforcement of state responsibility rarely engages jurisdictional mechanisms, and rather usually occurs within the context of disparate diplomatic relations.[1180]

Nevertheless, the project of considering municipal law analogies and importations remains quite illuminating when seeking original solutions to difficult state responsibility questions. In fact, it is no secret that many mechanisms found under state responsibility are mirrored in domestic legal systems. Writing specifically about state responsibility from an international perspective two decades ago, Philip Allott recognized this mutual interpenetration. Indeed, he observed that "[r]esponsibility is used in municipal law to separate wrongdoing by a person whose mind functions in an abnormal way from the consequences of the wrongdoing", and that "[t]he concept of responsibility is also used in municipal law to deal with certain problems of attribution or imputation, especially where there is not a direct connection between the wrongdoer and the wrongful act."[1181] Thus, it would probably be

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But *Cf.* Riccardo Pisillo-Mazzeschi, *The Due Diligence Rule and the Nature of International Responsibility of States*, 35 GERMAN YEARBOOK OF INTERNATIONAL LAW 9-51 (1992), reprinted in Provost, STATE RESPONSIBILITY, *supra* note 77, at 129-139 (using the erroneously-imported distinction in order to invoke 'obligations of diligent conduct' and 'obligations of result').

[1179] See Provost, *Introduction*, *supra* note 77, at XIII-XIV. It is also interesting to note that terrorism has sometimes been analogized with a 'tort' under the global legal order. For support of this proposition, see Eileen Rose Pollock, *Terrorism As a Tort in Violation of the Law of Nations*, 6 FORDHAM INTERNATIONAL LAW JOURNAL 236-260 (1982-1983).

[1180] See Provost, *Introduction*, *supra* note 77, at XIV.

[1181] Allott, *State Responsibility and the Unmaking of International Law*, *supra* note 971, at 515.

much to the dismay of Lauterpacht[1182] that recent international responsibility scholarship is replete with discussions on whether municipal law analogies can inform the law of state responsibility,[1183] an exercise that seems increasingly attractive with the emergence of transnational actors and the need to better integrate them into the international legal framework against a multipolar political backdrop.

For instance, some commentators observe that transnational counterterrorism strategies have unnecessarily oscillated between domestic criminal law and international law models. Absent from most post-9/11 legal rhetoric, however, is the possible importation of torts-derived concepts in order to inform possible international legal responses to transnational terrorism.[1184] Very relevantly, one author notes the suspicious absence of the "civil law of torts" in most discussions surrounding counterterrorism, and underscores that "[c]oncepts in civil law may be particularly useful in designing effective responses to terrorism, including further development of civil litigation against terrorism."[1185] Others follow suit and echo similar considerations, opining that "[i]nternational responsibility occupies a smaller niche within the realm of the law of tort."[1186] Along similar lines, certain authors note the inherent compatibility between secondary norms of responsibility and the rules of civil procedure under domestic common law regimes, "which sets forth a distinctive set of rules that apply across the various substantive areas of law – although the common law still distinguishes civil procedure from criminal and administrative procedure and thus does not treat

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[1182] See, e.g., Provost, *Introduction*, *supra* note 77, at XIII (noting the awkwardness of borrowing from municipal tort law or delictual responsibility in the field of State responsibility, and citing Lauterpacht, PRIVATE LAW, *supra* note 1145).

[1183] See, e.g., the sources cited in Proulx, *International Responsibility*, *supra* note 384, at 589 n.27.

[1184] See, e.g., Higgins, PROBLEMS & PROCESS, *supra* note 49, at 155-159 (invoking the tort-inspired notion of 'standard of care' in her chapter dealing with state responsibility). See also Duffy, THE 'WAR ON TERROR', *supra* note 133, at 266.

[1185] James Kraska, *Torts and Terror*: *Rethinking Deterrence Models and Catastrophic Terrorist Attack*, 22 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 361, 382-382 (2007) (also remarking that [t]he application of tort theory to strategic nuclear doctrine offers value in rebuilding deterrence against catastrophic nuclear terrorism). See also *Ibid*, at 383 n.89 *in fine*.

[1186] Rigaux, *International Responsibility*, *supra* note 179, at 81.

procedure as a fully homogeneous field."[1187] There is no reason why such reasoning could not extend to state responsibility and, more precisely, to the mechanics of establishing (or determining) state accountability for the acts of non-state actors. In fact, this is already a reality.[1188]

Indeed, the case for working with municipal law analogies – especially those derived from tort law – becomes exceedingly compelling when confronted with significant international legal practice borrowing from that domestic scheme, particularly in the field of state responsibility.[1189] For one thing, while the Iran-U.S. Claims Tribunal itself is barred from settling most disputes arising from torts, related jurisprudence is replete with reference to tort law.[1190] More importantly, the UN Compensation Commission mentioned above in Chapter 3, mandated with overseeing reparations flowing from Iraq's responsibility for its unlawful invasion of Kuwait, is an apt case in point of international legal practice drawing heavily on domestic legal influences (including seeking guidance from other international remedial bodies applying those same domestic standards). In fact, the two most dominant influences on the implementation of the Compensation Commission were derived both from the Iran-U.S. Claims Tribunal

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[1187] Bodansky and Crook, *Introduction*, *supra* note 873, at 780 n.51. This position was eventually discarded by the ILC Special Rapporteur. See Crawford, *The ILC's Articles*, *supra* note 1167, at 876 (also citing David Ibbetson, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS (2001)).

[1188] Indeed, as both foundational publicists and more contemporary scholars have underscored, municipal legal principles have had a profound influence on the law of state responsibility. See, e.g., Lauterpacht, PRIVATE LAW, *supra* note 1145, at 134-135; Caron, *The Basis of Responsibility*, *supra* note 325, at 160.

[1189] Some describe state responsibility as an international law of tort governing relations between states. See, e.g., Yates, *State Responsibility*, *supra* note 44, at 213. See also Sompong Sucharitkul, *State Responsibility and International Liability Under International Law*, 18 LOYOLA L.A. INTERNATIONAL AND COMPARATIVE LAW JOURNAL 821, 839 (1996) (equating "breaches of all types of international obligations under State responsibility" with "delicts, torts, or crimes under international law").

[1190] By way of example, consider *Roeder v. Islamic Republic of Iran*, 195 F. Supp. 2d 140, 184 (D.D.C. 2002), aff'd 333 F.3d 228 (D.C. Cir. 2003), cert. denied, 124 S. Ct. 2836 (2004), especially at 144. However, it is possible to infer from the Tribunal's own jurisprudence that it is habilitated to settle claims involving torts, as long as they relate to property rights in the same manner as an expropriation. See, e.g., *Short v. Iran*, *supra* note 106, at 78, para. 11; *International Systems & Controls Corp. v. Industrial Development and Renovation Organization of Iran*, Award No. 256-439-2, paras. 94-95 [12 IRAN-U.S. C.T.R. 239] (26 September 1986); *Yeager*, *supra* note 113, at 99.

and American mass tort claims administration.[1191] In devising adequate legal models to process the impressive volume of claims, the architects of the Commission "looked to U.S. mass tort claims administration which is absolutely applicable", in areas as diverse as environmental damage and liability of manufacturers for defective breast implants and other products.[1192] Indeed, there is every indication that the Commission's legal and operational frameworks were "using some of the techniques and arts of sampling that were developed in those [asbestos and Dalkon Shield] cases."[1193] Interestingly, the Commission in large part elected the U.S. mass tort claims model as an incubator for international reparation because, at the time of its inception, it was believed that such framework would prove more effective than the arbitral structures espoused by the Iran-U.S. Claims Tribunal.[1194] As a result, the Commission's expedited procedures borrowed directly from U.S. mass tort theory and litigation.[1195]

Ultimately, this further lends credence to the idea that domestic law analogies can sometimes play a determinant role in the progressive development of the law of state responsibility.[1196] Whilst there is little resistance amongst leading publicists to the idea that "international responsibility has largely

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[1191] See, e.g., Lea Carol Owen, *Between Iraq and a Hard Place*: *The U.N. Compensation Commission and Its Treatment of Gulf War Claims*, 31 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 499, 514 (1998); Ken Myers, *Gulf War Continuing for U.S. Lawyers*: *Attorneys Battle Iraq in Courtrooms over Billions in Invasion-Related Damages*, NATIONAL LAW JOURNAL, 20 June 1994, at A1; Curt M. Dombek, *The Twilight Zone of International Arbitration*, 21 No. 4 LITIGATION 42 (1995).

[1192] Myers, *Gulf War Continuing for U.S. Lawyers*, *supra* note 1191, at A17.

[1193] Nicolas C. Ulmer, *The Gulf War Claims Institution*, 10 JOURNAL OF INTERNATIONAL ARBITRATION 85, 88 (1993). See also Ronald J. Bettauer, *The United Nations Compensation Commission--Developments Since October 1992*, 89 AMERICAN JOURNAL OF INTERNATIONAL LAW 416, 418-419 (1995); Eric Schmitt, *Righting Wrongs of War*: *Billions in Claims Against Iraq*, NEW YORK TIMES, 18 November 1994, at B9.

[1194] See Steven Mufson, *The Long Quest for Iraqi Compensation*, WASHINGTON POST, 7 April 1991, at H7. See also Gregory Townsend, *The Iraq Claims Process*: *A Progress Report on the United Nations Compensation Commission & U.S. Remedies*, 17 LOYOLA L.A. INTERNATIONAL AND COMPARATIVE LAW JOURNAL 973, 986 (1995).

[1195] See Dinah Shelton, *Righting Wrongs*: *Reparations in the Articles on State Responsibility*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 833, 856 (2002); Bederman, *The United Nations Compensation*, *supra* note 625.

[1196] See, more generally, Wolfgang Friedmann, *The Uses of "General Principles" in the Development of International Law*, 57 AMERICAN JOURNAL OF INTERNATIONAL LAW 279, 281 (1963); Separate Opinion of Judge McNair in *International Status of South West Africa*, [1950] ICJ REPORTS 128, at 148 (Advisory Opinion of 11 July) ("[i]nternational law has recruited and continues to recruit many of its rules and institutions from private systems of law").

followed a private law model", it is widely perceived as undeveloped from the standpoint of the interests that private law may need to fulfill in this context (i.e. the issues to be addressed when tort claims have to be adjudicated).[1197] For example, in addition to the conceptual incongruities associated with importing private law causation, identified in Section A), further uncertainty surrounds the questions of extinctive prescription[1198] and joint and several liability.[1199] Thus, whilst tort law and other domestic legal principles directly informed the implementation of state responsibility and the handling of claims under that regime, such importations were not without problems, as seen in both the records of the UN Compensation Commission[1200] and the Eritrea-Ethiopia Claims Commission.[1201] It follows that further clarity is needed. The present project strives to lend assistance in remedying this conceptual dearth.

**b) Domestic Law Analogies: Moving Towards Strict Liability**

As discussed above, the legal regime set forth by the ILC's *Articles* is, indeed, ripe for analogizing or importing domestic law principles into the realm of state responsibility. Even though notions extracted from domestic legal regimes, especially strict liability, might inform the anlaysis under international law, these notions may be, themselves, subsequently altered by the process of importation as is often the case with domestic legal transplants.[1202] Moreover, in the broader context of national tort law it is sometimes more efficient to opt for a rule of strict

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[1197] André Nollkaemper, *Constitutionalization and the Unity of the Law of International Responsibility*, 16 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 535, 560 (2009).

[1198] *Cf.* Kaj Hobér, EXTINCTIVE PRESCRIPTION AND APPLICABLE LAW IN INTERSTATE ARBITRATION (2001).

[1199] See, e.g., John E. Noyes and Brian D. Smith, *State Responsibility and the Principle of Joint and Several Liability*, 13 THE YALE JOURNAL OF INTERNATIONAL LAW 225 (1988).

[1200] See, e.g., David D. Caron, *The UNCC and the Search for Practical Justice*, in Richard B. Lillich (ed.), THE UNITED NATIONS COMPENSATION COMMISSION 367, 377 (1995).

[1201] See, e.g., Won Kidane, *Civil Liability for Violations of International Law*: *The Jurisprudence of the Eritrea-Ethiopia Claims Commission in The Hague*, 25 WISCONSIN INTERNATIONAL LAW JOURNAL 23, 37-38 (2007). Interestingly, the ECHR has had to develop its own *lex specialis* on several related matters. See Matti Pellonpää, *Individual Reparation Claims under the European Convention on Human Rights*, in Randelzhofer and Tomuschat, STATE RESPONSIBILITY AND THE INDIVIDUAL, *supra* note 745, at 109-129.

[1202] See, e.g., Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 21; Crawford, *The ILC's Articles*, *supra* note 1167, at 878. It is interesting to note that terrorism has sometimes been construed as a tort under the global legal order. For support of this proposition, see Pollock, *Terrorism As a Tort*, *supra* note 1179, at 236-260. See also, generally, James Kraska, *Torts and Terror*, *supra* note 1185.

liability over a negligence or fault-based rule.[1203] In entertaining the adoption of a positive theory of strict liability in domestic settings, for example, the "choice between strict liability and negligence depends on the degree to which there is a reciprocal exchange of risk among actors, and the extent to which benefits, in addition to risks, are externalized."[1204] When transposing this line of analysis, host-states are often better positioned to thwart terrorist attacks than civilians or victim-states in most scenarios, thereby militating in favour of a liability rule that acknowledges the privileged rapport that a host-state entertains with is territory.

Much in the spirit of *Corfu Channel*, a state's exclusive control over its own territory informs the knowledge it has, or should have, of possible terrorist activities percolating therein. This idea of territorial control then, in turn, has a direct incidence on evidentiary matters, should a claim of indirect responsibility arise. As a result, the wrongful state will be better situated in complying with evidentiary standards than the wronged state following a terrorist attack. As a corollary, more latitude will -- or should -- generally be allotted to the wronged state when it comes to the burden of proof and related issues. Indeed, the holding extracted from *Corfu Channel* is quite instructive:

> 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 a 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 by 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.[1205]

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[1203] On this issue, generally, and its application in domestic law, see, e.g., Steven Shavell, *Strict Liability versus Negligence*, 9 JOURNAL OF LEGAL STUDIES 1-25 (1980).

[1204] Keith N. Hylton, *A Positive Theory of Strict Liability*, 4 REVIEW OF LAW AND ECONOMICS 153-181 (2008).

[1205] *Corfu Channel*, *supra* note 67, at 182. For a recent discussion of this holding and of surrounding issues, see Ruth Teitelbaum, *Recent Fact-Finding Developments at the International*

Interestingly and building on this holding in the *Oil Platforms* case, the U.S. argued that, "[p]articularly in light of Iran's exclusive control of the territory in the Faw area from which the missile that hit Sea Isle City was fired, this evidence fully satisfies the burden of establishing that Iran is responsible for the attack on the Sea Isle City."[1206] However, the ICJ ultimately rejected this view.

It is interesting to note that in the 1970s, the law of state responsibility increasingly became akin to the tort concept of negligence or, at least, primarily governed by principles of due diligence and reasonableness.[1207] Consequently, the underlying reasonableness of a response vis-à-vis the original wrongful act guided much of the Security Council's attitude in legitimizing reprisals against host-states. This certainly entailed a rigorous evaluation of the host-state's failure to prevent a cross-border attack, along with the significance and ramifications of the terrorist strike, itself.[1208]

In this respect, one commentator raised an interesting question – somewhat akin to the tort concept of contributory negligence – with regard to the aggrieved state's own conduct: "[w]hy could not the state have defended itself against these guerilla activities by measures of defense adopted on its own territory?"[1209] However, it is not clear whether a victim state's contributory negligence would effectively weigh in the balance for the purposes of establishing responsibility and imposing countermeasures. In *Corfu Channel*, the facts clearly indicated that the U.K. vessels were cognizant of potential dangers in the channel when they passed through it. Irrespective of this knowledge and the ultimate course of action, the Court held that the responsibility of Albania was not

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*Court of Justice*, 6 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 119-158, 135-139 (2007).

[1206] Rejoinder of the United States, 23 March 2001, available online at http://www.icj-cij.org/docket/files/90/8634.pdf (last visited on 30 October 2008).

[1207] There were hints of this in Bowett's seminal work on Israeli reprisals in the 1960s, especially when addressing the Council's partial acceptance of "reasonable" reprisals: *Reprisals*, *supra* note 422, at 20-21.

[1208] On the role of fault in a state's failure to act in conformity with an international obligation, see Christenson, *Attributing Acts*, *supra* note 115, at 315-316; Pierre-Marie Dupuy, *The International Law of State Responsibility*: *Revolution or Evolution?*, 11 MICHIGAN JOURNAL OF INTERNATIONAL LAW 105-128, 109-112 (1989).

[1209] Bowett, *Reprisals*, *supra* note 422, at 20-21. On the question of contributory negligence as it pertains to state responsibility, generally, see Bederman, *Contributory Fault*, *supra* note 878.

attenuated or mitigated by the sole virtue of the U.K.'s contributory negligence.[1210]

Under the new paradigm of state responsibility, the Council has somewhat distanced itself from this earlier posture of reasonableness and could arguably move towards a more radical conception of indirect modes of responsibility, also hinging on strict liability undertones. In particular, one could ponder whether the objectives enshrined in Resolutions 1368 and 1373 would be better served by short-circuiting the concept of attribution altogether in the context of transnational terrorism. Presumably, combating terrorism by all 'necessary steps' -- to invoke post-9/11 Council parlance – would also include international 'legal' steps. Hence, for various political factors identified below, there is no reason to discard *ipso facto* the prospect of shifting both a rebuttable presumption of indirect responsibility and the onus of refuting that legal inference onto states having failed to prevent transnational terrorism before the potential benefits of such an approach have been adequately considered. The proposed framework of strict liability is, however, subject to a few caveats and motivated by several policy considerations.

It is interesting to note in passing that, in his seminal doctoral dissertation and other works, Lauterpacht perhaps erroneously correlated the role and place of fault in state responsibility with the notion of absolute responsibility.[1211] More precisely, this nexus is probably better explained by reference to Lauterpacht's belief that absolute liability stems from the positivists' resistance to importing the domestically-derived concept of fault into state responsibility.[1212] Brownlie rightly highlights Lauterpacht's – and other endorsers of his view's – respective shortcomings in grasping the common law notion of strict liability, along with the international law-derived idea of objective responsibility. Moreover, it would seem that both notions fit neatly within core parameters of state responsibility

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[1210] See *Corfu Channel*, *supra* note 67, at 35-36. On the question of due diligence as it pertains to state responsibility, generally, see Pisillo-Mazzeschi, *The Due Diligence*, *supra* note 60, at 9-51.

[1211] See, e.g., Lauterpacht, PRIVATE LAW, *supra* note 1145, at 134-143; Elihu Lauterpacht (ed.), INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT: VOLUME 1: THE GENERAL WORKS 398-401 (1970); Lauterpacht, *Règles générales*, *supra* note 455, at 359-364.

[1212] See, e.g., Brownlie, SYSTEM, *supra* note 205, at 3.

law. Indeed, "[t]here's good reason for believing that many publicists, including Lauterpacht, have failed to understand that what in common law terms is called strict liability, and what in the law of nations is denominated objective responsibility, are perfectly compatible with elements of knowledge, advertence, or control."[1213] Of particular relevance to any comparative study of the transplantation of municipal legal mechanisms is the role of strict liability in civil law systems. Whilst fault unquestionably remains a pervasive component of civil law liability systems (namely by infusing certain presumptions under domestic civil law structures), certain categories of cases also rely on different manifestations of strict liability.[1214]

Under the Québec experience, for instance, products liability law offers more of a mixed or complex model. By way of mere example, Article 1473 of the *Civil Code of Québec* provides that "[t]he manufacturer, distributor or supplier of a movable property is not liable to reparation for injury caused by a safety defect in the property if he proves that the victim knew or could have known of the defect, or could have foreseen the injury." The provision further specifies: "[n]or is he liable to reparation if he proves that, according to the state of knowledge at the time that he manufactured, distributed or supplied the property, the existence of the defect could not have been known, and that he was not neglectful of his duty to provide information when he became aware of the defect."[1215] The duty found in the second paragraph of this provision has also been affirmed judicially, namely by the Supreme Court of Canada in *Bank of Montreal* v. *Bail Ltée*.[1216] Upon first glance, the spirit animating this provision proves difficult to import into the realm of state responsibility or, at least, appears to stand in contradiction with some of the tenets of the indirect responsibility paradigm explored above. However, a more focused analysis of the second paragraph of Article 1473 reveals

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[1213] *Ibid*, at 44.

[1214] See, e.g., André Tunc (ed.), INTERNATIONAL ENCYCLOPAEDIA OF COMPARATIVE LAW: VOLUME XI: TORTS 48-49 and Chapter 5 (1983); Frederick H. Lawson, NEGLIGENCE IN THE CIVIL LAW 43-50 (1950); Henri Mazeaud *et al.* (eds.), TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE DÉLICTUELLE ET CONTRACTUELLE (Tomes I and II) Chapter 4 (1965-1983); Frederick H. Lawson and Basil S. Markesinis, TORTIOUS LIABILITY FOR UNINTENTIONAL HARMS IN THE COMMON LAW AND THE CIVIL LAW (VOLUME 1) Chapter 4 (1982).

[1215] *Civil Code of Québec*, R.S.Q. ch. 64.

[1216] [1992] 2 S.C.R. 554.

that the manufacturer, distributor or supplier is expected to demonstrate that the existence of the defect could not have been known in order to seek exoneration. Hence, this provision operates on the very important reversal of the burden of proof, which – when transposed to counterterrorism is triggered by strict liability rationale for present purposes – will become the cornerstone of the proposed model of state responsibility advocated below. In short, the policy impetus for advocating a model of strict liability for failing to prevent terrorism purports to avoid transferring an inordinate burden of risk to innocent victims, just as Article 1473 concerns itself with sheltering the consumer from undue risks associated with defective products. Therefore, the burden of precaution in combating and preventing terrorism falls squarely -- or predominantly -- upon states.[1217]

Conversely, in tort law under common law systems the concept of strict liability has sometimes been construed as absolute liability. For example, under this approach a manufacturer cannot subtract himself from his obligation to the buyer once the harm is done, save in circumstances where causation cannot be established. Generally, defences are not available under a rationale of absolute liability.[1218] However, there exists a second and influential school of thought on the subject, which purports to demonstrate that several defences do exist against a claim of strict liability, and that the pivotal device in such litigation resides in the onus shift from plaintiff to defendant.[1219] In that regard, several parallels can also be drawn with Canadian municipal law, as the Supreme Court's jurisprudence faithfully embodies this second strand of liability by recognizing that a defence of

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[1217] It is acknowledged that this comparison – not the substance of the ultimate proposal and transplantation – is partially flawed. Analogising products liability to preventing terrorism is misleading, as, for one thing, the state does not derive profit from terrorist activity (unlike the manufacturer of goods), though it may benefit from tolerating terrorists as a tool of foreign policy.

[1218] See, e.g., Carla Ann Clark, *Howard v. Allstate Insurance Co. -- Louisiana's Attempt at Comparative Causation*, 49 LOUISIANA LAW REVIEW 1163, 1166 (1989). See also Brownlie, SYSTEM, *supra* note 205, at 44. This argument has also been advanced vis-à-vis strict liability in certain domestic legal fields, such as financial auditing. See, e.g., Lawrence A. Cunningham, *Choosing Gatekeepers*: *The Financial Statement Insurance Alternative to Auditor Liability*, 52 UCLA LAW REVIEW 413, 425 (2004); Frank Partnoy, *Barbarians at the Gatekeepers?*: *A Proposal for a Modified Strict Liability Regime*, 79 WASHINGTON UNIVERSITY LAW QUARTERLY 491, 540-546 (2001) (both arguing that a strict liability regime would eliminate the due diligence defence in its entirety).

[1219] See, e.g., *Ibid*; David G. Owen, *Products Liability*: *User Misconduct Defenses*, 52 SOUTH CAROLINA LAW REVIEW 1 (2000). See also William L. Prosser, HANDBOOK OF THE LAW OF TORTS Chapter 13 (4th Edition, 1971).

due diligence is available against an offence of strict liability.[1220] Reiterating Lauterpacht's abovementioned misapplication of the concept of absolute liability and noting that "strict liability is only relatively strict, not absolute", Brownlie aptly captures the above argument: "[s]trict liability is essentially a *prima facie* responsibility, and various defences or justifications may be available; it is not to be confused with absolute liability for which there can be no mode of exculpation."[1221] However, it should be noted that, whilst it has acquired some traction in certain theoretical accounts and been invoked across a wide array of fields -- sometimes indiscriminately -- the notion of strict liability has failed to achieve any sort of consensus or uniform application in public international law.[1222] In fact, this legal standard has even engendered practical inconsistencies in domestic legal settings.[1223] Ultimately, the model espoused in this dissertation is somewhat influenced by the second conception of strict liability discussed above, although it likely rests in some middle ground between what has sometimes been envisaged as absolute liability in the law of state responsibility, on one hand, and strict liability and vicarious liability under domestic legal structures, on the other.[1224]

A final dose of political pragmatism seems apposite before moving on to the implementation of the proposed model, as it should be recalled that the whole exercise of promoting compliance with counterterrorism obligations is predicated on risk assessment and risk management at the domestic level. As seen in Chapter 1, both these approaches trickle down to states in making budgetary

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[1220] See, e.g., *R.* v. *Rube*, [1992] 3 S.C.R. 159; *Lévis (City)* v. *Tétreault*; *Lévis (City)* v. *2629-4470 Québec inc.*, [2006] 1 S.C.R. 420.

[1221] See Brownlie, SYSTEM, *supra* note 205, at 44 (also underscoring that "[t]he essence of strict liability in common law is the shift of the burden of proof and, as the dictum of Blackburn J. in *Rylands* v. *Fletcher* indicates with absolute clarity, the defender (defendant) has a good range of defences by way of discharging the burden of exculpation").

[1222] See Karl Zemanek, *State Responsibility and Liability*, in Winfried Lang, Hanspeter Neuhold and Karl Zemanek (eds.), ENVIRONMENTAL PROTECTION AND INTERNATIONAL LAW 193 (1991); Teresa A. Berwick, *Responsibility and Liability for Environmental Damage*: *A Roadmap for International Environmental Regimes*, 10 GEORGETOWN INTERNATIONAL ENVIRONMENTAL LAW REVIEW 257, 263 (1998).

[1223] For an account on the lack of consistency surrounding the notion of strict liability in a specific judicial context, see Peter M. Gerhart, *The Death of Strict Liability*, 56 BUFFALO LAW REVIEW 245, 304 (2008).

[1224] See previous comments on vicarious liability, *supra* notes 205, 323, 939-948, 951-954, along with the accompanying text.

decisions vis-à-vis counterterrorism, in establishing domestic law enforcement priorities and, more importantly, in deciding whether or not to divert their resources and policy infrastructures towards the fulfillment of specific international obligations. Obviously, these realities must be balanced against the primary rules regarding prevention developed in the *Corfu Channel* judgment and exemplified in the *Tehran Hostages* case. In addition, keeping in mind the analogical approach espoused above, such underlying considerations are also mirrored in domestic legal orders. In fact, the allocation of resources and manpower in meeting the state's obligations features prominently in the Supreme Court of Canada's own jurisprudence on the liability of public authorities. For example, in the *Brown* case the Court held that the province owed a duty of care to users of its public highways.[1225] In that case, RCMP officers failed to respond in a timely fashion to reports of icy highway conditions following road accidents, primarily because it was still operating under the summer maintenance schedule. The charge levelled against the relevant public authorities, therefore, hinged on negligence in a manner very reminiscient of the failure to act imputed to the Iranian state in *Tehran hostages*. Ultimately, whilst the Court recognized the primary duty owed to the public at large, it absolved the government from liability on the basis that maintaining the summer schedule was truly a decision residing at the governmental level. In particular, its rationale involved classical policy concerns such as financial and human resources in meeting obligations, along with negotiations with government unions.[1226] In sum, this representative sampling of a dominant legal trend arising in domestic common law jurisdictions clearly points in the direction of a context-sensitive, policy-oriented analysis. On the one hand, such national judicial pronouncements signal a palpable compatibility with the topic under study, in that -- in a manner redolent of the *Tehran Hostages* reasoning explored in Chapter 2 -- the language underpinning

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[1225] *Brown* v. *British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420 [hereinafter *Brown* case].

[1226] On these issues in the Candian context, see, e.g., J.A. Smillie, *Liability of Public Authorities for Negligence*, 23 UNIVERSITY OF WESTERN ONTARIO LAW REVIEW 213 (1985); L.N. Klar, *The Supreme Court of Canada*: *Extending the Tort Liability of Public Authorities*, 28 ALBERTA LAW REVIEW 648 (1990).

this jurisprudence clearly correlates the notion of 'taking reasonable steps' with the fulfillment of the obligation at hand.[1227] Put another way, reasonableness remains a cardinal focal point in the factual inquiry. On the other hand, when transposed to the international context the analysis will undoubtedly become more complex by virtue of the host-state's capacity – *and* policy inclination – to act and prevent transnational terrorism. With these concerns in mind, the dissertation now turns to the concrete implementation of the strict liability-inspired deterrence model prefaced above.

### 5. Mitigating Tensions: Implementing a Model Inspired by Strict Liability

As seen above, the notions of risk assessment/management will be a running theme throughout any theoretical inquiry involving the melding of international legal questions and counterterrorism policy. This line of argument becomes particularly compelling when considering the modern law of state responsibility, paired with the intricate challenge of devising a regime of liability suited to the increasingly sophisticated attacks of non-state actors.[1228] With this in mind, the driving force behind the projected reform is to provide the right incentives to governments in combating terrorism. As discussed earlier in the context of the Security Council's powers, enforcement measures undertaken under the *UN Charter* can have deleterious effects on the populations of the targeted states, much in the same fashion that disproportionate countermeasures under state responsibility can engender devastating results for the peoples inhabiting the sanctuary states, without necessarily inducing the corresponding governments to comply with their international obligations. As one author aptly notes, "[t]he objective of enforcement measures is to attempt to provoke a change in the behaviour of the leaders of a country, not to harm innocent people",[1229] a

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[1227] See, e.g., *Brown* case, *supra* note 1225, at 22 (holding that the state "is only responsible for taking reasonable steps to prevent injury.").

[1228] See, e.g., Steven R. Ratner, *Is International Law Impartial?*, Unpublished Paper, available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=643821 (last visited April 5, 2005), at 22 (also citing Nyugen Quoc Dinh, DROIT INTERNATIONAL PUBLIC 618 (Patrick Daillier and Alain Pellet 5th ed. 1994)).

[1229] Dominicé, *The International Responsibility*, *supra* note 534, at 369.

policy quest that should be transposed *mutatis mutandis* to the realm of countermeasures under state responsibility repertoire.

Hence, the objective underpinning a shift in onus to the host-state is not only to transfer the burden of proof but also to shift the incentives to the sanctuary state. Interestingly, the idea of generating incentives for states to cooperate under international law and to comply with international norms pervades rationalist legal thinking.[1230] As mentioned previously, this type of regime could be tantamount to a compromise between sacrificing a host-state's territorial integrity/sovereignty and upholding its dignity on the international scene. Such a model clearly does not suit all areas within the realm of international state responsibility, which coexist on a continuum. Certain conventional breaches between states likely rest at one end of the spectrum and could never attract a rule of strict liability. At the other end of the continuum, perhaps not as far as the duty to prevent genocide, for instance, the obligation to prevent terrorist attacks resides.[1231]

Unlike under contract law, when addressing the latter area of state responsibility, the international community often engages in the objective of saving lives and protecting civilians. In addition, terrorism is a crime so intrinsically repugnant to humanity that it arguably warrants a stringent scheme of state responsibility.[1232] In fact, some authors query whether it would have been

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[1230] See, e.g., Pierre-Hugues Verdier, *Cooperative States*: *International Relations, State Responsibility and the Problem of Custom*, 42 VIRGINIA JOURNAL OF INTERNATIONAL LAW 839, 843, 844, 846, 849, 852, 853-854 (2002); Jeffrey L. Dunoff and Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE LAW JOURNAL 1, 32-33 (1999).

[1231] There were hints of this reasoning in Hersch Lauterpacht's remarks in 1955: "[t]he comprehensive notion of an international delinquency ranges from ordinary breaches of treaty obligations, involving no more than pecuniary compensation, to violations of International Law amounting to a criminal act in the generally accepted meaning of the term." Hersch Lauterpacht, OPPENHEIM'S INTERNATIONAL LAW: VOLUME I: PEACE 339 (8th Edition, 1955); Lauterpacht, *Règles générales*, *supra* note 455, at 349-357.

[1232] One commentator delivers a vivid and convincing testimonial as to the international urgency in combating this crime. See Kriangsak Kittichaisaree, INTERNATIONAL CRIMINAL LAW 127 (2001). See also *Measures to Eliminate*, *supra* note 82 (acknowledging that terrorist attacks violate human rights principles); *Measures to Prevent International Terrorism which Endangers or Takes Innocent Human 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*, G.A. Res. 40/61, U.N. GAOR, 40th Sess., U.N. Document A/Res/40/61 (1985) (recognizing that terrorism "endanger[s] or take[s]

wiser to include terrorism within the framework of ILC discussions on international crimes, so as to lead to "increased State responsibility."[1233]

As a corollary, whilst injury is not a constitutive element of responsibility under the ILC's *Articles*, there is undoubtedly a correlation between the nature and magnitude of the harm inflicted by a terrorist strike and the reparation that may be sought under international law. As Dinah Shelton highlights, this reality has a direct incidence on the mechanics of state responsibility: "[c]learly, the amount of reparation will vary according to the quantum of harm".[1234] When dealing with terrorism-induced harm to civilian life and property, the level of reparation owed to the state hosting such individuals and property – or to the state formally espousing their claims for the purposes of state responsibility[1235] – might very well be commensurate with the actual injury sustained.

In the specific context of counterterrorism, this rule entails that the original territorial state not only has to cease harbouring and supporting terrorists on its territory, pursuant to ILC Article 30(a), but may also be called upon to provide assurances/guarantees of non-repetition by virtue of Article 30(b), whilst also effectuating reparation proportionate with the harm inflicted, pursuant to Articles 35 and 36 (which, incidentally, may involve restitution or compensation).[1236] This idea can be traced back to the oft-cited *Chorzów Factory* case, which clearly differentiated the rights and interests accruing to individuals following an international breach, on one hand, and the corresponding position of the representing state or states, on the other, which, it should be stressed, remain(s) the sole rights-bearer(s) for the actuation of state responsibility in such instances.[1237] In light of the ideas advanced above, however, it follows that "[t]he

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innocent human lives, jeopardize[s] fundamental freedoms and seriously impair[s] the dignity of human beings.").

[1233] See Daudet, *International Action*, *supra* note 273, at 202.

[1234] Shelton, *Righting Wrongs*, *supra* note 1195, at 846.

[1235] On the Canadian experience and the espousal of claims by the state, see Jean-Gabriel Castel, LEGAL SERVICES PROVIDED BY THE DEPARTMENT OF EXTERNAL AFFAIRS WITH RESPECT TO INTERNATIONAL JUDICIAL CO-OPERATION AND OTHER MATTERS (Department of Foreign Affairs, 1987); Hugh M. Kindred *et al*., INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED IN CANADA 674-675 (6th ed., 2000).

[1236] *ILC Articles*, *supra* note 76. See also Dupuy, *State Sponsors*, *supra* note 29, at 11.

[1237] *Chorzów Factory* case – Indemnity, *supra* note 628, at 28. See also *Mavrommatis Palestine Concessions*, 1924, P.C.I.J., Series A, No. 2, at 12.

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*".[1238] As evidenced by 9/11, once a terrorist strike is carried out and its aftermath resonates long after the final wisps of destruction have been washed away, the primary objective behind the obligation of prevention has been frustrated. Hence, it seems that the goals of the *UN Charter*, along with Resolutions 1368 and 1373, would be better served by transference of the onus onto the host-state. In that regard, the study now turns to the specific contributions of Resolution 1373 in this setting.

**a) Security Council Resolution 1373**

It should be recalled that Resolution 1373 – which implements a far-reaching, blanket obligation to prevent terrorism by all necessary steps – also translates into what seems to be an almost uncontested rule of customary law.[1239] In its recent resolution-making in this field, the Council has often used language redolent of a paradigm shift toward indirect state responsibility or, at least, indicated that the international community should combat terrorism using "all steps", which presumably includes imposing a heavier burden of precaution on sanctuary states.[1240] Described as the "most important instrument agreed upon"

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[1238] *Chorzów Factory* case – Indemnity, *supra* note 628, at 28. [Emphasis added.]

[1239] For support of this proposition, see, e.g., Pierre-Marie Dupuy, *La Communauté internationale et le terrorisme*, in J.-M. Thouvenin and C. Tomuschat (eds.), LE DROIT INTERNATIONAL FACE AUX NOUVELLES FORMES DE MENACES CONTRE LA PAIX ET LA SÉCURITÉ INTERNATIONALES 35-45, 40 (2004).

[1240] Landmark UN documents include *Resolution 1368*, *supra* note 402, at 1 (emphatically prompting all states "to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks…that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors will be held accountable."); *Resolution 1373*, *supra* note 71 ("all States shall…[r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorists acts…[d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens" and reaffirming "the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorists acts.") [Emphasis added.]; S/RES/1378 of 14 November 2001 (condemning "the Taliban for allowing Afghanistan to be used as a base for the export of terrorism by the Al-Qaida network and other terrorist groups and for providing safe haven to Usama Bin Laden, Al-Qaida and others associated with them".) [Emphasis added.]; S/RES/1383 of 6 December 2001; and S/RES/1386 of 20 December 2001. See also UN General Assembly Resolution 56/1 of 12 September 2001 (in which the General Assembly "[*u*]*rgently calls* for international cooperation to prevent and eradicate acts of terrorism, and stresses that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of such acts will be held accountable").

since 9/11,[1241] the reach and effects of the obligations set forth by Resolution 1373 cannot be overstated, as they apply to both direct/overt and indirect/passive support of terrorist activity. As one commentator underscores, "UN resolution 1373 might be seen as approval of an expanded theory of state responsibility attributing the behavior of non-state terrorists to a state that knowingly "harbors" terrorists and does not take action to prevent further terrorist attacks."[1242] There is no question that the Council thereby instituted a stand-alone, autonomous obligation of prevention vis-à-vis transnational terrorism.[1243] The Council thus declared that all states shall, *inter alia*: i) deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens; ii) prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens; and iii) 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.[1244] Construed as part of a new 'legislative' role for the Council,[1245] and "as one of the most striking examples of both the efficiency and the far reaching bearing of "secondary legislation"",[1246] this resolution "imposes binding obligations on states to take extensive counter-terrorist measures", which include "criminalising 'terrorism' and support for it, imposing serious penalties, freezing assets and excluding 'terrorists' from asylum and refugee protection."[1247]

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[1241] Van Krieken, TERRORISM, *supra* note 72, at 5.

[1242] J. Patrick Kelly, *The International Law of Force and the Fight Against Terrorism*, 21 DELAWARE LAWYER 18, 19 (2003).

[1243] For support of this proposition, see Martin, LES RÈGLES INTERNATIONALES, *supra* note 1, at 457.

[1244] See also *supra*, Chapter 1, Section B).

[1245] See, e.g., Chesterman and the Austrian Federal Ministry, THE UN SECURITY COUNCIL, *supra* note 155, at 12. See also, generally, Paul C. Szasz, *The Security Council Starts Legislating*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 901 (2002).

[1246] Dupuy, *The Law After the Destruction of the Towers*, *supra* note 1139. On this issue, generally, see Arangio-Ruiz, *On the Security*, *supra* note 677, at 609.

[1247] Duffy, THE 'WAR ON TERROR', *supra* note 133, at 45. For discussion of the far-reaching effects of these measures, see Eric Rosand, *The Security Council As 'Gobal Legislator'*: *Ultra Vires or Ultra Innovative*, 28 FORDHAM INTERNATIONAL LAW JOURNAL 542, 546-551 (2005); Ian Johnstone, *Legislation and Adjudication in the UN Security Council*: *Bringing Down the*

Consequently, the proposed framework of state responsibility constitutes a sort of compromise between two categorical positions. On one hand, there might be some tendency within the legal community to advocate the imposition of an obligation of result upon host-states, indicating that, once a terrorist attack is successfully launched, the object of the obligation has been frustrated and responsibility should automatically follow.[1248] Otherwise, host-states will elude responsibility and the purpose of the obligation to prevent terrorism will be eviscerated of any enforceability and efficacy. Whilst specifically exploring the relationship between state responsibility and terrorism, Jean-Christophe Martin recently entertained this possibility from a conceptual standpoint, noting that, "[l]'inaction de l'État peut enfin constituer une violation non d'une obligation de comportement telle l'obligation de diligence, mais d'une obligation de résultat."[1249]

Although not directly on point and a highly questionable postulate, Jean Combacau interestingly underscores -- albeit in the oft-discussed context of injuries to aliens -- that states's due diligence obligations to prevent harm to aliens could be fulfilled by repairing the harm after the primary obligation has been breached. This construction ostensibly signifies that the prescribed result could be attained via two possible avenues, an argument that seems to run counter to the very essence of obligations of result. In other words, Combacau ascribes a binary character to international responsibility structure, whereby a wrongful state could dissipate its responsibility by i) either complying with the primary obligation of prevention, or, in case it fails to do so, by ii) restituting/compensating the international wrongful act, which inexorably entails the application of secondary

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*Deliberative Deficit*, 102 AMERICAN JOURNAL OF INTERNATIONAL LAW 275 (2008). But *Cf.* Yoram Dinstein, *Terrorism As an International Crime*, 19 ISRAEL YEAR BOOK ON HUMAN RIGHTS 55, 56-57 (1989) (noting that the condemnation of terrorism as "criminal" is hortatory); Saul, DEFINING TERRORISM, *supra* note 26, at 204-205.

[1248] On the distinction between obligations of means and result, as applicable to the ILC's *Articles*, see Pierre-Marie Dupuy, *Reviewing the Difficulties of Codification*: *On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility*, 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW 371 (1999). At p. 375, he argues for importing this distinction in state responsibility, especially when considering that states have to deploy best efforts to prevent private harmful activity.

[1249] Martin, LES RÈGLES INTERNATIONALES, *supra* note 1, at 459-460.

norms under the ILC's *Articles*.[1250] The dissertation has partially drawn from these positions by stating that terrorist strikes should now be looked upon in the abstract, namely as either completed or prevented, thereby justifying a rationale partly informed by strict liability, at least on a preliminary basis. Invoking once again the tension between sovereignty and combating terrorism efficiently, some scholars argue, albeit with particular emphasis on WMDs, that a collective duty to prevent would legitimize infringing sovereignty, should host-states fail to eliminate terrorist threats.[1251]

Conversely, other commentators rightly express that the U.S. in fact lumped analytically distinct categories into one confused framework during the invasion of Afghanistan, thereby eroding or unnecessarily broadening the parameters of use of force in a fashion that threatens state sovereignty, non-intervention and political independence.[1252] This confusion was perhaps exacerbated by the U.S.' initial bellicose rhetoric, which conflated several unrelated factors into one difficult or legally convoluted approach, and made the connection between the attacks of 9/11 and the law of state responsibility nebulous, at least upon first glance.[1253] At the root of this confusion "is the fact that Afghan territory and the institutions of the Afghan government were attacked without clarity as to whether the state was considered responsible for the original attack (or for an imminent threat) or only for other wrongs in respect of terrorists on its territory, and what relevance, if any, such responsibility had to the justification of the use of force against it."[1254] This confusion was undoubtedly

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[1250] See Combacau, *Obligations*, *supra* note 1025, at 189.

[1251] See Lee Feinstein and Anne-Marie Slaughter, *A Duty to Prevent*, 83 FOREIGN AFFAIRS 136 (2004).

[1252] See, e.g., Brunnée and Toope, *Canada and the Use*, *supra* note 171, at 248. Toope and Brunnée have also pursued and further elaborated this line of reasoning in a series of thought-provoking accounts. See, e.g., *Slouching Towards New 'Just' Wars*: *International Law and the Use of Force After September 11th*, LI NETHERLANDS INTERNATIONAL LAW REVIEW 363-392 (2004); *The Use of Force*, *supra* note 1106, at 785-806. See also Duffy, THE 'WAR ON TERROR', *supra* note 133, at 55 (referring to the "post-9/11 muddying of legal waters" in her chapter on state responsibility).

[1253] See, e.g., *Address to a Joint Session*, *supra* note 262. See also Stern, *La Responsabilité*, *supra* note 262, at 686 (querying if this type of 'amalgam' is desirable).

[1254] Duffy, THE 'WAR ON TERROR', *supra* note 133, at 213. Duffy further ponders whether this precedent will be invoked to justify future uses of force, "for example against any of the many

further compounded by the U.S.' categorical stance following the acts of 9/11, whereby President Bush asserted that, in tracking down the culprits, no distinction would be made "between the terrorists…and those who harbor them."[1255] If anything, such posture further exacerbated the above-referenced debate concerning the nature of the obligation of preventing terrorism for state responsibility purists, and potentially obfuscated the grounds upon which – be it means, best efforts, or result – such duty was rooted. Interestingly enough, certain commentators rather expound that, in addition to placing emphasis squarely on holding individual terrorists responsible, "the Bush Administration's War on Terror developed a secondary goal of holding State sponsors of terrorism accountable for their assistance."[1256]

On the other hand, in contrast, more moderate views would undoubtedly construe the obligation to prevent terrorism as requiring an *ex post facto* exercise of factual evaluation, to be performed on a case-by-case basis.[1257] Regardless of the approach ultimately espoused by the international community, it is fair to say that an obligation of prevention based on invariably producing a specific outcome is not always feasible, let alone reasonable.[1258] Interestingly, the IACHR spoke to

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other states with terrorist cells operating out of their territory on the basis of unclear standards of responsibility." See *Ibid*.

[1255] See *Statement by the President in his Address to the Nation*, 11 September 2001, available online at www.whitehouse.gov/news/releases/2001/09/20010911-16.html (last visited on 10 March 2006). See also *President Bush's Remarks*, WASHINGTON POST, September 12, 2001, at A2; U.S. President, *President Shares Thanksgiving Meal With Troops*, White House Press Release, Washington, DC, 21 November 2001, available online at http://www.whitehouse.gov/news/releases/2001/11/20011121-3.html (last visited on 20 August 2007); United Nations Security Council 56th Session, 4370th Meeting, Verbatim Record, 12 September 2001, UN Doc. S/PV.4370, 7-8 (U.S.), available online at http://www.un.org/Docs/sc/committees/1373/pv4370e.pdf (last visited on 20 August 2007); Press Release, *President Bush Addresses United Nations General Assembly*, 23 September 2003, available online at http://www.whitehouse.gov/ news/releases/2003/09/20030923-4.html (last visited on 21 August 2007); *President Bush Speaks to United Nations*, *supra* note 1074; Saul, DEFINING TERRORISM, *supra* note 26, at 197.

[1256] Smith, *International Law*, *supra* note 56, at 736.

[1257] Similar reasoning has been extended to the intersection of cyber warfare and state responsibility. See Jeffrey Carr, INSIDE CYBER WARFARE: MAPPING THE CYBER UNDERWORLD 56 (2010). Moreover, the implications of applying state responsibility to virtual settings are increasingly being analyzed through the lens of the new indirect responsibility paradigm, advocated above in Chapter 2. See, e.g., David E. Graham, *Cyber Threats and the Law of War*, 4 JOURNAL OF NATIONAL SECURITY LAW & POLICY 87, 96 (2010).

[1258] Interestingly, Dupuy characterizes obligations of prevention as a sub-category of 'obligations to endeavour' (i.e. obligations of 'conduct' in the civil law sense). See Dupuy, *Reviewing*, *supra*

this point in 1988 and emphasized that obligations of prevention do not, necessarily, warrant a specific result but should, nonetheless, be undertaken with the utmost seriousness. As per the Court's reasoning, the failure to take the obligation to prevent seriously may, in turn, signal the violation of that international legal undertaking, a finding directly transposable to counterterrorism obligations. Indeed, the Court proclaimed that "[t]he duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective...[w]here the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane."[1259] Hence, the most effective way to resolve the tension between opposite views on the nature of the obligation to prevent is perhaps to adopt a framework grounded somewhere in the middle of the two categorical positions. Given the serious nature of terrorist activity and the objective of protecting civilians, this context provides us with more leeway in imposing stricter rules of state responsibility. Indeed, it appears that, in light of the emergence of harbouring, support and acquiescence to terrorism as dominant bases for invoking responsibility, state practice or, at least, widespread state political will supports a corresponding increase in accountability mechanisms. It thus follows that "[t]he attitude of states in this area has been evolving towards stricter standards of state responsibility and imposition of clearer obligations."[1260]

### b) The Efficient Breach Doctrine and Other Rationalist Considerations

It becomes apparent from the foregoing considerations that strong law and economics undertones pervade this whole discussion.[1261] Although certain noteworthy attempts to extend this theoretical approach to law to other facets of

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note 1248, at 380. While not directly on point, see also Cançado Trindade, *Complementarity*, *supra* note 455, at 266.

[1259] *Velásquez Rodríguez*, *supra* note 17, at para. 177.

[1260] Beard, *America's New*, *supra* note 73, at 579.

[1261] For a succinct account of law and economics, generally, see Michael J. Trebilcock, *Economic Analysis of Law*, in Richard F. Devlin (ed.), CANADIAN PERSPECTIVES ON LEGAL THEORY 111-121 (1991).

international legal discourse have been produced recently, its relationship with state responsibility remains largely underexplored.[1262] Conversely, the notion of risk assessment has been applied to international terrorism and yields interesting theoretical insights.[1263] Indeed, as explored in Chapter 1, a state's decision to comply with counterterrorism obligations will be largely informed by both the resources at its disposal and its capacity to thwart terrorist threats emanating from its territory. As such, that state may well determine that the scarcity of resources does not justify diverting its funds and policy infrastructures towards counterterrorism objectives, an eventuality that is, arguably, offset by a countervailing international obligation to acquire and utilize counterterrorism capacity or, when unable to do so, to seek external assistance in meeting that goal. Yet, regardless of the angle under which it is tackled, it becomes clear that the reform of state responsibility vis-à-vis terrorism does not hinge on the same vital considerations as the breach of treaties on commercial matters, for instance.

Unlike situations of conventional breaches or other kinds of ongoing harm flowing from an initial internationally wrongful act (i.e. non-lethal transnational pollution), the underlying rationale of the obligation to prevent terrorist attacks will be completely eviscerated if such excursions are not forestalled. That is to say that, in other cases, whilst the harm carried out still contravenes the relevant primary obligations, restitutive and compensatory arrangements are available to redress the damage and remain, perhaps, even more relevant to dealing with post-breach repercussions than in situations involving transnational terrorism. Granted, there may be ripple effects or ramifications resulting from a catastrophic terrorist attack, but the failure to prevent the initial attack -- which translates into the original wrongful act -- remains the principal object of the primary rule under study. Such scenarios do not solely entail economic loss, such as contractual breaches would for instance, but also focus on the protection of innocent civilians

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[1262] See generally Dunoff and Trachtman, *Economic Analysis*, *supra* note 1230; Dunoff and Trachtman, *The Law and Economics*, *supra* note 750, at 394. On economic analysis of the law of state responsibility, specifically, see Eric A. Posner and Alan O. Sykes, *An Economic Analysis of State and Individual Responsibility Under International Law*, 9 AMERICAN LAW AND ECONOMICS REVIEW 72 (2007).

[1263] See Ayaz R. Shaikh, *A Theoretic Approach to Transnational Terrorism*, 80 GEORGETOWN LAW JOURNAL 2131 (1992).

vis-à-vis widespread and systematic annihilation or loss of limb. For example, transferring the contractual notion of 'efficient breach' to the obligation of preventing terrorism would yield perverse results under this light, as states could engage in balancing human lives in deciding whether or not to breach their obligation. In domestic settings, this proposition essentially entails that a contractual party might opt to breach a contract, should unforeseen or more advantageous circumstances arise, thereby offering a more profitable avenue. In the net-gain or cost-benefit scheme of things, therefore, the breach proves more beneficial since the breaching party will only be held to the disbursement of money damages, whilst it may recoup its losses, and more, through a second and distinct bargain.[1264] Yet, it should be recalled that the obligation to prevent terrorism partly stems from international treaties. Consequently, one may not lose sight of the fact that, to a limited extent, "[t]reaties have long been analogized to contracts".[1265] Furthermore, since it fails to find any persuasive grounding in the civil law tradition, the efficient breach analogy remains exclusively connected with common law repertoire.[1266]

Once transposed to the context of state responsibility for failing to prevent terrorist acts, the efficient breach doctrine would essentially empower states to arbitrarily decide when it is advantageous to breach the corresponding obligation. For example, a state could decide not to inject significant funds into law enforcement or border security measures if its intelligence concluded that a possible attack would only jeopardize a few human lives. That state would once

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[1264] The contractual doctrine of efficient breach is widely thought to have originated in Oliver Wendell Holmes' statement in *The Path of the Law*, 10 HARVARD LAW REVIEW 457, 462 (1897) ("the duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it -- and nothing else."). Since Holmes' statement, many commentators have encapsulated the efficient breach doctrine in various contexts, including under public international law. See, e.g., William R. Corbett, *A Somewhat Modest Proposal to Prevent Adultery and Save Families*: *Two Old Torts Looking for a New Career*, 33 ARIZONA STATE LAW JOURNAL 985, 1031 (2001); Lee Shidlofsky, *The Changing Face of First-Party Bad Faith Claims in Texas*, 50 SOUTHERN METHODIST UNIVERSITY LAW REVIEW 867, 893 (1997). See also Dunoff and Trachtman, *Economic Analysis*, *supra* note 1230, at 31.

[1265] Dunoff and Trachtman, *Economic Analysis*, *supra* note 1230, at 28. For a discussion of domestic analogies and dissimilarities between treaty and contract law, see *Ibid*, at 29-31.

[1266] *Cf.* Ronald J. Scalise, Jr., *Why No "Efficient Breach" in the Civil Law?*: *A Comparative Assessment of the Doctrine of Efficient Breach of Contract*, 55 AMERICAN JOURNAL OF COMPARATIVE LAW 721 (2007).

again be engaging in a delicate exercise of risk assessment, thereby balancing lives and making cost-efficient decisions. However, that state would be trading in human capital, as opposed to making cost-benefit determinations solely involving monetary risk or potential property damage. Therefore, in the context of terrorism, the stakes can become inherently greater and justify a stricter regime of state responsibility in order to offset potentially perverse counterterrorism assessments.[1267] For reasons of juridical pragmatism alone, the transplantation of the 'efficient breach' theory to the present context also seems ill-advised if it is only to seek grounding in Macaulay and Macneil's relational theory of contract, for instance.[1268]

In short, the potential benefits of this transplant are significantly hampered by the fact that, contrary to the reality prevalent under domestic legal structures, the role and scope of responsibility under international law is simply not as expansive as liability mechanisms found in those municipal settings. This shortcoming can incontrovertibly be cast at the level of enforcement, given the presence of competent judicial jurisdictions within domestic legal orders mandated with overseeing the application of the law of contracts, whilst simultaneously promoting commercial transparency and efficacy.[1269] Conversely, no corresponding competent international judicial organ can be pointed to as the guardian of the integrity of 'contractual' dealings arising between parties, for lack

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[1267] This line of argument is, by no means, aimed at diminishing or discarding the potential economic impact or property damage engendered by transnational terrorism. For more on this topic, see *infra* notes 1871-1872 and accompanying text. For example, one could easily envisage an economic loss-generating situation where terrorists target Hydro-Québec facilities in a strike, thereby forcing the organization to shut down the electricity system in Québec and to revamp some of its infrastructure. See also, generally, Mikel Buesa and Thomas Baumert (eds.), THE ECONOMIC REPERCUSSIONS OF TERRORISM (2010).

[1268] See, generally, the following works by Stewart Macaulay: *Non-Contractual Relations in Business*: *A Preliminary Study*, 28 AMERICAN SOCIOLOGICAL REVIEW 55 (1963); *The Use and Non-Use of Contracts in the Manufacturing Industry*, 9 PRACTICAL LAWYER 13 (1963); *An Empirical View of Contract* [1985] WISCONSIN LAW REVIEW 465 (1985). See also the following works by Ian R. Macneil: *The Many Futures of Contracts*, 47 SOUTHERN CALIFORNIA LAW REVIEW 691 (1974); *Contracts*: *Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law*, 72 NORTHWESTERN UNIVERSITY LAW REVIEW 854 (1978); THE NEW SOCIAL CONTRACT (1979).

[1269] See, generally, the following works by Ian R. Macneil: *Contract Remedies*: *A Need for a Better Efficiency Analysis*, 144 JOURNAL OF INSTITUTIONAL AND THEORETICAL ECONOMICS 6-39 (1988); *Efficient Breach*: *Circles in the Sky*, 68 VIRGINA LAW REVIEW 947-969 (1982), especially at 961.

of a better term. As a best case scenario, states can voluntarily elect to submit a contentious situation involving the application of the law of state responsibility for resolution by the ICJ but this option is, by far, not the standard avenue pursued by quarreling nations. As a result, the economic calculations animating much of the decision of a contractual party to breach its obligations at the domestic level simply cannot be as narrowly framed within international legal discourse, especially in light of the multinational and multi-actor backdrop against which such decisions would presumably be contemplated. Nevertheless, the prospect of importing rationalist-inspired concepts into the present debate, such as the 'efficient breach' doctrine, raises interesting philosophical questions when analyzed through the lens of counterterrorism policy.

In fact, as highlighted by previous discussion dealing with strict liability under state responsibility, the obligation of prevention under study presupposes the existence of a whole range or variants of normativity and enforceability schemes on the international scene. More importantly, it indicates that the prevention of terrorism belongs to the realm of categorical obligations in that, once a state fails to forestall a terrorist excursion, the principal purpose of the obligation is defeated.[1270] This has considerable incidence on the theoretical appraisal of the underlying morality and utilitarian considerations pertaining to human beings, whom simultaneously amount to policy end-users and subjects in the reform of state responsibility.[1271]

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[1270] See Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 140 n.270. This is not to say, however, that a successful terrorist strike is the *sine qua non* predicate for triggering indirect state responsibility. Indeed, a host-state can act in contravention with international law by the sole fact of failing to repress terrorist factions on its territory or to heed Security Council counterterrorism resolutions. For instance, Pakistan is in violation of its international counterterrorism obligations if it harbours members of Al Qaeda on its territory, irrespective of whether a terrorist strike is ultimately launched from its soil.

[1271] Jeremy Waldron opines that, "part of the reason why we value IL [international law] is that it offers to improve the lives of real individuals, billions of them—men, women, and children – in the world." He further adds that the real purpose of international law and the rule of law "in the international realm is not the protection of sovereign states but the protection of the populations committed to their charge." See *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, New York University School of Law Public Law & Legal Theory Research Paper Series, Working Paper No. 09-01, January 2009, available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1323383 (last visited on 9 February 2009).

It must be recalled that one vision of compliance, be it in national or international contexts,[1272] remains inextricably intertwined with price theory. It follows that "[f]rom this perspective, the key to compliance is the price of breach: where the price of a breach is sufficiently high, compliance will result. The price of breach must be measured both in terms of the measure of damages and of the extent to which institutions exist mandatorily to require the payment of damages."[1273] Aside from the possible moral impediments precluding the implementation of efficient breach principles in state responsibility,[1274] it must be reiterated that domestic contract law is typically operationalized through the mechanism of money damages and ultimately facilitated by effective adjudicatory and enforcement mechanisms and institutions. In fact, the availability of monetary awards is central to the law and economics paradigm and, thus, enables the stakeholders to engage in cost-benefit analysis.[1275] As prefaced above, this structure is further supported by vertical enforcement mechanisms within municipal legal systems -- a feature absent in international law -- which also facilitates the institutionalization of price theory, along with the quantifiable internalization of risk. However, extending this line of reasoning to a politically-charged area, such as counterterrorism, proves problematic both in terms of law and philosophy: there is no inherent transferability of efficient breach principles under state responsibility,[1276] at least when contemplated through the lens of

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[1272] For a range of provocative accounts on the issue of compliance under international law, see, e.g., Brunnée and Toope, *Persuasion*, *supra* note 49, at 273-295; George W. Downs et al., *Is the Good News About Compliance Good News About Cooperation?*, 50 INTERNATIONAL ORGANIZATION 379 (1996); Benedict W. Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICHIGAN JOURNAL OF INTERNATIONAL LAW 345 (1998); Koh, *Why Do Nations*, *supra* note 721. See also *Symposium, Implementation, Compliance and Effectiveness*, 19 MICHIGAN JOURNAL OF INTERNATIONAL LAW 303 (1998).

[1273] Dunoff and Trachtman, *Economic Analysis*, *supra* note 1230, at 31 (also pointing out that "a research program could descriptively evaluate the relative binding nature of international treaties and could normatively suggest changes to treaty structures to enhance their binding nature, where enhanced compliance is in fact desired").

[1274] This is not to suggest, however, that moral constraints can never be integrated into an economic analysis of the law. In fact, both morality and economic sensibilities can sometimes become mutually reinforcing when exploring potential legal models geared towards the prevention of terrorism. See, generally, Eyal Zamir and Barak Medina, *Law, Morality, and Economics*: *Integrating Moral Constraints with Economic Analysis of Law*, 96 CALIFORNIA LAW REVIEW 323 (2008).

[1275] See, e.g., Dunoff and Trachtman, *Economic Analysis*, *supra* note 1230, at 32.

[1276] See *Ibid*, at 31.

counterterrorism and the balancing of lives. As a result, in the context of transnational terrorism, the stakes can appear inherently greater and could justify a stricter regime of responsibility. As a corollary, it is imperative to ponder whether the objective of instilling some degree of legitimacy and fairness amongst nations through liability mechanisms necessarily entails the rethinking of primary obligations or, alternatively, whether this objective can be vindicated through revisiting trans-substantive rules.[1277]

Undoubtedly inspired by the writings of Anne-Marie Slaughter, Pierre-Hugues Verdier rightly highlights that "[t]he most significant recent development in international legal studies has undoubtedly been the collapse of the intellectual barrier between the disciplines of international law and international relations."[1278] Although certain commentators have developed meaningful rationalist-inspired scholarship applying game theory to international law and customary law,[1279] the field of state responsibility remains largely unexplored in this context, especially in light of its lack of enforcement mechanisms and inherent generality. This reality also comes into sharp relief through the works of certain institutionalist scholars: "[y]et, since institutionalist scholars have focused on formal regimes established by multilateral treaties, they have neglected the customary norms and regimes that form the backbone of many fundamental areas

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[1277] On the question of legitimacy in the global struggle against terrorism, see Thomas M. Franck, *Porfiry's Proposition*: *The Role of Legitimacy and Exculpation in Combating Terrorism*, in Yoram Dinstein and Mala Tabory (eds.), INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE 149-195 (1989).

[1278] Verdier, *Cooperative States*, *supra* note 1230, at 840. For support of Verdier's point, see Brett Frischmann, *A Dynamic Institutional Theory of International Law*, 51 BUFFALO LAW REVIEW 689, 680 n.1 (2003). On the role of international law in the discipline of international relations, see Friedrich Kratochwil, RULES, NORMS, AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS (1989); Byers, THE ROLE OF LAW, *supra* note 543; Anne-Marie Slaughter, *International Law and International Relations*, 285 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 9-249 (2000). It should be stressed that both neo-realism and neo-liberalism permeate and mould the fusion of international law and international relations theory. See Judith L. Goldstein, Miles Kahler, Robert O. Keohane and Anne-Marie Slaughter (eds.), LEGALIZATION AND WORLD POLITICS (2001); Peter J. Katzenstein, Robert O. Keohane and Stephen D. Krasner, *International Organization and the Study of World Politics*, 52 INTERNATIONAL ORGANIZATION 645 (1998).

[1279] See, generally, Jack L. Goldsmith and Eric A. Posner: *A Theory of Customary International Law*, 66 UNIVERSITY OF CHICAGO LAW REVIEW 1113 (1999); *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VIRGINIA JOURNAL OF INTERNATIONAL LAW 639 (2000). See also Dunoff and Trachtman, *Economic Analysis*, *supra* note 1230, at 33-36.

of international law. Such is the case of the law of state responsibility, with its customary and only partly codified rules, decentralized (and often non-existent) adjudication and enforcement, and general rather than subject-specific orientation."[1280] This blurring of the frontier between international law and international relations has also prompted leading scholars to dig a considerable furrow into international political theory.[1281]

In that light, the most interesting argument advanced by Verdier suggests that theoretical debate over state responsibility has, up to now, been cursory, with too little emphasis on the policy underlying actual rules.[1282] In sum, Verdier opines that academic discussion surrounding the topic has remained far too superficial, simply resorting to the promulgation of abstract rules of liability without delving deeper into the policy analysis underpinning the stated rules. It is no surprise, therefore, that "this debate has traditionally taken place on an "existential" level, separate from the descriptive task of defining positive rules."[1283] These propositions align with René Provost's own concerns with regard to the lack of theoretical insight and exploration in this legal realm, given that "[t]he law of state responsibility tends to be a complex field in which principles are articulated at a level of abstraction that obfuscates their theoretical underpinning."[1284] In the same spirit, Provost further cautions that relying on these general and abstract rules, a reflex which inevitably stems from any exercise of codification, may in fact negatively impede efforts to magnify the law of state responsibility through a more critical or theoretical lens.[1285] Indeed, Paul Reuter

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[1280] Verdier, *Cooperative States*, *supra* note 1230, at 841.

[1281] See, e.g., Kenneth W. Abbott, *Modern International Relations Theory*: *A Prospectus for International Lawyers*, 14 YALE JOURNAL OF INTERNATIONAL LAW 335 (1989); Anne-Marie Slaughter Burley, *International Law and International Relations Theory*: *A Dual Agenda*, 87 AMERICAN JOURNAL OF INTERNATIONAL LAW 205 (1993); Anne-Marie Slaughter *et al.*, *International Law and International Relations Theory*: *A New Generation of Interdisciplinary Scholarship*, 92 AMERICAN JOURNAL OF INTERNATIONAL LAW 367 (1998).

[1282] Verdier, *Cooperative States*, *supra* note 1230, at 841.

[1283] *Ibid*, at 841-842.

[1284] Provost, *Introduction*, *supra* note 77, at XIX. See also Bodansky and Crook, *Introduction*, *supra* note 873, at 780.

[1285] Provost, *Introduction*, *supra* note 77, at XX (expounding that "codification can provoke doctrinal sclerosis, dissuading creative and critical analysis by imposing a set of basic assumptions as the necessary starting point of any study on state responsibility."). On similar points, see also Brownlie, *The Responsibility*, *supra* note 244, at 360; David D. Caron, *The ILC Articles on State*

foreshadowed these considerations some years before when writing about the ILC's codification project, terming it a "political, extensive, abstract and general" endeavour.[1286]

Several other influential commentators have followed suit and levelled a wide array of criticisms against the progressive codification and development of state responsibility, often invoking the high level of abstraction characterizing the ILC's work, or the lack of specificity or pragmatic guidelines in governing concrete scenarios implicating that body of law.[1287] Implicit in this approach is the fact that state responsibility repertoire cannot seek to achieve greater clarity than the primary rules it strives to serve. As a corollary, the implementation of international liability cannot prove more 'rigorous' and 'effective' than what is prescribed in this regard by the pertinent primary obligations under international law.[1288] It logically follows that the high level of abstraction found in the ILC's *Articles*, coupled with the undefined normativity and content of certain primary obligations, further compounds the mechanics of attribution, compliance and return to legality. A case in point is undoubtedly found in certain counterterrorism obligations, which leave a large margin of appreciation for the implementation of those same duties and, more importantly for present purposes, for the ensuing regulation of international breaches of the corresponding primary norms.

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*Responsibility*: *The Paradoxical Relationship Between Form and Authority*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 857-873 (2002); Treves, *The International*, *supra* note 78, at 225.

[1286] See Paul Reuter, *Trois observations sur la codification de la responsabilité internationale des Etats pour fait illicite*, in Virally, LE DROIT INTERNATIONAL, *supra* note 340, at 389-398, 390. See also Roucounas, *Non-State Actors*, *supra* note 376, at 392.

[1287] For a sampling of these views, see, e.g., Richard R. Baxter, *Reflections on Codification in Light of the International Law of State Responsibility for Injuries to Aliens*, 16 SYRACUSE LAW REVIEW 745, 747-748 (1964-1965); Richard B. Lillich, *The Current Status of the Law of State Responsibility for Injuries to Aliens*, in Richard B. Lillich (ed.), INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 21 (1983); Myres S. McDougal, Harold D. Lasswell and Lung-chu Chen, HUMAN RIGHTS AND WORLD PUBLIC ORDER 762 n.92 (1980).

[1288] For an expression of these two ideas prior to the ILC's adoption of the *Articles on State Responsibility*, see, e.g., Statement by Dr. Pemmaraju Sreenivasa Rao, JS (L&T) Ministry of External Affairs on November 2, 1999, Agenda Item 155: Report of the International Law Commission V State Responsibility, available online at http://www.un.int/india/ind93.htm (last visited on 5 May 2008).

### c) Confronting Abstraction: The Lack of Specificity in the *Articles*

In fact, the broader project of ascertaining existing rules of state responsibility is without doubt the "most ambitious and most difficult topic of the codification work of the International Law Commission."[1289] But devising a specific regime of responsibility for transnational terrorism applicable to sanctuary states poses singularly intractable challenges. The difficulties associated with mounting such a system predominantly reside in the politically-sensitive nature of the topic and the inherent interdisciplinary analogies or insights that govern any exhaustive analysis of state responsibility.

The more indomitable problem in implementing positive rules vis-à-vis counterterrorism is attributable to the inherent lack of specificity and to the political volatility pervading this facet of state responsibility and, more importantly, the field of counterterrorism more generally. As discussed above, this difficulty is further exacerbated by linguistic and semantic impediments, such as the lack of consensus on a universally accepted definition of 'terrorism'.[1290] This lack of consensus necessarily entails that states may, in fact, be hard-pressed to agree on positive rules given the large margin that states possess in characterizing what constitutes 'terrorism'. As prefaced earlier, it is clear that sanctuary states have a duty to thwart terrorist excursions emanating from their territory. However, international law remains sketchy as to the very contents and contours of this obligation, the implementation and enforceability mechanisms to ensure its compliance, and its application to context-specific scenarios, ranging from historical transborder insurgency, as evidenced by the Israel-Arab record, to the deployment of one-time attacks on civilians, such as 9/11.[1291] In language partially redolent of Verdier's argument, some scholars argue that the rethinking

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[1289] Malanczuk, AKEHURST'S, *supra* note 165, at 254. See also Higgins, PROBLEMS & PROCESS, *supra* note 49, at 148 (speaking of the inherent difficulty of codifying state responsibility); Provost, *Introduction*, *supra* note 77, at XII (noting that "the diversity of opinions within the [International Law] Commission mirrors the many real substantial uncertainties which characterize this field of international law.").

[1290] On this issue, see Proulx, *Rethinking the Jurisdiction*, *supra* note 31, at 1030-1041; Reisman, *International Legal Responses*, *supra* note 64, at 9-13.

[1291] As discussed above in Chapter 2, this argument must be appreciated with caution. For further discussion about this caveat, see Proulx, *Babysitting Terrorists*, *supra* note 163, at n. 137.

of trans-substantive rules, such as attribution, is ineffective and that desirable policy objectives would be better vindicated through the reaffirmation of the primary obligations of states.[1292] Yet, there is nothing in Verdier's own scholarship or in conventional wisdom, for that matter, precluding a thorough policy appraisal of the role that secondary norms of responsibility can play in the prevention and suppression of transnational terrorism.

For the reasons highlighted above, the present study calls into question the claim that revisiting trans-substantive rules does not yield fruitful results. By circumventing attribution altogether in this setting, we are in fact employing an alternate avenue to implement a positive rule pertaining to the prevention of terrorist activity. By making sanctuary states automatically liable, and thereby transferring the onus of refuting the initial finding of responsibility onto them, we are actually imposing a positive duty aiming at eradicating transnational terrorism. In other areas of human activity entailing potential hazardous consequences, such as environmental degradation, the focus is now shifting to prevention. Indeed, scholars highlight the fact that "[m]ore interest is now being shown in the creation of legal obligations that would give rise to state responsibility before pollution occurs": the law of state responsibility can certainly play a role toward the fulfillment of this objective.[1293] As a corollary, it follows that "no preventive regime can succeed over time without the firm foundation provided by the development of rules of state responsibility that remove existing defenses to state liability and that create significant penalties for the actual violation of pollution thresholds."[1294] Whilst some defences should remain available with liability being nonetheless significantly enhanced, there is no reason why this reasoning could not extend to current counterterrorism efforts, although the content of the actual preventive rules may become subject to conflicting constructions. Indeed, this trend has already been observed in the field of international environmental

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[1292] See, e.g., Jinks, *State Responsibility*, *supra* note 315, at 83; Brunnée and Toope, *Canada and the Use*, *supra* note 171, at 794-795 and n.55.

[1293] Allen L. Springer, *The Evolving Law of State Responsibility for Pollution*, in THE INTERNATIONAL LAW OF POLLUTION: PROTECTING THE GLOBAL ENVIRONMENT IN A WORLD OF SOVEREIGN STATES 123, 125-126 (1983).

[1294] *Ibid*, at 124.

law, where rules governing the prevention of environmental damage are susceptible to conflicting interpretation, even more so than rules of responsibility applicable to situations where environmental damage has already materialized.[1295] Nevertheless, implicit in the views of those who endorse this posture is not only a desire to implement efficient preventive measures, but also a quarrel with the perceived inadequacy of the secondary rules of state responsibility – especially those pertaining to the legal consequences of an internationally wrongful act – in actually remedying environmental harm or forestalling future pollution.[1296] Therefore, emphasis on prevention must be that much more pronounced and explicit for the corresponding rules to become effective in thwarting terrorist activity. As argued above, one would imagine, without much protest, that the stakes can sometimes become inherently greater when dealing with counterterrorism. When contrasted with environmental damage, for instance, the effects of catastrophic terrorist strikes are usually immediate, whilst only sometimes identifiable or even assessable.[1297]

Needless to say, the idea of assessing damages resulting from a terrorist attack is also intimately tied to the notion of legal consequences for an internationally wrongful act under the aegis of the ILC's *Articles*.[1298] Indeed, Article 36(2) provides that "compensation shall cover any financially assessable damage."[1299] However, this rule has significant and complex implications from the point of view of compensation for terrorism. In fact, the reality might very well be that it becomes difficult to put a precise dollar figure on terrorism-based damage, be it in human capital or property. A finding of state responsibility usually entails restitution in kind or another type of compensation, but defining

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[1295] *Ibid*, at 144.
[1296] *Ibid*, at 124. On the failure of prevention in this context, see also *Ibid*, at 130.
[1297] See, e.g., *Ibid* at 142 (noting that many of the effects of pollution are "cumulative, diffused, and subtle" and that "scientific knowledge on the linkage of these effects to specific pollution sources is also so limited that "by the time scientific evidence of the kind that would satisfy the standard of proof of the *Trail Smelter* arbitration is available, irreversible or long-lasting damage may have occurred."").
[1298] For more background on the legal consequences of internationally wrongful acts, both at the domestic and international levels, see Frederick A. Mann, *The Consequences of an International Wrong in International and National Law*, 48 BRITISH YEARBOOK OF INTERNATIONAL LAW 1-65 (1976-1977). See also Noyes and Smith, *State Responsibility*, *supra* note 1199, at 238-242.
[1299] *ILC Articles on State Responsibility*, *supra* note 76.

restitution or compensation for the damages inflicted by transnational terrorism remains problematic, as is the case with environmental damage. As a consequence, "[i]t may be very difficult to assess the value of many of the resources and interests, such as unexploited fish and wilderness areas, that are so often the targets of pollution, and equally hard to assign a monetary figure to the degree of damage done."[1300] The same reasoning is directly transposable to the aftermath of terrorism: although the obvious effects of terrorist attacks may seem immediately cognizable, there might be significant ensuing ripple effects and more subtle repercussions resulting from the original attack, amongst which the possible degradation of natural ecosystems undoubtedly features.[1301]

Along similar lines and in response to the dilemma of unreliable assessment benchmarks of damage in such scenarios, the International Oil Pollution Compensation Funds take the view that many forms of environmental damage cannot be compensated because the means used to calculate damages in monetary terms are 'abstract' and 'theoretical'.[1302] This line of thinking was very much alive in the Tribunal's decision in *Trail Smelter*, as it refused to compensate the U.S. for damage allegedly inflicted to urban businesses and property, arguing that such harmful activity "even if proved, is too indirect and remote to become the basis, in law, for an award of indemnity."[1303] Moreover, determining who should be the recipient of compensation can prove difficult, especially when damage engendered by terrorist attacks is caused to resources or persons extending outside of national boundaries, or spanning over more than one territory. Although far from any definite or ideal solution, strict liability aims to partly alleviate or, perhaps more appropriately *expedite*, the damage appraisal and

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[1300] Springer, *The Evolving Law*, *supra* note 1293, at 138.

[1301] For a recent study of the correlation between terrorism and the protection of natural ecosystems, see, e.g., Dara Lovitz, *Animal Lovers and Tree Huggers Are the New Cold-Blooded Criminals?*: *Examining the Flaws of Ecoterrorism Bills*, 3 JOURNAL OF ANIMAL LAW 79 (2007).

[1302] The International Oil Pollution Compensation Funds are available to cover damages caused by spills of persistent oil from tankers. Their website can be accessed here: www.iopcfund.org. For more background on the Funds, see, generally, Måns Jacobsson, *The International Oil Pollution Compensation Funds and the International Regime of Compensation for Oil Pollution Damage*, in Jürgen Basedow and Ulrich Magnus (eds.), POLLUTION OF THE SEA: PREVENTION AND COMPENSATION 137-150 (2007).

[1303] Springer, *The Evolving Law*, *supra* note 1293, at 138.

assessment process. By accepting that an internationally wrongful act has automatically been carried out by failing to prevent a transborder terrorist strike, the focus of the inquiry can then shift to the application of secondary rules, which will entail, amongst other things, a rigorous examination of damage, cause-and-effect concerns, compensation and other types of legal consequences flowing from the engagement of the ILC's *Articles*.

**d) Overcoming Evidentiary Hurdles**

Finally, the most convincing argument for the implementation of strict liability dimensions vis-à-vis international terrorism resides in the evidentiary problems pertaining to the establishment of attribution.[1304] For instance, the ICJ's holding in *Nicaragua* reveals the intricacies related to gathering evidence with a view to imputing liability to a state. The Court underscored that the challenge was "not the legal process of imputing the act to a particular State for the purpose of establishing responsibility, but the prior process of tracing material proof of the identity of the perpetrator."[1305] Not to mention that *Nicaragua* instituted a "quite unrealistic obligation" upon the party seeking to establish responsibility of marshalling evidence demonstrating the provision of specific instructions or directions flowing from the host-state to irregulars having perpetrated a transnational attack.[1306] Recent events taking root in post-Cold War internal armed conflicts also illustrate the inherent challenges in persuasively making a case for state responsibility, particularly in instances of genocide as evidenced by the ICJ's treatment of the *Genocide* case or the International Commission of Inquiry for Darfur's holding on the issue, for example.[1307]

In general terms, whilst no uniform rule can be identified across the board the standard of proof applicable to state responsibility proceedings will presumably be different and lower than evidentiary rules governing instances of individual responsibility. Whilst the state responsibility standard appears to be

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[1304] For a thoughtful review of evidentiary concerns related to omissions, see Dinah Shelton, *Judicial Review of State Action by International Courts*, 12 FORDHAM INTERNATIONAL LAW JOURNAL 361 (1989).
[1305] *Nicaragua*, *supra* note 119, at 39.
[1306] Värk, *State Responsibility*, *supra* note 12, at 189.
[1307] See Abass, *Proving State Responsibility*, *supra* note 117, at 871 and *seq*.

grounded in the 'balance of evidence' submitted by both states to a dispute, scholars still debate the content of such rule while nonetheless acknowledging that the onus in such cases is considerably attenuated, as opposed to evidentiary standards associated with international criminal law, for example.[1308] However, this is not to suggest that the standard of proof applicable to state responsibility is necessarily immutable in all instances. In fact, in a Dissenting Opinion, Judge Shahabuddeen expressed that "the standard of proof varies with the character of the particular issue of fact" and that "a higher than ordinary standard may…be required in the case of a charge of "exceptional gravity against a State.""[1309] In fact, as Maurice Kamto highlights in a recent contribution, the ICJ's practice in this field does not operate on any one dominant typology, but rather invokes a hierarchy of probative statuses or values when assessing evidence, an approach that varies in light of the facts and circumstances of each case.[1310] It logically follows that accusations of state responsibility for terrorism should, correspondingly, attract a more rigorous standard of evidence before international tribunals in many circumstances.[1311]

In more concrete terms, when faced with the breach of an obligation to prevent a given event, namely a terrorist attack, an aggrieved state is in somewhat of a legal impasse in establishing the international responsibility of the host-state. Undoubtedly, the host-state is often better positioned than the injured state to know what logistical and human means, intelligence, police and military means

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[1308] See, generally, Durward D. Sandifer, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 127 (Revised Ed., 1975). For the ICJ, see Shabtai Rosenne, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-1966 1089-1090 (3rd edition, 1997). For the Inter-American Court of Human Rights, see Thomas Buergenthal, *Judicial Fact-Finding*: *Inter-American Human Rights Court*, in Richard Lillich (ed.), FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS 270-271 (1992); Shelton, *Judicial Review*, *supra* note 1304, at 384-387. For the Human Rights Committee, see Dominic MacGoldrick, THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT OF CIVIL AND POLITICAL RIGHTS 150 (1994) (expounding that the applicable standard of proof is the 'balance of probabilities', as opposed to the ordinary 'beyond a reasonable doubt' criminal standard).

[1309] See Dissenting Opinion of Judge Shahabuddeen in *Qatar* v. *Bahrain (Jurisdiction and Admissibility)*, [1995] ICJ REPORTS 6, at 63 (citing *Corfu Channel*, *supra* note 67, at 17).

[1310] See *Les Moyens de preuve devant la Cour internationale de Justice à la lumière de quelques affaires récentes portées devant elle*, 49 GERMAN YEARBOOK OF INTERNATIONAL LAW 259, 260 (2006).

[1311] For support of this proposition, see André Nollkaemper, *Potential Consequences of the Rise of Individual Responsibility for the Law of State Responsibility*, in Koufa, THESAURUS ACROASIUM, *supra* note 202, at 55-81, 74.

were at its disposal to eliminate the threat.[1312] Recently speaking to the relationship between corporate social responsibility and international responsibility, David Caron echoed some of the foregoing considerations in the following fashion: "it is argued by some that such deterrence is appropriate inasmuch as the corporation after all is in a better position than the State to detect and punish misconduct by its employees. Similarly, it can be argued in the international case that the State is in a better position than the amorphous international community to monitor and punish its agents."[1313] Consequently, obtaining a sense of factual clarity into the host-state's behaviour vis-à-vis the impugned transnational terrorist strike becomes particularly difficult when this state wields exclusive control over the relevant facts.[1314] Hence, this reality militates in favour of implementing a system obliging the actor controlling such information to tender the relevant evidence so as to counter a claimant state's contention that it failed in preventing transnational terrorism.

Furthermore, as the sole sovereign and legal guardian of its national borders, the host-state simply has the most insight and reach into terrorist activities conducted on its territory.[1315] Establishing attribution based on very limited publicly available facts will pose a significant obstacle for aggrieved states, especially in light of the fact that the content of the obligation to prevent is far from being settled law. It should be noted, however, that certain scholars reject the implementation of strict or absolute liability in international law, especially in pollution matters. In the specific context of counterterrorism, like-minded commentators follow suit, expounding that "[g]iven the covert nature of

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[1312] For support of this argument, see Barnidge, Jr., NON-STATE ACTORS, *supra* note 7, at 154 n.87. On the difficulties of proving that a state had the means to prevent a terrorist attack, see Christenson, *Attributing Acts*, *supra* note 115, especially at 314 n.14. See also Condorelli, *The Imputability*, *supra* note 125.

[1313] Caron, *State Crimes*, *supra* note 958, at 27.

[1314] See, e.g., Christenson, *Attributing Acts*, *supra* note 115, at 315.

[1315] Granted, this line of argument must be appreciated with caution and begins to wane when considering host-states which, while rhetorically committed to eradicating terrorism, nonetheless have difficulty in controlling portions of their territory, thereby tolerating extremist elements on their soil. In this light, the U.S. and its allies may actually be better situated – or more effective – than Yemen in acquiring insight into terrorist plots and bases of operation in the Abyan, Ma'rib and Shabwa governorates, or than Pakistan in ascertaining the status of Taliban and Al Qaeda fighters in its Northwestern, semiautonomous tribal areas.

many terrorist activities, the requirement of absolute liability sets too strict a standard".[1316] Rather, they advocate a fault-based model of state responsibility, sometimes grounding their assertions in the *Corfu Channel* ruling, which, in their view, predicated Albania's responsibility on knowledge of the presence of minefields within its territorial sea. In light of this reasoning, had the Court wanted to circumvent the element of fault and impose strict liability, they argue, it would not have expended considerable time and effort in ascertaining the existence of this knowledge, which correspondingly entails that fault or the lack of due care was required.[1317] This line of argument may be reconciled with some of the writings of eminent publicists who endorse the notion of fault-based state responsibility, although specific legal approaches to fault range from classical subjective 'psychological' fault,[1318] to 'normative' fault,[1319] to 'psychological-normative' fault.[1320] Others rather attempt to reconcile the theory of fault with the theory of objective responsibility, which will be discussed in greater detail below.[1321]

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[1316] McCredie, *The Responsibility*, *supra* note 70, at 94.

[1317] See, e.g., Springer, *The Evolving Law*, *supra* note 1293, at 131 and authorities cited therein (invoking the works of Louis F.E. Goldie and Ludwick Teclaff).

[1318] Amongst jurists supporting this view, Roberto Ago is often credited as the intellectual founder of the contemporary theory of psychological fault. See *Le délit international*, *supra* note 1038, at 450-498. Amongst those who feature within Ago's intellectual progeny, one may find Alf Ross, A TEXTBOOK OF INTERNATIONAL LAW: GENERAL PART 241-258 (1947); Georg Schwarzenberger, INTERNATIONAL LAW (VOLUME 1): INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 649 and *seq*. (3rd Edition, 1957).

[1319] For proponents of this view, see, e.g., Hildebrando Accioly, *Principes généraux de la responsabilité internationale d'après la doctrine et la jurisprudence*, 96 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 349-441, 369-370 (1959-I); Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 163-240 (1953); Gabrièle Salvioli, *Les Règles générales de la paix*, 46 RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL 1-164, 96 and *seq*. (1933-IV).

[1320] The language is borrowed from Pisillo-Mazzeschi, *The Due Diligence*, *supra* note 1178, at 99-102. For accounts dealing with 'psychological-normative' fault, see *Ibid*, at 101-102 and authorities cited.

[1321] See, e.g., Brownlie, SYSTEM, *supra* note 205, at 37-49; Louis Cavaré, LE DROIT INTERNATIONAL PUBLIC POSITIF 310-333 (1951); Pierre-Marie Dupuy, *Le Fait générateur de la responsabilité internationale des Etats*, 188 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 21 and *seq*. (1984); Francisco V. García-Amador, *State Responsibility – Some New Problems*, 94 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 365-491, 382 and *seq*. (1958-II); Charles Rousseau, DROIT INTERNATIONAL PUBLIC (Volume V) 16 and *seq*. (1983); Schwarzenberger, INTERNATIONAL LAW, *supra* note 1318, at 632-652; Karl Zemanek, *La Responsabilité des Etats pour faits internationalement illicites*: *Ainsi que pour faits internationalement licites*, in Karl Zemanek and Jean J.A. Salmon (eds.), RESPONSABILITE INTERNATIONALE 36 and *seq*. (1987).

Whilst this reading of the *Corfu Channel* decision may appear attractive upon first glance, it must always be balanced against the perhaps more probative theory rooted in the mistaken translation of the French text discussed elsewhere in the present dissertation,[1322] which might, in fact, signal that the Court endorsed a rationale of strict liability or some similarly-minded standard. This jurisprudential interpretation also seems congruent with the factual treatment delivered by the Court in that judgment. In particular, whilst the Court ostensibly favoured a cautious approach when exploring the relationship between the use of the host-state's territory and the issue of knowledge, its ultimate reasoning demonstrated that Albania in fact knew -- at least constructively -- about the mine-laying and failed to deploy any reasonable attempt to prevent the ensuing harm. Nevertheless, the French version of the decision can compellingly be construed as imposing some precedent of 'no-knowledge' international responsibility, an analysis that may easily be transposed to a state's failure to prevent transnational terrorism. What is more, the Court's ruling also carries with it an enlargement of states' due diligence activity in meeting their international duties, a notion highly compatible with various post-9/11 scholarly suggestions that counterterrorism obligations constitute 'bolstered' duties (or 'obligations renforcées' pursuant to French scholarship).[1323] In fact, this development is undoubtedly coextensive with recent Security Council practice, which also considerably expanded the scope of states' due diligence obligations towards a more exacting standard than before 9/11.[1324] As discussed above, particularly significant are the prescriptions laid down in Council Resolution 1373, which make it "clear…that the United Nations Security Council has enhanced the obligations of States to take measures

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[1322] See the following notes and accompanying text, *supra*: Chapter 1, Section C)1., notes 86-91; Chapter 2, Section D)1., note 311; Chapter 2, Section D)2., notes 334-335; Chapter 4, Section B)2.a), notes 1054-1055. See also *infra*: Chapter 4, Section C)1., notes 1524-1525; Chapter 4, Section C)2.b), note 1650.

[1323] In the field of terrorist funding, for example, see Nicolas Angelet, *Vers un renforcement de la prévention et la répression du terrorisme par des moyens financiers et économiques?*, in Karine Bannelier *et al.*, LE DROIT INTERNATIONAL, *supra* note 475, at 219-237.

[1324] Compare the wording of Resolution 1373 with pre-9/11 scholarly accounts, such as Lillich and Paxman, *State Responsibility*, *supra* note 67, at 210 and *seq*. (recognizing that the obligation of due diligence cannot be cast as absolute, rather requiring states to deploy best possible efforts and to take reasonable steps in light of both their capacity and the circumstances at hand).

to prevent terrorism. These obligations have effectively changed the low threshold due diligence obligation States had until the U.N. Security Council Resolution 1373 of 2001 to prevent their territory from being used to launch terrorism conduct in other States to requiring States to compulsorily take all measures to prevent terrorism."[1325]

Regardless of the intricacies of each theory, meeting a fault-based responsibility standard can prove quite challenging because of the inherent difficulty in proving negligence against the wrongful state under international legal principles. As discussed throughout this dissertation, this evidentiary impediment is further exacerbated by the fact that the contents of primary counterterrorism obligations are sometimes ill-defined, or expressed in general terms. Thus, this reality would advocate towards shifting the burden of proof onto the wrongful state, so as to alleviate undue pressure placed on the victim state. Indeed, the wrongful state is often better situated to have known – or to be expected to have known – about the pertinent terrorist activity on its territory.[1326] Some take this reasoning even further and argue that such knowledge – or presumption of knowledge – automatically flows from the exercise of state sovereignty. This thinking is very much alive in Judge Alvarez's concurring opinion in *Corfu Channel*. He writes:

> [E]very State is considered as having known, or as having a duty to have known, of prejudicial acts committed in parts of its territory where local authorities are installed; *that is not a presumption, nor is it a hypothesis, it is the consequence of its sovereignty*. If the State alleges that it was unaware of these acts, particularly if they occurred in circumstances in which vigilance was unavailing - eg., by the action of submarines, etc. - it must prove

[1325] James Thuo Gathii, *Commercializing War*: *Private Military and Security Companies, Mercenaries and International Law*, Unpublished Paper, available online at http://ssrn.com/abstract=1356887 (last visited on 1 August 2009), at 15-16. [References omitted.] Gathii also reconnects with some of these arguments in his recent book, titled WAR, COMMERCE, AND INTERNATIONAL LAW (2009).

[1326] Although not directly on point, see Slaughter, A NEW WORLD ORDER, *supra* note 1165, at 170.

> that this was the case, for otherwise its responsibility is involved.[1327]

Since failing to prevent a given event from occurring is an inherently nebulous and difficult concept, the objectives of efficiency and legitimacy would seem to be better vindicated through a shift in onus to the host-state.[1328] Some scholars call into question the wisdom of this potential shift, albeit in environmental matters. Whilst "a presumption in favor of the pollution victim, if generally accepted, could mitigate some of the negative effects of the fault standard", it follows that it "is likely to be of limited effectiveness on an international level, where states are seldom willing to use formal adjudicative institutions to resolve environmental disputes."[1329] Certainly, the unwillingness of sanctuary states to conform to adjudicative or other compensatory arrangements might also significantly impede any progress expected from the transference of onus in favour of aggrieved states in cases of catastrophic terrorism. In addition to adjudicatory or compensatory impediments, this situation can also be compounded if the host-state refuses to formally accept responsibility for the wrongful, terrorist act.

An embodiment of all these concerns can be extracted from the *Lockerbie* incident, discussed above in Chapter 3. Indeed, whilst the Libyan state continuously refused to bear responsibility for the bombing, it accepted to indemnify the families of the victims. However, considerable delays occurred in actually providing compensation, thereby signalling that the mechanisms of state responsibility can easily become paralyzed or ineffectual when falling at the mercy of political whim.[1330] Ultimately, Libya officially acknowledged the

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[1327] *Corfu Channel*, *supra* note 67, at 44. See also Schiedeman, *Standards of Proof*, *supra* note 481, at 264. But *Cf*. McCredie, *The Responsibility*, *supra* note 70, at 86; Lillich and Paxman, *State Responsibility*, *supra* note 67, at 276-279.

[1328] Interestingly, similar reasoning also pervades some facets of international humanitarian law. See, e.g., Duffy, THE 'WAR ON TERROR', *supra* note 133, at 262. See also *Ibid*, at 305, for a similar discussion on international human rights law.

[1329] Springer, *The Evolving Law*, *supra* note 1293, at 132.

[1330] For discussion on these aspects of the *Lockerbie* incident, see, e.g., Babback Sabahi, *The ICJ's Authority to Invalidate the Security Council's Decisions Under Chapter VII*: *Legal Romanticism Or the Rule of Law?*, 17 NEW YORK INTERNATIONAL LAW REVIEW 1, 47 n. 226 (2004); Sean D. Murphy, *Libyan Payment to Families of Pan Am Flight 103 Victims*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 987, 989-991 (2003); Keith Sealing, *Thirty Years*

findings of the Scottish trial and bore the state responsibility that derived from it, whilst also committing to working in concert with the Security Council in order to facilitate the ongoing investigation.[1331] Consequently, the Libyan Minister of Foreign Affairs declared on 29 April 2003 that, "[m]on pays a accepté de prendre sa responsabilité civile pour les actions de ses fonctionnaires dans l'affaire Lockerbie, conformément au droit civil international et à l'accord survenu en mars à Londres entre les responsables libyens, américains et britanniques".[1332]

Most likely prompted by fears of criminalization of the Libyan state, one can readily decipher the invocation of peculiar language in this diplomatic statement, with the terms 'responsabilité civile' and 'droit civil international' being ostensibly difficult to substantiate or ground legally.[1333] Nevertheless, the tripartite agreement was ultimately ratified by Libyan authorities in a letter dated 15 August 2003, and addressed to the Security Council, in which Libya declared that it "[h]as facilitated the bringing to justice of the two suspects charged with the bombing of Pan Am 103 and accepts responsibility for the actions of its officials".[1334] By the same token, Libya therein formally acknowledged its international responsibility, undertook to refrain from providing any form of support to terrorists and ensured that the proper arrangements were put into place in order to provide adequate compensation to the concerned individuals.[1335] In sum, and despite considerable political hurdles and delays, the Libyan precedent epitomizes a quintessential application of the mechanics of state responsibility law whereby the host-state expressly accepted its international responsibility in

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*Later*: *Still Playing Catch-Up with the Terrorists*, 30 SYRACUSE JOURNAL OF INTERNATIONAL LAW AND COMMERCE 339, 346 (2003); Mike Wooldridge, *Analysis*: *Lifting Sanctions on Libya*, BBC NEWS, 12 September 2003, available online at http://news.bbc.co.uk/1/hi/world/africa/3199551.stm (last visited on 15 August 2007).

[1331] See, e.g., Jonathan B. Schwartz, *Dealing with a "Rogue State": The Libya Precedent*, 101 AMERICAN JOURNAL OF INTERNATIONAL LAW 553, 573 (2007).

[1332] *Attentat de Lockerbie*: *Tripoli accepte sa responsabilité civile*, LE MONDE, 29 avril 2003.

[1333] Jean-Marie Sorel writes about 'flou artistique' and 'terme inadapté' when canvassing the Libyan position. See *L'Épilogue des affaires dites de "Lockerbie" devant la C.I.J.*: *Le temps du soulagement et le temps des regrets*, 107 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 933, 943 (2003).

[1334] UN Doc. S/2003/818.

[1335] As such, a compensation totaling 2.7 million dollars was disbursed to the Bank for International Settlements on 22 August 2003. For more background on the dispute and ensuing settlement, see Murphy, *Libyan Payment to Families*, *supra* note 1330, at 987-990.

failing to prevent terrorism.[1336] Needless to say, not all cases of tacit or inadvertent assistance to terrorists will compel the involved governements to comply docilely with the prescriptions of international law. In fact, diplomatic resistance or flat-out denial of any sort of complicity in terrorist plots often goes hand-in-hand with state-condoned policies of surrogate warfare or terrorism via proxy -- the whole purpose behind such tactics being, amongst other things, to eschew responsibility. Therefore, such reality would potentially point to some *lex ferenda* policy inclination towards more stringent liability schemes.

A general conclusion may be gleaned from the foregoing considerations: even if we accept the implementation of a positive rule purporting to impose a higher burden of precaution on sanctuary states, albeit through the rethinking of trans-substantive rules, the initial impediments highlighted by Verdier remain intractable. The extant scheme of state responsibility remains characterized by overarching generality, whilst the application of the proposed reform may oscillate toward – often desirable – fact-specific assessments of terrorist strikes or may even engender the development of idiosyncratic reasoning. Thus, it becomes apparent that this rule could only be operationalized through the mechanism of a variable threshold, in order to account for the whole panoply of sanctuary state inaction vis-à-vis transnational terrorism, ranging from passiveness to willful blindness, to active encouragement. Indeed, the idea of modulating the application of international legal standards is certainly not foreign to the discipline of state responsibility or to other international legal fields.[1337]

Thus, in this light it is helpful to consolidate select rationalist, international relations, and international legal theories, albeit through a preliminary exploration

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[1336] See, e.g., Martin, LES RÈGLES INTERNATIONALES, *supra* note 1, at 469. But *cf.* Kimberley N. Trapp, *Jean-Christophe Martin, Les Règles internationales relatives à la lutte contre le terrorisme, (Bruxelles: Bruylant, 2006)*, 19 REVUE QUÉBÉCOISE DE DROIT INTERNATIONAL 399, 403 (2006).

[1337] See Barboza, *Legal Injury*, *supra* note 748, at 9 (invoking a variable scale metaphor and comparing the structure of Article 1 of the *ILC Articles on State Responsibility* to a set of scales). More generally, it is widely accepted that international responsibility also entails varying degrees of actual accountability. See Arangio-Ruiz, *State Fault and the Forms*, *supra* note 340, at 25-42; Riphagen, *Second Report*, *supra* note 340, at 79. See also Battaglini, *War Against Terrorism*, *supra* note 426, at 147-149 (invoking a geometry-based metaphor to explain certain aspects of international responsibility).

of the compatibility between state responsibility, terrorism, and legal theory. As prefaced above, applying rationalist theories to state responsibility law proves particularly illuminating, given the inherent struggle between rational choice, compliance, reciprocity, and self-interest involved in the balancing of competing policies under international legal structures. However, this line of argument can be a misleading benchmark, especially when dealing with politically charged policy areas, such as counterterrorism. Unlike situations of contractual relationships, against which game theory and efficient breach principles can be applied convincingly, this scheme of state responsibility can carry, with it, intrinsically greater stakes. The delicate balance between security and state sovereignty, which is actuated through the phenomena of risk assessment and risk management, has (or should have) an altogether different overarching purpose in certain circumstances: the protection of civilian life. As a corollary, this scheme entails a wider margin of error and, correspondingly, shrinks institutional repertoire and enforcement mechanisms on the international scene, which are typically operationalized through monetary compensation or adjudicatory structures in domestic law. Hence, it follows that terrorism can require a more stringent framework of state responsibility. Undoubtedly, this challenge is further exacerbated by factual complications engendered by new technological advances, such as the Internet, which ultimately have an obfuscating impact on the application of both trans-substantive and secondary norms of state responsibility. For instance, the occurrence of terrorist cyber-attacks significantly hampers the attribution of the initial unlawful conduct to a host-state for myriad reasons, including the difficulty of determining authorship of the attacks, the unreliability of Internet Protocol addresses as a basis for attribution and the possibility that unruly cyber-terrorist behaviour leading to a single strike may concomitantly originate in several host-states from a traditionally 'geographic' standpoint. As one commentator aptly underscores, "[t]o answer these issues of attribution and to pin down those responsible for attacks, it is necessary to institute a standard of state responsibility that recognizes the difficulties inherent in cyber law."[1338]

[1338] Shackelford, *From Nuclear War*, *supra* note 126, at 214.

In addition, whilst rationalist-inspired approaches to international law and compliance might appear desirable from a policy standpoint, they remain fraught with an inescapable sense of methodological weakness given that they rely, quite extensively, on a set of basic assumptions that may or may not be present in any given analysis of international legal norms. To name but a few, rationalist accounts of international legal relations invariably rest upon the notion that the maximization of preferences – presumed to be 'exogenous and constant'[1339] – drives the actions of states, which necessarily amount to rationalist actors. In turn, these preferences can run the gamut of state interest, ranging from monetary to moral or aesthetic considerations, and remain characterized by a great margin of heterogeneity on a state-to-state basis.[1340] In what has been construed as a necessary legal oversimplification in order to countenance the rationalist agenda, these accounts also rest upon the assumption that states are unitary actors, a notion appearing at odds with the developments explored above and with the stated mission of identifying legal arrangements aimed at better integrating a multiplicity of actors within a multipolar political framework. Put another way, methodologically-driven simplifications are required in order to ensure that rationalist legal models generate verifiable predictions with regard to abstract situations.[1341] Arguably, there is no guarantee that such methodologically-doctored results would yield similar patterns of state compliance and influence if transposed to the realm of state responsibility in a real-world environment. Conversely, this fleeting critique is, by no means, meant to act as a complete disavowal of the potential benefits that may be derived from rationalist constructions of international law. Rather, the objective is to put forth an intellectually holistic theoretical approach when considering the possible contributions of various counterterrorism deterrence models within the purview of the law of state responsibility. In fact, this cautious approach seems on par with

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[1339] Andrew T. Guzman, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 17 (2008).

[1340] See, e.g., Joel P. Trachtman, THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW 1 (2008).

[1341] On this point and the considerations explored before it, see generally Niels Petersen, *How Rational Is International Law?*, Unpublished Paper, available online at http://ssrn.com/abstract=1423727 (last visited on 30 July 2009).

recent scholarly resistance to the rationalist international legal agenda -- especially the works of Goldsmith and Posner in the area -- even prompting one commentator to astutely declare that there are limits to *The Limits of International Law*.[1342] The solution, therefore, is not to cast all rationalist-driven interpretations of the relevant legal norms under study as inherently heretic from a PIL-friendly vantage point, but rather to approach them with a critical eye.

With this in mind, the proposed reform of state responsibility -- namely via the circumvention of attribution and the implementation of a two-tiered strict liability-infused mechanism -- is consonant with several other legal theories. In addition to instilling some degree of legitimacy in international relations and to promoting fairness among nations, it also facilitates the imposition of positive rules in the underlying legal system. Indeed, this remains a recurrent criticism vis-à-vis state responsibility in the post-9/11 era, namely that the international community fails to sufficiently circumscribe primary obligations of states. Through the rethinking of trans-substantive rules of state responsibility towards enhancing more efficient international liability models, the proposed reform strives to do away with this impediment so as to clearly affirm the obligation to prevent terrorist attacks. More importantly, as will be canvassed below, the suggested framework fits neatly under an interactional theory of international law, which could mean that formal normativity may be derived from it, without reference to the elaboration of new positive rules.

**6. A Two-Tiered Strict Liability Mechanism**

In sum, the objective in shifting the onus is not only to transfer the burden of proof but also to shift the incentives to the host-state.[1343] Moreover, it aims at

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[1342] See Ann van Aaken, *To Do Away with International Law? Some Limits to 'The Limits of International Law'*, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW 289-308 (2006) (discussing Goldsmith and Posner, THE LIMITS, *supra* note 721). For a critique articulated from a 'traditionalist' standpoint, see Detlev F. Vagts, *International Relations Looks at Customary International Law*: *A Traditionalist's Defence*, 15 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1031 (2004).

[1343] In a recent book about the relationship between state responsibility and terrorism, Tal Becker frames the idea of shifting the burden of proof through the prism of direct state responsibility as follows: "[i]t 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

transferring the *right* incentives to the targeted governments. This could be achieved, it is argued, through a two-tiered strict liability-inspired mechanism, namely through the excision of attribution from the equation and recognition that, once a terrorist attack has been launched from a state's territory, that state is automatically indirectly responsible for the attack. In many ways, this line of reasoning seems congruent with modern conceptions of state responsibility, which strive to engage liability as soon as an internationally wrongful act is committed. Of particular importance to this idea is the consecration of the 'wrongful act' as sole trigger of international responsibility and cornerstone of the ILC's construction of liability, along with the eventual deletion of the concept of 'injury' from the ILC's *Articles*. Brigitte Stern speaks to this textual evolution, highlighting that "[t]his is clearly a break, if only semantic, compared with the past approach, displaying the will to bring responsibility into existence as soon as the international legal order is breached, that is to introduce a sort of review of legality through the institution of international responsibility."[1344]

In other words, extending this rationale to counterterrorism, a successful cross-border terrorist strike establishes a *prima facie* case of responsibility against the host-state. In order to make this argument palatable, one must accept the premise that, in addition to a sanctuary state's organs having allowed an attack to materialize in a given circumstance, state responsibility "also might be based on the mere control of the state territory."[1345] Whilst some caution that a rule of customary international law is required for state responsibility to be triggered in the latter case, others call into the question the existence of a rule endorsing such broad parameters for state responsibility.[1346] Keeping in the spirit of public international law, the emergence of such a rule of customary international law

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properly be utilized in making that determination in specific instances." See TERRORISM AND THE STATE, *supra* note 2, at 271.

[1344] Stern, *A Plea for 'Reconstruction'*, *supra* note 654, at 94.

[1345] Kirchner, *Third Party Liability*, *supra* note 138, at 781 (applying this rationale to Lebanon's involvement in the 2006 Israel-Hezbollah conflict). The notion of territorial control is central in state responsibility. For thoughtful discussion of this aspect, see Brownlie, SYSTEM, *supra* note 205, at 180-188.

[1346] See Kirchner, *Third Party Liability*, *supra* note 138, at 781; Juraj Andrassy, *Les Relations Internationales de Voisinage*, 79 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 73-182, 79 (1951-II).

should be fuelled not only by pertinent state practice, but also by corresponding *opinio juris*.[1347] One could certainly argue that the response to 9/11 has generated significant legal capital towards this end, as evidenced in part by the unprecedented international support it garnered.[1348]

This line of reasoning seems to fit neatly within the furrow created by the ILC's *Articles*, which create a regime reminiscent of 'absolute liability' under some lights. Indeed, just as when a terrorist attack is carried out and, according to the arguments advanced in this dissertation, creates a presumption of state responsibility, the *Articles* operate on the premise that, once an internationally wrongful act has been committed, it triggers the responsibility of the wrongful state, albeit through the channel of attribution. In a recent book chapter, Shabtai Rosenne invokes the term 'absolute responsibility', which may in fact be a misnomer, to describe the work of the ILC.[1349] He notes that "[t]he new approach to responsibility adopted by the International Law Commission replaces the traditional notions of fault and damage with a concept of absolute responsibility arising from any breach of an international obligation of the responsible State."[1350] Although Rosenne later mitigates this posture by calling into question the pervasiveness of 'absolute responsibility' under current state responsibility structures,[1351] it is nonetheless fair to query whether the ILC's *Articles* do, in fact, implement a regime of strict liability by subtracting fault, intent and injury altogether from the calculus of modern state responsibility. In other words, the whole premise underlying the *Articles* is somewhat compatible with the idea of 'absolute liability'.[1352] If this argument was to fall short, one could certainly rely

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[1347] *Continental Shelf*, *supra* note 254, at 77.

[1348] Consider the remarks in Duffy, THE 'WAR ON TERROR', *supra* note 133, at 49.

[1349] Along similar lines, Ian Brownlie also points out Hersch Lauterpacht's erroneous use of the term 'absolute liability'. See Brownlie, SYSTEM, *supra* note 205, at 3.

[1350] Rosenne, *Decisions of the ICJ*, *supra* note 526, at 298.

[1351] *Ibid*, at 299 ("[a]t the time of writing, however, there is no certainty that this concept of absolute liability, independent of fault and of damage cause by the act (or omission), will be accepted as today's *lex lata*"). Speaking about state responsibility in insurrection and civil war, Ian Brownlie also rejected the idea of absolute liability and further contended that such a standard finds no grounding in state practice. See Brownlie, SYSTEM, *supra* note 205, at 171.

[1352] For a discussion on the notion of intent under state responsibility, see Jean Salmon, *L'intention en matière de responsabilité internationale*, in Virally, LE DROIT INTERNATIONAL, *supra* note 340, at 413-422.

on the recent writings of international legal scholars arguing that state responsibility doctrine and practice actually support the notion of strict liability.[1353] Ultimately, it might prove impracticable to entirely excise the concept of fault from the application of the *Articles*, a notion that may be reconciled with post-9/11 applications of state responsibility and governmental failures in controlling national territory. For instance, Yemen's potential responsibility in failing to control portions of its territory -- most notably the Abyan, Ma'rib and Shabwa governorates, where both Al Qaeda and Aden-Abyan Islamic Army members congregate -- must not seek grounding in some absolute construction of international liability, but can rather be substantiated by consistent failures, by that state, to comply with Security Council prescriptions to stamp out terrorist networks within its borders and by reference to general international law.[1354]

Therefore, a more proper term to describe the ILC's codification might actually be 'objective responsibility',[1355] although the *Articles* arguably rely on both *objective* (i.e. an internationally wrongful act, consisting of an act or omission, constitutes a breach of an international obligation) and *subjective* (i.e. the internationally wrongful act is attributable to the state under international law, which depends on a subjective application of the facts at hand) elements.[1356] Picking up on the previous environmental legal thread, a more adequate and salient example of 'objective responsibility' may be found in Article 51 of the 1973 *Treaty Between Uruguay and Argentina Concerning the Rio de la Plata and the Corresponding Maritime Boundary*.[1357] Indeed, Article 51 provides that "[e]ach Party shall be liable to the other for damage inflicted as a result of pollution caused by its own activities or by those of individuals or legal entities

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[1353] See, e.g., Malcolm Shaw, INTERNATIONAL LAW 700 (5th Edition, 2003).

[1354] For similar reasoning vis-à-vis Afghanistan and Al Qaeda, see Arai-Takahashi, *Shifting Boundaries*, *supra* note 414, at 1096-1097.

[1355] See, e.g., Pechota, *The Limits of International Responsibility*, *supra* note 1018, at 177.

[1356] Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 81-85; Dupuy, *State Sponsors*, *supra* note 29, at 4; Springer, *The Evolving Law*, *supra* note 1293, at 125-126.

[1357] 19 November 1973, DOALOS/OLA – UNITED NATIONS, available online at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/URY-ARG1973MB.PDF (last visited on 25 August 2007).

domiciled in its territory."[1358] In such instances, there is no requirement that proof of governmental involvement in the polluting activity be demonstrated, either through an act or omission. In addition, this automatic finding of responsibility also simultaneously circumvents the evidentiary impediments often associated with attribution. Similar provisions are found in both the 1967 *Outer Space Treaty*[1359] and the 1979 *Moon Treaty*,[1360] which make the states parties automatically responsible for damage caused by the actions of their nationals in outer space. Borrowing from this reasoning, albeit through the distinctive lens of strict liability, the *Convention on International Liability for Damage Caused by Space Objects*[1361] also "codifies a regime of strict liability, stating that "[a] launching State is absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft in flight.""[1362] Similarly, several influential publicists have endorsed theories favouring objective state responsibility, starting with Anzilotti's objectivist scholarship,[1363] which also inspired an impressive academic following.[1364] At the outset, a limiting factor to this line of argument certainly derives from the idea that all such activity (e.g. pollution reduction, outer space exploration) is under direct control or supervision

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[1358] *Ibid*.

[1359] See Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Annex to United Nations General Assembly 2222 (XXI) of 19 December 1966, available online at http://www.unoosa.org/oosa/SpaceLaw/gares/html/gares_21_2222 .html (last visited on 27 August 2007).

[1360] See Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Annex to United Nations General Assembly 34/68 of 5 December 1979, available online at http://www.unoosa.org/ oosa/SpaceLaw/gares/html/gares_34_0068.html (last visited on 27 August 2007).

[1361] Convention on International Liability for Damage Caused by Space Objects, Sept. 1, 1972, U.N.T.S. 187, Can. T.S. 1975 No. 7, 24 U.S.T. 2389, T.I.A.S. No. 7762.

[1362] Michel Bourbonnière, *National-Security Law in Outer Space*: *The Interface of Exploration and Security*, 70 JOURNAL OF AIR LAW AND COMMERCE 3, 22 (2005). For a recent review of strict liability in international environmental agreements, see, e.g., Alex Kiss and Dinah L. Shelton, *Strict Liability in International Environmental Law*, in Tafsir Malick Ndiaye and Rüdiger Wolfrum (eds.), LAW OF THE SEA, ENVIRONMENTAL LAW AND SETTLEMENT OF DISPUTES: LIBER AMICORUM JUDGE THOMAS A. MENSAH 1131, 1135-1138 (2007).

[1363] See, e.g., Anzilotti, *La Responsabilité*, *supra* note 191, at 5-29.

[1364] For a variety of views on objective constructions of state responsibility, see, e.g., Jules Basdevant, *Règles générales du droit de la paix*, 58 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 471-692, 668 and *seq*. (1936-IV); Paul Guggenheim, TRAITÉ DE DROIT INTERNATIONAL PUBLIC (VOLUME II) 49 and *seq*. (1954); Hans Kelsen, GENERAL THEORY OF LAW AND STATE 66 and *seq*. and 367 (1945); Paul Reuter, *Principes de droit international public*, 103 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 598 (1961-II).

by the host-state or, at least, received similar political treatment at the time those stricter liability standards were conventionally introduced and implemented.

Nevertheless, whenever exploring the relationship between state responsibility and highly hazardous activities, such as terrorism or transboundary pollution, one must bear in mind the inherent affinity between strict liability and/or absolute responsibility and the rationale underlying the ILC's *Articles*.[1365] Similarly, whilst certain scholars call into question the existence of a rule of customary law or a principle of international law enshrining the discipline of strict liability for ultra-hazardous activities,[1366] others resolve this discrepancy by inferring that "there may be a general principle of law that imposes strict liability on a State for abnormally dangerous activity".[1367] Speaking to the *Trail Smelter* and *Corfu Channel* line of cases while using common law torts-derived language, Higgins echoed some of these views, noting that "all make clear a duty of care to prevent injury."[1368] She further argued that "[t]he *standard* of care is still unclear. But, with regard to *some* activities of an inherently hazardous nature, it is increasingly suggested that there is an absolute duty of care, reflected in resultant strict liability."[1369] Although questionable upon closer inspection, Rosenne's conclusions remain illuminating and further reinforce the argument that absolute liability may, in fact, apply to some wrongful acts: "[w]hatever the future of the

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[1365] See, e.g., Springer, *The Evolving Law*, *supra* note 1293, at 133; Michael J. Matheson, *The Fifty-Eight Session of the International Law Commission*, 101 AMERICAN JOURNAL OF INTERNATIONAL LAW 407, 413 (2007). See also, generally, Harold Hongju Koh, *Separating Myth From Reality About Corporate Responsibility Litigation*, 7 JOURNAL OF INTERNATIONAL ECONOMIC LAW 263, 266 (2004).

[1366] See, e.g., Victoria R. Hartke, *The International Fallout from Chernobyl*, 5 DICKINSON JOURNAL OF INTERNATIONAL LAW 319, 335-337 (1987). For a sample of divergent and classical views on the application of strict liability regimes to various fields of ultra-hazardous activities from prominent scholars, compare Gunther Handl, *Liability As an Obligation Established by a Primary Rule of International Law*, 16 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 49, 49-79 (1985); Gunther Handl, *State Responsibility for Accidental Transnational Environmental Damage by Private Persons*, 74 AMERICAN JOURNAL OF INTERNATIONAL LAW 525 (1980); C. Wilfred Jenks, *Liability for Ultra-Hazardous Activities in International Law*, 117 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 99-200 (1966); Louis F.E. Goldie, *Liability for Damage and the Progressive Development of International Law*, 14 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 1189 (1965).

[1367] Zou Keyuan, *Environmental Liability and the Antarctic Treaty System*, 2 SINGAPORE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 596, 620 (1998).

[1368] Higgins, PROBLEMS & PROCESS, *supra* note 49, at 157.

[1369] *Ibid*.

draft articles, with or without change, there is no doubt that the concept of absolute responsibility, at all events for certain types of unlawful acts, is now implanted in international law."[1370] Given the scope of certain rules and the stakes involved, one would think that this rationale should become particularly apt with regard to internationally wrongful acts entailing the violation of serious human rights/protection of civilian life obligations, such as those embodied in counterterrorism norms.

However, this is a far cry away from actually reading in a strict liability standard into the *ILC Articles on State Responsibility* – or from advancing that the *Articles* are dispositive on the question of a host-state's responsibility for failing to thwart private harmful activities emanating from its territory – as certain influential scholarly voices have contended in the wake of 9/11. Admittedly, imposing strict liability standards in response to states' failure to prevent transnational terrorism extends the legal rationale beyond what is routinely envisaged for that level of engagement on the international scene, particularly for outer space activities, the launch of satellites, high-risk water dams and nuclear facilities. This legal alignment between highly hazardous fields of activity and stringent liability standards can be best explained by the fact that such operations typically fall under serious and narrow state control. What is more, these types of activities also usually significantly benefit the involved host-states, thereby justifying their support and acceptance of the ensuing risk. Upon first glance, such logic cannot be analogized to counterterrorism, as host-states certainly do not derive any tangible benefits from terroristic enterprises (unless they utilize toleration as a tool of foreign policy). Nevertheless, as will be explored below,[1371] compelling policy reasons militate in favour of a responsibility-expanding regime in combating the transnational scourge of terrorism.

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[1370] Rosenne, *Decisions of the ICJ*, *supra* note 526, at 299. Citing Theodor Meron, *International Law in the Age of Human Rights*: *General Course on Public International Law*, 301 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 9-490, 249 (2003), he further adds that, "[w]hatever the attitude of Governments – and in the final resort only a widely accepted international convention, State practice, or judicial decisions, can consolidate this new concept of international responsibility – it is certain that this approach will enjoy powerful backing from the most qualified publicists of the various nations (in the words of Article 38(1)(*d*) of the Statute of the International Court)." See *Ibid*.

[1371] See, e.g., *infra* Chapter 5, Section 3, especially Section 3.a).

Interestingly, relying upon the Draft Articles on their second reading – and not in their final version – Professor Franck erroneously inferred that they "make it clear that a state is responsible for the consequences of permitting its territory to be used to injure another state."[1372] Whilst the notion of 'permitting its territory' can perhaps be conceptually dissociated from the idea of strict liability because giving permission to use a territory arguably entails knowledge of that use by the host-state, Franck further substantiates his claim by invoking recent Security Council practice. One could certainly ponder whether this practice would presumably also encompass cases of tacit support, whereby a state unknowingly allows its territory to be used by terrorist factions. In particular, Franck opines that paragraph 3 of Resolution 1368 following the 9/11 attacks consecrates a stricter standard of responsibility for terrorism, applicable to "sponsors of these terrorist attacks" including those "supporting or harbouring perpetrators".[1373] He ultimately extends his approach to the attacks of 9/11, expounding that the "Taliban clearly fit that designation."[1374] Whilst, on the one hand, Franck's conclusion seems on par with recent state and institutional practice, thereby consecrating the shift to a law of 'indirect responsibility' proposed above in Chapter 2, his reliance on the ILC's *Articles* remains somewhat puzzling. The initial resistance to this line of thinking can perhaps be explained by the fact that the *Articles* do not seem to support a legal basis for attribution hinging *solely* on a territorial nexus between a terrorist attack and a host-state, a notion equally mirrored in the general law of recourse to force according to more recent scholarly accounts.[1375] In fact, as José Alvarez astutely underlines, endorsing Franck's view could be tantamount to giving credence to the notion that the *Articles* actually rely upon a mechanism of strict liability in such related

[1372] Franck, *Terrorism*, *supra* note 38, at 841.
[1373] *Ibid*.
[1374] *Ibid*.
[1375] See, e.g., Brunnée, *The Security Council*, *supra* note 1106, at 123 (opining that the proper framework in tackling global terrorism resides in self-defence and not state responsibility, rejecting the agency paradigm in this setting and expounding that the mere 'harbouring and supporting' of terrorists is insufficient as a basis to invoke self-defence (i.e. calling for evidence of direct support or tacit approval, at a minimum); Nolkaemper, *Attribution*, *supra* note 248, at 136.

scenarios.[1376] As Alvarez points out, it follows that the ILC narrowly circumscribed, at least in terms of the textual delivery of its *Articles*, the scope of state responsibility for the acts of private persons to specific circumstances, namely where: i) the private conduct is directed or controlled by the state; ii) the non-state actors are exercising elements of governmental authority; or iii) the host-state acknowledges or adopts as its own the conduct in question.[1377]

More importantly, the whole thrust of this dissertation operates in tandem with the premise that imposing strict liability for failing to prevent terrorism cannot rest on any precise exegesis in the works of the ILC and must, therefore, be grounded in customary international law or emerge through creative analogies and rapprochements. Certainly, as is partially the case in some portions of this project, one can argue that it is possible to reel in the concept of strict liability within the furrow of the ILC's *Articles* when dealing with certain types of primary obligations, a posture that does not stand in contradiction or dissonance with public international law. In fact, it is no secret that differing international legal obligations will entail varying thresholds of responsibility – ranging from due diligence to absolute liability[1378] – which, in turn, will have an impact on the application of secondary rules of state responsibility (at least in terms of how or when – if at all – the rules of responsibility should come into play, depending on whether an actual obligation was breached by reference to the applicable threshold). This argument, however, seems far removed from endorsing Professor Franck's own vision, which, if authoritative would, for all intents and purposes, render this whole exercise purely academic. In sum, for the reasons discussed above, the idea of implementing a model inspired by strict liability under the auspices of the *Articles* might, in fact, better address the problem of transborder terrorism and help vindicate particular policy objectives in the "war" on terror, such as prevention. The possible implementation of strict liability elements under the ILC's programme of work is, by no means, accomplished by virtue of the ILC's *Articles*' text alone. Indeed, far more rigorous intellectual incursions into

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[1376] Alvarez, *Hegemonic International Law Revisited*, *supra* note 1110, at 879-880 n.34.
[1377] *Ibid* (essentially paraphrasing Articles 8, 9 and 11 of the *Articles*, *supra* note 76).
[1378] See, e.g., Crawford, *Revising the Draft Articles*, *supra* note 993, at 438.

disparate facets of international law are required to make the merging of strict liability influences and the ILC's landmark document on state responsibility palatable.

### a) Striking a Balance: Limiting Governmental Interference in the Private Sphere While Upholding the Sovereign Equality of States

Although instilling the right incentives in governmental programmes is a noble objective, the argument developed above is not premised on the promotion of totalitarian states,[1379] nor does it strive to implement a system of absolute liability[1380] whereby host-states are deprived of the opportunity to exculpate themselves *ex post facto*. Indeed, eminent publicists have convincingly discarded the doctrine of absolute responsibility as a potential policy backbone for the law of state responsibility. In 1758, for example, and drawing from the Grotian assertion that state responsibility for private acts can only flow from state complicity in a wrongful act via the concepts of *patientia* (i.e. the host-state fails to take the necessary steps to thwart the wrongful act when it has knowledge of the existence of such act) or *receptus* (i.e. the host-state shelters the wrongdoers after the fact by failing to extradite or punish them),[1381] Emerich de Vattel opined that responsibility could only attach to the state if it approved or ratified the act, thereby transforming itself in "the real author of the affront".[1382] Echoing, once again, the notions of *patientia* and *receptus*, de Vattel further underscored that "if

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[1379] Gordon Christenson encapsulates the problem with granting dictatorial control to states over private conduct, a solution neither feasible nor desirable in international relations. See *Attributing Acts*, *supra* note 115, at 368. Nor is the objective to encourage state sponsorship of terrorism through the imposition of multilateral structures. Although not directly on point, consider Evan Stephenson, *Does United Nations War Prevention Encourage State-Sponsorship of International Terrorism? An Economic Analysis*, 44 VIRGINIA JOURNAL OF INTERNATIONAL LAW 1197-1230 (2004).

[1380] In analyzing the possible implementation of a *prima facie* case of liability under a prospective Convention on Terrorism prior to 9/11, McCredie highlighted the role of the reviewing court and discarded absolute liability as the preferred mechanism. See McCredie, *The Responsibility*, *supra* note 70, at 94. Conversely, it is interesting to note that Bowett had not completely ruled out the possible crafting of a rule of absolute liability in the context of indirect responsibility. See *Reprisals*, *supra* note 422, at 19-20. More radically, see Baker, *Terrorism*, *supra* note 275, at 48 ("terrorism may be the functional equivalent of an armed attack for which the perpetrators and their sanctuary states are absolutely liable.") [Emphasis added.]

[1381] Hugo Grotius, James B. Scott (translator), 2 DE JURE BELLI AC PACIS 523-526 (1646).

[1382] Emerich de Vattel, Charles G. Fenwick (translator), THE LAW OF NATIONS: OR THE PRINCIPLES OF NATURAL LAW: APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND SOVEREIGNS 72 (1916).

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".[1383]

As such, should the obligation to prevent terrorism attract the status of an obligation of result, it remains doubtful that the mere existence of this obligation would dictate specific means to be implemented domestically in order to attain the prescribed objective, and thereby impinge on the quasi-exclusive dominion of nation-states to govern their internal affairs.[1384] Interestingly, the ICJ most recently confirmed that an obligation of result must be performed 'unconditionally' and that the non-observance of its prescriptions triggers state responsibility. However, the Court added that the states bound by the obligation of result are free to choose the "means of implementation", which also entails a 'reasonable' grace period to orchestrate constitutional adjustments in order to incorporate the obligation within the domestic setting (e.g. through the adoption of legislation, for instance).[1385]

In addition, one of the inherent features of strict liability resides in shifting the burden of exculpation onto the defendant or, to use state responsibility parlance, onto the wrongful state.[1386] Similarly, because of the brooding private/public sphere dichotomy that underlies both counterterrorism efforts and state responsibility for non-state actions, it is imperative to insulate any proposed reform of international responsibility against "excessively intrusive or oppressive counterterrorist measures".[1387] For instance, Canada, a long-standing champion

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[1383] *Ibid*, at 71 and 75.
[1384] See, e.g., Combacau, *Obligations*, *supra* note 1025, at 198.
[1385] *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, I.C.J., Judgment of 19 January 2009 [hereinafter *Request for Interpretation – Avena*], at para. 44.
[1386] See, e.g., Brownlie, SYSTEM, *supra* note 205, at 1.
[1387] David Glenn, *Scholar Would Place Liability on Countries That Harbor Terrorists* (Vincent-Joel Proulx of McGill University Faculty of Law's opinion on Pakistan's responsibility in London Terrorist Bombings, 2005) (Interview), THE CHRONICLE OF HIGHER EDUCATION, Volume 52, Issue 31, April 7, 2006, at p. A24. See also Duffy, THE 'WAR ON TERROR', *supra* note 133, at 137-138.

of human rights and international justice, has elected the vehicle of immigration-based security certificates as one of the mechanisms with which to neutralize potential national security threats and, by the same token, as one of the means to comply with its obligation of prevention under international law. Whilst the Supreme Court recently struck down the security certificate scheme as unconstitutional, this legislative arrangement nonetheless paved the way for questionable human rights practices and sparked considerable controversy in civil society, the general public and academia.[1388] Along similar lines, one could ponder why any reference to the safeguarding of human rights law is absent from Resolution 1373, which, in many ways, amounts to the cornerstone of modern counterterrorism policy-making and sets out stringent obligations upon states to prevent terrorist attacks.[1389] This puzzling (and deliberate?) oversight has generated some concern amongst regional organizations, which have reaffirmed the importance of upholding human rights law and humanitarian law in the global struggle against terrorism.[1390] It is no surprise, therefore, that the reporting requirements under the Counterterrorism Committee instituted by virtue of Resolution 1373 have generated some "predictably opportunistic" documents from "reliable human rights violators, purportedly justifying old and new repressive national measures."[1391]

As a corollary, this lack of direction has prompted some commentators to level charges against the Council to the effect that it foments human rights violations "by 'opening the hunting season on terrorism', including calling for its

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[1388] See *Charkaoui* v. *Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350. For commentary on the case and on the broader security certificate scheme, along with its reception in Canadian society, see Maureen T. Duffy and René Provost, *Constitutional Canaries and the Elusive Quest to Legitimize Security Detentions in Canada*, 40 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 531 (2009).

[1389] For support of this proposition, see Duffy, THE 'WAR ON TERROR', *supra* note 133, at 138.

[1390] See, e.g., Council of Europe, *Guidelines on Human Rights and the Fight Against Terrorism*, available online at http://www1.umn.edu/humanrts/instree/HR%20and%20the%20fight%20against%20terrorism.pdf (last visited on 18 August 2007), preamble, at para. (i); Resolution 1271 (2002) ("*Combating Terrorism and Respect for Human Rights*"), adopted by the Parliamentary Assembly of the Council of Europe on 24 January 2002, available online at http://assembly.coe.int/Main.asp? link=/Documents/AdoptedText/ta02/ERES1271.htm (last visited on 18 August 2007); Organization for Security and Co-Operation in Europe, OSCE Charter on Preventing and Combating Terrorism, available online at http://www.osce.org/documents/odihr/2002/12/1488_ en.pdf (last visited on 18 August 2007), at para. 7.

[1391] Alvarez, *Hegemonic International Law Revisited*, *supra* note 1110, at 876.

criminalisation, absent guidelines as to its definition, meaning or scope."[1392] The fact that post-9/11 Council resolutions have engendered broad-reaching consequences for member states and individuals, such as the freezing of assets of people and organizations suspected of involvement in terrorism, could potentially bring about serious implications for the oversight of Council decision-making in the "war" on terror. Whilst it has been demonstrated that the Council is not above the law in Chapter 3 and little more needs to be said on this issue, it should be noted in passing that diverse voices argue that these resolutions might conflict with human rights standards and, in light of the rather limited set of tools to review these decisions on the international plane, individuals have initiated challenges to these resolutions both at the national and regional levels. In the face of a seemingly unchecked international decision-making body, and with a view to limiting governmental interference in private affairs in the spirit of state responsibility, *inter alia*, this legal framework, paired with the emerging practice of individual and/or regional challenges to Council decision-making, raises significant legal questions. Amongst the obvious ones, certain scholars query whether states and regional organizations such as the European Union may engage in reviews and/or challenges of Security Council anti-terrorism resolutions.[1393] In that regard, and as discussed above, the recent jurisprudence of the European Court of Justice seems to resolve this legal conundrum in the affirmative. Indeed, in the *Kadi and Al Barakaat* case, that Court invalidated a regulation promulgated by the Council of the European Union targeting specific individuals associated with the Taliban or Al Qaeda, along with their assets, by virtue of United Nations Security Council resolutions, thereby arrogating power to review and control such functions and the resolutions of the Security Council, albeit indirectly.[1394]

Although the thrust of this dissertation operates on possible exceptions in the law of state responsibility, any potential overhaul of liability mechanisms for

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[1392] Duffy, THE 'WAR ON TERROR', *supra* note 133, at 351. See also *Ibid*, at 359.
[1393] For a thoughtful and recent series of edited accounts on this question, see André Nollkaemper and Erika de Wet (eds.), REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES (2003).
[1394] *Kadi and Al Barakaat*, *supra* note 160.

government inaction or collusion in terrorist activities should not distance itself significantly from the objective of limiting governmental interventionism in private spheres – paired with upholding human rights protection – an idea underlying the general rule of non-attribution of private conduct. As one commentator notes, "[t]he general rule, namely that States are not internationally responsible for the conduct of private persons reflects that States cannot – or should not – control the activities of their citizens."[1395] Therefore, should a reform of state responsibility be initiated in the field of counterterrorism, it should probably be accompanied by efforts to "work in some kind of supervisory mechanism to make sure that constitutional principles and human rights are upheld."[1396] Others address this concern, albeit through the lens of vertical integration of international law in domestic courts, by observing that "the long-negotiated rules of state responsibility…incorporate some dimension of international due process" and that "the emphasis of modern state responsibility doctrine on secondary obligations…suggests some quasi-procedural mandate."[1397] At any rate, it becomes clear that the principles underpinning state responsibility for terrorism "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."[1398] In the same vein, certain scholars, even prior to 9/11, attempted to justify the *raison d'être* of attribution by reference to its – supposedly – corresponding objective of minimizing governmental interventionism in the private sphere.[1399]

Echoing the thoughts of Professor Rosenne discussed above, certain publicists construe recent state responsibility scholarship as crystallizing a radical shift and, perhaps, as foreshadowing the implementation of a mechanism of

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[1395] Wolfrum, *State Responsibility*, *supra* note 229, at 425.
[1396] Glenn, *Scholar Would Place Liability*, *supra* note 1387, at A24.
[1397] Ahdieh, *Between Dialogue*, *supra* note 1163, at 2131-2132 (and authorities cited therein).
[1398] Becker, TERRORISM AND THE STATE, *supra* note 2, at 271.
[1399] See, e.g., Christenson, *The Doctrine of Attribution*, *supra* note 208, at 323 (arguing that "the policy basis for attribution is at the conceptual line preventing the State's entrance into every private sphere under the guise of responsibility.").

absolute liability based not on assigning the unlawful act to the state, but grounded in its failure to act. Jerzy Kranz first notes that state responsibility in this setting "may result not only from controlling irregular units, but also from the lack of sufficient control over them, or failure to act, or negligence, including failure to comply with the legally binding resolutions of the Council." He further underscores that this evolution of the doctrine shifts "the stress from full control, through relative control, to the duty to maintain due diligence or presumption of absolute responsibility."[1400] Regardless of one's stance on this question, if poorly-conceived this framework is ripe for abuse against weaker states,[1401] especially developing countries that may not have the same means as industrialized nations in combating terrorism. In this regard, it is vital to distinguish the lack of monetary or personnel resources in combating terrorism from a state's (sometimes voluntary or inadvertent) failure in complying with its due diligence obligations in repressing terrorism.[1402] Consequently, a deficiency in logistical capabilities required to crack down on terrorism is not synonymous with a lack of political will, nor does it translate into the adoption or endorsement of the terrorists' cause by the governing apparatus.[1403] In other words, a failure to fulfill due diligence obligations should not automatically brand the host-state as 'unwilling' to prevent transnational terrorism but rather as 'unable' to achieve such objective.[1404] As one author notes, it would appear that due diligence, again, acts as a relevant benchmark in gauging a state's compliance with counterterrorism obligations in this setting: "[o]nly when the state makes diligent efforts to prevent terrorists from using its territory to plan and prepare for attacks on other states, but is incapable of accomplishing this objective, will it fulfill its

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[1400] Kranz, *The Use of Armed Force*, *supra* note 130, at 80.

[1401] On different precedents of abuse against, or undue interference in the internal affairs of, weaker states generally, see Charles De Visscher, *La Responsabilité des Etats*, in BIBLIOTHECA VISSERIANA DISSERTATIONUM IUS INTERNATIONALE ILLUSTRANTIUM, Volume II, at 89-119, 117-118 (1924); Philip C. Jessup, A MODERN LAW OF NATIONS: AN INTRODUCTION 95-96 (1948).

[1402] See Martin, LES RÈGLES INTERNATIONALES, *supra* note 1, at 459. It is imperative to recall that, in the *Tehran Hostages* case, the ICJ opined that the shortcomings of the Iranian state were "due to more than mere negligence or lack of appropriate means". See *Tehran Hostages* case, *supra* note 67, at para. 63.

[1403] On the question of a host-state's obligations pertaining to counterterrorism capacity-building, see Becker, TERRORISM AND THE STATE, *supra* note 2, at 144-146.

[1404] See, e.g, Lehto, INTERNATIONAL RESPONSIBILITY, *supra* 48, at 474-475.

international obligation."[1405] Recent episodes involving regional and transnational terrorist groups also illustrate the idea that a state's inability to contain extremist threats percolating within its territory is not necessarily tantamount to an espousal of the terrorists' cause or ideology. For instance, the Abu Sayyaf terrorist network operating within the Philippines -- whose "stated goal is to promote an independent Islamic state in western Mindanao and the Sulu Archipelago (areas in the soutern Philippines…)" -- has consistently eluded effective law enforcement.[1406] Similar circumstances surround the activities of the Jemaah Islamiyah organization, a militant Islamist group carrying out terrorist operations in several southeastern Asian states while furthering its objective of "establish[ing] a pan-Islamic state across much of [Southeast Asia]".[1407] Quite to the contrary, "the governments of states from which terrorists operate may be affirmatively antithetical to, or at least not share, the ideological goals of terrorist groups present in their territory."[1408]

Conversely, as one author noted prior to 9/11, indigence and depleted manpower are not, in and of themselves, sufficient bases for exoneration under the framework of state responsibility. This inference seems politically desirable both from *lex lata* and *lex ferenda* perspectives. Consequently, any effective system of liability should ensure that those reasons are accompanied by potential defences available against a presumption of liability -- such as civil war on the territory of the state in question -- in order to refute a *prima facie* case of responsibility against a host-state.[1409] This conclusion brings us to another vital consideration weighing heavily in the policy analysis surrounding the reconceptualization of state responsibility in this context. Granted, as discussed above the enlargement of the scope of due diligence in counterterrorism settings after 9/11 has undoubtedly enabled numerous rights abuses in various states, and

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[1405] Romano, *Combating Terrorism*, *supra* note 70, at 1034.
[1406] United States Department of State, COUNTRY REPORTS ON TERRORISM 2004 93-94 (2005), available online at http://www.state.gov/documents/organization/45313.pdf (last visited on 30 June 2007).
[1407] Council on Foreign Relations, *Jemaah Islamiyah*, October 3, 2005, http://cfrterrorism.org/groups/jemaah.html (last visited on 30 June 2007).
[1408] Allen S. Weiner, *The Use of Force and Contemporary Security Threats*: *Old Medecine for New Ills?*, 59 STANFORD LAW REVIEW 415, 432 (2006).
[1409] See McCredie, *The Responsibility*, *supra* note 70, at 94.

continues to pose a real danger from the standpoint of human rights protection across the globe. Therefore, it follows that effective safeguards must be developed in order to reconcile legally bolstered counterterrorism obligations in the face of enhanced transnational terrorist capacity, on one hand, and the precepts underpinning fundamental human dignity and epitomized by the human rights project, on the other. However, equally important to the debate at hand is the tension arising between the sovereign equality of states on the international scene, on one hand, and the propensity of powerful states to self-authorize intervention vis-à-vis states failing to prevent terrorism, on the other. In particular, the very concept of sovereignty "as a form of power generated through self-exception" is being brandished by a few powerful Western states, such as the U.S. and Great Britain, as a means to justify interventionist stances into the affairs of other states, which, incidentally, may ultimately foster human rights and humanitarian violations.[1410]

With this in mind, the present study and other like-minded, policy-oriented reforms of state responsibility aimed at enhancing the prevention and suppression of terrorism must strike a delicate balance – albeit legally and politically precarious under some lights – between the vital principle of non-intervention under international law and the pressing need to stamp out terrorist networks. At the end of the day, endorsing legal standards that would indiscriminately subject host-states to highly intrusive consequences flowing from an internationally wrongful act would unequivocally signal a blatant failure in achieving the abovementioned balance. Needless to say, the legal analysis is further compounded by the fact that the ensuing interventions may entail some forcible component – particularly under the Responsibility to Protect Doctrine, which has become a multilateral response regime exclusively involving recourse to force – or some other sovereignty-erosive form of extraneous intercession. As a corollary, there is a crucial need – co-extensive with identifying international

[1410] This language is borrowed from *Sovereign Self-Exceptionality and International Intervention*: *Reading Security Council Resolutions as Acts of Declaration*, Paper presented at the annual meeting of the ISA's 49th Annual Convention, *Bridging Multiple Divides*, San Francisco, 26 March 2008, available online at http://www.allacademic.com/meta/p250911_index.html (last visited on 20 July 2009).

accountability mechanisms for failing to prevent transnational terrorism – to devise effective safeguards and checks/balances with a view to upholding the sovereign equality and the rights of states in the proposed framework. This priority becomes particularly urgent in light of the conceptually fertile interrelationship connecting the law of state responsibility with the all-too-pertinent language shift from a 'right to intervene' to a 'reponsibility to protect' that may be derived from the R2P doctrine and, ultimately, harnessed with a view to shedding new light on secondary norms of state responsibility. In addition, an extra layer of complexity pervades the analysis when those liability mechanisms and, potentially, the ensuing consequences target ineffective or 'failed' states. Such scenarios are considered in the next section in the hopes of developing a theory that is also cognizant and sensitive to the realities facing the developing world whilst, simultaneously, aiming at eradicating impunity or the prospect of waging surrogate terrorism via proxies.

**b) The Conundrum of Ineffective or 'Failed' States**

As seen in Chapter 1, several factual scenarios involving a state's failure to prevent transnational terrorism challenge the traditional rules of state responsibility, with sometimes subtle or convulated questions of state involvement – ranging from tacit acquiescence to direct logistical/financial/military support falling short of meeting the *Nicaragua* standard – further clouding the equation. Yet, a crucial distinction resides in scenarios involving states capable of thwarting terrorist attacks but reticent to do so due to lack of political will or regional pressure. Reviving Cassese's pre-9/11 concerns over the 'grey' area of uncertainty that permeates possible levels of government involvement in terrorism, it is clear that "the issue becomes more difficult when a state, which has the ability to control terrorist activity, nonetheless tolerates, and even encourages it."[1411] A case in point might be that of Pakistan, whose tribal regions – also contiguous with the Afghan border – have

[1411] Travalio, *Terrorism*, *supra* note 1097, at 154.

served and still serve as refuge for expelled Taliban and Al Qaeda members.[1412] In fact, Al Qaeda members seeking solace in those areas have also used those contiguous regions as launch pads for terrorist excursions into Afghanistan.

Aside from signalling a "growing violence stemming from attacks by militants based in Pakistan's unruly tribal areas",[1413] this escalating theatre of war simultaneously lays out a textbook application of complex transborder terrorist insurgency for the purposes of state responsibility, and brings Pakistan's efficacy in containing that threat into sharp relief. In that regard, it is likely that Pakistan's inefficiency in combating terrorism is at least partially attributable to its lack of political will and not solely to an absence of actual means towards this end. Perhaps swayed by international pressure to step up its counterterrorism efforts, it should be noted that Pakistan started deploying troops in the targeted tribal areas in 2004, in order to better contain the threat.[1414] Similar initiatives have also recently intensified as a result of renewed pressures by Washington calling for Pakistan to quell the abundance of Taliban and Al Qaeda elements within its borders. These requests undoubtedly stem from some level of reciprocity – albeit perhaps asymmetric – now governing relations between the U.S. and other nations in the pursuit of better counterterrorism norm compliance. In particular, since 9/11 the U.S. has provided colossal amounts of foreign aid to ineffective states – with over ten billion dollars going to Pakistan alone – in the hopes of increasing counterterrorism structures in those countries and, as a corollary, of acquiring more influence in those states' domestic and foreign policies.[1415]

It is no surprise, therefore, that such behaviour patterns generate the inference that "[t]he attacks have made the U.S. more dependent on other states

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[1412] See, e.g., Qazi Jawadullah and Pir Zubair Shah, *Suicide Bomber Attacks Anti-Taliban Meeting in Northwest Pakistan, Killing More than 40*, NEW YORK TIMES, October 11, 2008, at A10; Mark Mazzetti, David Rohde and Margot Williams, *New Generation of Qaeda Chiefs Is Seen on Rise*, NEW YORK TIMES, April 2, 2007, at A1. Some allegations have also surfaced to the effect that there might be terrorist training camps on Pakistani soil. See, e.g., Carlotta Gall and David Rohde, *Pakistan Lets Taliban Train, Prisoner Says*, NEW YORK TIMES, August 4, 2004, at A1.

[1413] Eric Schmitt, *Joint Chiefs Chairman Is Pessimistic on Afghanistan*, NEW YORK TIMES, October 10, 2008, at A12.

[1414] See Françoise Chipaux, *Le Pakistan a décidé de «nettoyer» les zones tribales des éléments d'Al-Qaida*, LE MONDE, February 25, 2004.

[1415] See William Arkin, *What $10 Billion Has Bought in Pakistan*, WASHINGTON POST, November 6, 2007.

for assistance, some form of reciprocity is to be anticipated…the U.S. is being more solicitous of Pakistan's request for economic aid than before September 11."[1416] More importantly, at the time of writing it is now foreseeable that Pakistan will become the breeding ground for another large-scale military intervention or, at least, an extension of current efforts in Afghanistan to root out Al Qaeda safe havens and bases of operations. Indeed, American troops have been deployed in the targeted regions in order to mount excursions against persons linked both with Al Qaeda and the Taliban.[1417] Just recently, concerns are growing that Pakistan may have failed in containing the activities of Pakistani Taliban within the tribal region of North Waziristan, as this organization is believed to have directed and financed Faisal Shahzad in what has now become known as the failed Times Square bomb plot.[1418]

A similar eventuality could also result from the "failed state" scenario – as is certainly the case for Somalia – and, to a lesser extent, from the situations prevalent in Yemen and (arguably) Pakistan.[1419] For instance, it should pertinently be recalled that the Security Council also imposed sanctions on Sudan because it harboured terrorists.[1420] This possibility, in turn, signals important implications for the law of state responsibility and certainly raises myriad difficult policy questions when devising an applicable deterrence model. For instance,

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[1416] Robert Keohane, *The Public Delegitimation of Terrorism and Coalition Politics*, in Ken Booth and Tim Dunne (eds.), WORLDS IN COLLISION: TERROR AND THE FUTURE OF GLOBAL ORDER 141-151, 143 (2002). See also Deborah W. Larson, *Exchange and Reciprocity in International Negotiations*, 3 INTERNATIONAL NEGOTIATION 121, 127 (1998); David Baldwin, ECONOMIC STATECRAFT 292-294 (1985).

[1417] See, e.g., Jane Perlez and Pir Zubair Shah, *Confronting Taliban, Pakistan Finds Itself at War*, NEW YORK TIMES, October 3, 2008, at A1; *U.S. Airstrike Said to Kill 5 in Pakistan*, NEW YORK TIMES, October 12, 2008, at A8; *Pakistani Officials Say U.S. Strikes Kill 12 in Villages*, NEW YORK TIMES, October 4, 2008, at A8.

[1418] See, e.g, Joseph Berger, *Pakistani Taliban Behind Times Sq. Plot, Holder Says*, NEW YORK TIMES, May 9, 2010.

[1419] See, e.g., Olivier Roy, LES ILLUSIONS DU 11 SEPTEMBRE: LE DÉBAT STRATÉGIQUE FACE AU TERRORISME 18 (2002). Consequently, the "war" on terror adversely affects and further impedes democratic institution-building in failed states, such as in Somalia. See, e.g., Kirsti Samuels, *Constitution-Building During the War on Terror*: *The Challenge of Somalia*, 40 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 597 (2008). On Afghanistan's potential status as a 'failed state', see Byers, *Terrorism*, *supra* note 30, at 403; Daniel Thürer, *The 'Failed State' and International Law*, 81 INTERNATIONAL REVIEW OF THE RED CROSS 731 (1999).

[1420] S.C. Res. 1054, U.N. SCOR, 46th Sess., 3660th mtg., U.N. Document S/RES/1054 (1996). On state responsibility in the context of the Sudanese war, see Henderson, *Michael Byers*, *supra* note 85, at 152-153.

what if a 'failed' (or inefficient) state is unable to repel the terrorist threat percolating within its own borders or, even worse, does not have the capacity to monitor such activity or to even know about such operations? Implicit in this fact is the idea that the host-state has sacrificed a portion of its territorial sovereignty simultaneously when it lost potential control over terrorist organizations on its territory.[1421] Should we expect it to subscribe to alternate 'thwarting scenarios' such as the deployment of troops within its borders, or the implementation of more stringent law enforcement methods? This line of inquiry has particular implications for Security Council-approved measures against 'failed' states or against nations governed by illegitimate or repressive regimes, which clearly amounts to an ambiguous legal area.[1422]

Some authors resolve these questions by arguing that, in such circumstances, states are expected to accept extraneous counterterrorism assistance or, perhaps, even to seek out such aid. According to this school of thought, failure to accept any such forthcoming help could signal the sanctuary state's unwillingness to comply with its preventive counterterrorism obligations and could, potentially, be tantamount to the commission of an internationally wrongful act.[1423] In fact, the idea of counterterrorism capacity-building lies at the core of the efforts underlying Resolution 1373.[1424] These problems are further compounded by the current situation in Iraq, which unquestionably falls neatly under the rubric of 'failed state'.[1425] As a result, Iraq now hosts a plethora of

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[1421] Peter Kovács ponders the implications of such a situation, namely where "le terrorisme est subi par l'Etat", and identifies the following ramification in this scenario: "l'Etat est incapable d'exercer les prérogatives de sa souveraineté territoriale vis-à-vis d'une organisation terroriste ayant son fief sur son sol." See *Beaucoup de questions et peu de réponses autour de l'imputabilité d'un acte terroriste à un Etat*, 1 JOURNAL OF EUROPEAN INTEGRATION STUDIES 20, 23 (2002). In such circumstances, Brigitte Stern argues that it would be unfair to attribute the terrorist actions to the sanctuary state. See Stern, *La Responsabilité*, *supra* note 262, at 688.

[1422] See the discussion in Christopher B. Hynes, Carrie Newton Lyons and Andrew Weber, *National Security*, INTERNATIONAL LAWYER 683, 683-684 (2007).

[1423] See, e.g., Kimberley N. Trapp, *Back to Basics*: *Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors*, 56 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 141, 147 n.33 (2007); Nolkaemper, *Attribution*, *supra* note 248, at 161.

[1424] Noëlle Quénivet, *You Are the Weakest Link and We Will Help You! The Comprehensive Strategy of the United Nations to Fight Terrorism*, 11 JOURNAL OF CONFLICT AND SECURITY LAW 371, 390-391 (2006).

[1425] See, e.g., Antonio F. Perez, *Legal Frameworks for Economic Transition in Iraq -- Occupation Under the Law of War Vs. Global Governance Under the Law of Peace*, 18 TRANSNATIONAL

terrorist factions and irregular bands, and could plausibly transform into a launching pad for transborder attacks.[1426] In sum, it is fair to contend that "[v]iolations of human rights today are not always committed by strong dictatorial governments in a police state. They are as likely to be committed by non-state actors in failed states".[1427]

Again, this range of questions brings the tension between upholding state sovereignty and combating terrorism efficiently into sharp focus. Interestingly enough, it should also be recalled that influential scholar, Hersch Lauterpacht, believed and wrote that the very concept of 'sovereignty' impedes the advancement of the law of state responsibility.[1428] In this spirit, short-circuiting or trumping the privileges of sovereignty might, in fact, be a solution in cases where host-states are inefficient, or when terrorist threats loom large while containment options within the targeted territories are depleted. The failed/inefficient state scenario not only directly informs the possible application of attribution standards to a challenging factual pattern, but it also becomes particularly intractable when contemplated through the lens of the nature of the obligation of preventing terrorist attacks. Indeed, the fact that the scope of this

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LAWYER 53, 60 n.27 (2004); Frank Rich, *They'll Break the Bad News on 9/11*, NEW YORK TIMES, June 24, 2007, at 14.

[1426] See, e.g., *War Without End*, NEW YORK TIMES, May 27, 2007, at 49; John F. Burns, *Iraq to Release Detainees in Bid to Ease Tensions*, NEW YORK TIMES, June 7, 2006, at A1; *The Struggle for Iraq*: *A Violent Crusade*; *Terrorists Trained by Zarqawi Were Sent Abroad, Jordan Says*, NEW YORK TIMES, June 11, 2006, at 11. It has also been alleged that Kurdish terrorists are using Iraq as a haven in order to launch excursions against Turkey. See, e.g., Peter W. Galbraithm, *Our Corner of Iraq*, NEW YORK TIMES, July 25, 2007, at A19. In addition, the occupation of Iraq by coalition forces not only raises the possible question of the international responsibility of the occupant but, alternatively, of the administration established by the occupying power as well. For discussion of these themes, see Eyal Benvenisti, THE INTERNATIONAL LAW OF OCCUPATION xiii (1993).

[1427] Dinah Shelton, *International Human Rights Law*: *Principled, Double, Or Absent Standards*?, 25 LAW AND INEQUALITY: A JOURNAL OF THEORY AND PRACTICE 467, 513 (2007).

[1428] Hersch Lauterpacht believed that "the traditional respect for State sovereignty refrained the development of the law of international responsibility, particularly regarding the consequences of responsibility." For him, it followed that "the traditional theory limited responsibility only to the reparation for damage (material and moral), without it being possible for States, as a result of their sovereignty, to be punished. This vision, however, in exempting the State from the consequences of its own violations of the law, appeared entirely arbitrary, limiting the action of justice at the international level." See Cançado Trindade, *Complementarity*, *supra* note 455, at 261. See also Lauterpacht, *Règles générales*, *supra* note 455, at 339 and 349-350, 350-352.

obligation is far from circumscribed also engenders additional conceptual and practical uncertainties.[1429]

It should be noted, however, that the lack of political will does not exclusively foment a state's failure to thwart terrorist threats emanating from its territory. A resounding example is the situation in Chechnya, where terrorist training camps abound despite Russia's ostentatious efforts in combating international terrorism.[1430] Amongst similar lines, as discussed in Chapter 2, the 1982 Israel-Lebanon conflict also epitomized a scenario whereby a state had lost control over its territory (the southern portion in Lebanon's case), and from which terrorist organizations were launching excursions.[1431] This type of failed/inefficient state paradigm can easily reoccur, as some states currently constitute havens for terrorists who are looking for potential strongholds where they may conduct their operations. Some scholars resolve this dilemma by attenuating responsibility of the (failed/inefficient) local government in favour of a potentially narrower right to recourse to force accruing to the victim state, so that it may root out the terrorist bases of operation within the borders of the sanctuary state.[1432] Whilst such construction may appear attractive upon first glance, it also significantly threatens to erode the much-needed equilibrium between devising effective rules of international responsibility in the face of enhanced terrorist capacity and respecting the sovereign equality of states (which inherently entails limiting unchecked interventionism against weaker states). In addition, engaging economically weaker states in the elaboration of more efficient state responsibility rules for counterterrorism not only fosters multilateralism and

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[1429] Karl Zemanek summarizes these concerns trenchantly. See *Does the Prospect*, *supra* note 50, at 131.

[1430] For support of this proposition, see Martin, LES RÈGLES INTERNATIONALES, *supra* note 1, at 459. See also C.J. Chivers, *The Chechen's Story*: *From Unrivaled Guerrilla Leader to the Terror of Russia*, NEW YORK TIMES, September 15, 2004, at A9.

[1431] Martin, LES RÈGLES INTERNATIONALES, *supra* note 1, at 459. For a recent discussion through the lens of the 2006 Israel-Hezbollah conflict, see Kirchner, *Third Party Liability*, *supra* note 138, at 780-782.

[1432] See, e.g., Battaglini, *War Against Terrorism*, *supra* note 426, at 145 (also citing Yoram Dintein, *The International Legal Response to Terrorism*, in Roberto Ago (ed.), INTERNATIONAL LAW AT THE TIME OF ITS CODIFICATION: ESSAYS IN HONOUR OF ROBERTO AGO (VOL. II) 139-152, 146 (1987)). On the notion of self-help vis-à-vis terrorism, see John F. Murphy, *State Self-Help and Problems of Public International Law*, in Alona E. Evans and John F. Murphy (eds.), LEGAL ASPECTS OF INTERNATIONAL TERRORISM 553-573 (1978).

international cooperation, but it will also ensure a greater degree of compliance with the rules being developed. Obviously, this objective remains intimately tied to the goal of protecting developing countries in that, "negotiating international rules in multilateral fora gives weaker states greater influence, and this provides them with an incentive to follow the resulting agreements, leads to quasi-voluntary compliance, and thus lowers the costs of enforcement (pacification)."[1433] Hence, we must correspondingly develop safeguards in order to avoid indiscriminate condemnation of host-states, as it is not likely that the international community will accept a blanket rationale of absolute liability and automatic reprisals against ineffective states in all cases.[1434] In fact, forcible reprisals have been expressly excluded from the purview of state responsibility law;[1435] thus, the only juridically legitimate response to an internationally wrongful act involving force would arguably have to be framed within the furrow of self-defence.

At this juncture, an appropriate dose of political realism seems apposite. The model advocated in the present dissertation certainly extends, rather easily from a conceptual standpoint, to straightforward cases of indirect state involvement in terrorism such as those practiced in Libya and Syria. However, as the analysis has shown and will reiterate later on, specially *infra* Section C)2.b), harder cases significantly cloud the equation, particularly in light of the host-states' capacity, or lack thereof, to meet counterterrorism obligations.[1436] Surely, a quintessential example of an inefficient state in combating terrorism remains that of Lebanon in 2006, which lost effective control over the southern portion of its territory and, as a result, of Hezbollah factions launching transnational strikes from that region. Whilst considerable bases for engaging international responsibility might be persuasively established when a state's loss of territorial control enables transnational terrorism, implementing the legal consequences

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[1433] Nico Krisch, *International Law in Times of Hegemony*: *Unequal Power and the Shaping of the International Legal Order*, 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 369, 373 (2005).
[1434] See, e.g., Byers, *Terrorism*, *supra* note 30, at 408.
[1435] See, e.g, Declaration on Friendly Relations, *supra* note 365; Elisabeth Zoller, PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES 38-39 (1984).
[1436] See also *supra* Chapter 1, Section C)4.

flowing from that liability might prove politically impracticable.[1437] Indeed, enforcing effective countermeasures against uncooperative states involved in state support of terrorism or carrying out surrogate warfare via proxies (e.g. Iran, Syria) might prove difficult. Similarly, attempts to seek reparations against ineffective states like Sudan or Somalia -- in a truly monetary or restitutive spirit -- might be equally improbable. In this light, a sceptical outlook on the potential contributions of the law of state responsibility would call into question the very engagement of that corpus of rules. Under this lens, it thus appears that liability mechanisms can provide little more than some symbolic establishment of the state's wrongdoing without any corresponding coercive sanction.

However, it is the contention of this chapter, and of subsequent sections as well, that this type of reparation – albeit symbolic because it stops at the mechanics of establishing responsibility without registering any tangible restitutive impact (i.e. in the spirit of 'satisfaction', although perhaps unrequited) – and the effect of such responses should not be dismissed or underemphasized. Granted, whilst the prospect of imposing some forms of diplomatic or official apologies upon those states might be challenging, the establishment of a host-state's responsibility, alone, can nonetheless provide some level of cathartic release from both a legal and political standpoint. In particular, it might well be that the ascertainment of a state's commission of a wrongful act – exemplified by its failure to prevent transnational terrorism – suffices as a remedy, much in the same way that a declaratory judgment can provide some degree of closure on contentious issues in a domestic judicial setting. Alternatively, this reality does not preclude the opposite scenario, namely where post-wrongful act condemnation acquires traction on the international plane and effectively pressures the wrongful state into redressing the harm, into acknowledging its international responsibility or into complying with other secondary obligations under state responsibility repertoire. Similarly, whilst more controversial, this objective might also be attained via more forceful political means, such as Security Council intercession or ICJ judicially-imposed obligations of reparation

[1437] Further discussion on these issues is found, *infra*, in Conclusion to Chapter 5.

explored above in Chapter 3, or, even more polemically, via coordinated multilateral response regimes involving force under the aegis of the R2P Doctrine or the scheme of collective self-defence. In this light, the transfer in onus under the proposed model seeks to partly alleviate some of the problems associated with both host-states' lack of political will and scarcity of means in combating terrorism.

**c) Transferring the Onus onto the Host-State**

As mentioned previously, a *prima facie* finding of indirect responsibility would necessarily involve a transfer of the burden of proof onto the host-state.[1438] Upon first inspection, the premises underlying this proposition might seem to run counter to the ICJ's pronouncements on indirect responsibility. It becomes apparent that the resolution of hard cases, such as those involving vague state inaction vis-à-vis terrorism, will revolve, to a large extent, around the host-state's exclusive territorial control.[1439] This same notion of control, however, might not be sufficient in all cases to persuasively engage a *prima facie* mechanism of responsibility. Yet, as amply referenced throughout this dissertation, the precedent set forth by the response to 9/11 arguably reverses this line of reasoning, at least in cases of catastrophic terrorism generally caused by serious violations of an international duty (i.e. the obligation to prevent terrorist activity). This stance is further bolstered by myriad Security Council resolutions deploring the government of Afghanistan's regime and calling for it to suppress terrorist activities on its soil, and by that state's egregious disregard for both the Council's exhortations and international law, more generally. Regardless of one's stance on this potential debate, it remains clear that, whilst the notion of exclusive territorial

[1438] Conversely, it would appear that the perpetration of terrorist activities by non-state or private actors does not necessarily or automatically shift the burden of proof onto the claimant (wronged) state. In that regard, Ian Brownlie's remarks are quite instructive. See Brownlie, SYSTEM, *supra* note 205, at 164-165.

[1439] For hard cases involving state failures to prevent terrorism, see Robert Barnidge's discussion about Hart's description of the tension between the general and the specific, which he then, in turn, re-designates as the 'plain case' and the 'unenvisaged case'. See Barnidge, Jr., NON-STATE ACTORS, *supra* note 7, at 140-141. On the original nomenclature, see H.L.A. Hart, THE CONCEPT OF LAW 126-129 (2nd edition, 1994). See also Barnidge, NON-STATE ACTORS, *supra* note 7, at 141 n.17 and accompanying text, inviting the reader to compare his examples of the 'plain case' and the 'unenvisaged case' with the model found in Proulx, *Babysitting Terrorists*, *supra* note 163, at 662-666.

control remains inextricably linked to indirect state responsibility for terrorism, it also exerts a direct incidence on, and sometimes complicates pertinent evidentiary concerns. Thus, the possible role of knowledge – or potential knowledge – in preventing an impugned terrorist attack becomes prevalent in the analysis. Of particular importance are the findings extracted from the *Corfu Channel* decision, which seem apposite here:

> […] it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself, and apart from other circumstances, neither involves *prima facie* responsibility nor shifts 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 a more liberal recourse to inferences of fact and circumstantial evidence […]
>
> The Court must examine therefore whether it has been established by means of indirect evidence that Albania has knowledge of mine-laying in her territorial waters independently of any connivance on her part in this operation. The proof may be drawn from inferences of fact, provided they leave *no room* for reasonable doubt. The elements of fact on which these inferences can be based may differ from those which are relevant to the question of connivance.[1440]

Prior to 9/11, some scholars touched upon the possible implementation of a *prima facie* finding of responsibility in certain cases, which entailed a corresponding transfer in the onus to the host-state. In the same stroke of the pen,

[1440] *Corfu Channel*, *supra* note 67, at 18. See also Bennouna, *Réflexions*, *supra* note 8, at 377.

these commentators underlined the political and legal consequences of circumventing presumed responsibility in such extreme cases, albeit when dealing with specific types of terrorism: "[w]ith respect to hostage-taking, the State on whose territory it occurs must be presumed responsible and carry the burden of establishing its innocence. Exonerating Lebanon and Iran may lead to dangerous claims of exemption."[1441] Under the proposed model, however, it logically follows that the host-state will be able to refute the initial finding of responsibility or, at least, diffuse some of its momentum in the second prong of the two-tiered strict liability approach. In other words, once responsibility has been established and the onus has shifted, the host-state will purport to demonstrate how it exhausted all options offered to it, exercised due care, and used all means possible to thwart the terrorist attack.

This will undoubtedly operate by reference to a somewhat objective construction of the notion of due diligence in the second tier of the inquiry, whilst examining state responsibility for failing to prevent terrorism.[1442] In other words, the very exercise of determining whether the sanctuary state's behaviour can be said to be congruent with the accepted thresholds of due diligence does not necessarily entail a subjective component in the application of liability rules. Building on Anzilotti's influential scholarship in this field, one view would rather construe the concept of due diligence as a vital and substantive aspect lying at the very core of the obligation of prevention: "where we are faced with the concept of the State's due diligence in preventing certain acts of private persons, this does not represent a particular subjective element of responsibility, but rather the *very content* of the international duty."[1443] Along similar lines, other objectivist

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[1441] Maurice Flory, *International Law*: *An Instrument to Combat Terrorism*, in Higgins and Flory, TERRORISM, *supra* note 1, at 30-39, 36.

[1442] For a recent application of the due diligence standard to counterterrorism for the purposes of the law of state responsibility, see Robert P. Barnidge, Jr., *States' Due Diligence Obligations With Regard to International Non-State Terrorist Organisations Post-11 September 2001*: *The Heavy Burden that States Must Bear*, 16 IRISH STUDIES IN INTERNATIONAL AFFAIRS 103-125 (2005). See also, more generally, Robert P. Barnidge, Jr., *The Due Diligence Principle Under International Law*, 8 INTERNATIONAL COMMUNITY LAW REVIEW 81 (2006); Horst Blomeyer-Bartenstein, *Due Diligence*, in Rudolf Bernhardt (ed.), ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1110–1115 (Vol. 1, 1992).

[1443] Pisillo-Mazzeschi, *The Due Diligence*, *supra* note 1178, at 103.

scholars opine that due diligence should be construed as an 'objective' rule, which serves to complete or enhance the content of certain international obligations.[1444] "In such cases, the concept of fault is only an ""easy analogy" in order to synthetically express the content of a special State duty to prevent a given event."[1445]

Ultimately, considerations pertaining to the distinction between obligations of means and result,[1446] the logistical capacity of the host-state and its loss of control over its territory, and so on, should only be invoked in the second tier of the strict liability-infused approach, as an integral part of the defence against the *prima facie* finding of responsibility. For example, while consonant with the proposed model, the repeated strikes carried out since 2004 by the Revolutionary Armed Forces of Colombia ("FARC") against Colombian civilians and security forces from Ecuador could be construed as establishing a *prima facie* case of responsibility. In particular, the fact that those recurrent transborder attacks were not thwarted suggests "that Ecuador had failed in its due diligence obligation under international law to prevent harm to Colombia, either due to a lack of will or ability to locate and dismantle FARC camps in Ecuadoran territory"; in attempting to cogently refute the presumption of international responsibility weighing against it, it follows that Ecuador would be "required [to] demonstrate effectiveness in counterterrorism".[1447] Before moving on to that analytical step, it is useful to briefly highlight the other advantages of the proposed model.

**7. Other Advantages of a Strict Liability Model**

The strict liability-inspired approach, coupled with the circumvention of attribution from the equation of state responsibility for terrorism, promotes fairness amongst states and somewhat levels out the disparity in economic and

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[1444] For support of this proposition, see, e.g., Edwin M. Borchard, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS 213 and *seq*. (1919); Eagleton, THE RESPONSIBILITY, *supra* note 190, at 76-94.

[1445] Pisillo-Mazzeschi, *The Due Diligence*, *supra* note 1178, at 103.

[1446] Indeed, in the context of the ILC's *Articles*, assessing the scope of any international obligation will entail the evaluation of several factors, including the conduct/result dichotomy. See Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 125.

[1447] Cecilia M. Bailliet, *The "Unrule" of Law*, *supra* note 437, at 200.

political power.[1448] In sum, this proposed model would place all host-states on equal footing, at least on a preliminary basis, irrespective of their economic or social status. In addition, this model would dissipate the direct responsibility paradigm in most cases, as the new trend toward indirect responsibility has become a sort of safety net, save in rare circumstances where an aggrieved state can adequately establish direct involvement by the host-state.

**a) Impact on International Relations and Reciprocity**

The proposed model also strives to impart legitimacy upon the international legal system,[1449] while also instilling some, albeit modest, level of predictability to the Security Council's decision-making when it is harnessed with a view to applying the rules of state responsibility. As argued in Chapter 3, the role of the Council in applying the law of state responsibility to a state's failure to prevent transnational terrorism is rather limited but can nonetheless be an important part of the reparative process. What is more, the Council can sometimes apply its powers in a quasi-judicial fashion. For the purposes of the present study, this means that the law of state responsibility provides a legal background or environment against which the Council can make political decisions as to the international responsibility of host-states in some circumstances.[1450] Although different situations warrant different levels of response, the involvement of the Council in the assessment of state responsibility, if applicable, will undoubtedly remain acutely politically-oriented. Bearing in mind the arguments explored above, it might nonetheless be helpful to define clearer rules or guidelines of state responsibility to govern that eventuality, as the Council might sit as the final arbitrator in implementing state responsibility in some cases and, ultimately, in granting a response involving force against

[1448] Interestingly, the concept of fairness is undeniably one of the cardinal principles underpinning strict liability in many domestic legal systems. See, e.g. James A. Henderson, *Coping with the Time Dimension in Products Liability*, 69 CALIFORNIA LAW REVIEW 919, 931-39 (1981). On the moral philosophy underlying certain regimes of strict liability, see David G. Owen, *The Moral Foundations of Products Liability Law*: *Toward First Principles*, 68 NOTRE DAME LAW REVIEW 427 (1993). On the concept of fairness in international law, see generally Franck, FAIRNESS, *supra* note 672.

[1449] On the notion of legitimacy in international law, generally, see Thomas Franck, THE POWER OF LEGITIMACY AMONG NATIONS (1990).

[1450] For further discussion on this point, see *supra* Chapter 3, Section A)3.b).

terrorism where justified. Needless to say, similar reasoning is easily extended to the ICJ's decision-making, which, under some lights, is perhaps more compatible with the implementation of state responsibility as an alternative to unilateral state action.

Shifting the onus to the host-state offers several advantages, including an overhaul of the ICJ's fact-finding function in establishing responsibility. As a corollary, such reform would aim to partially counter the problematic aspects of the Court's practice in this regard.[1451] In particular, the Court's process is essentially devoid of any probative fact-finding; it routinely accepts states' factual submissions on faith and ascribes judicial recognition to reports prepared by international organizations or government agencies without independent verification. In attempting to remedy this deficiency, this mechanism shifts the burden squarely on sanctuary states and aims to effectively streamline the Court's, or any other intermediary's or arbitrator's (perhaps the Council's in limited instances) decision-making process when establishing the existence of a breach. As a result, the decision-maker automatically infers that responsibility flows to the host-state and the focus of the inquiry then turns sharply to the scope and content of that state's actions and diligence in preventing terrorism. Granted, some of the evidentiary problems identified above might still persist under the proposed model. However, there seems to be something rudimentarily equitable in obliging the wrongdoing state to meet the Court's minimal evidentiary threshold (as opposed to the other way around) – i.e. by demonstrating that it accumulated sufficient due diligence capital to refute the presumption weighing against it – once the claimant has successfully established the defendant's failure to prevent terrorism. In demonstrating that it fulfilled its obligation of prevention, a state might expose itself to alternate peacekeeping arrangements, as opposed to full-scale military invasion, such as the deployment of law enforcement units to capture suspected terrorists.[1452] Indeed, vigilant law enforcement will

[1451] For an account on recent issues related to the Court's fact-finding activities, see Teitelbaum, *Recent Fact-Finding Developments*, *supra* note 1205, at 119-158.

[1452] Thus, several accounts concede that a state allowing its territory to become a launch pad for terrorism may forfeit its right to sovereignty in various contexts and, correspondingly, is entitled to

undoubtedly contribute to a productive global counterterrorism campaign.[1453] Based on the evidence adduced from the host-state's case, the ICJ or the Security Council might consider that a given course of action is disproportionate and, therefore, gauge the adequate levels of response *ex ante* (especially when further terrorist attacks are imminent or expected to emanate from the sanctuary state in question). When the Council is involved, subject to the considerations explored in Chapter 3, it follows that this determination will be achieved predominantly through a political process that may also, concomitantly, draw on state responsibility repertoire and straddle quasi-judicial analytical terrain. More importantly, and to the extent possible, this type of structure will hopefully strive to eliminate the pursuit of retaliation inspired by retribution alone.

It logically follows from the foregoing that the proposed reform also purports to promote some degree of impartiality in international relations, however modest it may be,[1454] or, at least, to infuse the principle of reciprocity with some significance as it should constitute a driving force in state responsibility repertoire vis-à-vis terrorism. It should be recalled that reciprocity underlies much of the logic of modern state responsibility, whilst also aiming at stabilizing unbalanced or disproportionate power dynamics between states on the international plane.[1455] In fact, as prefaced in previous chapters, the prospect of maintaining previously established reciprocal relations might, in fact, act as a significantly more potent deterrent against wrongful acts or, alternatively, as a

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invite outside intervention to neutralize the threat. See Baker, *Terrorism*, *supra* note 275, at 40; Rao, *International Crimes*, *supra* note 210, at 68. See also Michael Byers, *Letting the Exception Prove the Rule*, 17 ETHICS AND INTERNATIONAL AFFAIRS (2003), available online at http://www.cceia.org/resources/journal/ 17_1/roundtable/852.html (last visited on 18 August 2007). It should also be reiterated that "Security Council resolutions post September 11, asserted a duty on UN member states to deny safe haven to terrorists and to bring them to justice." See Duffy, THE 'WAR ON TERROR', *supra* note 133, at 107.

[1453] See, e.g., Nicholas Kulish and Alan Cowell, *German Police Arrests Terror Suspects*, NEW YORK TIMES, September 27, 2008; Heather Timmons, *Police in India Make Several Arrests in String of Bombings*, NEW YORK TIMES, September 15, 2008, at A10.

[1454] A thoughtful account on impartiality in international law is found in Ratner, *Is International Law Impartial?*, *supra* note 1228.

[1455] On the role of reciprocity in international relations, generally, see Robert O. Keohane: *Reciprocity in International Relations*, 40 INTERNATIONAL ORGANIZATION 1-27 (1986); *Reciprocity in International Relations*, in Stephen Chan and Cerwyn Moore (eds.), THEORIES OF INTERNATIONAL RELATIONS (VOLUME II) 228-253 (2006); Deborah Welch Larson, *The Psychology of Reciprocity in International Relations*, 4 NEGOTIATION JOURNAL: ON THE PROCESS OF DISPUTE SETTLEMENT 281-301 (1988).

catalyst in inducing compliance with international obligations. Therefore, reciprocity ensures that states have a vested interest in sustaining the *status quo* insofar as it amounts to predictable behavioural patterns.[1456] Venturing a step further and grounding their arguments in the eventual attainment of full equality between states, some scholars argue that reciprocity becomes systematized. This posture entails "that reciprocity moves from a bilateral to a systemic level, whereby the state accepts to bear an obligation on the basis of a legitimate expectation that the system will generally ensure the imposition of similar or corresponding obligations on all members of the system."[1457]

Yet, the framework of state responsibility and countermeasures, which is also deprived of vertical implementation or enforcement schemes and mechanisms habitually found under domestic law, embodies the disparate nature of international relations. In fact, Morgenthau described international politics as a struggle for power[1458] and the concept of countermeasure, specifically for present purposes, quintessentially illustrates that point. On the one hand, countermeasures undoubtedly constitute a forceful -- and sometimes fruitful -- response to violations of international law.[1459] More importantly, countermeasures epitomize the many ways in which public international law attempts to adapt to the anarchical structure of the international community, a reality that has certainly been exacerbated by state-sponsored, state-condoned, or state-tolerated transnational terrorism.[1460] From a realist standpoint, this idea is not far removed from Kenneth Waltz's Theory of International Politics, which invokes the concept of 'anarchy' as the starting premise in capturing the legal and

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[1456] See, e.g., Arthur Watts, *The International Rule of Law*, 36 GERMAN YEARBOOK OF INTERNATIONAL LAW 15-45, 41 (1993); James S. Watson, *A Realistic Jurisprudence of International Law*, 30 YEAR BOOK OF WORLD AFFAIRS 265-285, 283 (1980). Although not directly on point, consider also David Hume, THEORY OF POLITICS (Edited by Frederick Watkins) 119 (1951).

[1457] Provost, INTERNATIONAL HUMAN, *supra* note 207, at 122.

[1458] See, e.g., Hans Morgenthau, POLITICS AMONG NATIONS 25 (1956).

[1459] The scheme of countermeasures under the existing law of state responsibility is set out at ILC Article 49 and *seq.*, *supra* note 76.

[1460] Dupuy invokes far more cautious language to describe the role of countermeasures in restoring and/or maintaining the public order of the international community, terming it a 'law of coexistence'. See Dupuy, *State Sponsors*, *supra* note 29, at 15.

political zeitgeist of international society.[1461] For proponents of this realist canon, the field of international relations strives to uphold the balance of power whilst maintaining its inherent structural independence, a feature ostentatiously absent from domestic politics.[1462] For structural realism scholars, therefore, the behaviour of states on the international plane is ultimately informed by their respective foreign policies with the aim of maintaining the aforementioned balance of power, a notion highly compatible with the concept of *reciprocity*. In sum, for Waltz and his intellectual progeny "the international system functions similarly to the free market system. The tripartite model offered by Waltz – the structure of the international system, the behavior of the States, the systemic result – imposed the hegemony of realism as a theory of international relations."[1463]

As a result, the paramount analytical linchpin of international relations hinges not so much on human nature, or on the makeup of domestic governments, but on a careful assessment of the *structure* of the international system.[1464] This entails careful consideration of the various factors governing international affairs and power dynamics prevalent within that very system, as opposed to commissioning meticulous scrutiny of states' potential benevolent cooperative intent. In particular, these observations come to life when contemplated through the prism of the dominant assumptions shared by structural realists. Those postulates may be summarized as follows:

i) Given the absence of any central government on the international scene, the ensuing system can be aptly described as 'anarchic'.

ii) "[S]tates inherently possess some offensive military capability, which gives them the wherewithal to hurt and possibly destroy each other."

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[1461] See, e.g., Kenneth Waltz, THEORY OF INTERNATIONAL POLITICS (1979). For a concrete application, see Kenneth Waltz, *International Politics Is Not Foreign Policy*, 6 SECURITY STUDIES 54-57 (1996).

[1462] See Waltz, THEORY, *supra* note 1461, at 91. For further exploration of these issues, see, e.g., Iulia Motoc, *Controversial Aspects of Democracy in International Law*: *The Right to Political Participation in Foreign Affairs*, in Koufa, THESAURUS ACROASIUM, *supra* note 202, at 275-308, 287-288.

[1463] Motoc, *Controversial Aspects*, *supra* note 1462, at 287-288.

[1464] Anne-Marie Slaughter, *International Law and International Relations Theory*: *A Prospectus*, in Eyal Benvenisti and Moshe Hirsch (eds.), THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION 16-49, 22 (2006).

iii) "States can never be certain about the intentions of other states."

iv) The "most basic motive driving states is survival. States want to maintain their sovereignty."

v) As a result, a steady dose of strategy is called for under this theoretical canon and states are justified in approaching their survival from that vantage point.[1465]

Whilst one of the purposes of the present study is to shed more light on how to enhance transnational cooperation on counterterrorism issues, the flipside to the argument also warrants consideration. Indeed, as Structural Realism evinces, the anarchical structure of international society potentially erects significant stumbling blocks to the idea of increasing cooperation, as self-serving foreign policies and unilateralism simply cannot be excised altogether from the equation. In fact, such structure rather points in the other direction and compels states to almost jealously guard their fleeting and precarious sovereignty in a setting that could be best described as the political equivalent of the survival of the fittest. As a result, such reality places self-preservation above any form of prospective cooperation aimed at identifying, and moving forward on, shared understandings and common policies; a sort of cost-benefit rationale then begins to pervade the political throught-process and "states instead maximize their specific gains relative to other states."[1466] Surely, the international reality is not so bleak and, as will be discussed later on, other policy factors may mitigate some of the more inimical aspects of international legal structure towards a more cooperative transnational legal accountability framework. Yet, the concerns formulated by structural realists must nonetheless be internalized in the inquiry and, when striking a balance between enhanced transnational cooperation on counterterrorism and better integration of non-state actors within that project, a policy-oriented reform of state responsibility must never lose sight of potential real-world obstacles driven by assymetrical power dynamics on the world stage.

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[1465] See John Mearsheimer, *The False Promise of International Institutions*, 19 INTERNATIONAL SECURITY 5, 11-12, 14 (1999).

[1466] Slaughter, *International Law*, *supra* note 1464, at 22. See also Mearsheimer, *The False Promise*, *supra* note 1465, at 14.

As a corollary, it follows that such reform must also weigh the sovereign equality of states and state rights considerably in the balance.[1467]

This is not to say, however, that this realist perspective should be embraced as the sole relevant theoretical line of inquiry into the possible role of state responsibility law in preventing terrorism, whilst still placing particular emphasis on the place of countermeasures within the anarchical structure of international society. In fact, other theoretical accounts may shed some light on this very relationship. For instance, Institutional Neo-liberalism rather characterizes 'anarchy' simply as the absence of a common or centralized governement, as opposed to the more widespread notions of disarray and chaos.[1468] This line of argument becomes particularly interesting when framed within the broader corpus of state responsibility rules, and is perhaps challenged, at least for present purposes, by the Security Council's heightened role as a counterterrorism legislator since 9/11.[1469] Therefore, the exercise of designating the international society as an anarchical one also rests at the very core of the thesis of both neo-realists and institutional neo-liberalists.

For Hedley Bull, the notion of 'anarchy' necessarily carries, with it, some co-extensive rules of peace that, despite the prevalent anarchical structure of international society, remain indispensable in ensuring the very survival and perennity of that community.[1470] Should this school of thought be taken a step further in the present context, it could signal that the very idea of return to legality -- as embodied in the core mission statement of state responsibility law, and typically actuated by countermeasures (which, ironically, draw on 'peaceful' methods of dispute resolution/enforcement of international obligations) -- could strive to achieve this broader objective of pacification within a hostile international social structure (here represented by diametrically opposed states at the primary level of counterterrorism obligations, e.g. Iran versus Israel).

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[1467] See, e.g., *supra* Section B)6.b).

[1468] See, e.g., Robert O. Keohane, INTERNATIONAL INSTITUTIONS AND STATE POWER: ESSAYS IN INTERNATIONAL RELATIONS THEORY 1 (1989).

[1469] See, e.g., the discussion of Security Council Resolution 1373, *supra* Chapter 4, heading B)5.a).

[1470] See Hedley Bull, ANARCHY IN THE INTERNATIONAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS 72 (1977).

Espousing a decidedly different position, constructivists rather explain the notion of 'anarchy' as the outcome of inter-state interaction on the international plane – or as a result of an inter-subjects process – which both converge into a broader social construction.[1471] As attractive as all these theories may appear, much should be said about the importance of 'reciprocity' within the aforementioned anarchical international society and Waltz'theory remains particularly instructive in this regard.

Moreover, the case for international compliance and against future deployment of countermeasures under state responsibility is further bolstered by asymmetrical economic *rapports de force* prevalent on the international scene. As Zemanek rightly underscores, reciprocity provides states with "a shared interest in the maintenance of predictable patterns of conduct" and it follows that, "[a] State which disrupts this web of reciprocal relations by a countermeasure risks to suffer more injury than the target State, unless it is the dominant power in one of the abovementioned asymmetrical relations which, in the world of today, means almost exclusively the United States, with the European Union and China as potential candidates."[1472] As a corollary, drawing on the previous discussion of reciprocity in this field,[1473] the most important feature of the proposed reform resides in the need for interaction and multilateralism between states. After all, it must be recalled that "the means necessary to strike back against international terrorism are only partially and imperfectly provided by existing principles of international law, and that further improvement depends on strengthening international collaboration."[1474] Much in the spirit of the *Genocide* judgment, if all states attempted to prevent terrorism in concert, thereby enhancing state compliance over-all, not only would they increase the likelihood of attaining the ultimate result of prevention but they would also lower the cost of enforcement, while the cost of breach would presumably increase as a result. Moreover, the obligations enforceable under the law of state responsibility are inextricably

[1471] See, e.g., Alexander Wendt, *Anarchy Is What States Make of it*: *The Social Construction of Power Politics*, 46 INTERNATIONAL ORGANIZATION 392-425 (1992).
[1472] Zemanek, *Does the Prospect*, *supra* note 50, at 129.
[1473] See, e.g., Chapter 3, under heading B)4.
[1474] Daudet, *International Action*, *supra* note 273, at 202.

intertwined, especially in highly volatile fields such as counterterrorism, where prevention is paramount. Therefore, the obligation of preventing terrorist attacks emanating from states' territories remains intimately connected to the duty to extradite or punish terrorists under the rubric of multilateralism: "[e]nhanced cooperation for bringing persons to justice and securing reliable evidence is essential if states are to meet their obligations to prevent and punish serious crimes such as those committed on 9/11."[1475]

This line of thinking is undoubtedly inspired by Fuller's seminal work in this area and, more specifically, by his interactional theory of law.[1476] As part of his contribution to the field of legal theory, Fuller developed a concept of "interactional expectancies"[1477] in customary law, which may, in turn, be extended to the realm of state responsibility. In borrowing from his reasoning, the idea of excising attribution altogether from state responsibility thus serves the purpose of stabilizing interactional expectancies between international actors faced with increasing terrorist threats.[1478]

As discussed at different stages of this dissertation, whilst also drawing on the law and economics paradigm along with prominent rationalist theories, the proposed reform not only aims at transferring the burden of precaution onto host-states, but also purports to transfer incentives in combating terrorism to governments[1479] and to foster enduring multilateral networks.[1480] Conversely, as

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[1475] Duffy, THE 'WAR ON TERROR', *supra* note 133, at 133.

[1476] Fuller, *Human Interaction*, *supra* note 604. For a thought-provoking theoretical account on interaction and international law, see Brunnée and Toope, *International Law and Constructivism*, *supra* note 51.

[1477] See Fuller, *Human Interaction*, *supra* note 604, at 7. This idea also aligns with the concept of "shared understanding", as developed in international relations scholarship. For a detailed discussion on the concept of "shared understanding", see Brunnée and Toope, *International Law and Constructivism*, *supra* note 51, at 30-31, 32-33, 35, 49-50, 53, 61, 65-67 and 70. For a recent application of the principle of 'shared understanding' to the U.N. Guiding Principles on Internal Displacement, see Hannah Entwisle, *Tracing Cascades*: *The Normative Development of the U.N. Guiding Principles on Internal Displacement*, 19 GEORGETOWN IMMIGRATION LAW JOURNAL 369, 387-388 (2005).

[1478] For a discussion of this concept, see Fuller, *Human Interaction*, *supra* note 604, at 8-9.

[1479] An argument may be advanced that the prospect of incurring liability might prompt states to better thwart terrorism. For a recent account, see Zemanek, *Does the Prospect*, *supra* note 50, at 125-136.

[1480] On combating terrorism through multilateral channels, see John W. Head, *Essay*: *What Has Not Changed Since September 11--The Benefits of Multilateralism*, 12 KANSAS JOURNAL OF LAW & PUBLIC POLICY 1-12 (2002); Eric Remacle, *Vers un multilatéralisme en réseau comme*

Provost underscores, unilateralism entails a very specific implication for the law of international responsibility: "[t]he right of states unilaterally to assess a breach by another state and to validate what would otherwise be an illegal act has the potential of significantly destabilizing international relations."[1481] As a corollary, it follows that, under the aegis of state responsibility, countermeasures are subjective recourses in that the aggrieved state must unilaterally assess the illegality of the initial wrongful act.[1482] We must recall that the "war" on terror is a truly global campaign, an exercise that can only be conducted successfully through multilateral channels.[1483] Thus, the broader objective of combating terrorism through multilateral avenues ineluctably involves the implementation of a "reciprocity of benefits" between states facing terrorist activity on their territory and potential victim states: the impetus for compliance with the obligation to forestall terrorist attacks is captured by fear of retaliation or, more importantly, by the possibility that states may not fulfill their international duties.[1484]

In addition, the law of state responsibility in the post-9/11 era might largely evolve through hostile inter-state relations, a premise that is highly reconcilable with Fuller's interactional theory. In fact, according to his perception of law, "while enemies may have difficulty in bargaining with words, they can, and often do profitably half-bargain with deeds. Paradoxically the tacit restraints of customary law between enemies are more likely to develop during active

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*instrument de la lutte contre le terrorisme?*, in Karine Bannelier *et al.*, LE DROIT INTERNATIONAL, *supra* note 475, at 331-344; Volker Röben, *The Role of International Conventions and General International Law in the Fight Against International Terrorism*, in C. Walter *et al.* (eds.), TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS LIBERTY? 789-821 (2004).

[1481] Provost, *Introduction*, *supra* note 77, at XV. Similarly, see Daudet, *International Action*, *supra* note 273, at 202; O'Connell, *Controlling Countermeasures*, *supra* note 744, at 49-62.

[1482] See Martin, LES RÈGLES INTERNATIONALES, *supra* note 1, at 487. See also Sentence arbitrale du 9 décembre 1978 dans l'affaire concernant l'*Accord relatif aux services aériens du 27 mars 1946 entre les Etats-Unis d'Amérique et la France, RSA,* Vol. XVIII, p. 483, para. 81; Denis Alland, JUSTICE PRIVÉE ET ORDRE JURIDIQUE INTERNATIONAL: ÉTUDE THÉORIQUE DES CONTRE-MESURES EN DROIT INTERNATIONAL PUBLIC 345 (1994); Labayle, *Droit international et lutte contre le terrorisme*, *supra* note 852, at 137.

[1483] See Toope, *Powerful but Unpersuasive*, *supra* note 1085, at 93-96; Jonathan F. Lenzner, *From a Pakistani Stationhouse to the Federal Courthouse*: *A Confession's Uncertain Journey in the U.S.-Led War on Terror*, 12 CARDOZO JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 297, 297-300 (2004); McCredie, *The Responsibility*, *supra* note 70, at 73. On a related point, see Paulus, *The War Against Iraq*, *supra* note 1086, at 721.

[1484] On this point, see Fuller, *Human Interaction*, *supra* note 604, at 32.

warfare than during a hostile stalemate of relations; fighting one another is itself in this sense a "social" relation since it involves communication."[1485] Drawing on Fuller's rationale, to endorse a regime of strict liability – which will primarily purport to amplify reciprocal expectations of compliance with counterterrorism duties – should perhaps be largely actuated through positive state actions rather than through rhetorical processes. What is more, this idea is not completely incongruent with the writings of certain eminent constructivists, which collapse both positive state actions and rhetorical commitments under the heading of state practice.[1486] This objective, therefore, can be attained through a variety of inter-state actions, including the sharing of intelligence, transnational cooperation on terrorism policy and law enforcement, extradition of suspected terrorists, subjection of suspected terrorists to international criminal/judicial institutions if national prosecutions prove illusory, the provision of counterterrorism personnel to inefficient states, and so on. Hence, the *sine qua non* application of this theory – and one of the driving forces behind the proposed model – resides in the conveyance of clear messages through reciprocal state actions.[1487] At first sight, the proposed two-tiered strict liability mechanism seems to achieve this policy objective, as it increases reciprocal and multilateral collaboration, transparency, expectations of compliance, and foments reciprocity of benefits.

Aside from enhancing the legitimacy of international efforts to combat terrorism and delineating the ambit of state responsibility, this model would also foster states' comparative policy-making and collaborative efforts. Interestingly, this policy objective has certainly been a running theme throughout rationalist literature.[1488] Surely, several commentators rightly expound that multilateral

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[1485] Fuller, *Human Interaction*, *supra* note 604, at 31. For a highly reconcilable constructivist take on this idea, albeit through the lens of intervention, see Martha Finnemore, THE PURPOSE OF INTERVENTION: CHANGING BELIEFS ABOUT THE USE OF FORCE 5 (2003).

[1486] See, e.g., Friedrich Kratochwil, *Citizenship*: *On the Border of Order*, in Yosef Lapid and Friedrich Kratochwil (eds.), THE RETURN OF CULTURE AND IDENTITY IN INTERNATIONAL RELATIONS THEORY 181, 190-94 (1996); Greenwood Onuf, *Constructivism*, *supra* note 603, at 59; Alexander Wendt, *Collective Identity*, *supra* note 603, at 390.

[1487] Fuller, *Human Interaction*, *supra* note 604, at 31 ("[h]ere the prime desideratum is to achieve – through acts, of course, not words – the clear communication of messages of a rather limited and negative import; accordingly there is a heavy concentration on symbolism and ritual.").

[1488] See, e.g., Verdier, *Cooperative States*, *supra* note 1230, at 843, 844, 846, 849, 852, 853-54; Dunoff and Trachtman, *Economic Analysis*, *supra* note 1230, at 32-33.

collaboration should be preferred over unilateral state action in instilling a preventive character to the "war" on terrorism.[1489] Along the same lines, there appears to be a marked correlation between the circumvention of attribution, the fostering of multilateral cooperation, deriving legitimacy in the international "war" on terror, and promoting fairness amongst nations.[1490] In this spirit, states could therefore engage in significant risk control and risk assessment of possible terrorist threats and, one hopes, encourage multilateral exchanges of information and intelligence, along with financial 'red-flagging' of terrorist assets.[1491] We must remember that the overarching objective is to make the global fight against terror a preventive rather than a curative effort, and that the imposition of strict liability-infused standards for failing to prevent terrorism constitutes a solution of last resort, namely when an excursion could not have been prevented.[1492] However, until the attack itself is carried out, we must contemplate all reasonable steps in between to prevent it. In fact, the IACHR spoke to this point in the *Velásquez Rodríguez* case and aptly encapsulated the tenets of state responsibility, opining that "[t]he State has a legal duty to take *reasonable steps* to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."[1493] In addition to sending a message of deterrence to

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[1489] See, e.g., Christopher Clarke Posteraro, *Intervention in Iraq*: *Towards a Doctrine of Anticipatory Counter-Terrorism, Counter-Proliferation Intervention*, 15 FLORIDA JOURNAL OF INTERNATIONAL LAW 151, 205 (2002); Dov Waxman, *Terrorism*: *The War of the Future*, 23 FLETCHER FORUM OF WORLD AFFAIRS 201, 205 (1999). See also, generally, Quigley, *The Afghanistan War*, *supra* note 38, at 541-562.

[1490] For a thoughtful discussion on the concept of legitimacy in international law, see Franck, THE POWER OF LEGITIMACY, *supra* note 1449, at 16-17, 19 and 24.

[1491] Terrorist fundraising – or the lack of control thereof – is another significant dimension of counterterrorism and, sometimes, a determinant element of indirect state responsibility. On terrorist financing and prevention, see David Cole, *Terror Financing, Guilt by Association and the Paradigm of Prevention in the 'War on Terror'*, Unpublished Paper, available online at http://scholarship.law/ georgetown.edu/fwps_papers/82 (last visited on 1 August 2009); William Wechsler, *Strangling the Hydra*: *Targeting Al-Qaeda's Finances*, in J. Hogue and R. Gideon (eds.), HOW DID THIS HAPPEN? TERRORISM AND THE NEW WAR 129-143 (2001); Zagaris, *The Merging*, *supra* note 32, at 123-157.

[1492] See, e.g., Banks, *Addressing State*, *supra* note 153, at 57 (observing that "[v]arious scholars also argue for preventative, rather than curative, measures").

[1493] *Velásquez Rodríguez*, *supra* note 17, at para. 174. [Emphasis added.]

complacent governments, this approach can provide states with a locus to voice, to calibrate, and to test out their counterterrorism policies.

Needless to say, the mechanics of state responsibility must also be accompanied – both preventively and curatively – by a steady dose of diplomacy and international pressure, which may likely entail a tension between the competing strategies of punishment and deterrence versus containment. When taken in the aggregate context of its tempestuous relationship with both the international community and terrorism, the case of Libya is illustrative of this trend. Indeed, in 2003 Muammar el-Qaddafi announced that his nation was phasing out its nuclear and biological/chemical weapons programme, a development that would ineluctably draw attention to the recent invasion of Iraq as a possible catalyst. Yet, whilst recognizing that this might have been a factor at play, some commentators rather construe the explanation of the Libyan policy choice as a direct result of a security guarantee given to that state by the U.S.; unlike the situation in Iraq, the objective therefore shifted from regime change to modifying the existing regime's behaviour.[1494] More importantly, this development evinced the effectiveness of diplomatic pressure in the context of counterterrorism – particularly as a vehicle to increase the cost of noncompliance with international obligations for the purposes of state responsibility – at least in two ways. On one hand, it offered a *curative* effect in that Libya's decision to bring its conduct closer to conformity with accepted international standards signalled a desire to enhance compliance with primary norms so as to avoid the application of secondary norms of responsibility. This posture was also motivated by internal political factors within Libya, stemming from the desire to extricate itself from the sanctions regime imposed upon it in light of its ties to terrorism, as described in Chapter 3. More importantly, this policy shift also generated some cathartic effect for past misdeeds given Libya's ongoing relationship with terrorism, which can be cast at the secondary normative level of responsibility if one accepts the premise that the application of that legal scheme entails the deployment of a web of competing norms, actors and processes. After all, it

[1494] See Robert Litwak, *Containment 2.0*, WORLD POLITICS REVIEW, July 21, 2009.

should be recalled that, in the Libyan scenario, the Security Council dealt with the state responsibility aspects of the dispute while the ICJ tackled legal issues pertaining to extradition and, ultimately, political leverage and diplomatic pressure were also applied outside any institutionalized setting. As a result, in that case the successful deployment of state responsibility repertoire was contingent on both the involvement of a multiplicity of actors and the superimposition of concurrently applicable legal regimes and political processes. On the other hand, pursuing this new direction produced a *preventive* effect in that this policy choice might actually prevent or decrease the likelihood of future transnational terrorist strikes originating from Libya and, as a corollary, increase its due diligence capital in the event that it fails to thwart such an excursion.

These considerations can also be reconciled with several aspects extracted from recent writings emanating from liberal theorists, although some emphatically advocate the implementation of government networks in combating terrorism. Anne-Marie Slaughter points out that "the United Sates has pushed the even more informal approach of "coalitions of the willing," both at the unitary state level of enlisting military allies and at the disaggregated state level of networking to combat terrorist financing, share intelligence on terrorist activity, and cooperate in bringing individual terrorists to justice."[1495] Even as early as 1975, Jordan Paust emphasized the importance of data and intelligence-sharing in the spirit of transnational cooperation, so as to better advance the global struggle against terrorism.[1496] Indeed, according to this line of thought, "[p]romoting actual government networks in all these areas is a far better approach, as it would institutionalize the cooperation that already exists and create a framework for deepening future cooperation in virtually every area of domestic policy."[1497]

There is no question that the possible formulation of governmental networks would prove indispensable in advancing the "war" on terror and in

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[1495] See, e.g., Slaughter, A NEW WORLD ORDER, *supra* note 1165, at 265.

[1496] See *A Survey of Possible Legal Responses to International Terrorism*: *Prevention, Punishment, and Cooperative Action*, 5 GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 431, 448-451 (1975). See also Reisman, *International Legal Responses*, *supra* note 64, at 15-16.

[1497] Slaughter, A NEW WORLD ORDER, *supra* note 1165, at 265.

fulfilling the objectives of state responsibility. The mere fact that concerted and coordinated institutional structures are in place would not only assist states in better complying with their counterterrorism obligations, but it might also help better prevent terrorist attacks, thereby curtailing the need to engage state responsibility altogether in preventable cases of terrorism. In addition, the idea of networking governments to combat terrorism must also be appreciated against the backdrop of extant state responsibility structures. Whilst the UN General Assembly has now moved towards the idea of enshrining the law of state responsibility in a convention,[1498] there is no indication that this newly launched agenda constitutes a politically feasible objective. Indeed, in the face of the political climate prevalent since 9/11, certain scholars highlight this difficulty whilst also reiterating the advantages of favouring transnational and regional cooperation in the hopes of stamping out terrorism in the global campaign against ideological warfare.[1499] Not to mention that, whilst this eventuality might generate more dominant and extensive patterns of influence and compliance, as opposed to the more diffused level of authority the ILC's *Articles* exert in their current form, the road to adopting a comprehensive convention on state responsibility is fraught with obstacles and political pitfalls.[1500] Hence, the challenges associated with the adoption of a convention – coupled with the preferred exercise of transnational or regional couterterrorism cooperation under the existing framework of the *Articles* – would seem to align with David Caron's

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[1498] See Draft Resolution of 9 November 2007 – Agenda Item 78: Responsibility of States for Internationally Wrongful Acts, United Nations General Assembly, A/C.6/62/L.20, at para. 4 (deciding to "include in the provisional agenda" and to "further examine, within the framework of a working group of the Sixth Committee, the question of a convention on responsibility of States for internationally wrongful acts or other appropriate action on the basis of the articles."). See also Responsibility of States for Internationally Wrongful Acts, Report of the Sixth Committee, 21 November 2007, UN Doc. A/62/446, at paras. 5-7 (confirming that Draft Resolution A/C.6/62/L.20 was adopted by the Sixth Committee without a vote). On the necessity of adopting a convention on state responsibility, see, e.g., Constantin P. Economidès, *Le Projet de la CDI sur la responsabilité de l'État pour fait internationalement illicite*: *Nécessité d'une convention internationale*, 58 REVUE HELLÉNIQUE DE DROIT INTERNATIONAL 77-83 (2005).

[1499] See, e.g., McWhinney, *Codifying International Law*, *supra* note 679, at 134.

[1500] See, generally, James Crawford and Simon Olleson, *The Continuing Debate on a UN Convention on State Responsibility*, 54 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 959 (2005).

astute "paradox that [the *Articles*] could have more influence as an ILC text than as a multilateral treaty."[1501]

**b) Social Stigma Argument**

One final argument must be addressed squarely. Some might argue that this new law of strict liability would impugn the dignity of host-states that honestly do their best to prevent terrorism, or that put forth earnest efforts in doing so while falling short in producing the expected result. Even though such state would not be held directly responsible for the attack, they would nonetheless face the social stigma of having violated international law. However, imposing automatic indirect responsibility on a state for failing to prevent a terrorist attack achieves a certain level of equality between all host-states, at least on a preliminary basis. As a lesser of two evils in a way, in most circumstances this framework would do away with the undesirable prospect of labelling a host-state 'directly responsible' or 'complicit' in a terrorist attack, as aggrieved states may opt to proceed under the indirect responsibility paradigm. Conversely, imposing automatic indirect responsibility might cast a socially stigmatic light on host-states. In other words, host-states might look unfavourably upon the obligation to justify or establish that their conduct was in conformity with their international obligation to prevent terrorism, without correspondingly requiring (or by exempting) an aggrieved state from establishing attribution of the wrongful act to the relevant host-state.

A similar line of argument has sometimes been running through other spheres of international law. For instance, we have seen one of its manifestations in the context of the World Trade Organization, namely in the *Asbestos* case.[1502] In that litigation, France was called upon to justify a decree prohibiting asbestos or asbestos-containing products under Article XX of the *General Agreement on Tariffs and Trade*. The dispute settlement panel concluded that, although France's ban discriminated against other types of carcinogens, that discrimination

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[1501] Caron, *The ILC Articles*, *supra* note 1285, at 858.

[1502] *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc. WT/DS135/R (2000) (Dispute Settlement Panel) and WTO Doc. WT/DS135/AB/R (2001) (Appellate Body) [hereinafter *Asbestos* case].

could be justified under the grounds of public health found under Article XX. Hence, the Panel Report carried, with it, the notion that the banning on the French market of a known carcinogenic – whilst discriminatory – could be justified under the structure of the *GATT*. Although France technically "won" before the Panel, it nonetheless appealed the case to the Appellate Body. The Appellate Body ultimately reversed this reasoning by focusing on the likeness of the products at hand, whilst also discarding the panel's discrimination rationale. In short, the Appellate Body recognized the right of France to afford different treatment to hazardous products without being labelled violators of the national treatment principle.[1503] It logically follows that the Appellate Body seemed somewhat aware of the social stigma or adverse effect involved by steering the same course as the Panel. Put another way, it appears that, in this instance, the Appellate Body's decision was driven by its acknowledgment that its potential ruling on a violated international legal obligation carried with it great reputational, dignity and, perhaps, political cost (even if that violation was nullified on technical grounds).[1504] Interestingly, the idea that a state's reputation on the international scene remains the most significant generator of its compliance with international obligations has most recently attracted the attention of international relations theorists.[1505]

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[1503] See, e.g., Henrik Horn and Joseph H.H. Weiler, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, in Henrik Horn and Petros C. Mavroidis (eds.), THE WTO CASE LAW OF 2001: THE AMERICAN LAW INSTITUTE REPORTERS' STUDIES 14-40, 38 (2004). The rules of state responsibility have also sometimes been extended to the WTO system. See Santiago M. Villalpando, *Attribution of Conduct to the State*: *How the Rules of State Responsibility May Be Applied Within the WTO Dispute Settlement System*, 5 JOURNAL OF INTERNATIONAL ECONOMIC LAW 393-429 (2002); Mariano Garcia-Rubio, ON THE APPLICATION OF CUSTOMARY RULES OF STATE RESPONSIBILITY BY THE WTO DISPUTE SETTLEMENT ORGANS (2001). In an article, Alberto Alvarez-Jimenez rejects the rigid transplantation of the ICJ's perhaps retrogressive interpretation of the rules of state responsibility in the *Genocide* case to the WTO system. See *International State Responsibility for Acts of Non-State Actors*: *The Recent Standards Set by the International Court of Justice in Genocide and Why the WTO Appellate Body Should Not Embrace Them*, 35 SYRACUSE JOURNAL OF INTERNATIONAL AND LAW AND COMMERCE 1, 15-25 (2007).

[1504] For a thought-provoking discussion on states' reputational costs under international law, see Rachel Brewster, *Unpacking the State's Reputation*, 50 HARVARD INTERNATIONAL LAW JOURNAL 231 (2009).

[1505] See, generally, Guzman, HOW INTERNATIONAL LAW, *supra* note 1339. Compare with Joel P. Trachman's recent study, THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW (2008). For a critique of Guzman's treatment of the subject, see Rachel Brewster, *The Limits of Reputation on Compliance*, Unpublished Paper, available online at http://papers.ssrn.com/sol3/papers.cfm?

This reasoning is also very much alive in the age-old debate over the criminalization of state responsibility, in that "the primary justification for State crimes is the moral stigma of criminal conviction."[1506] In stark contrast, the ICJ seems to have eschewed this line of thought in the *Corfu Channel* case, thereby refusing to condemn the defendant state for a 'grave omission' (which would have also entailed that said state had the capability of preventing the wrongful conduct). Indeed, the ICJ "took the easier path of ascertaining a 'knowledge' which really was an instance of collusion. In so doing, the Court avoided to declare that such a wrong had been committed…[w]hen they have to condemn a State, international courts prefer to do it at the lowest possible moral cost for the State in question."[1507]

In response to this argument, it is imperative to recall that there are no ideal solutions in preventing international terrorism: mitigation of the tensions between sovereignty and reputation remains a noble objective in making the world a safer place. Writing about the USS Pueblo case of 1968[1508] from the perspective of state responsibility, one commentator pragmatically resolves the aforementioned tension between upholding dignity and combating terrorism efficiently (although such dictum might rather belong to the realm of *lex ferenda*) in the following manner: "[f]or modern democratic States, what is paramount is to protect their nationals' lives rather than uphold in the abstract the dignity of the State."[1509] Moreover, the approach advocated in this dissertation strives to attain a reasonable ground between the zeal of imposing unreasonable obligations on host-states, namely obligations of result, and envisioning a regime too loosely suited for modern ideological warfare, where states can easily elude responsibility. This argument is in the same spirit as Brownlie's own remarks on

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abstract_id= 1337826 (last visited on 21 July 2009); Harlan Grant Cohen, *Can International Law Work? A Constructivist Expansion*, 27 BERKELEY JOURNAL OF INTERNATIONAL LAW 636 (2009).

[1506] Caron, *State Crimes*, *supra* note 958, at 27.

[1507] Rigaux, *International Responsibility*, *supra* note 179, at 91.

[1508] For more background on the USS Pueblo incident, see, e.g., Richard B. Bilder, *The Role of Apology in International Law and Diplomacy*, 46 VIRGINIA JOURNAL OF INTERNATIONAL LAW 433, 443 (2006); Hilary K. Josephs, *The Remedy of Apology in Comparative and International Law*: *Self-Healing and Reconciliation*, 18 EMORY INTERNATIONAL LAW REVIEW 53, 80-81 (2004); Daniel Patrick O'Connell, THE INFLUENCE OF LAW ON SEA POWER 65 (1975).

[1509] Nakatani, *Diplomacy and State Responsibility*, *supra* note 406, at 40.

the relationship between responsibility and international organizations, which precludes the possible exoneration of state liability through a subterfuge or alternate legal arrangement: "[a] State cannot avoid responsibility by creating an international organization."[1510]

Although the international community should take stock of these types of concerns, the "war" on terrorism further complicates the equation: unlike under the WTO system, we are often dealing with human lives and, to the extent possible, with the protection of those lives. From that perspective, it would seem desirable and more efficient to slightly sacrifice 'saving face', so to speak, rather than to infringe territorial sovereignty and to fail in preventing massive deaths and widespread terror. Finally, the social stigma argument can also be interpreted as a positive force, generating realistic incentives and expectations amongst the international community, subject, of course, to the further elaboration of the relevant primary rules of international law.[1511] It has been shown above, partly through a discussion of the principle of reciprocity in international relations, that the prospect of states incurring international responsibility for failures to prevent terrorism, or the fear internalized by them that such eventuality might materialize, might enhance their observance of counterterrorism obligations and, concomitantly, increase the cost of non-compliance with such undertakings (i.e. bolster the compliance pull of prevention). There is no doubt that *prima facie* indirect state responsibility responds to similar logic. Similarly, scholars have extended this type of reasoning to other facets of the international "war" on terror, rather equating semantically analogous practices to 'shame sanctions' and a process of international 'shaming'. For instance, writing about recent detainee abuse at Abu Ghraib prison carried out by U.S. troops, one publicist argues that "social sanctions like shaming have a powerful role to play in enforcing

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[1510] See Brownlie, *The Responsibility*, *supra* note 244, at 361. This line or reasoning would undoubtedly extend to colluding, terrorism-sponsoring states. See *Ibid*, at 362. See also Yee, *The Responsibility of States*, *supra* note 1144, at 448-449; Jean d'Aspremont, *Abuse of the Legal Personality of International Organizations and the Responsibility of Member States*, 4 INTERNATIONAL ORGANIZATIONS LAW REVIEW 91-119 (2007).

[1511] Consider Peirano, *International Responsibility*, *supra* note 365, at 193. Finally, an argument may also be advanced to the effect that the prospect of incurring liability might prompt states to better thwart terrorism. See, e.g., Zemanek, *Does the Prospect*, *supra* note 50, at 125-136.

international law norms" and, as a corollary, "[w]hen properly deployed, shaming activity by the international community can serve to influence the offending state to take corrective action and fill the enforcement gap in international law."[1512] Similar objectives can also be attained through the non-binding 'views' issued by the United Nations Human Rights Committee.

Conversely, there is nothing in the preceding considerations precluding the application of the social stigma rationale to the deployment of secondary rules of responsibility. In other words, the above analysis placed significant emphasis on the fact that a mechanism of automatic attribution or a *prima facie* presumption of indirect responsibility attaching to a host-state having failed to prevent terrorism may cast that state in a stigmatic light in the hopes of generating positive incentives. In other words, under this light the social stigma argument amounts to a *means* to an end (i.e. by branding a host-state 'internationally responsible', we are compelling it to bring its behaviour within the furrow of its international obligations, e.g. by preventing further attacks, by engaging in transnational cooperation, by cracking down on terrorist installations/training camps within its borders, by freezing terrorist assets, by remedying the wrongful act, and so on). Yet, this approach was always contingent on the ability of the host-state to refute that presumption pursuant to various factors, which will be thoroughly canvassed *infra* under heading C)2. (i.e. to demonstrate that it fulfilled its obligation of prevention and/or that nothing more could reasonably have been expected of it).

That said, there might be cases where the obligation violated – or the actual breach of international law – will be so egregious or straightforward that it will eclipse all further considerations and precipitate the application of the consequences of international responsibility. An obvious case would be a situation where a host-state, upon being found indirectly responsible on a *prima facie* basis, would accept its responsibility and, thereby, trigger the application of the remedial provisions of the ILC's *Articles*. Another example would be a

[1512] Sandeep Gopalan, *Alternative Sanctions and Social Norms in International Law*: *The Case of Abu Ghraib*, 2007 MICHIGAN STATE LAW REVIEW 758, 786 (2007) (and further adding, at 786-787, that "[t]he [shaming] campaign forced U.S. citizens to come to terms with the fact that their government was acting in violation of internalized international norms (against torture).").

scenario whereby the automatic finding of responsibility acts as the remedy, in and of itself, without any consideration for the various paramaters found under the second tier of the proposed framework (*infra* Section C)2.). In contrast with the model advocated earlier, these situations would signal that the *prima facie* presumption of responsibility constitutes an *end* in itself and, what is more, *the* end for the purposes of 'closure', albeit an imperfect one, under state responsibility repertoire.

A parallel can be drawn with the ICJ's recent ruling in the *Genocide* case in that, if a terrorist attack is actually carried out from a given territory and the host-state fails to thwart it, responsibility can flow to that state (i.e. trigger the *prima facie* presumption of responsibility under the proposed model). Yet, under this second conception of *prima facie* state responsibility, no further analysis is engaged to determine whether the state actually upheld, within the realm of reason, the standard of behaviour that could have been reasonably expected from it in the circumstances. Indeed, in the *Genocide* case the Court opined that "a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed."[1513] However, in such instances all other considerations can be circumvented if the pertinent adjudicating body determines that its declaration to the effect that the host-state failed to comply with is obligation of prevention constitutes adequate satisfaction.[1514] Whilst perhaps unclear until further developed in practice, such a posture seriously threatens to erode and undermine the political equilibrium that a two-tiered model seeks to achieve. Host-states must absolutely be given an opportunity to refute the case against them; strict liability is solely invoked with a view to generating desirable policy incentives, promoting multilateral cooperation and encouraging diligent state compliance with counterterrorism obligations.

Based on the foregoing reasons and the precedence achieved by indirect responsibility, international law could possibly countenance a regime of strict liability, albeit predicated on the opportunity for host-states to raise defences or

[1513] *Genocide Case*, *supra* note 100, at para. 431.
[1514] *Ibid*, at para. 463. See also *Corfu Channel*, *supra* note 67, at 35-36.

justifications vis-à-vis their duty to prevent terrorist attacks. Indeed, such approach would seem somewhat reminiscent of past doctrines of collective responsibility, espoused, *inter alia*, by William Hall and Clyde Eagleton. For Hall, whilst a state could exculpate itself subsequently by demonstrating its lawful behaviour, the fact remained that "prima facie a state is of course responsible for all acts and omissions taking place within its territory".[1515] Echoing a similar viewpoint, Clyde Eagleton also put forth the proposition that a state "should be responsible for the individual's act from the moment of its occurrence", whilst also pointing out that local remedies would act as "a means of discharging this responsibility."[1516] It is also highly relevant to note that, prior to 9/11, one commentator entertained the possibility of establishing a *prima facie* case of liability for failing to prevent terrorist attacks under the aegis of a prospective Convention on Terrorism. Whilst reserving a role for a reviewing court in assessing the failures of due diligence of the wrongful state, he rejected the idea of absolute liability as a potential model and incorporated the possibility for host-states to "explain their actions" after the fact, on a case-by-case basis. Therefore, under this model host-states would have been allowed to introduce evidence regarding their compliance with international counterterrorism obligations. He further identified four 'permissible exceptions for a failure to comply' with such legal undertakings, namely: i) when the host-state is faced with civil conflict, thereby impeding its capability of thwarting the terrorist threat; ii) when the host-state demonstrates it acted within the parameters of due diligence to repel the threat but was unable to do so; iii) when the host-state demonstrates that it is lacking the monetary or human resources to adequately contain the threat; and iv) when the host-state demonstrates that the terrorist attacks were financed/sponsored by other states.[1517]

However, it is important to register an initial caveat in that regard, sometimes also raised in the literature dealing with state responsibility for

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[1515] William E. Hall, A TREATISE ON INTERNATIONAL LAW 193 (1884).
[1516] Eagleton, *Measure of Damages*, *supra* note 190, at 56. See also Hessbruegge, *The Historical Development*, *supra* note 1096, at 280-281; Roy Curtis, *The Law of Hostile Military Expeditions as Applied by the United States*, 8 AMERICAN JOURNAL OF INTERNATIONAL LAW 1, 35 (1914).
[1517] See McCredie, *The Responsibility*, *supra* note 70, at 93-94.

transboundary environmental harm. Indeed, certain publicists argue that the defences available under the logic of indirect responsibility are precisely what impair the advancement of effective preventive environmental obligations and, in turn, engender difficulties in the application of the rules of attribution. Moreover, these same scholars argue that the very existence of these defences have also motivated states to adopt conduct that would, otherwise, not be permissible or advisable.[1518] Clearly, no such latitude should be afforded in the field of counteterrorism, as the paramount objective often remains to save human lives; no margin for appreciation or derogation can be allotted in such instances, at the risk of people's lives. Put another way, defences available under the second prong of the two-tiered state responsibility model espoused herein should not create an escape clause for non-compliance. Nevertheless, it is imperative to explore the second tier of the proposed strict liability approach, namely possible considerations raised by host-states against a *prima facie* presumption of indirect responsibility formulated against them. This exercise starts with a brief overview of the obligation of prevention, which constitutes the focal point of the proposed strict liability inquiry and, by the same token, the cornerstone of modern indirect state responsibility. Furthermore, as prefaced above, this examination will reinforce the idea that primary counterterrorism obligations remain, to a large extent, intimately connected to secondary rules of state responsibility.

### C) The Obligation of Prevention at International Law

As prefaced above, the present project now turns to the analytical task enshrined under the second tier of the proposed model, which rests upon a context-sensitive, policy-informed approach. Before so doing, however, it is important to briefly review and frame the scope of the obligation of prevention, which will act as the analytical cornerstone of the ensuing politico-juridical exploration.

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[1518] See, e.g., Springer, *The Evolving Law*, *supra* note 1293, at 129.

### 1. Emergence of the Obligation of Prevention

As discussed above, a salient observation may be gleaned from recent international developments: states are expected to forestall terrorist activities emanating from their territory and causing harm to another. This idea has long been ingrained in international law, albeit in other branches of the discipline such as in environmental law's treatment of transboundary pollution, most notably in Principle 21 of the Stockholm Declaration.[1519] The rule stated in Principle 21 of the Stockholm Declaration was reaffirmed in Principle 2 of the 1992 Rio Declaration and was reiterated in the 2002 World Summit on Sustainable Development. It has also been transposed into declarations adopted by the United Nations, such as the *Charter of Economic Rights and Duties of States* and *the World Charter for Nature*, and has been formally adopted by other international organizations and conferences.[1520]

It ineluctably follows from these premises, therefore, that a state will be responsible for 'noxious fumes' emanating from its territory when caused by a terrorist organization.[1521] In fact, that imagery is rooted in the famous *Trail Smelter* arbitration, in which the Tribunal was faced with transboundary pollution originating from Canada and hindering American interests.[1522] Similarly, the idea

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[1519] See, e.g, UN Conference on the Human Environment, Stockholm Declaration, June 16, 1972, UN Doc. A/CONF.48/14, Principle 21, 11 *ILM* 1416 (1972) [hereinafter *Principle 21*].

[1520] See e.g., Preliminary Declaration of a Program of Action of the European Communities in respect to the Environment, OJEC C 112/1, 20 December 1973; Final Act, Conference on Security and Cooperation in Europe, Helsinki, August 1975; Article 20 of the ASEAN Agreement on the Conservation of Nature and Natural Resources (Kuala Lumpur, 9 July 1985), 15 ENVIRONMENTAL POLICY AND LAW 64 (1985); Article 194(2) of the United Nations Convention on the Law of the Sea, available online at United Nations Convention on the Law of the Sea, available online at http://www.un.org/Depts/los/ convention_agreements/texts/unclos/closindx.htm; the 1979 Geneva Convention on Long Range Transboundary Air Pollution; Preamble of the 1992 United Nations Framework Convention on Climate Change; Article 3 of the Convention on Biological Diversity. For academic support of this proposition, see, e.g., René Lefeber, TRANSBOUNDARY ENVIRONMENTAL INTERFERENCE AND THE ORIGIN OF STATE LIABILITY 19-47 (1996).

[1521] Referring to the widely used *Trail Smelter* metaphor. See *Trail Smelter* arbitration (*U.S.* v. *Canada*), *R.I.A.A.*, vol. III, 1905 (1938/1941) [hereinafter *Trail Smelter*]. See also Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 140.

[1522] For a variety of recent contributions discussing this seminal decision, see Rebecca M. Bratspies and Russell A. Miller (eds.), TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION (2006) (for the purposes of state responsibility and terrorism, specifically, see the contributions of Mark A. Drumbl, *Trail Smelter and the International Law Commission's Work on State Responsibility for Internationally Wrongful Acts*

that host-states are responsible for ensuring that the activities carried out within their jurisdiction do not spill over and adversely affect the environment of third states was consecrated by the ICJ as a well-established principle of international law in both the *Nuclear Weapons* advisory opinion and the *Gabĉíkovo-Nagymaros* case.[1523] However, as will be explored in greater detail momentarily, it should be noted that some scholars call into question the relevance and 'precedential' value of *Trail Smelter* under state responsibility, particularly as an incubator for a rule compelling states to prevent *any* harm emanating from their territory. Nevertheless, whilst disputed in some circles the importance of this case cannot be overlooked in any exhaustive treatment of modern state responsibility law. Perhaps more importantly, in its famous *Corfu Channel* decision, the ICJ ruled that a state may not allow its territory to become a launch pad for harmful conduct.[1524] As a corollary, such conclusion must also be considered in light of the probable eventuality that the Court endorsed a no-knowledge standard of international responsibility therein, a notion that was explored extensively above.[1525] Whilst the actual norm derived from the ICJ's holding may arguably be construed as rather imprecise or general, the prohibition on states to allow their territories to become bases for harmful activity has nonetheless become a well-established area under international law -- namely under the rubric of 'state responsibility' -- and has generated "strong records of influence and compliance."[1526] On the same year *Corfu Channel* was handed down, the UN Survey of International Law inferred that there, indeed, exists "general recognition of the rule that a State must not permit the use of its territory for purposes injurious to the interests of other States in a manner contrary to

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*and State Liability*, and Cristina Hoss and Pierre-Marie Dupuy, *Trail Smelter and Terrorism*: *International Mechanisms to Combat Transboundary Harm*).

[1523] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ REPORTS 1996, pp. 241-242, at para. 29; *Gabĉíkovo-Nagymaros*, *supra* note 250, at pp. 77-78, para. 140.

[1524] See generally *Corfu Channel*, *supra* note 67, at 22. See also García-Mora, INTERNATIONAL RESPONSIBILITY, *supra* note 200, at 109-112 and 130; Duffy, THE 'WAR ON TERROR', *supra* note 133, at 42; Martin, LES RÈGLES INTERNATIONALES, *supra* note 1, at 454. As discussed in the following page, it should be noted that some authors also call into question the persuasiveness of this line of cases.

[1525] See, e.g., *supra* Chapter 1, Section C)1., especially notes 87-91 and accompanying text; *supra* notes 241-243, 334-335, 1053-1055, 1322-1324, 1524-1525, 1650 and accompanying text.

[1526] Finnemore and Toope, *Alternatives to "Legalization"*, *supra* note 91, at 747.

international law."[1527] Forty-seven years after *Corfu Channel*, the ICJ reaffirmed this rule in an advisory opinion, noting that "[t]he 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".[1528]

Again, here the violation of international law stems from the state's failure to control its territory and, by implication, irregular units/terrorist factions within its territory rather than from complicity in the terrorist plot or, alternatively, from actual control – effective or comprehensive – over the terrorists perpetrating the attacks (which would, in turn, trigger direct state responsibility under some lights).[1529] In addition to *Trail Smelter* and *Corfu Channel*, a third decision, the *Lake Lanoux* case,[1530] taken in its whole, is also sometimes invoked in scholarship in support of this proposition.[1531] However, it should be noted that some authors call into question the persuasiveness of this line of cases, rather expounding that *Corfu Channel* and *Trail Smelter* fail to ground the existence of an obligation to prevent ultra-hazardous and highly polluting activities.[1532]

Jaye Ellis has been a particularly vocal proponent of this line of argument and, in a recent book chapter, questions the legitimacy of *Trail Smelter* as a trend-setting precedent whilst also shedding new light on the Tribunal's reliance on, and misquoting of, Clyde Eagleton on state responsibility.[1533] As Ellis astutely points out when referring to the cited excerpt, Eagleton essentially reaffirms the principle of non-attribution of private acts to host-states,[1534] a notion that is

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[1527] UN Doc. A/CN.4/1/Rev.1, at 34 (1949).
[1528] *Nuclear Weapons Advisory Opinion*, *supra* note 1523, at pp. 241-242, para. 29.
[1529] See, e.g., Brownlie, SYSTEM, *supra* note 205, at 182.
[1530] See *Lake Lanoux* case (1957), *R.I.A.A.*, vol. XII, at 281-317.
[1531] See, e.g., Springer, *The Evolving Law*, *supra* note 1293, at 133-134 (but also acknowledging the ambiguity associated with this line of cases).
[1532] See, e.g., Benedetto Conforti, INTERNATIONAL LAW AND THE ROLE OF DOMESTIC LEGAL SYSTEMS 170 (1993). For a discussion of these three cases, see Sturma, *Some Problems*, *supra* note 933, at 373-376.
[1533] See Jaye Ellis, *Has International Law Outgrown Trail Smelter*?, in Bratspies and Miller, TRANSBOUNDARY HARM, *supra* note 1522, at 56-65.
[1534] The principle of non-attribution can also be traced back to a PCIJ's ruling, where it declared that "[s]tates can act only by and through their agents and representatives." See *German Settlers in Poland*, Advisory Opinion, 1923, PCIJ, Series B, No. 6, at 22. For academic support of this proposition, see Jennings and Watts, OPPENHEIM'S, *supra* note 323, at 502-503; Malanczuk,

ultimately absent from the Tribunal's ruling: "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 by revealing the state in an illegality of its own – an omission to prevent or publish, or positive encouragement of, the act of the individual."[1535] In sum, this view presupposes that *Trail Smelter* did not create a duty for host-states to prevent any harm emanating from their territory and resulting from highly polluting activities. As Eagleton remarked in a fashion reminiscent of previous discussion on absolute responsibility, the focus of the inquiry rather hinges on any positive obligation or duty to prevent certain private conduct accruing to those states, a notion highly reconcilable with counterterrorism efforts. It follows that, "[t]he state cannot be regarded as an absolute guarantor of the proper conduct of all persons within its bounds. Before its responsibility may be engaged, it is necessary to show an illegality of its own; and this involves simply the question of what duties are laid upon the state with regard to individuals within its boundaries by positive international law."[1536]

Whilst the *Trail Smelter* arbitration undoubtedly sets forth a framework for incorporating responsibility and liability mechanisms within international environmental law, it remains unclear whether it convincingly establishes a rule of strict liability that could be, in turn, transposed integrally to counterterrorism. Whilst entertaining the possibility of deriving a rule of strict liability from *Trail Smelter*, Alexandre Kiss and Dinah Shelton echo some of Ellis' concerns about the inherent ambiguity in the Tribunal's reasoning, expounding that the arbitration "left open the question of whether a State exercising all due diligence would be liable if transfrontier harm results despite the State's best efforts" and adding that "the tribunal did not clarify whether a State is liable only for intentional, reckless or negligent behavior (fault based conduct) or whether it is strictly liable for all serious or significant transboundary environmental harm."[1537] Conversely, other

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AKEHURST'S, *supra* note 165, at 259; Talmon, *Responsibility of International Organizations*, *supra* note 961, at 410; Wolfrum, *State Responsibility*, *supra* note 229, at 424.

[1535] See Ellis, *Has International Law Outgrown Trail Smelter*?, *supra* note 1533, at 56-65 (citing Eagleton, THE RESPONSIBILITY, *supra* note 190, at 77).

[1536] Eagleton, THE RESPONSIBILITY, *supra* note 190, at 77.

[1537] Kiss and Shelton, *Strict Liability*, *supra* note 1362, at 1131-1132.

scholars rather construe the *Trail Smelter* precedent as endorsing the proposition that responsibility should not be based on fault, but on standards conceptually adjacent to strict liability.[1538] This viewpoint would appear congruent with classical doctrines supporting regimes premised on strict liability or absolute liability in order to better compel financial compensation for ultra-hazardous activities, a policy option principally attributable to economic sensibilities and concerns of 'risk allocation'.[1539]

As previously mentioned, the obligation of a state to prevent terrorist attacks emanating from its territory can also be derived from several other sources. With the advent of modern terrorism and transborder insurgency,[1540] some publicists are extending the scope of this obligation to other spheres of public international law. For instance, influential voices within American legal scholarship maintain that states have a collective 'duty to prevent' humanitarian disasters, along with the harbouring, production, and deployment of weapons of mass destruction.[1541] Similarly, the notion that states have an obligation to prevent transnational terrorist attacks emanating from their territory – as a stand-alone proposition – has also acquired credence in academic circles.[1542] The objective here is not to enumerate all of the possible sources of this obligation but to acknowledge that it has emerged as an important rule under international law. In fact, the existence of that norm is so widely recognized that it poses no

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[1538] See, e.g., Hyun S. Lee, *Post Trusteeship Environmental Accountability*: *Case of PCB Contamination on the Marshall Islands*, 26 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY 399, 413-414 and authorities cited therein (1998).

[1539] See, e.g., Hersch Lauterpacht, *Delictual Relationships between States*: *State Responsibility*, in Lauterpacht, THE COLLECTED PAPERS, *supra* note 1211, at 251, 399.

[1540] On modern terrorism and international law, see Lippman, *The New Terrorism*, *supra* note 168.

[1541] See, e.g., Feinstein and Slaughter, *A Duty to Prevent*, *supra* note 1251, at 136. It should be noted, however, that other prominent scholars categorically reject Feinstein and Slaughter's duty to prevent. For instance, Brunnée and Toope take issue with this approach, judging that the duty to prevent unnecessarily merges all justifications for recourse to force into one overriding security threat preemption model. See Brunnée and Toope, *Slouching Towards*, *supra* note 1252, at 387-390 and accompanying footnotes; *The Use of Force*, *supra* note 1106, at 802-804 and accompanying footnotes.

[1542] See Brown, *Use of Force*, *supra* note 148, at 4-5; Lippman, *The New Terrorism*, *supra* note 168.

problems and should not fuel a futile or circuitous debate.[1543] Much of the pertinent and modern sources of the obligation, such as Resolutions 1368 and 1373, have already been engaged in depth above. At any rate, it is helpful to briefly canvass the major sources of this obligation.

First and foremost, this obligation stems from the basic principle of sovereignty, which entails both rights and obligations.[1544] As one commentator notes, the concept of sovereignty also implies a correlative obligation of *due diligence*, particularly in the field of counterterrorism: "[l]a diligence est une obligation traditionnelle en droit international général, conçue comme un corollaire de la souveraineté, qui suppose que l'Etat veille, dans la mesure de ses moyens, à ce que ne se développent pas, à partir des territoires soumis à sa juridiction ou à son contrôle, des activités portant atteinte aux intérêts étrangers qui y sont localisés ou aux droits des étrangers."[1545] In fact, significant state practice corroborates the duty to exercise due diligence[1546] and it should be rather uncontroversial to classify this obligation as now immutably ingrained within general international law.[1547] From the perspective of cross-border relations and without disregard for potential *erga omnes* implications, it must also be emphasized that, under universal neighbouring principles, it is well established

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[1543] Many commentators have recognized this obligation. See, e.g., Brown, *Use of Force*, *supra* note 148, at 4-5 and 13-18; Lippman, *The New Terrorism*, *supra* note 168; Feinstein and Slaughter, *A Duty to Prevent*, *supra* note 1251.

[1544] For support of this proposition, see, e.g., Condorelli, *The Imputability*, *supra* note 125, at 240; Cançado Trindade, *Complementarity*, *supra* note 455, at 253-269, 259. See also Feinstein and Slaughter, *A Duty to Prevent*, *supra* note 1251, at 2 (citing a report of the Evans-Sahnoun Commission).

[1545] François Dubuisson, *Vers un renforcement des obligations de diligence en matière de lutte contre le terrorisme?*, in Karine Bannelier *et al.*, LE DROIT INTERNATIONAL, *supra* note 475, at 142.

[1546] See, e.g., Green Haywood Hackworth, DIGEST OF INTERNATIONAL LAW (VOLUME V) 654-665 (1940-1944); Marjorie Millace Whiteman (ed.), DIGEST OF INTERNATIONAL LAW (VOLUME VIII) 815-819, 830-835 (1963-1973); Elihu Lauterpacht (ed.), THE CONTEMPORARY PRACTICE OF THE UNITED KINGDOM IN THE FIELD OF INTERNATIONAL LAW 120 (1962); Alexandre-Charles Kiss (ed.), RÉPERTOIRE DE LA PRATIQUE FRANÇAISE EN MATIÈRE DE DROIT INTERNATIONAL PUBLIC (VOLUME III) 590-636 (1962-1972); J.A. Beesley and C.B. Bourne (eds.), *Canadian Practice in International Law During 1970 As Reflected Mainly in Public Correspondence and Statements of the Department of External Affairs*, 9 CANADIAN YEARBOOK OF INTERNATIONAL LAW 276, 295-297 (1971).

[1547] See, e.g., Brownlie, SYSTEM, *supra* note 205, at 162.

that some rights of one state end where the territory of another state begins.[1548] An obvious source of this obligation further lies in Article 2(4) of the *UN Charter*, which expressly prohibits its members from the threat or use of force against another country and reflects customary law.[1549] Based on that logic, a host-state that has the capability to prevent a terrorist attack but fails to do so will evidently not fulfill its duty under Article 2(4), since terrorism almost invariably amounts to recourse to force by definition. This proposition is undoubtedly reinforced when the host-state openly supports or endorses the terrorist attack on another state's territory.[1550] Indeed, one must always bear in mind that state responsibility for failing to prevent terrorism can be predicated on the state authorities' subsequent approval of the attack both pursuant to Article 11 and the *Tehran Hostages* case.[1551] This reasoning partly prompted José Alvarez to identify a new rule endorsed by the Security Council in the years following 9/11, thereby correlating the 'harbouring and supporting' rule with Article 2(4) of the *UN Charter* in the following manner: "[a] state's assistance to, harboring of, or post hoc ratification of violent acts undertaken by individuals within its territory, or perhaps even mere negligence in controlling such individuals, may make that state responsible for those acts and justify military action against it. In other words, such state action (or inaction) may constitute a breach of the state's own duty not to violate UN Charter Article 2(4)."[1552] In addition to Resolutions 1368 and 1373, there are

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[1548] See, e.g., Declaration on Friendly Relations, *supra* note 365; Declaration on Principles Guiding Relations Between Participating States, Conference on Security and Co-operation in Europe, Final Act (Helsinki, 1975), available online at http://www.osce.org. This proposition can also be traced back to Max Huber's famous arbitral award in *Îles Palmas*, *supra* note 67, at 164. See also Jennings and Watts, OPPENHEIM'S, *supra* note 323, § 119, at 385; Peirano, *International Responsibility*, *supra* note 365, at 191. There are also hints of this idea in Hume's seminal works on the theory of politics. See, e.g., Hume, THEORY OF POLITICS, *supra* note 1456, at 118 (discussing the law of nations and inferring that "there arises a new set of duties among the neighbouring states").

[1549] See Article 2(4) of the *UN Charter*, *supra* note 527. On this point, see also Brown, *Use of Force*, *supra* note 148, at 4. For a background discussion on the role of Article 2(4) in international relations, see Thomas Franck, *Who Killed Article 2(4)? Or*: *Changing Norms Governing the Use of Force by States*, 64 AMERICAN JOURNAL OF INTERNATIONAL LAW 809 (1970); Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICHIGAN LAW REVIEW 1620 (1984).

[1550] See, e.g., Baker, *Terrorism*, *supra* note 275, at 42 and 48.

[1551] *Tehran Hostages* case, *supra* note 67, at 33-35.

[1552] Alvarez, *Hegemonic International Law Revisited*, *supra* note 1110, at 879. But *Cf.* Nolkaemper, *Attribution*, *supra* note 248, at 160.

several additional documents adopted under the aegis of the United Nations,[1553] such as other Council resolutions[1554] and multilateral treaties,[1555] which impose an affirmative duty on states to prevent acts of transnational terrorism. The obligation of preventing terrorist acts has also been emphatically affirmed through international judiciaries.[1556] Thus, once the breach of the obligation to prevent terrorist attacks is established, the mechanism of state responsibility will automatically be triggered, irrespective of whether that obligation was grounded in treaty law,[1557] in customary law,[1558] in general rules of international law[1559] or in *jus cogens*.[1560] This obligation is also clearly mirrored under the precepts of IHL.[1561]

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[1553] See, e.g., Declaration on Friendly Relations, *supra* note 365, which is repeated almost verbatim in *Measures to Eliminate*, *supra* note 82, at 5(a). These declarations now reflect customary international law.

[1554] Several Security Council resolutions stand for the principle that international terrorism should be eradicated. See, e.g., S/RES/883 of 11 November 1993, 5th preambular (affirming "that the suppression of international terrorism…is essential for the maintenance of peace and security"); S/RES/1044 of 31 January 1996, 1st and 2nd preambulars ("[d]eeply disturbed by the world-wide persistence of acts of international terrorism in all its forms which endanger or take innocent lives, have a deleterious effect on international relations and jeopardize the security of States…expressed their deep concern over acts of international terrorism and emphasized the need for the international community to deal effectively with all such acts"); S/RES/1189 of 13 August 1998, 3rd preambular ("reaffirming the determination of the international community to eliminate international terrorism in all its forms and manifestations"); S/RES/1269 of 19 October 1999, para. 1 ("Calls upon all States to implement fully the international anti-terrorist conventions to which they are parties, encourages all States to consider as a mater of priority adhering to those to which they are not parties"); *Resolution 1267*, *supra* note 386, 5th preambular ("reaffirming its conviction that the suppression of international terrorism is essential for the maintenance of international peace and security"); *Resolution 1333*, *supra* note 386, 7th preambular.

[1555] Several treaties on combating terrorism are currently in effect, thereby strengthening international will in recognizing an affirmative obligation of prevention. For a list of treaties and UN resolutions, see Proulx, *Rethinking the Jurisdiction*, *supra* note 31, at 1031-1033, n. 47, and accompanying text.

[1556] As discussed in Chapter 2, the ICJ has recognized it in the *Tehran Hostages* case, at least by analogy.

[1557] See, e.g., *Continental Shelf*, *supra* note 254, at 38-39, para. 63; *Nicaragua*, *supra* note 119, at 95, para. 177. On the relationship between international treaties and state responsibility, see, e.g., Derek W. Bowett, *Treaties and State Responsbility*, in Virally, LE DROIT INTERNATIONAL, *supra* note 340, at 137-145

[1558] *Continental Shelf*, *supra* note 254, at 38-39, para. 63.

[1559] See Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 126.

[1560] See Vienna Convention on the Law of Treaties, 23 May 1969, *U.N.T.S.*, vol. 1155, at 331; Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 127. On this issue, see also Article 12 of the ILC's *Articles*, *supra* note 76, which establishes that the "origin and character" of an international obligation is irrelevant in demonstrating a breach of that obligation.

[1561] See, e.g., *Nicaragua*, *supra* note 119, at p. 119, para. 255. See also Martin, LES RÈGLES INTERNATIONALES, *supra* note 1, at 455.

In addition, customary law has long established a duty incumbent upon states to diligently suppress and prevent the use of their territory as a launch pad for activities harmful to other states, a notion that also covers acts carried out by private individuals.[1562] Similarly, states are expected to diligently suppress or prevent harm emanating from private actors and injuring foreign nationals within their own territory.[1563] For the purposes of the study at hand, it is imperative to highlight that both duties have been construed as extending to transnational terrorist acts.[1564] On the topic of *due diligence* obligations, Brigitte Stern astutely queries "si n'est pas apparue de façon coutumière *une obligation de diligence renforcée en matière de terrorisme international*."[1565] Drawing on the particularly stringent counterterrorism obligations imposed by the Security Council on the Taliban, she further suggests that "[c]ette obligation de diligence peut même apparaître comme *doublement renforcée dans le cas de l'Afghanistan*."[1566] Interestingly, a premonitory expression of the judicial genesis of these rules is perhaps embodied in the *Reparation for Injuries* case, in which

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[1562] See, e.g., *Alabama Claims Arbitration* (1872), Moore 1 INTERNATIONAL ARBITRATION 495; *Neer case (US v. Mexico)*, (1926) 4 RIAA 60, 61-62; *Caire Claim (France v. Mexico)*, (1929) 5 RIAA 516; *Texas Cattle*, *supra* note 67; *Corfu Channel*, *supra* note 67; *Tehran Hostages* case, *supra* note 67, at 31-32, paras. 63 and 67; *Nicaragua*, *supra* note 119. See also Hersch Lauterpacht, *Revolutionary Activities by Private Persons Against Foreign States*, 22 AMERICAN JOURNAL OF INTERNATIONAL LAW 105 (1928); Kelsen, PRINCIPLES (2nd Ed.), *supra* note 747, at 205-206; Brownlie, *International Law*, *supra* note 417, at 729. This rule can also be derived, inferentially, from *Asian Agric. Prod. Ltd.* v. *Republic of Sri Lanka*, 4 I.C.S.I.D. (W. Bank) 246, 252, 270, 284-285 (1990) (stressing that Sri Lanka's obligation to protect foreign nationals and property is not rooted in strict or absolute liability, but rather in due diligence).

[1563] See, e.g., *British Property*, *supra* note 67, at 640; *Tehran Hostages*, *supra* note 67; *Janes*, *supra* note 67, at 87; *Massey Claim*, *supra* note 67, at p. 155; *Youmans Case*, *supra* note 67; *Solis*, *supra* note 67; *Texas Cattle*, *supra* note 67; *Home Missionary*, *supra* note 67; *Noyes Case*, *supra* note 67, at p. 308. See also Brownlie, SYSTEM, *supra* note 205, at 161; Lillich and Paxman, *State Responsibility*, *supra* note 67, at 222-251, 262-270.

[1564] See, e.g., Lillich and Paxman, *Ibid*, at 254-262, 276-307; Sompong Sucharitkul, *Terrorism As an International Crime*: *Questions of Responsibility and Complicity*, 19 ISRAEL YEARBOOK ON HUMAN RIGHTS 247 (1989); Luis L. Kutner, *Constructive Notice*: *A Proposal to End International Terrorism*, 19 NEW YORK LAW FORUM 325 (1974); Franck and Niedermeyer, *Accommodating*, *supra* note 201, at 99-128.

[1565] See Stern, *La Responsabilité*, *supra* note 262, at 689. [Emphasis in original.]

[1566] *Ibid*, at 690. She further adds, at *Ibid*, that "[s]'il y a eu violation de ces obligations de *due diligence*, les talibans engagent leur responsabilité internationale, mais la discussion reste ouverte de savoir si la violation de ces obligations permet de leur imputer les actes des terroristes." But *Cf. Ibid*, at 692 ("[q]uoiqu'il en soit, que ce soit du fait d'un acte illicite propre ou de l'imputation de l'acte du particulier, l'Etat est en tout cas responsable des conséquences dommageables de l'acte du particulier, en l'espèce des conséquences dommageables des attentats du 11 septembre.").

Israel's international responsibility for failing to prevent the assassination of Count Bernadotte -- a United Nations mediator in Palestine -- by Jewish extremists in Israel is inferred by the ICJ for the purposes of pursuing its advisory opinion.[1567]

Hence, it is now trite to say that states are responsible for preventing terrorist excursions emanating from their territory.[1568] The ILC's *Articles*, which indicate that an internationally wrongful act can originate from an action or omission,[1569] further support the existence of such an obligation, when supplemented by the abovementioned sources. Irrespective of possible ontological complexities associated with omissions,[1570] it remains clear that the "crime of omission stands outside the chain of events within which a fact is connected with is consequences", in that "[a]n ethical duty – moral or legal – required someone to prevent the evil."[1571] A practical illustration of this principle could be found in illegal wartime conduct: "[i]f soldiers are accused of war crimes or if prisoners are tortured, the officers in charge of military discipline had a duty to prevent the perpetration of such wrongful acts and can themselves be punished although they did not materially engage into the conduct."[1572] Although international judiciaries have sometimes fumbled over the distinction between

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[1567] See *Reparation for Injuries Advisory Opinion*, *supra* note 788. See, also, in particular *Ibid*, at 185 ("[h]ere again the Court is authorized to assume that the damage suffered involves the responsibility of a State, and it is not called upon to express an opinion upon the various ways in which that responsibility might be engaged.").

[1568] For support of this proposition, see, e.g., Dinstein, *The International*, *supra* note 125, at 145; Battaglini, *War Against Terrorism*, *supra* note 426, at 143 (framing it as "international obligations of vigilance"). For more on the duty of vigilance, as expressed in the *Tehran Hostages* case, see Yoram Dinstein, WAR, AGGRESSION AND SELF-DEFENCE 206 (4th edition, 2004); Bederman, *Contributory Fault*, *supra* note 878, at 343; Jennifer Lane, *The Mass Graves at Dasht-e Leili*: *Assessing U.S. Liability for Human Rights Violations During the War in Afghanistan*, 34 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 145, 159 (2003); John Quigley, *State Responsibility for Ethnic Cleansing*, 32 U.C. DAVIS LAW REVIEW 341, 355 (1999).

[1569] See Article 2 of the ILC's *Articles*, *supra* note 76. There is no substantial difference between both types of conduct. On this point, see Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 82.

[1570] See, e.g., Mario Bunge, *The Revival of Causality*, in Floistad Guttorm (ed.), CONTEMPORARY PHILOSOPHY: A NEW SURVEY (VOL. II) 133-155, 136 (1986).

[1571] Rigaux, *International Responsibility*, *supra* note 179, at 82.

[1572] *Ibid*.

omissions and surrounding circumstances,[1573] it is uncontroversial to assume that a state's passiveness, complacence or indifference vis-à-vis the concoction of terrorist agendas on its own territory might trigger its international responsibility. Moreover, this position is framed and further buttressed by Article 14(3) of the ILC's *Articles*, which provides that "[t]he breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation."[1574]

Although the *Articles* underscore the distinction between instantaneous and continuing breaches of international obligations,[1575] the scope of this project is primarily concerned with the interplay between the obligation to prevent terrorism and the *Articles*, without any emphasis on the temporal dimensions of breaches under international law.[1576] In other words, once a state has failed to fulfill its obligation to prevent terrorism, its conduct will attract the application of secondary rules of state responsibility.[1577] As discussed above, it may well be that catastrophic terrorist strikes, such as those perpetrated on 9/11, could engender ripple effects and amount to an ongoing violation of international law if, for instance: i) the host-state is negligent in thwarting post-attack aftershocks, such as further attacks, that could have been prevented with the intelligence now at hand; or ii) further oversight/inaction by the host-state's government allows individuals to exploit the original attack on its territory for the purposes of recruitment or international political leverage; or iii) knowingly harbours terrorists on its soil

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[1573] On this point, see, e.g., *L'acquisition de la nationalité polonaise*, *supra* note 246; *Corfu Channel*, *supra* note 67, at 22-23; *Tehran Hostages* case, *supra* note 67, at 63 and 67; *Velásquez Rodríguez*, *supra* note 17, at para. 170.

[1574] Article 14(3), *ILC Articles on State Responsibility*, *supra* note 76.

[1575] For a discussion on the distinction between instantaneous and continuing breaches under international law, see *supra* Chapter 4, Section B)3.a).

[1576] On the concept of time in the context of international state responsibility, see Karl, *The Time Factor*, *supra* note 687, at 95-114; Wyler, *Quelques réflexions*, *supra* note 687, at 881-914. On time and the law, generally, see Higgins, *Time and the Law*, *supra* note 687.

[1577] On the distinction between primary rules and secondary rules of state responsibility and its underlying philosophy, see *Yearbook of the International Law Commission 1963*, vol. II (Part One), doc. A/CN.4/152, p. 228 at para. 5; Alland and Combacau, *'Primary' and 'Secondary'*, *supra* note 77.

and/or disregards or disobeys binding Security Council resolutions to that effect.[1578]

This type of inquiry certainly holds true with regard to the establishment of liability for the purposes of indemnification for terrorist attacks under domestic legal structures. In fact, this type of scenario brings about a plethora of additional questions with regard to the state apparatus' diligence: "[d]oes the loss sustained originate in the measures taken by the police in the field which proved to be insufficient? Or on the contrary, is it the result of the legal preventive orders enacted by the government which proved to be tardy or inadequate? Or again, have inadequacies of the rescue services increased the damage?"[1579] There is no reason why such concerns are not directly transposable to international state responsibility and further scrutiny will be accorded to them in the next section. Yet, the argument becomes particularly compelling when considering intelligence or law enforcement failures – between the Central Intelligence Agency and the Federal Bureau of Investigation within the U.S. in terms of domestic liability, for example[1580] – or the government of Afghanistan's failure to monitor and thwart Al-Qaeda despite numerous warnings from the Security Council and lamentations emanating from the international community, in terms of international state responsibility.[1581] Keeping the domestic legal indemnification analogy in mind, there is no reason why this rationale should not carry over to international law and enable the international community to scrutinize the shortcomings or negligence of host-states, especially if the terrorist attack in question was foreseeable. Indeed, "the administrative judge may find for serious negligence on the part of

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[1578] As one commentator noted prior to 9/11, "[w]here states are made aware, by factors or circumstances, of dangerous situations and do not act, they will be held accountable for the consequences." See McCredie, *The Responsibility*, *supra* note 70, at 86.

[1579] Renoux and Roux, *The Rights of Victims*, *supra* note 333, at 254.

[1580] See, e.g., Stephen J. Schulhofer, THE ENEMY WITHIN: INTELLIGENCE GATHERING, LAW ENFORCEMENT, AND CIVIL LIBERTIES IN THE WAKE OF SEPTEMBER 11 31-33, 63 (2002). It should be recalled that "a State is legally obliged to exercise due diligence to prevent the commission of acts of international terrorism within its jurisdiction." See *Report of the Sixty-First Conference*, INTERNATIONAL LAW ASSOCIATION 7 (1984). See also Martin, LES RÈGLES INTERNATIONALES, *supra* note 1, at 459.

[1581] On the relationship between the government of Afghanistan and Al-Qaeda, see Gunaratna, INSIDE AL QAEDA, *supra* note 3, at 10-20, 41, 53-60, 66-70, 72, 77-82, 123-124, 128, 131, 134, 142, 146, 151, 154, 159-161, 223, 227-232, 263, 275, 278, 285-286, 289-290, 293, 297-298.

the police services or a total lack of preventive measures, in so far as the act of terrorism was not absolutely unpredictable with regard to its time and place, and the authorities had failed to take notice of information suggesting the possibility of a terrorist attack."[1582] In tackling these difficult possibilities and similar situations, judiciaries emphasize the importance of knowledge possession by states and, perhaps more importantly, the correlation between information gathered and a 'real and immediate' risk to the potential victims of attacks.

In fact, the European Court of Human Rights was confronted with a relevant fact pattern in the *Osman* case.[1583] In that decision, charges were levelled against British police forces for failing to act on death threats directed at particular citizens. In reasoning strangely reminiscent of a widespread reading of *Corfu Channel*, the Court developed the following threshold in assessing the lack of preventive action impugned to the police forces: "it must be established…that the authorities *knew or ought to have known* at the time of the existence of a *real and immediate risk* to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."[1584] Ultimately, the Court held that "the applicants have failed to point to any decisive stage in the sequence of the events leading up to the tragic shooting when it could be said that the police knew or ought to have known that the lives of the Osman family were at real and immediate risk."[1585] Extending this rationale to transnational terrorism, as will be discussed under the subsequent heading dealing with the content of the obligation of prevention, intelligence or law enforcement failures, or complacency, can be sufficient to crystallize a host-state's international responsibility. Thus, a determinant element will reside in the actual level of risk faced versus the degree of inaction of the state apparatus, all

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[1582] Renoux and Roux, *The Rights of Victims*, *supra* note 333, at 254. On the obligation of states to punish the authors of crimes perpetrated against foreigners – framed as an obligation of result – see Combacau, *Obligations*, *supra* note 1025, at 188 (invoking the level of "diligence requise").

[1583] *Osman* v. *United Kingdom*, App. 23452/94, [1998] ECHR 101, Judgment of 28 October 1998, EctHR, REPORTS 1998-VIII, available online at http://www.worldlii.org/eu/cases/ECHR/1998/101.html (last visited on 15 August 2007) [hereinafter *Osman*].

[1584] *Ibid*, at para. 116. [Emphasis added.]

[1585] *Ibid*, at para. 121.

contemplated through the prism of the available information before the attack: "[t]he fact that a state possessed information as to terrorist threats and failed to act on it could conceivably be sufficient to render the state responsible if the threats are realised, although this would depend on there being clear information indicating a 'real and immediate risk' in circumstances where the state was in a position reasonably to prevent deaths and failed to do so."[1586]

Now that it has been established that an affirmative duty to forestall terrorist activities encumbers upon all states, the focus of the inquiry ineluctably shifts to the contents and contours of such obligation through the lens of a context-sensitive, policy-oriented approach. As one influential commentator highlights, "[i]t must always be borne in mind that the rules relating to state responsibility are to be applied in conjunction with other, more particular, rules of international law, which prescribe duties in various precise forms…the basic concept of responsibility is a necessary but not a sufficient condition for the imposition of responsibility for breaches of particular legal duties."[1587] In defining the obligation of prevention, the legal community might, again, have to defer to municipal law analogies and insights, as the realm of state responsibility offers a wide margin for cross-sectorial legal transplantations.[1588] The abovementioned texts form only but a part of the legal mosaic of international instruments in combating terrorism, and more academic writing is undoubtedly required so as to tease out the contours of some of the primary obligations contained therein. In the interim, it would undoubtedly prove beneficial to address the makeup of the obligation of prevention both from descriptive and prescriptive standpoints. This task will be better achieved through direct reference to the content of this obligation, as framed in the above proposed strict liability model.

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[1586] Duffy, THE 'WAR ON TERROR', *supra* note 133, at 308.
[1587] Brownlie, SYSTEM, *supra* note 205, at 40 (also adding that [t]he relevance of fault, the relative 'strictness' of the obligation, will be determined by the content of each rule").
[1588] But *Cf*. Provost, *Introduction*, *supra* note 77, at XIII (noting the awkwardness of borrowing from municipal tort law or delictual responsibility in the field of State responsibility, and citing Lauterpacht, PRIVATE LAW, *supra* note 1145).

### 2. Content of the Obligation of Prevention

As prefaced above, the second tier of the proposed strict liability approach centres on a host-state's attempt to refute or, at least, dissipate the *prima facie* finding of indirect responsibility against it. Most of the usual considerations surrounding the failure to prevent a terrorist attack -- be they the level of knowledge of the host-state, the size of the territory and its police/military capacity, the nature of the circumstances and history of terrorism within the country, and so on -- should be invoked throughout this second step. It is fair to say that international law could countenance a shift in onus flowing from the aggrieved country to the sanctuary state: as a result, the duty to demonstrate that the latter acted in conformity with its international obligations or that its conduct aligned with the objectives set out by the international community vis-à-vis terrorism should fall squarely on its shoulders. Hence, we start from the premise that, once the positive act has been carried out, namely that the terrorist strike was successful, responsibility and the burden of justification simultaneously attach to the host-state.[1589] This is not to say, however, that no issue of international responsibility arises prior to the failure by a state to prevent a transnational terrorist strike (i.e. international obligations are violated as soon as such state harbours terrorists on its territory in contravention of international law). Before moving on to the more 'modulatory' policy aspects of the obligation under study, some preliminary remarks are warranted on the very nature of that legal duty.

#### a) Obligation of Conduct versus Result Dichotomy

Indeed, the debate surrounding the elucidation of secondary obligations under the law of state responsibility in the context of counterterrorism raises the related and difficult question of defining the actual contours and character of the relevant obligations, at least at the primary level (if one accepts that relevant secondary obligations are automatically triggered once an internationally wrongful act by the state is established, a relatively uncontroversial proposition).

[1589] It is relevant to recall the discussion on the role of 'fault' in the context of the ILC's *Articles*. In particular, allusion was made to Crawford's response to Gattini, *supra* notes 1149-1152. In his reply, Crawford opened the door to implementing strict liability under the law of international state responsibility.

As canvassed above, the exploration of this dimension of counterterrorism policy is better pursued by reference to the distinction between obligations of means and obligations of result under public international legal discourse.[1590] The challenges arising from this line of inquiry are particularly acute, given the general ambiguity surrounding the status of obligations of prevention, generally, a confusion that is undoubtedly exacerbated by the delicate and politically-sensitive nature of combating transnational terrorism.

Although the distinction between obligations of conduct and result has proven instrumental at times under the auspices of the ILC's *Articles*,[1591] obligations of prevention "are usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur."[1592] This will presumably operate by reference to the afore-discussed notion of due diligence once the burden of proof has been transferred to the wrongful state, albeit through an objective construction of that concept. Drawing on Anzilotti's seminal work on objective responsibility, it becomes clear that any international obligation making states responsible for the acts of private persons "must be seen not as an "absolute" obligation to prevent or punish harmful activities carried out by private individuals; but as a "relative" obligation to maintain, with regard to such activities, that particular conduct of prevention and punishment which is required by international law."[1593] In broader terms, the distinction between obligations of conduct and result remains somewhat relevant for the application of the *Articles* but does not constitute the pivotal focal point: rather, it "may assist in ascertaining when a breach has occurred."[1594] Conversely, the importance of this

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[1590] On the distinction between obligations of means and obligations of result, generally, see Dupuy, *Le Fait générateur*, *supra* note 1321, at 9, 44, 47-51; Guy S. Goodwin-Gill, *State Responsibility and the 'Good Faith' Obligation in International Law*, in Malgosia Fitzmaurice and Dan Sarooshi (eds.), ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 75-104, 77-80 (2004).

[1591] The transplantation of these civil law concepts into international law has also engendered significant difficulties. On this topic, see Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 21.

[1592] *Ibid*, at 140.

[1593] Pisillo-Mazzeschi, *The Due Diligence*, *supra* note 1178, at 103.

[1594] Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 129. See also Brownlie, SYSTEM, *supra* note 205, at 241.

distinction cannot be ignored or under-emphasized.[1595] In terms of enforcing an obligation of result via the judiciary, courts will be more inclined to proceed on a case-by-case basis, rather than subsuming all similar obligations under a single legal matrix.[1596] In addition, this distinction has not been engaged as a determinative factor in guiding courts when adjudicating breaches of international obligations.[1597] So as to better frame the discussion to follow, it is nonetheless useful to briefly provide some background on both types of obligation, whilst also drawing some important comparisons with international environmental law.

Thus, an obligation of conduct requires or prohibits a certain conduct or behaviour by the state (e.g. a treaty obligation stipulating that member-states have to tax polluters at a certain level), whilst an obligation of result requires the state to bring about a certain situation or result. In so doing, the state is free to adopt any conduct or use any means at its disposal in attaining the prescribed result (e.g. member-states have to reduce greenhouse emissions by 30% by a certain date -- these states can then use any means to meet their obligation, such as taxing polluters, imposing stringent industry standards, imposing fines, implementing restrictive licensing, and so on). In fact, the ICJ has recently interpreted the notion of obligation of result rather liberally, granting, *inter alia*, a reasonable period of time for the implementing state to align its legislative or constitutional structure with the result of the obligation.[1598] At any rate, varying criteria will generally guide the analysis and be invoked to determine a breach of either type of obligation. Under an obligation of conduct, the focus of the inquiry hinges on the actual conduct of the state, while, under an obligation of result, one tends to analyze the actual effects of state action or inaction in the grander scheme of things. It should be mentioned, however, that these criteria are not always mutually exclusive and somewhat merge when it comes to obligations of prevention, a vital observation for present purposes given that most

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[1595] See, e.g., Oscar Schachter, *The Obligation of the Parties to Give Effect to the Covenant on Civil and Political Rights*, 73 AMERICAN JOURNAL OF INTERNATIONAL LAW 462, 462 n.1 (1979).

[1596] For example, compare *Colozza and Rubinat* v. *Italy*, *E.C.H.R.*, *Series A,* No. 85 (1985) [hereinafter *Colozza*]; *Islamic Republic of Iran* v. *United States of America (Cases A15 (IV) and A24)*, (1996) 32 *Iran-U.S.C.T.R.*, 115.

[1597] See Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 130.

[1598] *Request for Interpretation – Avena*, *supra* note 1385, at para. 44.

counterterrorism obligations will be instilled, at least in theory, with a mandatory preventive character. At the primary level, these types of obligations require the state to actually forestall the occurrence of a given event or situation. Failing such prevention after the event materializes, or the actual materialization of the event, itself, state responsibility can still arise if the conduct or actions of the state in question violate the content of the obligation of prevention. For instance, Pakistan is in violation of its international counterterrorism obligations if it harbours members of Al Qaeda on its territory, irrespective of whether a terrorist strike is ultimately launched from its soil. If the event does finally materialize, a nexus between the event and the conduct of the alleged wrongful state in question must be demonstrated. In cases where the event occurs and the state could have prevented it by adopting different conduct or, even when a state did not have the ability to thwart a terrorist strike but could have used means to significantly hamper it, the result required by the obligation can be said to not having been achieved. In other words, the obligation of prevention cannot be construed in absolute terms, as such construction would eviscerate it of any real substantive content. At the outset, one can glean the compatibility of this type of scenario with the notion of due diligence, which was addressed throughout the dissertation and remains the linchpin of many counterterrorism obligations.

It becomes clear that the nature and content of international obligations will have important and direct incidence on the application of the law of state responsibility. One can also immediately grasp that the interplay between the very nature of the obligations at play and the conduct or result that is expected of states can become rather complex. As a result, the corresponding legal interface of primary/secondary rules that emerges from the foregoing often remains marred by normative discrepancies or normative vacuums.[1599] In this light, as previously mentioned, it should be reiterated that obligations of prevention are usually equated with best efforts obligations, requiring states to take all reasonable or necessary measures to prevent a given event from occurring without

[1599] For a general discussion on the imprecision of the contents of primary obligations of conduct/result across different fields, see Combacau, *Obligations*, *supra* note 1025, at 185-186.

commissioning a specific result (i.e. the prevention of the given event). For example, the ICJ's recent judgment in the *Genocide* case seems to stand for the proposition that the oligation to prevent genocide, whilst not warranting a specific result, does nonetheless obligate a host-state to put forth its best efforts in attempting to quell the tragedy. In that particular case, the FRY authorities should have deployed "the best efforts within their powers to try and prevent the tragic events."[1600] Not surprisingly, the flipside to this posture is the idea that "for a State to be held responsible for breaching its obligation of prevention, it does not need to be proven that the State concerned definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them."[1601] Conversely, although very little efforts have been deployed in actually circumscribing the contents of primary counterterrorism obligations, there might, in fact, be a legal thrust toward the implementation of obligations of result in the "war" on terror, at least on a rhetorical level.

In the context of Security Council practice, a popular and recurrent manifestation of this phenomenon is for the Council to impose an obligation to criminalize terrorism – and the corresponding duty to prosecute – without providing an actual definition of 'terrorism'. How does a state prosecute or criminalize an activity that is not defined? This conundrum can be resolved by concluding that a sufficiently diversified group of states share common definitional cardinal points in their respective perceptions of what constitutes 'terrorism', so as to legally circumscribe that term for the purposes of the law of state responsibility. Furthermore, in such instances the Council invariably omits to furnish details as to the modes and fora of criminal prosecution. For instance, should a national prosecution of terrorist activity prove illusory because of political haggling, jurisdictional issues or other concerns, can we expect the referral of the matter to the International Criminal Court to be sufficient in meeting that state's obligation? As explored in depth above and in response to this rather broad margin of appreciation of the relevant primary norms, some

[1600] See *Genocide Case*, *supra* note 100, at para. 438.
[1601] *Ibid*.

states are increasingly criminalizing what traditionally constituted mere evidentiary elements in the domestic criminal law context so as to enhance their due diligence capital in stamping out extremist elements on their soil. As a corollary, we are witnessing a shift towards more indirect modes and forms of accountability both at the domestic and international levels.[1602]

Another, perhaps more relevant, example is the frequent exhortation by the Council upon states to refrain from harbouring and supporting terrorists on their respective territories. Again, no operative definition of 'harbouring and supporting' is advanced with a view to prescribing *specific* conduct.[1603] This confusion in turn brings about complex additional questions, of which, threshold concerns certainly dominate the inquiry. Looking beyond the much-decried provision of political and jurisdictional solace, to the toleration of training camps and other logistical accommodations afforded the Al Qaeda Network by Afghanistan, what other forms of governmental action or inaction will trigger a state's responsibility in failing to prevent terrorism? In the event that the sanctuary state is oblivious to the concoction of terrorist agendas on its territory, is it still 'harbouring' terrorists, pursuant to the Council's resolutions? More challengingly, both Pakistan and Yemen offer an intractable and hybrid model of compliance and toleration: on one hand, they both serve as key allies to the U.S. in its struggle against transnational terrorism while, on the other hand, they fail to control portions of their national territory and thereby tolerate extremist elements on their soil (for instance, in the Pakistani Northwestern, semiautonomous tribal areas or in the Yemeni Abyan, Ma'rib and Shabwa governorates). Further inquiries are potentially endless or, at least, as numerous as possible scenarios and degrees of governmental involvement or inaction vis-à-vis terrorism. This reality is undoubtedly exacerbated by the advent of new weaponry and technology, such as the Internet.[1604]

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[1602] For further discussion on these points, see *supra* Chapter 1, Section A); Chapter 4, Section B)2.b).

[1603] See Duffy, THE 'WAR ON TERROR', *supra* note 133, at 57-58.

[1604] On the challenges of cyber-terrorism, see, e.g., Gregory S. McNeal, *Cyber Embargo*: *Countering the Internet Jihad*, 39 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 789 (2007-2008).

Indeed, cyber-terrorism raises particularly intractable challenges for state responsibility, even if one accepts that the international struggle against terrorism is governed by straightforward primary obligations.[1605] Thus, the real difficulty crops up at the secondary level of the international breach, that is to say once the proper invocation of responsibility has been effectuated and an attempt to deploy the mechanics of international liability is engaged. Whilst it is theoretically possible to impute a cyber attack to a geographically-delimited area, ascertaining authorship of such unlawful conduct is, by no means, a straightforward task (i.e. was the conduct carried out by a state, non-state actors, a group, an individual or some mixed configuration of those elements?). In addition, the issue of anonymity works in tandem with that of the speed of online transactions and events in blurring all traces susceptible of leading back to the true culprits.[1606] As one commentator underscores, "even discriminate attacks easily become indiscriminate because the Internet is interconnected."[1607] As a corollary, even the seizure of Internet Protocol addresses can turn out to be a fallacious benchmark, as the web is increasingly utilized as a prized vehicle to pursue subterfuges and to engage in unlawful activity through surrogates.[1608]

A particularly striking case in point undoubtedly resides in a series of nebulous cyber-attacks carried out against online interests in Estonia in April-May 2007, a succession of events unprecendented in scale.[1609] These attacks were likely prompted by Estonia's decision to move a contentious Soviet-era statue to a new location. Over a period of several weeks, unidentified assailants waged an

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[1605] For a thoughtful discussion of these issues, see Lieutenant Commander Matthew J. Sklerov, *Solving the Dilemma of State Responses to Cyberattacks*: *A Justification for the Use of Active Defenses Against States Who Neglect Their Duty to Prevent*, 201 MILITARY LAW REVIEW 1 (2009).

[1606] See, generally, White House, THE NATIONAL STRATEGY TO SECURE CYBERSPACE (2003), available online at http://www.dhs.gov/xlibrary/assets/National_Cyberspace_Strategy.pdf (last visited on 4 August 2009); Susan Brenner, *At Light Speed*: *Attribution and Response to Cybercrime/Terrorism/Warfare*, 97 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 379 (2007).

[1607] Shackelford, *From Nuclear War*, *supra* note 126, at 199.

[1608] See Brenner, *At Light Speed*, *supra* note 1606, at 424 (highlighting that a host-state may enlist "'civilian' cybercriminals and cyberterrorists to conduct their operations from within its borders" in order to conceal the "purpose and origins of the statesponsored attacks" behind a civilian façade).

[1609] For more background on this episode, see Mark Landler and John Markoff, *Digital Fears Emerge after Data Siege in Estonia*, NEW YORK TIMES, May 29, 2007, at A1.

unrelenting onslaught of cyber-strikes against Estonian targets, including: i) immersing the websites of Parliament, the President and the Prime Minister with a barrage of junk email messages, thereby causing the sites to crash; and ii) bringing down several national newspaper websites, thereby provoking high-level consultations on devising a strategy to shelter essential services – such as online banking – from further attacks. In responding to this first round of online terrorist strikes, Internet service providers across the globe managed to thwart a majority of the incoming harmful data, thereby reinforcing the argument advanced above to the effect that the challenges posed by terrorism must be met with truly international responses whilst transnational cooperation must also be enhanced. Indeed, much in the cooperative spirit deriving from the *Genocide* judgment, if all states work in concert and take active steps towards repressing and thwarting terrorism on their respective soils, they might increase the likelihood of ultimately bringing about the intended result across the board (i.e. the prevention of transnational terrorism). After what initially appeared to be a diminution in additional prospective cyber-attacks, Estonia proclaimed that the attacks emanated from Russia. This politically-driven 'geographical' attribution, for lack of a better term, triggered another wave of online attacks, including: i) botnet attacks resulting in the incapacitation of the online portal of Estonia's largest bank, thereby engendering financial losses exceeding one million dollars; ii) capacity-gauging attacks on networks followed by data flood attacks originating from various sources and saturating the network routers' bandwith; and iii) a series of smaller-scale cyber strikes in the following weeks. The principal mode of attack centered on a strategy employing 'distributed denial of service' attacks ("DDOS attacks"), a tactic causing the targeted websites to malfunction as a result of continuous bombardment of factice information requests.[1610] In that regard, the final figures are staggering. According to the data collected by Arbor Networks Active Threat Level Analysis System, over 128 distinct DDOS attacks were perpetrated against specific Internet protocols located within Estonia throughout the online conflict; as a result, online traffic expanded from 20,000 packets to

[1610] See, e.g., *A Cyber Riot*: *Estonia and Russia*, THE ECONOMIST, May 12, 2007.

more than 4 million units per second.[1611] In addition to ranging between one and ten hours, the strikes emanated from different states, including Egypt, Peru, and Russia.

Not only does this precedent raise challenging questions with regard to the principle of attribution but, even before reaching such analytical stage, it leaves room for doubt as to the characterization of the cyber-attacks. Some commentators rightly ponder whether these attacks could be potentially construed as: a) cybercrimes resulting, in part, from Russian Nashi hackers staging a coup; b) cyberterrorism carried out by an organization seeking to further its own political or ideological agenda; or c) cyberwarfare accompanied by heavy involvement of Russian intelligence operatives.[1612] Ultimately, even if those attacks are qualified as emanating from the state directly or, alternatively, as stemming from the actions of non-state actors, the issue of attribution as it currently stands under the ILC's *Articles* remains elusive. Equally challenging is the fact that – similarly to some terrestrial attacks – web-based transnational strikes may span over several states, thereby further compounding the analysis whilst simultaneously entailing the potential application of Article 47(1), as will be discussed below.[1613] As a corollary, this transnational complexity significantly affects, perhaps restrictively, the means that states may harness with a view to complying with their counterterrorism obligations. Consequently, it is difficult to draw dispositive inferences either way without clearer legal organizing principles operating in tandem with a context-sensitive, policy-informed approach as the one proposed below in Section C)2.b). In this particular instance, there is some indication that Russia could have done more to prevent the cyber-attacks so as to increase its due diligence capital, as the nature of the attacks did not, in any way, absolve it from fulfilling its obligation of prevention. Further exacerbating its potential liability were both the fact that the attacks were of a continuing character, thereby requiring Russia to step up efforts to thwart future or imminent

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[1611] See Sean Kerner, *Estonia Under Russian Cyber Attack?*, SECURITY, May 18, 2007.
[1612] See, e.g., Shackelford, *From Nuclear War*, *supra* note 126, at 231; Susan Brenner, *At Light Speed*, *supra* note 1606, at 424.
[1613] For a discussion of this provision, see *infra* notes 1688-1694 and accompanying text.

attacks or to seek out external assistance in so doing, and the concern that the state was intentionally obstructing the criminal investigation because, *inter alia*, the Russian public hailed the hackers as national heroes.[1614] There was certainly a breakdown in cooperation between Russia and Estonia given Russia's conduct, which led to its violation of its obligation of prevention. Indeed, "[s]tates that deny involvement in a cyberattack, but refuse to open their investigative records to the victim-state, cannot expect to be treated as a state living up to its international duties."[1615] Russia's obligation included corollary duties, such as the adoption of more stringent criminal legislation, conducting more serious and probing investigations, prosecuting cyber-attackers and, while the investigation and prosecution were pending, cooperating with Estonia and other aggrieved states. Within the range of means available in attaining these objectives, Russia could have considered the implementation of early detection and warning programmes to thwart future cyber-attacks, along with the implementation of trace programmes in order to infiltrate virtual intermediaries back to their electronic source and ascertain the identity of the hackers.[1616]

More importantly for the purposes of the conduct/result dichotomy, the present line of argument, which has been somewhat critical of the Council's lack of direction, does not purport to insinuate that that organ should necessarily have pushed the legal envelope even further. In fact, compelling propositions have been put forth to the effect that Resolution 1373 and its accompanying framework amount to a constitutional revolution. Hence, it is up to international jurisprudence, international practice and legal scholarship to interpret, (de)construct, (re)construct and shape the relevant norms in order to move towards filling this conceptual void. Simply put, a straightforward obligation of

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[1614] See, e.g., Duncan Hollis, *Why States Need an International Law for Information Operations*, 11 LEWIS & CLARK LAW REVIEW 1023, 1026 (2007); Clifford Levy, *What's Russian for "Hacker"?*, NEW YORK TIMES, 21 October 2007.

[1615] Sklerov, *Solving the Dilemma of State Responses to Cyberattacks*, *supra* note 1605, at 72.

[1616] See, e.g., Ryan Naraine, *Chertoff Describes 'Manhattan Project' for Cyber-defenses*, EWEEK.COM, 8 April 2008, available online at http://www.eweek.com/c/a/Security/Chertoff-Describes-Manhattan-Project-for-Cyber-Defenses/ (last visited on 11 May 2010); David A. Wheeler and Gregory N. Larsen, *Techniques for Cyber Attack Attribution*, INSTITUTE FOR DEFENSE ANALYSES, October 2003, available online at http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA468859&Location=U2&doc=GetTRDoc.pdf (last visited on 11 May 2010).

prevention exists under international law –the policy thrust of the present dissertation rather advocates a renewed emphasis on the secondary rules of international responsibility as a way to shed more light on the application of primary rules. Conversely, the contrary argument must also be weighed in the balance, as further clarification of relevant primary rules could be immensely helpful; additionally, the potential implementation of obligations of result in this debate -- whilst unlikely and politically impracticable -- must nonetheless be considered in light of parallel developments in the field of international environmental law.

Following that logic for a moment, by hypothetically casting overarching obligations of result across the board, the main purpose of the Council in counterterrorism contexts would presumably be to disregard any specific means employed by states in fulfilling said obligations. Consequently, under this light the focus of state responsibility mechanisms would be strictly concerned with the actual result, as vague or broad as it may be. In other words, it becomes a way to short-circuit the imposition of policy guidelines – or pre-empts any potential and practical legislating function beyond the promulgation of abstract primary rules – emanating from the Council. However, the approach of providing broad and far-reaching obligations without defining a more specific range of permissible conduct towards attaining the desired result is dangerous, at least in one, obvious way. By completely disregarding the means used to fulfill the obligations, the Council is actually failing to provide any legislative or normative frameworks through which the legal objective should be perceived or contemplated. In particular, as discussed above, considerable emphasis should be placed on the protection of international human rights standards and constitutional safeguards.[1617] If no guidance is provided as to what conduct is permissible at a principled level in a highly complex and, in many regards, novel international campaign against terrorism, states can become susceptible to overreaction or to combating the threat via unlawful means.[1618] The flouting of long-established

[1617] See, *supra*, Section B)6.a).

[1618] Indeed, some argue that situations of social or political upheaval usually trigger an overreaction by the executive branch in deploying counter-crisis initiatives. For a thoughtful

international legal standards underpins one of the recent criticisms often levelled against U.S. policy in the "war" on terror since 9/11, for example.[1619] Moreover, in this context the realm of state responsibility can be seen as an incubator for the further extension and propagation of the values enshrined in international human rights. As Professor Chinkin rightly points out, "the assertion of State responsibility for failure to exercise due diligence to prevent, or for acquiescence in, abuses committed by non-State actors, whether they be private individuals, para-military forces, multinational corporations or religious fundamentalists, extends the reach of human rights guarantees."[1620] Similarly, the emergence of a vast multiplicity of non-state terrorist actors – operating nationally, internationally or transnationally – also served as policy impetus for the formulation of some of the tenets of the R2P Doctrine.[1621]

One must remain mindful, however, that states that flout international law in combating terrorism are most likely motivated by the blind and egregious pursuit of self-interests or by some politico-ideological inclination, rather than by any ostentatious disdain for the Security Council. Certainly, the lack of respect for the UN's structure of operation – compounded by the existence of what was once perceived as a sole, lonely superpower[1622] – remains part of the problem, but it is not entirely symptomatic of the recent disregard for international legal norms. That being said, however, it is no reason for the Council to fall short in its mandate of clearly reiterating international law and in promoting the advancement of international peace and security. In its altruistic attempts to set forth noble

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review of the reasons why executive branches sometimes misgauge the security threat(s) at hand, see Oren Gross, *Chaos and Rules*: *Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE LAW JOURNAL 1011, 1022–1042 (2003); Paust, *Post-9/11 Overreaction*, *supra* note 338, at 1335 and *seq*.

[1619] See, e.g., George P. Flechter, *Black Hole in Guantanamo Bay*, 2 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 121 (2004); Koh, *On American Exceptionalism*, *supra* note 34; David Luban, *The War on Terrorism and the End of Human Rights*, 22 PHILOSOPHY AND PUBLIC POLICY QUARTERLY 9, 9–14 (2002); Philippe Sands, LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES (2005); Johan Steyn, *Guantanamo Bay*: *The Legal Black Hole*, 53 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 1 (2004).

[1620] Chinkin, *Human Rights and the Politics of Representation*, *supra* note 1052, at 145.

[1621] *R2P Doctrine*, *supra* note 420, at 4.

[1622] See, e.g., Waxman, *Terrorism*, *supra* note 1489, at 205. Even though the U.S. may be the world's sole superpower, it still often requires the support of other important states in advancing its own agenda. See, e.g., Samuel P. Huntington, *The Lonely Superpower*, 78 FOREIGN AFFAIRS 35, 36 (1999).

guiding principles – such as the obligation to refrain from harbouring or supporting terrorists, for example – the Council might involuntarily be doing a disservice to the objectives of international peace and security, namely by essentially giving *carte blanche* to states in meeting their counterterrorism obligations. A direct consequence of this oversight would be serious human rights violations, as we are currently witnessing in certain states, a reality which certainly impairs the prospect of peace and security.

To make this line of argument even more palatable, one has to accept the exercise of drawing comparisons from the field of international environmental law. As argued amply throughout this dissertation, certain aspects of counterterrorism law closely track similar developments in the field underlying international environmental obligations. At the outset, the parallels are striking and equally facilitated by the conceptual affinity shared by both state responsibility and international environmental law.[1623]

Indeed, both counterterrorism law and international environmental law involve containing serious, sometimes massive or large-scale, and almost always man-made hazardous activities. Not only do these activities bring about grave and immediate damage, but also often engender additional or collateral effects. Yet, in both areas the primary rules – which obviously have an impact on the application of the secondary rules of liability – are far from consistent and, in many cases, fall short in actually prescribing specific conduct. For instance, the Security Council recently delivered broad-ranging and sweeping principles in regard to transnational terrorism, without harnessing its orders on more specific expectations of conduct or behaviour accruing to the addressees of its resolutions.[1624] Quite to the contrary, the Council's resolutions often warrant a specific result without providing adequate grounding as to the rationale or method for doing so, or simply fail to provide elements germane to the fulfillment of obligations promulgated in its resolutions. As canvassed in Chapter 3, this reality

[1623] For a general exploration of this last point, see Phoebe Okowa, STATE RESPONSIBILITY FOR TRANSBOUNDARY AIR POLLUTION IN INTERNATIONAL LAW (2000).
[1624] See, e.g., Duffy, THE 'WAR ON TERROR', *supra* note 133, at 37-38, 57-58 and 70.

most likely follows from the inherent limits on the Security Council's legislative powers.[1625]

Nevertheless, even though the rules of state responsibility for pollution are far from consistent, some scholars argue that there has been a noticeable shift toward the acceptance of obligations of result in the environmental field, both under treaty obligations and evolving general principles of law.[1626] On the inconsistency of liability rules for transnational pollution, invoking a practical example might be helpful and, in turn, directly transposable to counterterrorism. In the case of pollution of the sea by ship endangering or damaging a coastal state, the relevant treaties provide that it is the ship-owner (often a private person) who is liable toward the coastal state, as well as towards the private persons who suffered physically or in their property from the polluting act. In contrast, transboundary harm in State A originating from a private enterprise situated in the land territory of State B entails, as we have seen under certain conditions, the responsibility not of that private enterprise, but of State B on whose territory the pollution originated. At the outset, one can easily glean the inconsistency between different rules involving non-state actors that can perhaps – but flimsily – be explained by the state's exclusive territorial control in the latter scenario from a policy standpoint. Moreover, in international environmental law like in counterterrorism contexts, the contents of primary obligations are not always well-defined and this confusion is further exacerbated by the involvement of non-state actors in polluting activities (we must always bear in mind that an internationally wrongful act must be linked to the official state apparatus in order

[1625] On the Security Council's legislative role, generally, see Luis Miguel Hinojosa Martínez, *The Legislative Role of the Security Council in Its Fight Against Terrorism*: *Legal, Political and Practical Limits*, 57 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 333-359 (2008); Lawrence D. Roberts, *United Nations Security Council Resolution 687 and Its Aftermath*: *The Implications for Domestic Authority and the Need for Legitimacy*, 25 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 593, 594 (1993). But *Cf.* Dominicé, *The International Responsibility*, *supra* note 534, at 366-367; Marja Lehto, *Terrorism in International Law – an Empty Box or Pandora's Box*, in Jarna Petman and Jan Klabbers (eds.), NORDIC COSMOPOLITANISM: ESSAYS IN INTERNATIONAL LAW FOR MARTTI KOSKENNIEMI 291-313, 306 (2003). See also Koskenniemi, *The Police in the Temple*, *supra* note 535, at 325-348.

[1626] See, e.g., Springer, *The Evolving Law*, *supra* note 1293, at 130.

for responsibility to attach).[1627] When dealing with non-state actors, we must also remember that compliance by states with environmental or counterterrorism agreements depends in many cases not simply on state action, but also on the actions of private parties whose failure to reduce their pollution to the levels required by an agreement, or not to carry out transnational terrorist strikes, may cause a state to violate its obligations.

In terms of environmental obligations, a case in point may be found in the 1960 Frontier Treaty between the Netherlands and Germany, which provides that the parties "shall neither take *nor tolerate* any measures causing substantial prejudice to the neighbouring State."[1628] As a result, should substantial damage be carried out against one state by the acts of private persons in the other state, the latter could be held responsible for the injury sustained insofar as it tolerated the harmful activity on its soil. Here, as is the case in many restatements of the obligation to prevent terrorism, the international wrong is *toleration*. As Springer underlines, there is inherent ambiguity in a term like "tolerate", "which suggests that a state might be relieved of any responsibility had it made a sincere and determined – but unsuccessful – effort to prevent the polluting activity."[1629] This formulation has been recurrent in Security Council practice, both before and after 9/11, as it often uses the concepts of 'toleration' and 'support' in tandem.

Another striking example is found in a similar agreement originally struck between Czechoslovakia and Hungary, which contains an obligation that might be perceived as straddling both conduct and result terrain. That agreement requires parties to "*take steps to prevent* deliberate damage to the banks of frontier waters."[1630] Again, what is precisely expected of states is not certain: there is certainly a positive obligation incumbent upon states, anchored in the presence of operative language in the form of "take steps". Yet, the notion of "taking steps" is

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[1627] As classical author Dionisio Anzilotti proclaimed, "[l]'imputabilité, au point de vue du droit international, n'est donc pas autre chose que la conséquence du rapport de causalité qui existe entre un fait contraire au droit des gens et l'activité de l'État dont ce fait émane." See Anzilotti, *La Responsabilité*, *supra* note 191, at 291. See also Pierre-Marie Dupuy, *Dionisio Anzilotti and the Law of International Responsibility of States*, 3 EUROPEAN JOURNAL OF INTERNATIONAL LAW 139, 144 (1992).

[1628] Cited by Springer, *The Evolving Law*, *supra* note 1293, at 128.

[1629] *Ibid*.

[1630] *Ibid*.

vague in and of itself, an artificial legal threshold upon first glance; no further context or guidance is provided as to what types of means or methods are expected or even permissible in meeting the duty. In addition, the idea of prevention casts another dimension of the specific legal undertaking – possibly that of warranting a specific result, which resides in actually forestalling the given pollution – and arguably brings the specific stipulation within the furrow of obligations of result. However, the invocation of the term 'deliberate' further muddles the actual content of the obligation, since it seemingly imports a degree of intentionality into the equation without correspondingly fixing any modes of threshold. Here, we have the worst of both worlds: vague language as to the potential means to be employed in fulfilling the obligation, along with a prescribed – yet unclear – result, which, under ordinary international legal construction, would afford the implementing state wide latitude in the means employed to attain the specific result. Therefore, the nature of the obligation, which seems to oscillate somewhere between prevention and result, would seem, upon first glance, to make the very mention of "taking steps" otiose. In broader terms, almost all language in such treaty undertakings becomes superfluous since neither dimension of the obligation in question -- the actual result and/or identifiable steps in ensuring prevention -- can be clearly ascertained nor construed as dispositive in indicating the actual behaviour that is expected from states.

Similarly, Principle 21 of the Stockholm Declaration clearly holds states responsible for their failure to prevent extraterritorial harm caused by activities under their jurisdiction or control. Principle 21 provides that, "[s]tates have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."[1631] As some have noted, however, whilst states agreed on this principle in the abstract "it was

[1631] *Principle 21*, *supra* note 1519.

impossible to reach agreement on the content of that responsibility should harm actually occur."[1632] Hence, again we have a clear statement of principle without any clarification as to the actual application and content of the rule. This trend certainly pervades much of international environmental law, as unresolved questions still persist on primary rules expressing concepts such as the precautionary principle and sustainable development, for example.[1633] This reasoning and the corresponding conceptual incongruities are, of course, integrally transposable to counterterrorism law.

Conversely, some conventional exceptions to this general normative uncertainty do exist, thereby suggesting that an inescapable lack of interpretive direction has failed to metastasize to all areas of public international law and, correspondingly, does not pervade nor necessarily govern the entire realm of obligations of prevention. Indeed, certain conventional schemes deliver striking implementation lucidity in carving out obligations for member-states. In particular, Article 2(1) of the International Covenant on Economic, Social and Cultural Rights provides clear and unusual guidance as to the means of implementing the obligations enshrined therein, by direct reference, *inter alia*, to enabling legislation and international cooperation and assistance.[1634] What is more, the general comment to this provision offers a high degree of direction – at least, in less equivocal terms than usual – on the particulars and modalities of the obligations to be implemented, with both a direct reference to the ILC's treatment

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[1632] Springer, *The Evolving Law*, *supra* note 1293, at 134.

[1633] See, e.g., Roucounas, *Non-State Actors*, *supra* note 376, at 401-402.

[1634] Article 2(1) provides the following:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

See International Covenant on Economic, Social and Cultural Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27, available online at http://www.unhchr.ch/html/menu3/ b/a_cescr.htm (last visited on 14 July 2009).

of the distinction between obligations of conduct and obligations of result, and an interpretive exploration of the notion of "taking steps".[1635]

In the end, the controversy over the distinction between obligations of conduct and result, along with their scope and content, is far from resolved.[1636] Similarly, the ILC ultimately "simplified its classification of wrongful acts without having recourse to the distinction between obligations of conduct, prevention and result, even though the final text, in Article 14(3), still refers to an 'international obligation requiring a state to prevent a given event'."[1637] Nevertheless, the incorporation of this distinction in international law is sound, desirable, and its validity hardly contestable. As a general rule, it is ultimately fair to say that an overarching, overriding obligation of result in preventing terrorist activities will not be reasonable, let alone realistic.[1638] The dispositive analytical factor will rather lie in the conduct of the host-state itself in addressing the potential threat and in attaining a realistic result in light of the factual circumstances. As such, several commentators cast any obligation of prevention as an obligation of means, which inexorably entails a careful analysis of various parameters in order to gauge whether state conduct matches the content of the duty in a specific instance. The next section delves into this question but a few elements having an impact on determining whether the obligation of prevention was fulfilled can be identified at the outset, namely: the host-state's ability to influence the perpetrators of the internationally wrongful act, the geographical

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[1635] See Office of the High Commissioner for Human Rights, *The Nature of States Parties Obligations (Art. 2, par. 1): 14/12/90 – CESCR General Comment 3*, available online at http://www.unhchr.ch/tbs /doc.nsf/(symbol)/CESCR+General+comment+3.En?OpenDocument (last visited on 14 July 2009).

[1636] Some have taken issue with Ago and Crawford's respective characterizations of obligations to prevent and obligations of result. See, e.g., *supra* note 1248 and accompanying text and compare with Crawford, *Revising the Draft Articles*, *supra* note 993, at 440-442. The distinction between obligations of means and obligations of result was also invoked in *Gabčíkovo-Nagymaros*, *supra* note 250, at p. 77, at para. 135.

[1637] See, e.g., Dupuy, *A General Stocktaking*, *supra* note 508, at 1059; James Crawford, Pierre Bodeau and Jacqueline Peel, *La seconde lecture du projet d'articles sur la responsabilité des Etats de la Commission du droit international*, 104 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 911-938 (2000); James Crawford, Pierre Bodeau and Jacqueline Peel, *The ILC's Draft Articles on State Responsibility*: *Toward Completion of a Second Reading*, 94 AMERICAN JOURNAL OF INTERNATIONAL LAW 660-674 (2000).

[1638] But *Cf.* Higgins, PROBLEMS & PROCESS, *supra* note 49, at 156 (arguing that "with regard to particular obligations, a standard *higher* than due diligence may be required.").

location of the host-state vis-à-vis the location of the actual internationally wrongful act or transnational cooperation carried out with other states by the host-state.[1639] Indeed, this posture seems to have been endorsed recently by the ICJ in the *Genocide* case, albeit in relation to the obligation to prevent genocide.[1640]

**b) The Obligation of Prevention on a Variable Scale**[1641]

It becomes apparent that most obligations of prevention are highly 'modulatory' and remain shaped and informed by the actual means at the disposal of the states that are called upon to fulfill these legal undertakings, thereby militating in favour of a highly contextualized analysis in the post-breach setting. As ICJ Judge Mohamed Bennouna declares, "la prise en compte des moyens des uns et des autres fait que cette obligation connaît, de par sa nature même, certaines modulations, selon le contexte où elle est censée opérer."[1642] The best way to conceptualize the application of the obligation of prevention in the proposed framework, therefore, is to visualize a sliding element on a vertical bipolar continuum representing the conduct of the host-state (**see Appendix I**). At one end of the spectrum lies the expected (and specific) result dictated by the obligation to prevent terrorist attacks, namely to thwart the attack completely. At the other extremity of the continuum rests the utmost negligent and careless conduct a state can adopt in preventing terrorism, or actual endorsement. All along the way, various degrees of state efficiency in preventing attacks are skewered, increment-by-increment. This scale covers an exhaustive set of possibilities, ranging from the near prevention of a given attack to inaction.[1643] The sliding element represents the host-state's conduct and is positioned at the angle that best represents that state's action to prevent the given attack, in

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[1639] See, e.g., Bennouna, *Réflexions*, *supra* note 8, at 375.

[1640] *Genocide Case*, *supra* note 100, at para. 430.

[1641] Although not directly on point because dealing with the duty to prevent genocide, the ICJ expressed a similar idea, expounding that "[t]he content of the duty to prevent varies from one instrument to another, according to the wording of the relevant provisions, and depending on the nature of the acts to be prevented." See *Ibid*, at para. 429.

[1642] Bennouna, *Réflexions*, *supra* note 8, at 379.

[1643] Some scholars expressed hints of the idea of a variable model of state responsibility, albeit through the lens of armed reprisals. However, since much of the literature was written before 9/11, most of the relevant considerations hinged on *Nicaragua* and *Tadić*-inspired formulations of control or knowledge. See, e.g., Baker, *Terrorism*, *supra* note 275, at 36-37.

hindsight. The circumstances of the particular attack will affect the sliding element: should they be favourable to the host-state, the element will slide up, closer to the expected result. However, if they are construed against the host-state, they will burden the element and bring it down towards negligent or careless conduct.

For example, if a state had the logistical capacity to crack down on terrorist cells that perpetrated an attack but failed to do so (e.g. by not acting on intelligence reports), the element will descend.[1644] In this regard, it is useful to invoke China's proposal at Dumbarton Oaks in 1944 with regard to the elements underpinning a definition of 'aggression' contained in the draft *Charter* articles and later unveiled at the San Francisco conference. In the eyes of China, that crime was tantamount to the "[p]rovision of support to armed groups, formed within [a state's] territory, which have invaded the territory of another state; or refusal, notwithstanding the request of the invaded state, to take in its own territory all the measures in its power to deprive such groups of all assistance or protection."[1645] Whilst China's proposal was ultimately discarded, there is now every indication that the international community is moving towards a legal standard philosophically adjacent to the one originally espoused by that sate. This contention is undoubtedly further substantiated by Council Resolutions 1368 and 1373, which ostensibly make the "harbouring and supporting" of terrorists a basis for engaging a host-state's international responsibility.[1646] Governmental inaction when there is clearly capacity to act otherwise would also ostensibly extend to a state's failure to warn potential victim states of possible terrorist excursions emanating from its territory. In other words, the broader obligation to prevent terrorist attacks is also embedded with a 'duty to warn' component and failure to comply with that portion of the obligation may also trigger state responsibility.[1647]

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[1644] See *Osman*, *supra* note 1583; Duffy, THE 'WAR ON TERROR', *supra* note 133, at 308; McCredie, *The Responsibility*, *supra* note 70, at 86.

[1645] *Tentative Chinese Proposals for a General International Organization* (Aug. 23, 1944), [1944] 1 FOREIGN RELATIONS OF THE UNITED STATES 718, 725.

[1646] See, e.g., Franck, *Terrorism*, *supra* note 38, at 841.

[1647] For support of this proposition, see Theresa A. DiPerna, *Small Arms and Light Weapons*: *Complicity "With a View" Toward Extended State Responsibility*, 20 FLORIDA JOURNAL OF INTERNATIONAL LAW 25, 43 (2008). On this topic, see also Alexandra Boivin, *Complicity and*

Conversely, it must be borne in mind that, whilst a particular state might have garnered sufficient political will and succumbed to diplomatic pressure to exercise jurisdiction over suspected terrorists operating within its borders, locating the individuals may prove factually difficult in some instances.[1648]

Furthermore, if the host-state did not manage information flows properly within its own political and intelligence infrastructures, thereby increasing the risk of the given attack, the element will slide downward. If the host-state could have frozen terrorist assets within its jurisdiction, thereby paralysing the operational autonomy of a terrorist organization, but neglected to do so, the element will slide down the continuum. If the host-state could have acted, based on its knowledge of the impending attack, but failed to do so for reasons of endorsement or promotion of the terrorists' cause, the element will be lowered again.[1649] In that regard, the proposed model of strict liability has, up to now, addressed many facets of the application of *Corfu Channel* to host-states and the potential expansion of the Court's reasoning towards a no-knowledge regime of state responsibility in light of a glaring translation error.[1650] Equally important is the issue of constructive knowledge, which becomes paramount in this second tier of the strict liability-infused approach; given the importance of combating transnational terrorism, it follows that a host-state will no longer be able to hide behind 'willful blindness' in order to avoid responsibility.[1651] An alternate interpretation extracted from *Corfu Channel* is, therefore, directly transferable to the current framework, as the information a host-state had or *ought* to have had will have a direct incidence on its level of responsibility.

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*Beyond*: *International Law and the Transfer of Small Arms and Light Weapons*, 87 INTERNATIONAL REVIEW OF THE RED CROSS 467 (2005).

[1648] See Abbott, *Economic Sanctions*, *supra* note 290, at 298.

[1649] This also fits within the logic of *Tehran Hostages*, *supra* notes 221-222, 276, 1046 and accompanying text. On responsibility by endorsement, see Martin, LES RÈGLES INTERNATIONALES, *supra* note 1, at 461-462.

[1650] See, e.g., the following notes and accompanying text, *supra*: Chapter 1, Section C)1., notes 86-91; Chapter 2, Section D)1., note 311; Chapter 2, Section D)2., notes 334-335; Chapter 4, Section B)2.a), notes 1054-1055; Chapter 4, Section C)1., notes 1524-1525.

[1651] See, e.g., Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 82; Martin, LES RÈGLES INTERNATIONALES, *supra* note 1, at 458 n.37 and accompanying text. For further discussion about the role of knowledge in *Corfu Channel*, see Higgins, PROBLEMS & PROCESS, *supra* note 49, at 159-160.

For instance, Afghanistan could not hide behind the fact that it did not specifically know that Al Qaeda was planning the 9/11 attacks on its territory. To the contrary, its knowledge could be constructed or inferred from repeated Security Council exhortations directed against it and urging it to cease harbouring members of Al Qaeda, paired with international condemnation of that sanctuary, thereby tailoring Afghanistan's obligation of prevention towards an increased duty of vigilance and monitoring of Al Qaeda's activities because of the strong likelihood of transnational, subversive excursions by the group. As such, and much like in *Corfu Channel*, inferences of factual and circumstantial evidence could clearly establish a cognitive nexus -- whether real or constructed -- between the host-state and the non-state actors in the case of Afghanistan. Indeed, after discussing the notion of knowledge in *Corfu Channel* with regard to the 9/11 attacks, one commentator aptly summarizes this line of argument in the following terms: "the fact that al Qaeda was operative on its soil does not necessarily presuppose the Taliban's knowledge of the attacks, even drawing on the notion of *culpa*. Yet, it is arguable that without introducing the theory of absolute responsibility, the Taliban's knowledge could be remotely inferred on the basis of the notion of *culpa* in the particular circumstances, where obligations had been imposed on the Taliban by a series of the Security Council resolutions to take steps to prevent and punish international terrorism."[1652]

Moreover, if the host-state has knowingly harboured and/or supported members of a terrorist organization on its territory, whilst this organization overtly perpetrates egregious violations of international law, the element will slide down considerably. This aspect was also canvassed by Professor Bowett prior to 9/11 when assessing the reasonableness of reprisals against a state for terrorist activity emanating from its territory. Citing Falk, he listed one very important factor, amongst several others, evidently rooted in the law of indirect responsibility: "[t]hat the appraisal of the retaliatory use of force take account of the duration and quality of support, if any, that the target government has given to

[1652] Arai-Takahashi, *Shifting Boundaries*, *supra* note 414, at 1096-1097.

terroristic enterprises."[1653] This would undoubtedly be the case for the government of Afghanistan vis-à-vis the 9/11 attacks, which ignored several pleas by the Security Council demanding it cease harbouring members of Al-Qaeda.[1654] Similarly, if a state is in a position to prevent massive human rights abuse or save lives within its territory or extraneously but fails to intervene, its passiveness could engage its international responsibility.[1655]

In the same spirit, if a state fails to heed the instructions of the Security Council regarding the presence of terrorist organizations on its territory,[1656] the element will plummet, irrespective of whether such presence is due to the deliberate harbouring of the organizations by the state apparatus, or rather to a physical/political loss of control. The 2006 Israel-Hezbollah conflict also comes to mind and remains a poignant account in illustrating the potential role that state responsibility law could play in such instances. As discussed above, Lebanon's responsibility could plausibly be engaged as a result of it allowing the southern portion of its territory to be used by Hezbollah to perpetrate terrorist attacks against Israel.[1657] More importantly, Lebanon's failure in repelling the threat within its own territory should be contrasted with past Council pronouncements on the matter urging Lebanon to ensure the removal of Hezbollah factions on its soil.[1658]

This lack of state control by Lebanon over terrorist factions is, by no means, a novel phenomenon. Quite to the contrary and as explored above in Chapter 2, under Section D)3.a), the case of the PLO operating on Lebanese territory during the 1982 Israel-Lebanon conflict certainly provides some analogous grounds for analysis. Aside from evoking the image of a "state within a state", the PLO has had a long-standing history of using Lebanese territory to

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[1653] Bowett, *Reprisals*, *supra* note 422, at 27. [Emphasis added.]

[1654] Indeed, commentators highlight the pressing need to outlaw safe havens for terrorism, judging that they "are at the root of the problem of terrorism". See Rao, *International Crimes*, *supra* note 210, at 69.

[1655] For a recent application of this idea, along with a discussion of the government of Afghanistan, see, e.g., Budislav Vukas, *Humanitarian Intervention and International Responsibility*, in Ragazzi, INTERNATIONAL RESPONSIBILITY, *supra* note 50, at 235-240, 239-240.

[1656] See *Ibid* for the case of the government of Afghanistan.

[1657] See, e.g., Kirchner, *Third Party Liability*, *supra* note 138, at 781.

[1658] See, e.g., Security Council Resolution 1559, U.N. Doc. S/RES/1559 of 2 September 2004.

launch and facilitate excursions into Israel.[1659] In more recent years, Hezbollah now seems to carry that torch, so to speak, by also making ample use of the same territory to carry out terrorist missions against Israel. Also relevant to this second tier of the analysis is the fact that, in addition to controlling the southern portion of Lebanese territory, Hezbollah has, for all intents and purposes, also been at times subsumed under the official state apparatus, which might suggest *direct* attribution to Lebanon.[1660] As a corollary, should direct imputation acquire traction in this case, it would convert any ensuing recourse to force into an act of state, as opposed to non-state or private terrorism as this latter activity has been traditionally envisaged pursuant to state responsibility logic.

Along similar lines, if the sanctuary state has transferred – either willingly or unwillingly/inadvertently (although only the latter standard would have to be met to fit within the logic of indirect responsibility) – some state functions to private entities such as terrorist organizations, the element will be dragged down.[1661] If a terrorist attack is facilitated by the inadvertence or carelessness of the members or representatives of the official state apparatus in the execution of their ordinary functions or operations, the element will also topple down.[1662] Drawing on the experience of the ECHR with a view to establishing causation for

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[1659] See, e.g., McForan, THE WORLD, *supra* note 392, at 46-47; Franck, RECOURSE, *supra* note 120, at 57. The image of a 'state acting within a state' has also been brandished when discussing Al Qaeda's operations in relation to the Taliban. See Gunaratna, INSIDE AL QAEDA, *supra* note 3, at 82.

[1660] See Kirchner, *Third Party Liability*, *supra* note 138, at 780. See also Catherine Bloom, *The Classification of Hezbollah in Both International and Non-International Armed Conflicts*, 14 ANNUAL SURVEY OF INTERNATIONAL AND COMPARATIVE LAW 61, 78-82 (2008).

[1661] See, generally, Cristina Hoss and Pierre-Marie Dupuy, *Trail Smelter and Terrorism*: *International Mechanisms to Combat Transboundary Harm*, in Bratspies and Miller, TRANSBOUNDARY HARM, *supra* note 1522, at 225, 236. For a recent application to the 2006 Israel-Hezbollah conflict, see Kirchner, *Third Party Liability*, *supra* note 138, at 782 (also citing Peter Scholl-Latour, KAMPF DEM TERROR: KAMPF DEM ISLAM? 261 (2003), and declaring that "[t]he terrorist activities of Hezbollah can, furthermore, be attributed to Lebanon due to the fact that state functions have been allowed to fall into the hand of Hezbollah.").

[1662] For instance, Ian Brownlie notes that "general responsibility may be generated by inadvertence in the execution of normal State activity." Brownlie, SYSTEM, *supra* note 205, at 45-46. In support of this proposition, he alludes to the sequestration of Italian property in Tunisia by France and cites *In re Rizzo*, INT. L.R. 22 (1955), p. 317, at p. 322. See *Ibid*, at 46 n.65. In fact, in the *Rizzo* case, the Conciliation Commission found that "the act contrary to international law is not the measure of sequestration, but an alleged lack of diligence on the part of the French State – or, more precisely, of him who was acting on its behalf – in the execution of the said measure". See other authorities cited by Brownlie in *Ibid*, at 46 n.65.

obligations of prevention, an *ex post facto* test of foreseeability could be applied and, if the terrorist attack was reasonably foreseeable, the element would correspondingly move downwards (prompted by an inversely proportional correlation between the element and the degree of foreseeability of the given attack).[1663]

Conversely, if a state does not completely fulfill its obligation, or does not attain its potential in preventing the attack because doing so would generate more social unrest and terror,[1664] the element will slide up the continuum. In that regard, the case of Pakistan poses particularly intractable challenges with regard to that state's compliance with its international counterterrorism obligations. It is no secret that Pakistan has become an important focal point in the global struggle against terrorism, with members of both Al Qaeda and the Taliban seeking refuge in its Northwestern, semiautonomous tribal areas. Most recently, the Pakistani Army signed a truce with the Taliban regarding the Swat District, north of the Pakistani capital, which the host-state views as a method of appeasement because it would "free up the Pakistani Army, reduce civilian suffering and satisfy popular dissatisfaction with the local judiciary".[1665] However, for the purposes of the proposed model of responsibility, it is doubtful that Pakistan's course of action in this matter would, in fact, increase its due diligence capital in demonstrating that it is actively fulfilling its obligations. Hence, considerable effort, not mere political convenience in relinquishing the coveted tribal areas, in attenuating Pakistan's responsibility -- ostensibly by demonstrating that unmanageable civil conflict or internal/transnational guerrilla warfare would ensue if this truce is not brokered -- would be required in order to offset the detrimental effects of striking this potentially destabilizing agreement.

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[1663] See Benedetto Conforti, *Exploring the Strasbourg Case-Law*: *Reflections on State Responsibility for the Breach of Positive Obligations*, in Fitzmaurice and Sarooshi, ISSUES, *supra* note 1590, at 130-137, 135.

[1664] See, e.g., the first 'permissible exception' or defence available under McCredie's model, *supra* Chapter 4, Section B)7.b), note 1517. See also McCredie, *The Responsibility*, *supra* note 70, at 94.

[1665] Jane Perlez and Pir Zubair Shah, *Truce in Pakistan May Mean Leeway for Taliban*, NEW YORK TIMES, March 5, 2009.

At this time, however, it would appear that the truce could probably have the opposite effect to that of appeasing local tensions. In fact, through this arrangement the Pakistani government may effectively have created terrorist-friendly enclaves or "ministates with sanctuaries for Qaeda and Pakistani militants", a possibility that is further compounded by the fact that Taliban contingents are imposing a particularly harsh brand of Shariah law within the Swat District, crushing any form of dissent and torturing and murdering anti-Taliban militants in order to secure undisputed control over the region.[1666] This reality appears to be metastasizing throughout other regions of Pakistan, notably in light of the fact that the Taliban has recently acquired effective control over the Buner District, 70 miles from Islamabad, thereby exacerbating the difficulty in gauging that host-state's capability in repressing transnational terrorism.[1667] Equally difficult tactical choices confront Pakistani authorities in electing the best implementation models for ensuring compliance with their counterterrorism obligations. In particular, the wisdom of striking pseudo-law enforcement arrangements or containment missions with *lashkars* -- namely anti-Taliban tribal militias -- in Pakistan's Federally Administered Tribal Areas has been called into question.[1668] On the one hand, such agreements could potentially yield immediate payoffs and modest tactical gains, as long as the mission parameters are highly focused and confined to immediate and localized objectives. Conversely, whilst Washington is lobbying for increased collaboration with *lashkars* in combating terrorism in the region, those tribal militias are simply not geared towards conducting large-scale, ongoing military operations. Not to mention the fact that engaging them for the purposes of a long-term campaign against extremist elements within Pakistan's borders might pose significant risks to regional security and, in turn, disrupt the Pashtun tribal hierarchy that enables the

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[1666] *Ibid*.
[1667] See Jane Perlez, *Taliban Seize Vital Pakistan Area Closer to the Capital*, NEW YORK TIMES, April 22, 2009.
[1668] See Michael Kugelman, *Tread Lightly with Pakistan's Lashkars*, ASIA TIMES, July 16, 2009.

attainment of such, albeit limited, *lashkars*-driven tactical victories in the first place.[1669]

It is important to recall that this whole campaign against terrorism is an exercise in risk assessment. In any particular case, although the host-state failed to prevent one terrorist attack, it should not exacerbate passions and, through an overactive zeal, instigate further terrorist attacks or induce the overthrow of its legitimately elected government.[1670] Proportionality and reasonableness should govern this analysis or, at least, remain reliable benchmarks in gauging potential responses to terrorist threats. More importantly, if there is a significant disparity or disproportion between the size of the territory and military capacity of the host-state, as contrasted with the expanse of terrorist activity on the territory, the state's onus will decrease and the element will ascend.[1671] Similarly, if a portion of the state's territory has been taken over, so that the legitimate government does not wield any *de facto* control over the region in question although it genuinely desires to do so, the element will rise.[1672] If the state is logistically incapable of preventing an attack but considers the panoply of options offered to it, including allowing extraneous forces or law enforcement units onto its territory to combat the threat, its burden will be lowered considerably as it will have sacrificed sovereignty in favour of combating terrorism in a bilateral/multilateral setting.[1673]

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[1669] For further elaboration on this line of argument, see *Ibid*.

[1670] Bowett raised this problematic aspect through the lens of reprisals aimed at enticing states to prevent terrorism. See *Reprisals*, *supra* note 422, at 20. Although not directly on point, consider also Battaglini, *War Against Terrorism*, *supra* note 426, at 145-146; Rao, *State Terror*, *supra* note 1095, at 183-193.

[1671] On this issue, see notes 450-457 and accompanying text.

[1672] It is crucial to recall that the government of Afghanistan was, in fact, the *de facto* government in most of Afghanistan and, at best, provided sanctuary to Al Qaeda. See, e.g., George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 891, 891, 893 (2002); Cassese, *Terrorism Is Also*, *supra* note 463, at 999; Richard Falk, THE GREAT TERROR WAR 101 (2003). See also Stern, *La Responsabilité*, *supra* note 262, at 688-692.

[1673] On this point, see Byers, *Letting the Exception*, *supra* note 1452, under heading 'Exceptional Illegality'. On the virtues of combating terrorism through multilateral channels, see Head, *Essay*: *What Has Not*, *supra* note 1480, at 1-12; Fred C. Pedersen, *Controlling International Terrorism*: *An Analysis of Unilateral Force and Proposals for Multilateral Cooperation*: *Comment*, 8 TOLEDO LAW REVIEW 209-250 (1976); Volker Röben, *The Role of International Conventions and General International Law in the Fight Against International Terrorism*, in C. Walter *et al.* (eds.), TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS LIBERTY? 789-821 (2004).

It follows that, if a state relinquishes control over its territory or fails to capture or extradite terrorists operating on its territory, sending external law enforcement units to repel the terrorist threat certainly amounts to a proportionate countermeasure under the law of state responsibility.[1674] Indeed, as seen above, counterterrorism capacity-building lies at the very heart of the logic underpinning Security Council Resolution 1373 and its accompanying apparatus. Once again, these types of scenarios are evocative of the tension described earlier between combating terrorism efficiently and upholding state sovereignty. However, this phenomenon of multilateral *laissez-faire* might also entail that economically weaker states will be called upon to sacrifice their sovereignty more readily in order to repel a terrorist threat, a notion that may understandably shock the sensibilities of TWAIL scholars and sympathizers.[1675]

If, even in the absence of actual knowledge about possible terrorist activity, a host-state nonetheless undertakes reasonable and earnest measures to monitor potential terrorist plots or related activities within its territory, the element will be pulled up.[1676] This policy objective may be pursued through the collection and heeding of relevant intelligence, especially when the targets of intelligence-gathering are high-profile and vocal proponents of terrorist methods. Whilst the present dissertation has attempted to strike a sensible balance between civil liberties protection and combating terrorism efficiently – most notably by limiting governmental interference in the private sphere[1677] – certain egregious cases of terrorism-friendly rhetoric and activity nonetheless fail to attract the same level of governmental restraint. In other words, an individual or a group that openly endorses the agenda of renowned terrorist organizations, such as Al

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[1674] For support of this proposition, see Martin, LES RÈGLES INTERNATIONALES, *supra* note 1, at 493.

[1675] See, e.g., Antony Anghie, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW (2005); Anthony Anghie, THE THIRD WORLD AND INTERNATIONAL ORDER: LAW, POLITICS, AND GLOBALIZATION (2003); Makau Mutua, *What Is TWAIL?*, 94 PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 31 (2000); David P. Fidler, *Revolt Against or From Within the West? TWAIL, the Developing World, and the Future Direction of International Law*, 2 CHINESE JOURNAL OF INTERNATIONAL LAW 29 (2003).

[1676] See, e.g., Duffy, THE 'WAR ON TERROR', *supra* note 133, at 57. See also Stern, *La Responsabilité*, *supra* note 262, at 691 (applying similar reasoning to Afghanistan in relation to the 9/11 attacks).

[1677] See, e.g., the discussion in *supra* Chapter 4, Section B)6.a).

Qaeda, and actively participates in recruiting similarly-inclined individuals for its local chapters loses the benefits of privacy/anonymity and, by the same token, becomes a red flag for the purposes of devising intelligence programmes. A salient case in point would be that of Belgium in relation to the activities of Malika El Aroud, the widow of one of the two men who assassinated Ahmed Shah Massoud, the anti-Taliban resistance leader, in Afghanistan two days prior to 9/11 following a direct order from Osama bin Laden.[1678] Ms. El Aroud has since remarried and established herself as a leading Internet 'jihadist' in Europe and openly promotes Al Qaeda's agenda, grants interviews to CNN and other high-profile news outlets,[1679] actively recruits potential candidates for the organization and encourages its audience to take up arms against the West. What is more, one of her key target demographics is women, whom she openly urges to join the ranks of terrorist organizations. In 2007, confronted with accusations of support for radical Islamic organizations via websites, Switzerland's Federal Criminal Court found El Aroud guilty of aiding and abetting her Tunisian husband, Moez Garsalloui, in his support of criminal organizations and incitement of violence, and imposed a six-month suspended sentence. By monitoring El Aroud's activities and placing her at the centre of its counterterrorism intelligence-gathering, which it is currently and actively doing, Belgium will ensure that it considerably increases its due diligence capital in the second tier of the proposed model of strict liability and, as a corollary, alleviates the scope of its potential responsibility (provided that it acts upon the intelligence gathered if reasonable to do so).

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[1678] For more background on Ms. El Aroud, see Elaine Sciolino and Souad Mekhennet, *Belgian Woman Wages War for Al Qaeda on the Web*: *Belgian's Online Jihad Reflects Rise of Female Extremists*, INTERNATIONAL HERALD TRIBUNE, May 27, 2008; Elaine Sciolino and Souad Mekhennet, *Al Qaeda Warrior Uses Internet to Rally Women*, THE NEW YORK TIMES, May 28, 2008.

[1679] See, e.g., Paul Cruickshank, *Suicide Bomber's Widow Soldiers On*: *Wife of Assassin Professes Undying Affection for Bin Laden*, CNN WORLD, August 24, 2006, available online at http://edition.cnn.com/2006/ WORLD/asiapcf/08/15/elaroud/index.html (last visited on 18 February 2009).

If the host-state's conduct in response or prevention of the terrorist act can be qualified as diligent,[1680] whilst the level of diligence exerted should be, to the extent possible, inversely proportionate with the level of risk *known by the host-state at the time of the attack*,[1681] the element will move upward. A (perhaps) extreme example of a recent failure of due diligence may be gleaned from the alleged killing by Israel of 22 Palestanian police officers manning West Bank checkpoints. Whilst Israel's posture was undoubtedly grounded in the idea of reprisal, the killings were apparently also predicated on the failure of the Palestinian police officers to prevent the transit of terrorists who killed six Israeli soldiers earlier the same year.[1682] This reinforces the idea that the notion of due diligence remains paramount when exploring state responsibility for failing to prevent terrorism, as amply referenced throughout this dissertation.[1683] For instance, some scholars construed Afghanistan's obligation before 9/11 as embodying due diligence standards exceeding what would ordinarily reign as the prevalent template under international law (i.e. *une obligation de vigilance doublement renforcée*).[1684] Whilst many commentators rightly observe that counterterrorism obligations embody due diligence standards, it is nonetheless important to reiterate that, under this scheme, "it is the omission on the part of the state, not the injurious acts by the private actor, which constitutes the internationally wrongful act for which the state may be responsible."[1685]

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[1680] See, e.g., the second 'permissible exception' or defence under McCredie's model, *supra* Chapter 4, Section B)7.b), note 1517. See also McCredie, *The Responsibility*, *supra* note 70, at 94.

[1681] See, e.g., Smith, *International Law*, *supra* note 56, at 754 ("modern States therefore only become accountable for failing to act when a terrorist threat is known to them.").

[1682] See, e.g., James Bennett, *Israel Steps Up Counterstrikes*; *22 Palestinians Slain*, NEW YORK TIMES, 21 February 2002, at A1.

[1683] This idea also pervades the field of international environmental law – which has been comparatively invoked throughout the present study in order to better tailor legal responses to transnational terrorism – with some scholars calling for the analytical juxtaposition of state responsibility and due diligence standards in this setting. See, e.g., Alan E. Boyle, *State Responsibility and International Liability for Injurious Consequences of Acts Not Prohibited by International Law*: *A Necessary Distinction?*, 39 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 1, 22-23 (1990).

[1684] On Afghanistan's violation of its obligation, see Stern, *La Responsabilité*, *supra* note 262, at 688-692.

[1685] Duffy, THE 'WAR ON TERROR', *supra* note 133, at 57. There is no universally accepted definition of 'due diligence'. As one author suggests, a due diligence obligation "consists [in taking] the reasonable measures of prevention that a well-administered government could be

This rationale would presumably apply to states adopting measures aimed at cracking down on terrorism within their own borders following a terrorist strike emanating from their territory; this reactive, but simultaneously preemptive (at least under certain lights), posture would undoubtedly help in alleviating that state's responsibility in the event that subsequent attacks were carried out. A recent illustration of this mitigating factor can surely be extracted from Pakistan's toleration of -- and potential involvement with -- certain extremist elements on its territory having participated in the devastating Mumbai attacks in India. In fact, it appears that Pakistan is, indeed, attempting to thwart future attacks or, at least, to neutralize potential threats having, *inter alia*, raided the properties of suspected terrorists, arrested twenty members of terrorist groups, including Lashkar-e-Taiba, the group suspected of having coordinated and carried out the Mumbai attacks, and arrested Zaki-ur-rehman Lakhvi, described as the mastermind of those same attacks.[1686] Barring any additional damaging factor burdening Pakistan's obligation of prevention, its diligent efforts to stamp out the roots of transnational terrorism within its own borders would militate, at least upon first glance, in favour of propelling the element upward in the proposed model. It should be stressed, however, that the case of Pakistan's responsibility in the Mumbai attacks is particularly thorny, predominantly because the extent of the involvement of the Pakistani state apparatus in that transborder excursion has not been clearly ascertained. Indeed, it would appear that several extremist groups within that state "have functioned as an arm of Pakistan's military and intelligence services for two decades."[1687] In the event that a clear nexus can be established between the state and the terrorists, such a relationship would undoubtedly burden the element on the abovementioned continuum and militate in favour of expanding Pakistan's responsibility (likely in the direction of direct attribution). Conversely, this reality would wield little incidence on the determination of state responsibility

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expected to exercise under similar circumstances." See Shelton, *Private Violence*, *supra* note 989, at 21-22. See also Pisillo-Mazzeschi, *The Due Diligence*, *supra* note 60; Pierre-Marie Dupuy, *Due Diligence in the International Law of State Responsibility*, in Organisation for Economic Co-Operation and Development (ed.), LEGAL ASPECTS OF TRANSFRONTIER POLLUTION 369 (1977).

[1686] See, e.g., Jane Perlez, *Pakistan Moves to Curb Group Linked to Attacks*, THE NEW YORK TIMES, 10 December 2008.

[1687] *Ibid*.

for future attacks if it can be demonstrated that Pakistan has undertaken serious and good faith efforts to eradicate terrorism on its territory and, additionally, that it has severed ties with those extremist elements operating within its borders (i.e. that whatever rogue factions/entities involved in the perpetration of future attacks cannot be construed as binding the Pakistani state pursuant to the direct responsibility paradigm discussed above, *supra* Chapter 2, Sections B) and D)).

If the host-state amounts to a link in a chain or series of sanctuary states in which the terrorist attack has been planned and executed, that state's responsibility will be commensurate with its level of accommodation/support in relation to the other links in the chain,[1688] whilst the upward movement of the element will remain inversely proportionate with the proximity between the state's conduct and the crystallizing moment of the attack within the chain. This type of situation certainly challenges the very core and structure of the ILC's *Articles* and, in turn, engenders a plethora of secondary questions. One might think of states that are used as frequent launch pads for attacks or even territories that constitute 'havens' for terrorists. What should be the applicable legal regime in those instances? What kind of normative frameworks should govern a series of preparatory terrorist activities spanning over more than one state and ultimately culminating in either terrestrial or cyber attacks? How do we define the crystallizing moment? Do we hold the state from which the attack is launched as the ultimate responsible? Or do we expect every involved government to fulfill an obligation of conduct or result in preventing terrorist operations from reaching the next step of the plan? Is every link of the chain or thread of a given terrorist attack only significant in the overall picture, or can it be thwarted independently? Interestingly, there seems to be support for assessing each participating state's responsibility independently pursuant to Article 47(1), a proposition that has received jurisprudential support. For instance, in the *Phosphate Lands in Nauru* case, the ICJ found that Australia's responsibility could be assessed individually, even though both New Zealand and the U.K. also administered Nauru while it was

[1688] Consider Schiedeman, *Standards of Proof*, *supra* note 481, at 261; Smith, *International Law*, *supra* note 56, at 746.

a trust territory.[1689] Similarly, when addressing Albania's responsibility in *Corfu Channel*, the Court was not swayed by the fact that another actor – likely a state – had carried out the contentious mine-laying.[1690] But how, exactly, this rule -- now codified at Article 47(1)[1691] -- would be brought to bear in cases of passive support of terrorism, as was the case in Afghanistan, for example, remains to be seen.

In that regard, Brigitte Stern aptly frames the relevant scheme of inquiry along the following lines: "[l]a question insoluble est de déterminer jusqu'à quel point l'Etat afghan aurait pu prévenir les attentats du 11 septembre et jusqu'à quel point les personnes responsables des attentats se trouvaient bien avant les attentats sur le territoire afghan".[1692] For instance, it is important to recall the salience of the Hamburg cell in the perpetration of the 9/11 attacks: "la cellule la plus déterminante dans l'organisation des attentats semble avoir été celle de Hambourg, en Allemagne."[1693] It becomes clear that this type of scenario also brings about serious evidentiary impediments with regard to the application of Article 47(1), as already noted in the field of environmental protection. Given that gradual and cumulative pollution arising from multi-state sources following the contamination of natural elements (e.g. international rivers, sea, atmosphere) by land-based elements, and "[a]s the contribution of every single source of pollution is extremely difficult to assess, it would be inequitable to require that the injured party prove a causal nexus between a specific activity undertaken and the ensuing damage."[1694] Whilst fact-intensive and similar to assessing the emission of transboundary toxic pollutants, the identification of every relevant source of

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[1689] See *Case Concerning Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, [1992] ICJ REPORTS 240, 258-259 (26 June). See also, generally, Noyes and Smith, *State Responsibility*, *supra* note 1199.

[1690] See *Corfu Channel*, *supra* note 67, at 18.

[1691] This article states 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." See *ILC Articles*, *supra* note 76.

[1692] Stern, *La Responsabilité*, *supra* note 262, at 691.

[1693] *Ibid*, at n.66. For a similar line of inquiry with regard to use of force principles, see Duffy, THE 'WAR ON TERROR', *supra* note 133, at 191-192.

[1694] Scovazzi, *Some Remarks*, *supra* note 761, at 217-218. This phenomenon also appears to fly in the face of the reasoning extracted from *Corfu Channel*. See, e.g., Smith, *International Law*, *supra* note 56, at 754.

planning and execution of a given terrorist attack might prove challenging or even improbable in some cases.

In analyzing the conduct of the host-state *ex post facto* and, given the specific circumstances of the case, if one cannot reasonably fathom an ounce more of effort within the contemplation of the state as contrasted with what it actually did, the element will slide up. This is consistent with the logic of the *Colozza* decision referenced above.[1695] In that case, a person had been convicted *in absentia*, without having received notice of the trial. After being sentenced to 6 years in prison, the individual was unable to contest the conviction. Centering the claim on Article 6(1) of the European Convention before the ECHR -- which provides that "[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by the law" -- the individual stated that there had not been a fair hearing. As a result, "[t]he Court thus considered that article 6(1) imposed an obligation of result. But, in order to decide whether there had been a breach of the Convention in the circumstances of the case, it did not simply compare the result required (the opportunity for a trial in the accused's presence) with the result practically achieved (the lack of that opportunity in the particular case). Rather it examined what more Italy could have done to make the applicant's right "effective."""[1696] For instance, when a state genuinely and earnestly sets out to root out terrorist networks within its borders but nonetheless fails to prevent an attack, its responsibility would undoubtedly be mitigated to some extent.[1697] Finally, although this scenario should not be invoked as a defence in and of itself and should be accompanied by other mitigating factors, if the host-state lacks the

[1695] *Supra* note 1596.
[1696] Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 129. [Emphasis added.]
[1697] In such scenario, the host-state would presumably remain sheltered against self-defence. For support of this proposition, see Terry D. Gill, *The Eleventh of September and the Right of Self-Defense*, in Wybo P. Heere (ed.), TERRORISM AND THE MILITARY: INTERNATIONAL LEGAL IMPLICATIONS 23-42, 29 (2003).

financial wherewithal and/or human resources to adequately contain the threat,[1698] the element will move up.

Now visualize a second sliding element mounted on another vertical bipolar continuum representing the obligation of prevention, placed in a parallel and proximate position to the first bipolar continuum (**see Appendix II**). At the top of this continuum, and facing the expected (and specific) result pole on the other spectrum, one can find *jus cogens* obligations. For instance, should the obligation to prevent terrorism be framed within the prohibition enshrined in Article 2(4) of the *UN Charter* and retain *jus cogens* status, it might arguably sit at the summit of that spectrum. Indeed, public international law has generally recognized the *jus cogens* character of the prohibition of the use of force, as found in Article 2(4) of the *UN Charter*. Citing the ILC's commentary on Article 50 of the Draft Articles on the Law of Treaties, the ICJ spoke to this point in the *Nicaragua* decision: "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of jus cogens."[1699] This statement has also received wide support in legal scholarship.[1700] Thus, based on this conclusion, the rule developed by the ILC and, subsequently endorsed by the ICJ, would seem to put the whole debate surrounding direct responsibility to rest. In sum, if a host-state directly participates in a terrorist attack, it will evidently not fulfill its *jus cogens* obligation pertaining to the prohibition of the use of force in international relations. As discussed above, *jus cogens* obligations might arguably -- and certainly not without controversy -- attract a stricter regime of state responsibility. If such categorization were ultimately retained, the international responsibility of the host-state would thus be easily established in such instances.

At the other end of the second continuum rests the minimal standard of conduct prescribed by international law, this time sitting across from the utmost

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[1698] See, e.g., the third 'permissible exception' or defence under McCredie's model, *supra* Chater 4, Section B)7.b), note 1517. See also McCredie, *The Responsibility*, *supra* note 70, at 94.

[1699] *Nicaragua*, *supra* note 119, at 110, para. 190.

[1700] See, e.g., James Crawford, THE CREATION OF STATES IN INTERNATIONAL LAW 106 (1979); Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AMERICAN JOURNAL OF INTERNATIONAL LAW 55 (1966); Michel Virally, *Réflexions sur le <<Jus Cogens>>*, 12 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 5-29, 28 (1966).

negligent and careless conduct pole. Similarly to the other continuum, various degrees of international obligations are scattered between both poles, ranging from obligations to endeavour to obligations *erga omnes*.[1701] The gap between obligations of conduct and result, albeit a sliding concept as well, is dissimulated somewhere in the continuum of international obligations. On the second continuum, the element represents the formal characterization by the international community of the specific obligation under study.

Consider that both elements are connected by an elastic band and that the ideal objective is to maintain the elastic in a horizontal position or the elements aligned (**see Appendix III**). Hence, as soon as a slight incline is felt in either continuum, the elastic will stretch, thereby creating a gap between the elements. In order for the host-state to demonstrate that it used all necessary and reasonable means in preventing terrorism, there should be as small a gap as possible between the expected obligation and the conduct in question. Should such a cavity widen significantly, it will undoubtedly inform the analysis of responsibility: the liability of the host-state should be proportional to that gap (**see** example in **Appendix IV**).

In theory, the distinction between obligations of conduct and result will slide along the second continuum and adapt to the circumstances of the case, namely the conduct of the host-state represented by the position of the element on the first continuum. In other words, reasonableness will exert an influence in guiding the elements as to what constitutes an acceptable threshold for the host-state. Should the circumstances indicate that more could reasonably have been done by the host-state, the element will ineluctably fall lower on the first continuum, in which case the gap between elements will widen and, as a result, the elastic will elongate.

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[1701] See Combacau, *Obligations*, *supra* note 1025, at 196 (noting that "tandis que les obligations de résultat sont des obligations de réussir, les obligations de moyens ne sont que des obligations de s'efforcer…et l'échec…n'est jamais à lui seul une cause de responsabilité"). [Emphasis added.] For Robert Kolb, obligations to endeavour should be assessed in relation to international law's principle of 'good faith'. See *The Exercise of Criminal Jurisdiction Over International Terrorists*, in Bianchi, ENFORCING, *supra* note 1, at 227-281, 257.

To complicate the equation, the formal characterization of the obligation to prevent terrorism by the international community will also interact with the elements. For instance, should this obligation be characterized as an *erga omnes* duty, it will correspondingly attract a stricter regime of responsibility. A case in point could be contemplated through the lens of the 2006 Israel-Hezbollah conflict, which clearly reinforced the idea that every state is under an obligation *erga omnes* to combat terrorism and that, therefore, allowing its territory to be used for the purposes of transboundary terrorism amounts to a violation of a primary norm by the state.[1702] Consequently, under the proposed model there will be a significant upward movement of the second element, along with the gap between obligations of conduct and result; should the actual conduct of the host-state on the first continuum fall below what is required by the scheme of the obligation *erga omnes*, this will engender a considerable gap between the elements.

The most visible upward thrust might arguably result from the characterization, by the international community, of the obligation of prevention as a *jus cogens* engagement.[1703] In fact, some authors have recently flirted with the idea of characterizing state support of terrorism – and the corresponding failure to prevent transborder terrorist attacks – as a violation of *jus cogens*.[1704] Other accounts put forth more categorical proposals by suggesting, for example, that "[i]t is widely accepted that there is at least a presumption that most acts of

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[1702] See, e.g., Kirchner, *Third Party Liability*, *supra* note 138, at 781.

[1703] Similarly to obligation *erga omnes*, *jus cogens* obligations might also attract a stricter regime of state responsibility. See, e.g., Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 132. However, it has sometimes been asserted that *jus cogens* rules are, in fact, narrower than *erga omnes* obligations. See, e.g., Ronald St. J. Macdonald, *Fundamental Norms in Contemporary International Law*, 25 CANADIAN YEARBOOK OF INTERNATIONAL LAW 138 (1987); Theodor Meron, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS 187 (1986). Other scholars expound that *jus cogens* and *erga omnes* rules are essentially equivalent, albeit both dealing with different facets of the same norms. See, e.g., Michael Byers, *The Relationship Between Jus Cogens and Erga Omnes Rules*, 66 NORDIC JOURNAL OF INTERNATIONAL LAW 211, 230 (1997) (citing Bruno Simma, *Bilateralism and Community Interests in the Law of State Responsibility*, in Yoram Dinstein and Mala Tabory (eds.), INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE 821-844, 825 (1989)).

[1704] See, e.g., Dupuy, *State Sponsors*, *supra* note 29, at 12. But *Cf. Ibid*, at 12 n.29. Jean-Christophe Martin also explores the possibility of characterizing the obligation of prevention as a *jus cogens* obligation. See Martin, LES RÈGLES INTERNATIONALES, *supra* note 1, at 463-464. But *Cf. Ibid*, at 491 ("l'interdiction de soutenir le terrorisme ne relève certainement pas du droit impératif ou *jus cogens*.").

terrorism, if not all of them, amount to breaches of peremptory norms, as they violate basic principles of human rights and / or humanitarian law."[1705] This conclusion will inexorably turn on the further development of a legal duty of prevention of terrorist attacks -- whether through a more confined or regional radius of operation and compliance, or through a generalized and universal accepted rule -- as mirrored by customary international law.[1706] It follows that, the higher the obligation to prevent, the more onerous the burden of refuting indirect responsibility will be on the host-state. Irrespective of where the elements may ultimately fall, there will often be a constant sliding gap not only between the characterization of the obligation[1707] and the actual conduct of the state, but also between the obligation of conduct/result dichotomy and all other inter-polar degrees on both continuums (**see Appendix V**).

Although largely fact-driven, these dimensions of state responsibility require further elaboration by the international community, without succumbing to idiosyncrasy. In sum, these cases are governed by factual considerations and should be guided by overarching principles of reasonableness and proportionality.[1708] However, to require that all obligations of prevention be categorized under a single legal matrix is unrealistic. One inference becomes self-apparent: regardless of the approach ultimately espoused by the international community, along with the resistance by some scholars to possible discussions of standard of care issues under the rubric of state responsibility,[1709] this area of indirect state responsibility should be governed by a variable threshold model or, at least, would benefit from some level of case-by-case adjustment or adaptation

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[1705] Dupuy, *State Sponsors*, *supra* note 29, at 15 (citing Article 33 of Geneva Convention IV, along with provisions of the Statute of the International Criminal Tribunal for Rwanda and of the Rome Statute).

[1706] See Byers, *The Relationship*, *supra* note 1703, at 228 ("[t]he principal source of *jus cogens* rules may thus be identified as the process of customary international law.").

[1707] On the relationship between *erga omnes* and *jus cogens* rules, generally, see *Ibid*, at 230-238.

[1708] While framing his observations in the context of the 1986 U.S.-led campaign in Libya, Baker warns about the inherent dangers in attempting to mount a military response against a terrorist attack, a caveat that is rightly concerned with potential (and disproportionate) harm to civilians. See Baker, *Terrorism*, *supra* note 275, at 47. For more background on the Libya incident, see David Turndorf, *The U.S. Raid on Libya*: *A Forceful Response to Terrorism*, 14 BROOKLYN JOURNAL OF INTERNATIONAL LAW 187 (1988).

[1709] See, e.g, Higgins, PROBLEMS & PROCESS, *supra* note 49, at 157.

characterized by a context-sensitive and policy-informed approach. To impose an obligation of result to prevent terrorist attacks in all cases would prove unreasonable and inefficient. However, this does not preclude the application of an obligation of result when the facts of the case warrant it, such as when the host-state holds all the information and means to prevent a given attack but decides not to thwart the excursion. In such exceptional cases, namely where the misalignment between both continuums is so astronomical and the regime of responsibility is akin to a bright-line rule, breaches of international obligations are easily cognizable. In such scenario, there is no question that the breach of an obligation of means could also be ascertained. Finally, it seems that the international community must redefine some primary rules of international law after all, but not in the fashion proposed by those scholars who resist the engagement of secondary rules in so doing, as the principal obligation is arguably clear: a state has an affirmative duty to forestall transborder excursions emanating from its territory and injurious to other states.[1710] However, defining the contours of that norm, namely whether it should impose a specific result on states or belong to the realm of *jus cogens*, and so on, could send the international community back to the drawing board for quite some time. In aiming to shed greater clarity on this debate, the present chapter has attempted to partly facilitate this endeavour through a critical appraisal of the rules of state responsibility.

[1710] This obligation had also been recognized prior to 9/11. See Baker, *Terrorism*, *supra* note 275, at 40.

## CONCLUSION TO PART III

The world is now faced with new threats, coupled with the need to rethink international legal mechanisms. 9/11 is certainly one of the most pivotal moments in recent memory with regard to international law. It changed the way states protect their borders, the immigration flows in most Western countries,[1711] the way modern states conceive terrorism and counterterrorism, and so on. The importance of the response to 9/11 should not be underemphasized, as it marked a clear departure from prior practice in several areas of international law, state responsibility being central in that development. Not only did the response to 9/11 considerably challenge the application of *jus ad bellum*, it also initiated an important shift in the law of state responsibility. With the advent of important milestones in the field of state responsibility, such as the *Corfu Channel* judgment and the ILC's *Articles*, the transition from a model of attribution and direct responsibility to a model of indirect responsibility seems natural and logical. From this perspective and also considering the Security Council's resolve to eradicate terrorism, the move toward a mechanism inspired by strict liability does not seem improbable, provided it is endowed with significant safeguards for host-states. The objective underlying this project has been to instill life and rigor into a truly global counterterrorism campaign.

The strict liability-infused model embodies great potential for change, progress, and efficiency at the international level. Not only does it promote fairness amongst states but it also provides governments with the right incentives: combating terrorism can only be successfully accomplished on a multilateral level, through the mutual exchange of information and policies. The pursuit of egregious and blind self-interests will adversely affect the efficacy of the regime of international responsibility in promoting compliance. Although certain archetypal social elements such as crime and violence will never be completely

[1711] On the immigration debate following the events of 9/11, see, e.g., Lebowitz and Podheiser, *A Summary*, *supra* note 33, at 873-888; Tumlin, *Suspect First*, *supra* note 33, at 1173.

obliterated, the objective remains to design a scheme of state responsibility that is the most conducive to international peace and security.[1712]

On the other hand, this model also poses problems and is potentially ripe for abuse by economically stronger states. Efficient state responsibility mechanisms can be encapsulated in one word: compromise. This notion has pervaded the discussion above. Situations like the 1982 Israel-Lebanon conflict illustrate the inherent political tensions in establishing the parameters of indirect responsibility. Throughout most episodes of transborder aggression, the principle of sovereignty/territorial integrity is challenged by the crucial and often time-sensitive need to prevent terrorist attacks. If members of the international community hope to empower the global counterterrorism campaign, they will have to relinquish or, at least, concede some parts of the fundamental values underpinning the Westphalian system of nation-states. In many cases, the choice will ultimately land somewhere between sacrificing sovereignty or reputation/dignity. To make inroads into the latter concept would seem less offensive in a world where most states are omnipotent within their own national boundaries. As illustrated above, the central problem lies in the fact that states might be called upon to answer for acts that fall outside of their immediate control and, as a corollary, to ensure compliance with international standards that are largely dependent on the behaviour and compliance of non-state actors with those norms. This is what prompted Pierre-Marie Dupuy to astutely identify two possible avenues to promote compliance in those scenarios, especially in areas most in need of observance by non-state actors, such as international human rights, humanitarian law and terrorism. Dupuy therefore concludes that enforcement of state responsibility law can be achieved either by i) expanding the scope of subjects under international law, thereby extending international responsibility schemes directly to non-state actors; or ii) widening or loosening the rules of attribution in order to engage state responsibility flowing from the

[1712] See James Kraska, *Torts and Terror*, *supra* note 1185, at 383 and n.89 ("[c]oncepts in civil law may be particularly useful in designing effective responses to terrorism", and supporting the proposition that "the strict liability model of state responsibility promotes "international peace and security"").

conduct of non-state actors.[1713] The present dissertation has amply grounded its central argument within the furrow of this second proposal.

The international community is now seriously concerned with preventing attacks and in deterring terrorist organizations. To forestall the proliferation of terrorist activity through the channel of host-states can be a judicious strategy, if well orchestrated. However, logistical considerations also abound and we must take stock of the realities facing developing countries and ineffective states. For example, to ask a small country like Lebanon to effectively thwart PLO terrorists, whilst it has already surrendered a considerable region of its own territory, is probably unrealistic in some cases. Similarly, it is fair to ponder whether the oft-discussed due diligence standard is actually objective and equitable. As underscored throughout this dissertation, a sensible reform of state responsibility for counterterrorism purposes should seek innovative ways to address the challenges engendered by the North/South divide.[1714] In reality, developing countries undoubtedly have fewer resources at their disposal in combating transnational terrorism. As a corollary to this idea, any potential overhaul of state responsibility cannot steer clear of the question of whether the due diligence standard should operate on a variable scale, in that it should be lowered in inversed proportion to the actual means possessed by states in preventing terrorism. Writing prior to the adoption of the 2001 ILC's *Articles*, Rosalyn Higgins declared that, "a poor state with limited resources would have a low due diligence standard to meet, in seeking to control private behaviour that harms others…in the *Montijo Case*, before the US-Columbia Claims Tribunal, the Tribunal found a failure of due diligence to prevent injury to aliens, notwithstanding the problems the state had in exercising this standard of care."[1715]

Nevertheless, questions of state responsibility certainly crop up in that context and become particularly relevant in modern reality, notably in the

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[1713] See, e.g., *Quarante ans de codification*, *supra* note 317, at 318; *State Sponsors*, *supra* note 29, at 7.

[1714] See generally Arghyrios A. Fatouros, *International Law and the Third World*, 50 VIRGINIA LAW REVIEW 783 (1964); Richard A. Falk, Balakrishnan Rajagopal and Jacqueline Stevens (eds.), INTERNATIONAL LAW AND THE THIRD WORLD: RESHAPING JUSTICE (2008).

[1715] Higgins, PROBLEMS & PROCESS, *supra* note 49, at 156. [References omitted.]

aftermath of the 2006 Israel-Hezbollah conflict. In fact, at the time of writing it would appear that tensions are once again mounting between Lebanon, Israel and Syrian/Iranian-backed Hezbollah factions.[1716] In light of such realities, this dissertation has advocated the circumvention of the concept of attribution altogether in the context of counterterrorism. An alternate but similar solution to this problem from the standpoint of semantics could perhaps be envisaged through a mechanism of 'automatic attribution'. In other words, instead of short-circuiting the mechanics of attribution once a terrorist strike is launched, the ILC's *Articles* could rather operate on the premise that the act is *automatically* attributed to the sanctuary state, so as to better facilitate the implementation of the *prima facie* finding of indirect state responsibility. The impugned state could then proceed to refute the claim of responsibility pending against it, pursuant to the parameters discussed earlier. Indeed, it is fair to query whether the failure to prevent a terrorist strike emanating from its territory triggers the host-state's responsibility via the application of automatic attribution.[1717] Some scholars have touched upon this idea after 9/11, albeit using different jargon. For instance, after highlighting the lack of nuance or distinction underlying the U.S.' posture vis-à-vis terrorists and states that harbour them, Ben Saul queries whether the mere toleration or harbouring of terrorists on its territory is sufficient to trigger a state's *direct* responsibility.[1718] He ultimately concludes that "[i]t is too soon to judge the customary force of this view, but it exerts pressure to modify customary rules of State responsibility on attribution, by holding States directly responsible for private acts even if a State does not 'effectively control' (or exercise 'overall control' over) the private actor."[1719]

The concept of automatic attribution not only offers an interesting policy option for counterterrorism in that it would shift incentives onto governments to

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[1716] See, e.g., Bakri, *Backers of Hezbollah and Government Clash As Strike Disrupts Lebanon*, *supra* note 456; Bakri and Bowley, *Confrontation in Lebanon Appears to Escalate*, *supra* note 456; Worth and Bakri, *Hezbollah Threatens Attacks on Israeli Targets*, *supra* note 456.

[1717] See, e.g., Cassese, INTERNATIONAL LAW, *supra* note 593, at 390-391.

[1718] See Jinks, *State Responsibility*, *supra* note 315, at 83; Ruth Wedgwood, *The Fall of Saddam Hussein*: *Security Council Mandates and Preemptive Self-Defence*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 576, 583 (2003); Travalio and Altenburg, *Terrorism*, *supra* note 146, at 100-110; Cassese, *Terrorism Is Also*, *supra* note 463, at 998-999.

[1719] Saul, DEFINING TERRORISM, *supra* note 26, at 197. [References omitted.]

monitor terrorist activity within their borders more effectively, but it also remains intimately intertwined with other important milestones in the law of indirect responsibility. The aforementioned *Corfu Channel* decision and Resolution 1373 certainly come to mind and, in many ways, underpin both the modern shift to indirect state responsibility in international law and the possible revision of attribution standards. As one commentator notes, the symbiotic relationship between these highly relevant precedents and the concept of automatic attribution comes into sharp focus when contemplated through the lens of Lebanon's potential state responsibility in the 2006 Israel-Hezbollah conflict. As a result, "[t]his is not a secondary aspect of attribution; the duty to deny safe havens for terrorists on one's territory is a primary obligation. Pursuant to this analysis, Lebanon has violated international law by harboring Hezbollah terrorists."[1720]

In sum, when applying the above principles to the 9/11 context, a few conclusions become apparent. On one hand, by failing to prevent the 9/11 attacks, Afghanistan has violated its international obligation to prevent terrorism. This conclusion is further corroborated by the stringent prescriptions found in Resolution 1373. On the other hand, as extensively canvassed in Chapter 3, this violation, which is undoubtedly tantamount to a threat to international peace and security, can be subsumed under the furrow of Chapter VII of the *UN Charter*.[1721] In fact, certain commentators construe the 9/11 precedents as "falling under the newly enlarged definition of "a threat to international peace and security"."[1722] Consequently, this characterization carries, with it, significant implications. First and foremost, this construction implies that counterterrorism obligations can fit within the ambit of the Security Council's powers and potentially engage the Council's review or action on questions of state responsibility in certain circumstances, as argued in Chapter 3. Second, and more controversially, this legal interpretation also signals that an internationally responsible host-state like Afghanistan could arguably be targeted in a self-defence strike following a

[1720] Kirchner, *Third Party Liability*, *supra* note 138, at 781-782.
[1721] See, e.g., Dupuy, *State Sponsors*, *supra* note 29, at 7-8.
[1722] See Dupuy, *The Law After the Destruction of the Towers*, *supra* note 1139.

terrorist attack.[1723] However, to the extent possible, the deployment of these legal devices should preferably be achieved under the auspices of the Security Council. This line of reasoning certainly subscribes to the discipline enshrined in Resolution 1373.[1724]

As a corollary, it must be recalled that the legal response to 9/11 should always be appreciated with some degree of caution, as it aimed at redressing a particularly singular and unprecedented set of events. However, the pre-9/11 record does not invariably support a right to invoke self-defence following the finding that a state harboured and supported terrorist factions launching transnational strikes from its territory, such as was the case in Afghanistan. By way of example, in 1985 Israel proceeded to aerial assaults on PLO headquarters in the Tunisian suburb of Hammam-Plage following transborder excursions by the terrorist group. In substantiating its recourse to force, Israel relied upon the now-prevalent state responsibility-derived notion that Tunisia had harboured terrorists who subsequently attacked Israel.[1725] Ultimately, the Security Council discarded that basis for invoking self-defence and adopted a rather disapprobative stance vis-à-vis Israel's intervention.[1726] Whether such scenario would now qualify as a predicate for triggering a right to adopt a forcible response by the aggrieved sate – under the new paradigm ostensibly set by the response to 9/11 – is a matter to be determined through future international legal practice and remains largely governed by the facts arising in every single instance. Yet, what is important to retain for present purposes is that such scenarios are consistently contemplated through a state responsibility prism, with some commentators querying "[w]hy

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[1723] But *Cf.* Phoebe N. Okowa, *II. Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 55 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 742, 748 (2006). However, the lawful recourse to self-defence should be distinguished from the practice of 'defensive armed reprisal', which is unlawful and thus excluded from the purview of the ILC's *Articles*. On this last point, see See Dinstein, WAR, AGGRESSION, *supra* note 1568, at 222; Brown, *Use of Force*, *supra* note 148, at 35 (2003); J. Nicholas Kendall, *Israeli Counter-Terrorism*: *"Targeted Killings" Under International Law*, 80 NORTH CAROLINA LAW REVIEW 1069, 1082 (2002).

[1724] See Dupuy Dupuy, *State Sponsors*, *supra* note 29, at 7-8.

[1725] See UN Doc. S/PV.2615, 4 October 1985, at 86-87.

[1726] See, e.g., Conte, SECURITY, *supra* note 834, at 66-69.

was responsibility not attributed to Tunisia in 1985 but was presumed to be attributed to the Taliban in 2001?"[1727]

In short, the 'harbouring and supporting' principle has essentially taken over as the analytical linchpin under modern state responsibility vis-à-vis terrorism.[1728] Indeed, even eight years ago some commentators identified a "tendance [qui] pourrait aboutir à un élargissement de la responsabilité internationale, allant jusqu'à l'attribution des actes accomplis par les organisations terroristes aux Etats qui les soutiennent d'une façon ou d'une autre, en les abritant sur leur territoire ou en les aidant de quelque manière que ce soit."[1729] Based on the new paradigm, therefore, host-states can be found responsible as would be the babysitter who fails to prevent the children under his or her guard from burning down the neighbour's house.[1730] By way of example, the framework laid out in the *Civil Code of Québec* provides an instructive illustration of this mechanism by stipulating that, "[a] person having parental authority is liable to reparation for injury caused to another by the act or fault of the minor under his authority, unless he proves that he himself did not commit any fault with regard to the custody, supervision or education of the minor."[1731]

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[1727] Myra Williamson, *Security in the 21st Century*, 11 JOURNAL OF CONFLICT & SECURITY LAW 293, 296 (2006).

[1728] Consider Ratner, *Jus ad Bellum*, *supra* note 266, at 914.

[1729] Marcelo Kohen, *Les Controverses sur la question du "terrorisme d'Etat"*, in Karine Bannelier *et al.*, LE DROIT INTERNATIONAL, *supra* note 475, at 89. But *Cf.* Stern, *La Responsabilité*, *supra* note 262, at 687 (arguing that this approach is predicated on too much of a tenuous institutional link to warrant the imputation of the 9/11 attacks to the government of Afghanistan).

[1730] This analogy is inspired by the general remarks in Proulx, *Babysitting Terrorists*, *supra* note 163.

[1731] *Civil Code of Québec*, R.S.Q. ch. 64, article 1459(1). See also *Ibid*, article 1460, which provides that, "[a] person who, without having parental authority, is entrusted, by delegation or otherwise, with the custody, supervision or education of a minor is liable, in the same manner as the person having parental authority, to reparation for injury caused by the act or fault of the minor…[w]here he is acting gratuitously or for reward, however, he is not liable unless it is proved that he has committed a fault." Although not directly on point, the American experience also provides a microcosmic sampling of this practice. Following the implementation of a one-strike policy for termination of tenancy due to drug or criminal-related activities in the context of federally-assisted housing leases, American Courts have sometimes imposed a standard of strict liability vis-à-vis childcare providers. See, e.g., *Syracuse Housing Authority* v. *Boule*, 172 Misc.2d 254 (Syracuse City Ct. 1996) (ruling that no valid cause for termination of tenancy can be confirmed where a tenant has no knowledge of, or did not consent to, and could not foresee the illegal act perpetrated by her babysitter), affirmed 177 Misc.2d 400 (Onondaga County Ct. 1998), reviewed, 265 A.D.2d 832 (4th Dept. 1999) (applying a strict liability standard).

Hence, the vehement propositions advocating the maintenance of classical attribution principles seem somewhat distant and the question of *direct* state involvement does not hold the same relevance it once did. However, this new paradigm of indirect responsibility carries with it new and sometimes nebulous legal challenges, such as the necessary elucidation of the difference between obligations of conduct and result, further defining the nature of the obligation of prevention, identifying the applicable legal standard to ineffective states in combating terrorism, and so on. Given the current legal climate and lack of consensus on these issues, it is difficult to clearly and uniformly establish a legal regime governing these politically volatile situations. Nevertheless, it is imperative to devise general rules and parameters applicable to all normative breaches and, more importantly, to failures of due diligence leading to transnational terrorist attacks. Such objective was attempted above, through the possible implementation of a two-tiered strict liability-inspired system of indirect responsibility for terrorism. Yet, much still needs to be done and written to advance both the intellectual discourse and potential deterrence models in a fruitful fashion. In the meantime, we can only hope that our extant scheme of state responsibility, paired with vigilant law enforcement, will be able to contain the most serious threats.

# PART IV - IDENTIFYING NEXT STEPS AND LAYING OUT A PROSPECTUS FOR INTERNATIONAL LEGAL SCHOLARSHIP: PROBLEMS, CHALLENGES AND OUTLOOKS

## INTRODUCTION

This final part and chapter conclude by reviewing some key aspects of any reform of state responsibility law aimed at bolstering prevention and suppression efforts with a view to eradicating terrorism. In addition, it identifies some of the possible next steps worthy of contemplation in the intellectual inquiry leading to the further delineation of state responsibility, drawing, *inter alia*, on extraneous legal regimes not covered in the primary scope of analysis. Needless to say, one of the major challenges affecting this project stems from the fact-specific nature of terrorism, which makes it difficult to develop general rules and guidelines applicable to all breaches of counterterrorism obligations. This difficulty is exacerbated by the processes of self-judging and autoqualification which inevitably crop up in many areas of international law, especially in the face of legal indeterminacy, but that also remain central components in the application of the law of state responsibility.

The chapter proceeds to canvas these difficult questions along with ancillary issues so as to tease out some cardinal elements of a research programme on state responsibility for the future. Section A) investigates the challenges associated with elaborating general guidelines applicable to all breaches of the obligation of prevention and other counterterrorism duties. In so doing, it delves deeper into the difficulty of generalizing terrorism so as to develop uniform or general state responsibility guidelines. In particular, the specific relationship that sovereign states cultivate in relation to international responsibility -- typically manifested through self-judging and autoqualification -- is further scrutinized. This then sets the stage for the further exploration of other possible rapprochements between counterterrorism policy and analogous global phenomena, such as global warming. After addressing the viability of alternative legal schemes to the strict liability-infused model developed in Chapter 4, Section B) then proceeds to flagging a few key issues under the rubric of 'legal

consequences of an internationally wrongful act', including compensation and restitution.

## CHAPTER 5: A PARTIAL POLITICO-LEGAL SOLUTION LYING AT THE HEART OF INTERNATIONAL LAW

> 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.
>
> - Wolfgang Friedmann[1732]

### A) Difficulty of Developing Guidelines and General Principles for Fact-Intensive, Fact-Specific Phenomena

As prefaced above, this section delves into certain aspects of state responsibility law's singular mode of implementation outside of institutional frameworks, namely through inter-state mechanisms. As a result, victim states often sit as final arbitrators of internationally wrongful acts and must, correspondingly, devise countermeasures in order to redress those international breaches. The present section seeks to tease out the political and policy implications of such arrangement in the context of counterterrorism.

#### 1. Partial Solutions: State Centrism and Other Limits of State Responsibility

As demonstrated throughout this project, certain aspects of international law are shifting toward an increasingly transnational paradigm. Surely, the global order arising out of the post-Westphalian legal landscape devolved all sovereign powers and prerogatives into the hands of sovereign states. As a result, use of force standards and international law, generally, rested predominantly upon a

[1732] *The Growth of State Control Over the Individual and its Effect Upon the Rules of International State Responsibility*, 19 BRITISH YEARBOOK OF INTERNATIONAL LAW 118, 144 (1938).

bilateral conception of legal relationships. This state of affairs was most recently perpetuated during the Cold War era, where inter-state action motivated by an original private wrongdoing would have undoubtedly been perceived as highly destabilizing and detrimental in the grander scheme of nuclear *rapports de force*.[1733] In short, international law was traditionally envisaged as a state-centric endeavour, a structure that some ineluctably call into question or, alternatively, construe as symptomatic of the modern international legal order.[1734]

Yet, state responsibility law has long sought to adapt to private wrongdoing with a view to determining whether such conduct could be regulated, or neutralized, through the screen of the state. In particular, some theoretical advances based on complicity, collective responsibility or condonation, each, at times, more raw and unsophisticated than the other, were nonetheless articulated around one organizing principle: a connection between private behaviour and the control wielded by a state over the territory in which such conduct takes place. After all, "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."[1735]

In addition, modern events and the advent of the disaggregated state have dramatically challenged this once-prevalent international legal order. It is no longer true that states detain an unrivaled monopoly over power and wealth. Quite to the contrary, they must coexist with highly influential non-state actors; as a result, states and non-state actors now share power and influence on an unprecedented level.[1736] As discussed in previous chapters, they are partners not only in norm enforcement but also in norm creation.[1737] Two of their most

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[1733] See, e.g., Becker, TERRORISM AND THE STATE, *supra* note 2, at 361.

[1734] See, e.g., Margo Kaplan, *Using Collective Interests to Ensure Human Rights*: *An Analysis of the Articles on State Responsibility*, 79 NEW YORK UNIVERSITY LAW REVIEW 1902, 1902-1903 (2004).

[1735] Becker, TERRORISM AND THE STATE, *supra* note 2, at 361.

[1736] For an exploration of similar ideas, see Robert McCorquodale, *Beyond State Sovereignty*: *The International Legal System and Non-State Participants*, 8 REVISTA COLOMBIANA DE DERECHO INTERNACIONAL 103-160 (2006).

[1737] See, e.g., Frédéric Mégret's thought-provoking work on the role of non-state actors in implementing international law in the context of international resistance: *Can International Law Be a Law of Resistance? Ten Steps for a Renewal of International Normative Ambition*, Unpublished paper, 8 August 2007, available online at http://ssrn.com/abstract=1212542 (last

important shareholders, for present purposes, are undoubtedly the international community, which vests the viability of many of its interests in state compliance with international obligations protecting those interests, and the human security scheme -- which is sometimes dependent not only on loose coordination between governmental networks and non-state actors -- but which can also be challenged and shaped by non-state actors. In that regard, it can certainly be argued that transnational terrorist networks, such as Al Qaeda, have challenged and, to some extent, changed the rules of the game or, at the very least, prompted the international community and local governments to revisit certain policies. After all, "globalization can be an incredible force-multiplier" thereby evincing both a rich interplay/power sharing and power struggle between states and non-state actors.[1738] As a corollary, the resulting interplay between law and terror translates into two colliding networks, namely the emergence of transnational terrorist networks (e.g. Al Qaeda) and the network of law (which comprises transborder regulatory regimes, transnational litigation, the structures of public international law, and so on).[1739] To ensure that a truly effective transnational counterterrorism campaign acquires traction requires not only a rethinking of certain international legal components within the network of law, but also the harmonization and bolstering of both international and domestic aspects of that very network.[1740]

In this new reality, private actors can arrogate state-like power and influence with either positive or potentially devastating circumstances (i.e. in the case of transnational terrorism).[1741] Amongst ways to regulate this behaviour and, by the same token, to prevent catastrophic terrorist strikes, it is imperative to further analyze the role of states in tolerating and supporting terrorist activity.

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visited on 19 January 2008); *On the Iraqi 'Insurgency'*: *Rise and Fall of the Idea of Resistance to Occupation*, Unpublished paper, 5 November 2008, available online at http://ssrn.com/abstract= 1296060 (last visited on 19 January 2008).

[1738] Thomas L. Friedman, LONGITUDES AND ATTITUDES: EXPLORING THE WORLD AFTER SEPTEMBER 11 5 (2002).

[1739] See, generally, Christopher J. Borgen, *A Tale of Two Networks*: *Terrorism, Transnational Law, and Network Theory*, 33 OKLAHOMA CITY UNIVERSITY LAW REVIEW 409 (2009).

[1740] See, e.g., *Ibid*, at 410.

[1741] See, e.g., Jessica T. Matthews: *Power Shift*, in Robert J. Lieber (ed.), FOREIGN POLICY 219-235 (2008); *Power Shift*, in David Held and Anthony McGrew (eds.), THE GLOBAL TRANSFORMATIONS READER: AN INTRODUCTION TO THE GLOBALIZATION DEBATE 204-212 (2003); *Power Shift*, 76 FOREIGN AFFAIRS 50 (1997).

Delineating accountability levels of involved governments, along with the elaboration of certain general precepts governing all breaches of counterterrorism obligations, not only acknowledges the broad-reaching capacities of non-state actors but can also act as a gateway to identifying deterrence models and shift the focus squarely on prevention, albeit through the screen of the state.

The present study has attempted to heed this recent trend and argue for a substantive rethinking – or, at least, a different interpretation – of the rules of state responsibility.[1742] In many ways, it strives to join -- and casts itself as philosophically adjacent to -- recent scholarly contributions calling for a reassessment of the rules of attribution in light, *inter alia*, of the ICJ's pronouncement on the matter in the *Genocide* case.[1743] This inquiry, however, inexorably runs against one obstacle. Whilst the traditional conception of public international law might have been initially state-centric in its scope and philosophy, recent events confirm that non-state actors can now subvert this vision and challenge the rules that result from it, thereby shifting the focus away from an overemphasis on statehood in the search for answers and solutions to truly transnational problems. For example, in the field of international human rights law, the academic discussion is shifting increasingly towards a cogent and coherent challenge against the dominance of state-centrism in tackling violations of fundamental norms of international law.[1744] As a result, the intellectual discourse is "therefore moving away from the traditional view that under human rights law the individuals hold the rights while only states bear the obligations".[1745] Arguing that such contestation is simultaneously predicated on a normative and descriptive component, certain scholars go as far as to argue that the state's centrality in public international law is by no means indelible and, by

[1742] See also Hessbruegge, *The Historical Development*, *supra* note 1096, at 280-281.
[1743] See, e.g., Griebel and Plücken, *New Developments*, *supra* note 900; Cassese, *The Nicaragua and Tadić Tests*, *supra* note 116, at 649. See a similar line of reasoning, albeit from the perspective of fragmentation, in Richard Goldstone and Rebecca Hamilton, *Bosnia v. Serbia*: *Lesson from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia*, 21 LEIDEN JOURNAL OF INTERNATIONAL LAW 95-112 (2008).
[1744] See, e.g., Philip Alston, NON-STATE ACTORS AND HUMAN RIGHTS (2005); Andrew Clapham, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006); Olivier De Schutter (ed.), TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS (2006).
[1745] De Brabandere, *Non-State Actors*, *supra* note 879, at 192.

the same token, that it no longer enjoys the benefits of being the predominant actor in the discipline or even the central stakeholder in this setting.[1746]

Yet, in a seemingly paradoxical stance vis-à-vis the rise of the disaggregated state, the present study has elected to tackle the problem of transnational terrorism through the state-centric regime *par excellence*, namely the law of state responsibility. However, it has done so – and any study analyzing the relationship between state responsibility and terrorism should probably follow suit – whilst acknowledging the role of non-state actors in shaping and advancing international law. More importantly, as was shown above, the rules of state responsibility are probably far more adaptable to contemporary realities than would appear upon first glance, subject, of course, to the different interpretations and adjustments advocated throughout the present study. As Brownlie rightly underscores, "[t]he continuing relevance of the principles of state responsibility is not to be underestimated. In any event, these principles are more versatile than specialist writers are prepared to recognize".[1747] As a corollary, while non-state actors wield an unprecedented level of power and influence on the global scale, there is no reason to preclude, on that basis alone, the potential contributions of state responsibility law in tackling privately-inflicted harm through the screen of statehood, be it authored by rebel groups or transnational corporations.[1748] State responsibility remains a dominant player in international relations and, at the very least, warrants consideration whenever the commission of an internationally wrongful act is ascertained, irrespective of the enforcement deliverables it can or cannot ultimately produce.

Conversely, the idea of applying the law of state responsibility to transnational terrorism cannot make any credible claim to exhaustion of all remedies or legal regimes that can be harnessed with a view to combating

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[1746] Susan Marks, *State-Centrism, International Law, and the Anxieties of Influence*, 19 LEIDEN JOURNAL OF INTERNATIONAL LAW 339, 340 (2006).

[1747] Ian Brownlie, PRINCIPLES OF INTERNATIONAL LAW 190 (6th Edition, 2003).

[1748] State responsibility for non-state actions has generated considerable writing. See, e.g., McCorquodale and Simons, *Responsibility Beyond*, *supra* note 19, at 598-625; Juha Kuusi, THE HOST STATE AND THE TRANSNATIONAL CORPORATION: AN ANALYSIS OF LEGAL RELATIONSHIPS (1979); Shadrack B.O. Gutto, VIOLATION OF HUMAN RIGHTS IN THE THIRD WORLD: RESPONSIBILITY OF STATE AND TNCS (1983).

transnational crime. Nor does it strive to do so. This reality can be framed in rather reductive terms. If one were to conceive of an international society comprised of geo-politically delimited separate entities -- let's call them nation-states -- entitled to certain rights and inheriting certain obligations pursuant to some loosely-envisaged set of organizing principles -- let's call that backdrop the international community -- then that arrangement would invariably be prone to occasional power struggles and conflict. This possibility is further exacerbated by the fact that this international society is, at times, populated by egoists solely guided by the pursuit of self-interest, whilst also remaining predominantly characterized by disparate economic relations and asymmetrical power dynamics.[1749] However, there still needs to be some modicum of law and order, even in the face of the most tempestuous and asymmetrical dynamics. Accordingly, a sort of conceptual and legal safety net is devised in order to regulate and, ultimately, punish the violation by states of a core group of agreed-upon rules and principles in this legal order. That is the exclusive dominion of state responsibility law. The only difficulty is that there is no centralized enforcement monopoly, as opposed to those found in domestic constitutional legal orders; states are, therefore, left to their own devices when it comes to actually applying and implementing the law of state responsibility. As explored extensively in previous chapters, the notion of *reciprocity* often remains the only engine of survival in this setting.[1750] Whilst counterterrorism issues are generally not suited for the application of a policy of reciprocrity in some fields, such as humanitarian law,[1751] the law of state responsibility unquestionably eludes this general categorization and, rather, largely depends on reciprocity for successful deployment. Indeed, the scope of analysis of that body of law coincidentally happens to straddle the field of counterterrorism in the present project and, by the

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[1749] See the discussion on rationalist considerations *supra* Chapter 4, Section B)5.b) and, to a lesser extent, Chapter 1, Section A).

[1750] See, e.g., *supra* Chapter 4, Section B)7.a). See also, generally, *supra* Chapter 1, Section A) and Chapter 3, Section B)3.

[1751] See Provost, *Asymmetrical Reciprocity*, *supra* note 9, at p. 3, n.13 (expounding that "it is unwarranted to develop an analysis on the place of reciprocity in the laws of war around issues connected to anti-terrorism"). For a cynical treatment of reciprocity, see Osiel, THE END OF RECIPROCITY, *supra* note 9.

same token, explores the extension of this traditional area of international law to the subversive activities of non-state actors. Yet, the crux of the actual legal and reciprocal mechanics will be operationalized and achieved on a state-to-state level, thereby excising the problematic application of the notion of reciprocity to asymmetric situations involving private actors at a sub-state level.

It follows that states will exert a broad margin of appreciation not only on the applicability and – once that applicability is ascertained – on the modalities of state responsibility repertoire in light of the failure by another state to prevent a terrorist attack, but also on what constitutes 'terrorism' in any given case. These considerations bring the question of governmental autoqualification into sharp relief and steer the purview of legal analysis towards "Kelsen's proposition that only state parties to a controversy could autoqualify it."[1752] As a result, when the obligation to prevent terrorism is breached by a host-state, competing interpretations and constructions of the law of state responsibility – especially with regard to devising appropriate countermeasures – and of what, exactly, constitutes 'terrorism' will ineluctably arise.[1753] Needless to say, the ensuing margin of appreciation is rather broad and often divisive. As a corollary, the existence of potential conflicting qualifications also stems from the process of self-judging, itself also a very central feature of the default system of state responsibility.

Interestingly, ILC Special Rapporteur Arangio-Ruiz lobbied the Commission in 1992-1993 to adopt a mechanism of mandatory dispute settlement that would essentially have obligated states to exhaust all available dispute resolution options prior to adopting unilateral countermeasures.[1754] As part of his

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[1752] Provost, INTERNATIONAL HUMAN, *supra* note 207, at 338 n.2. See also Hans Kelsen, PEACE THROUGH LAW 13-14 (1944); Leo Gross, *States As Organs of International Law and the Problem of Autointerpretation*, in George Lipshy (ed.), LAW AND POLITICS IN THE WORLD COMMUNITY 59, 72-73 (1953). See also, generally, Leo Gross, *States As Organs of International Law and the Problem of Autointerpretation*, in Leo Gross, SELECTED ESSAYS ON INTERNATIONAL LAW AND ORGANIZATION 167-197 (1993).

[1753] For instance, it is relevant to recall that, in the *Nicaragua* case, the Nicaraguan government classified the *Contras* rebels as 'terrorists'. See *Nicaragua*, *supra* note 119, at 63-64, para. 113 and at 68, para. 121.

[1754] Gaetano Arangio-Ruiz, *Counter-Measures and Amicable Dispute Settlement Means in the Implementation of State Responsibility*: *A Crucial Issue Before the International Law Commission*, 5 EUROPEAN JOURNAL OF INTERNATIONAL LAW 20-53 (1994).

revolutionary proposal, he envisaged a third-party objective body mandated with monitoring and reviewing the adoption of countermeasures, so as to ensure that their application remained just and equitable.[1755] It is no surprise, therefore, that Arangio-Ruiz construed the prior settlement of disputes before resorting to countermeasures as an integral component of states' obligation to favour the peaceful resolution of international disputes in their relations.[1756] The Special Rapporteur's vision even included a draft article, which was incorporated into one of the Commission's drafts on state responsibility, and provided as follows: "[i]n cases, however, where the dispute arises between State Parties to the present articles, one of which has taken countermeasures against the other, the State against which they are taken is entitled at any time unilaterally to submit the dispute to an arbitral tribunal to be constituted in conformity with Annex II to the present articles."[1757] If adopted, such provision would have instituted a mandatory dispute resolution exigency under public international law, and correspondingly signaled a monumental shift in the law of state responsibility.[1758] Not surprisingly, the proposal gained some traction in certain academic circles – most notably spearheaded by Oscar Schachter[1759] – but ultimately failed to generate consensus. More importantly for present purposes, as Mary Ellen O'Connell highlights, Arangio-Ruiz's suggested scheme "would have eliminated in one move the right of an injured party to judge for itself the use of a sanction. They would have eliminated self-judging in the enforcement of international law in all cases except the immediate, emergency decision to use armed force in self-defence."[1760] Ultimately, the final delivery of the ILC's *Articles* excised, from the

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[1755] See *Report of the International Law Commission on the Work of its Forty-Fifth Session*, GENERAL ASSEMBLY OFFICIAL RECORDS, Forty-Eight Session, Supp. No. 10 (Doc.A/48/10), at para. 228.

[1756] See Gaetano Arangio-Ruiz, Fourth Report on State Responsibility, Doc.A/CN.4/444/Add. 1-3, at paras. 41-51.

[1757] Draft Article 5(2) in YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1995, ii, Part Two, at 78.

[1758] See Mary Ellen O'Connell, *Report of the Economic Sanctions Committee*: *The Impact of Sanctions on the Development of New International Law*, AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION 86-95, 94 (2001-2002).

[1759] Schachter, *Dispute Settlement*, *supra* note 957, at 476.

[1760] O'Connell, *Controlling Countermeasures*, *supra* note 744, at 56.

codified rules of state responsibility, the notion of predicating the adoption of unilateral countermeasures on prior mandatory dispute settlement.

In other words, absent any mandatory adjudicatory phase in the implementation of state responsibility – or barring any potential institutional intercession in the process[1761] – a victim state has seemingly unfettered discretion in determining that a host-state has violated its counterterrorism obligations and can, in turn, adopt unilateral countermeasures against that state. In fact, such ideas, paired with the notion that states also have the ability to ascertain whether there has been an 'armed attack' before invoking their right to self-defence, have acquired credence in legal literature.[1762] Speaking to the question of indeterminacy and international law's "modulated response" to that challenge in the "context of application and the nature of norms in human rights and humanitarian law", René Provost astutely underscores that there will be a "'dialogue' on international norms between these two or more actors holding possibly divergent views on the nature of the situation."[1763] Based on the foregoing considerations, this conclusion certainly holds true in the context of the application of state responsibility law to breaches of counterterrorism obligations, provided the host-state is not completely inimical to the idea of diplomatic engagement.

Moreover, therein lies the response to the first main obstacle identified above, namely the attempt to adapt a traditionally state-centric legal regime (i.e. state responsibility) to an increasingly transnational paradigm (i.e. terrorism). Whilst it has been demonstrated that certain aspects of state responsibility could adapt to the evolution of modern terrorism, that state responsibility is so central in international law that it cannot be overlooked when assessing potential deterrence models, and that terrorism often remains dependent on the state for its successful

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[1761] On the possible involvement of international organizations, see, e.g., *supra* Chapter 3.

[1762] See, e.g., Alland, JUSTICE PRIVÉE, *supra* note 1482, at 107-120; Gross, *States As Organs*, in Lipshy, LAW, *supra* note 1752, at 80-81; Provost, INTERNATIONAL HUMAN, *supra* note 207, at 338.

[1763] Provost, INTERNATIONAL HUMAN, *supra* note 207, at 338. Here, Provost writes about this 'dialogue' as pertaining to an internal armed conflict, whereby insurgents are afforded a "measure of functional sovereignty" in order to make a "valid legal characterization of the conflict", which, in turn, might run against competing qualifications of the conflict formulated by other involved actors. See *Ibid*.

execution,[1764] a simpler conclusion warrants consideration. To envisage the law of state responsibility as a cure-all legal solution -- or even as a consistently effective regime to thwart or punish state involvement in terrorism -- is illusory. In the highly decentralized and unregulated (or self-regulated) setting described above, where unilateral mechanisms for the determination of illegality and the enforcement of sanctions are predominantly vested in sovereign states, many recourses to state responsibility are bound to be subject to political considerations, score-settling and overreaction. Conversely, that is not to say that state responsibility cannot play some role in shifting incentives onto governments, in enhancing transnational cooperation and in stabilizing international relations.[1765] For instance, the international responsibility of Libya in the context of the *Lockerbie* incident was thoroughly canvassed in Chapter 3, *supra*, thereby i) bolstering the idea that state responsibility can offer some degree of closure vis-à-vis transnational terrorism, via the mechanisms of satisfaction and reparation, and; ii) as a corollary, supporting Security Council intercession in this process.[1766] But state responsibility – whether implemented via institutional structures or through more traditional inter-state vehicles – cannot completely or exhaustively address all the challenges posed by transnational terrorism or even offer any broad array of prospective solutions. Yet, state responsibility remains a central feature of public international law, a sort of default regime that can only be set aside conventionally or by *lex specialis*.[1767] And this ties into a second obstacle with which any project of this type will invariably grapple.

When confronted with any scholarly treatment of the legal accountability of states for private transnational activity, detractors of the relevance of state responsibility in the terrorism debate invariably borrow a page from the sceptics' handbook: what is the point? What can state responsibility law really bring to the table? This impression might even have sporadically crept into the reader's mind

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[1764] See, e.g., *supra* Chapter 2, Section D)1.

[1765] See *supra* Chapter 1, Section A); Chapter 4, Section B)7.a). This argument was also advanced, albeit partially, in the context of the possible institutionalized implementation of state responsibility law via the United Nations Security Council. See *supra* Chapter 3, Section B)3.

[1766] See, e.g., *supra* Chapter 3, Sections B)2. and B)4; Chapter 4, Section B)5.d).

[1767] See, e.g., Thirlway, *Injured*, *supra* note 79, at 324.

throughout the development of this dissertation, which is perfectly understandable. State responsibility remains an elusive and challenging topic and its potential contributions, whilst sometimes severely limited, cannot always be accepted on faith. But they can certainly be envisaged short of acting on a leap of faith. On a preliminary level, sceptics query how the formal rules of public international law can be brought to bear upon an undefined concept, namely that of 'terrorism'. However, the notion of 'terrorism' is sufficiently circumscribed – either through state practice or via the elaboration of international criminal law – to warrant in-depth legal analysis leading to the identification of potential models tailored towards its prevention and suppression.[1768] Alternatively, compelling arguments have been put forth in legal academia to the effect that 'terrorism' amounts to a mere term of convenience, thereby disabling the need to devise a separate 'international law of terrorism'; the fact that it is subsumed under existing international legal structures therefore provides argumentative ammunition for sidestepping the whole definitional polemic.[1769]

In addition, detractors of the main argument espoused in this study most consistently voice their disapproval in terms of the limits of public international law from the perspective of enforcement, particularly. Put another way, this line of reasoning implies that state responsibility is a toothless tiger: since there is no way of ensuring enforcement of the legal consequences of an international breach, why should we even bother invoking the secondary rules of state responsibility, especially given the fact that terrorism is an increasingly transnational phenomenon? There is certainly some validity to this line of argument stemming from the tension between state responsibility's centrality in international law and its absence from the legal assessment of – or even from the legal dialogue surrounding – certain major events premised on state wrongdoing or state failure in preventing harmful activity. Surely, state responsibility aspires to act as the

[1768] See, e.g., Conclusion to Part II.

[1769] But *Cf.* Hala El Amine, *Pourquoi la Cour pénale internationale n'est-elle pas compétente en matière de terrorisme international*, in Michael J. Glennon and Serge Sur (eds.), TERRORISM AND INTERNATIONAL LAW 247-267, 267 (2008). On the difficulty of defining terrorism, see also George P. Fletcher, *The Indefinable Concept of Terrorism*, 4 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 894 (2006).

default regime, a sort of safety net encompassing all breaches of international obligations. But it does not aspire to achieve perfect symmetry or, more pointedly, to generate an infallible track record –in fact, it cannot do so by its very nature and makeup, which meld politics, law, self-judging and unilateralism. Quite to the contrary, the failures of state responsibility have been, at times, spectacular, especially in the environmental field, for instance. As such, whilst state responsibility arguably constitutes one of the fundamental tenets of international environmental law, its underlying philosophy was eschewed following the disastrous accident in a nuclear power plant in Chernobyl or in the aftermath of the disastrous pollution of the river Rhine by the pharmaceutical company, Sandoz.[1770] In fact, states often prefer to exclude the application of state responsibility law for environmental degradation via the adoption of other conventional or liability regimes, in order to avoid the diplomatic complications associated with the application of that body of law and state-versus-state adjudication.[1771]

In response to these sceptics, one should certainly put forth the proposition that framing the issue over-emphatically as one of 'enforcement' is not particularly helpful and, in many ways, misses the whole purpose of state responsibility law. Indeed, state responsibility operates on the prospect of pinning responsibility for the wrongdoing of the *state* in failing to prevent subversive transborder activity, provided its ambit has not been excluded conventionally or via *lex specialis*. It takes root in the idea that governments are expected to fulfill

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[1770] Indeed, none of the European Union countries affected by the Chernobyl incident ever instituted claims against the Soviet Union. See Deveraux McClatchey, *Chernobyl and Sandoz One Decade Later*: *The Evolution of State Responsibility for International Disasters, 1986-1996*, 25 GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 659 (1996). See also Alexandre Kiss, *L'Accident de Tchernobyl et ses consequences au point de vue du droit international*, 32 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 139-152 (1987). Indeed, Alexandre Kiss has also written extensively on the Rhine River incident and related issues. See, e.g., *"Tchernobale" ou la pollution accidentelle du Rhin par les produits chimiques*, 33 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 719-727 (1988); *The Protection of the Rhine Against Pollution*, in Albert E. Utton and Ludwik A. Teclaff (eds.), TRANSBOUNDARY RESOURCES LAW 51-75 (1987); *La Pollution du Rhin et le droit international public*, in Roelof Hueting *et al.* (eds.), RHINE POLLUTION: LEGAL, ECONOMIC AND TECHNICAL ASPECTS 59-80 (1978).

[1771] See, e.g., Alexandre Kiss and Dinah Shelton, INTERNATIONAL ENVIRONMENTAL LAW 320 (2004); Henry W. McGee, Jr., *Litigating Global Warming*: *Substantive Law in Search of a Forum*, 16 FORDHAM ENVIRONMENTAL LAW REVIEW 371, 391 (2005).

their obligations to protect their populations from harm and prevent injurious activities affecting the interests of third states and individuals -- terrorist attacks incontestably fall under that rubric -- be they rooted in customary law, the R2P Doctrine or general principles of public international law. As one commentator points out, "[t]he language and conceptions of State responsibility define the boundaries of a sovereign's accountability in its relations with other States…they set the limits of what citizens can expect and demand from the countries in which they live".[1772] As a corollary – and in juxtaposition with state responsibility's potential curative character, typically actuated through the 'internationally wrongful act - attribution - legal consequences/reparation' syllogism – the rules enshrined in that body of law can produce a preventive effect and, correspondingly, shift incentives onto governments to comply with counterterrorism obligations. In short, as thoroughly explored in the chapters above, the prospect of incurring responsibility can generate desirable policy initiatives, stabilize international relations and palliate the enforcement gap that is symptomatic of the international society's anarchical structure (in this case, perhaps even before the perpetration of an internationally wrongful act given that the overarching principle is prevention).[1773]

But applying state responsibility law to counterterrorism policy is, by no means, aimed at assigning blame for the whole terrorist attack. It acknowledges that states play some role in the chain of events leading to the execution of a terrorist strike and strives to establish some degree of responsibility, commensurate to that state's involvement in the particular case. In attaining this policy objective, as argued above in Chapter 4, it becomes clear that a variable threshold or standard – coupled with a context-sensitive legal approach – is warranted. Inexorably, some level of causal sensibility is also called for in the analysis, as one commentator rightly underscores: "[i]t is suggested that the state is responsible for acts of international terrorism that it supports along a sliding scale of state responsibility that takes into account the state's misconduct and the

[1772] Becker, TERRORISM AND THE STATE, *supra* note 2, at 155.
[1773] See, e.g., Zemanek, *Does the Prospect*, *supra* note 50, at 125-134.

causative nexus between the state's misconduct and the harm."[1774] Whether similar determinations spill over to other facets of international law depends on the facts of the case but does not, in any way, impinge on the application of any concurring or overlapping legal regimes. In other words, the application of state responsibility provides only partial redress – a partial politico-legal solution – amidst a multiplicity of available recourses and policy avenues to stamp out terrorism, be they criminal, financial, reputational,[1775] domestic, international, law enforcement, and so on. A striking parallel can be extracted from international criminal law, a structure under which justice can seldom be achieved and exhausted in favour of all the victims and mourners. There are, therefore, only a handful of beneficiaries directly affected by the outcomes of specific cases. Yet, this system is still widely perceived as a worthwhile enterprise that contributes to international justice and deterrence. As a corollary, it offers some level of cathartic release even to those not specifically targeted by the result of international proceedings but nonetheless invested in fighting impunity for the individual crimes under scrutiny.

The main idea is that international criminal justice is oftentimes a largely symbolic remedy because it cannot truly redress every stakeholder's rights or interests in the grander scheme of things. Indeed, the administration and operation of international criminal tribunals, which are partially shaped by budgetary constraints and political impediments, translate into a highly selective endeavour: only a few -- sometimes 'high-profile' -- trials may be pursued, without providing solace in the way of 'individualized' justice to all relevant stakeholders.[1776] Yet, the application of international criminal law nonetheless

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[1774] Malzahn, *State Sponsorship*, *supra* note 92, at 96.

[1775] Interestingly, certain aspects of state responsibility law can also offer some redress via reputational avenues. See, e.g., the discussion on the social stigma argument pertaining to state responsibility, *supra* Chapter 4, Section B)7.b). According to some international relations theorists, a state's international reputation is often construed as the most important generator of its compliance with international law. See, generally, Guzman, HOW INTERNATIONAL LAW, *supra* note 1339. For a critique of Guzman's treatment of the subject, see Brewster, *The Limits of Reputation*, *supra* note 1505. For a broader discussion on reputational costs, see Brewster, *Unpacking the State's Reputation*, *supra* note 1504.

[1776] See, e.g., José E. Alvarez, *Crimes of States/Crimes of Hate*: *Lessons from Rwanda*, 24 YALE JOURNAL OF INTERNATIONAL LAW 413 (1999) (applying similar reasoning to the ICTR).

sends a strong and powerful message whilst promoting deterrence and enhancing reconciliation. A similar objective can, at times, be attained through the mechanisms of state responsibility; it provides some degree of solace in the way of cathartic release when ascertaining every entity's role within the chain of wrongdoers, and within the broader chain of events leading to the commission of an internationally wrongful act –host-states and non-state actors being distinctly conceptualized under that normative framework. Hence, state responsibility, like international criminal justice, remains, to a large extent, a sometimes symbolic and partial response to a problematic phenomenon, namely transnational terrorism.[1777] The idea of a symbolic redress or remedy is, itself, firmly entrenched within state responsibility repertoire, namely via the notions of satisfaction and guarantees/assurances of non-repetition. Moreover, these facets of symbolic justice are, themselves, mirrored in international criminal law and are increasingly attracting scholarly attention.[1778] Picking up on the thread discussed above, a perhaps more apt analogy would be to rightly accept that the law of state responsibility can become a toothless tiger under some lights but that it can, nonetheless, register some normative and remedial impact by using its paws and claws. Put another way, the fact that the law of state responsibility sometimes falls short in providing an exhaustive set of remedies does not correspondingly signal its failure in contributing to the fight against impunity, nor does it signify that it should be discarded as irrelevant because it only offers partial or inconsistent results. When state responsibility's role is diminished, the dominant tension is not one of bark versus bite, but rather one of scratch versus bite.

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[1777] Interestingly, the ILC's commentary on Article 49 speaks to this point in the following terms: "[i]n normal situations, satisfaction will be symbolic or supplementary and it would be highly unlikely that a State which had ceased the wrongful act and tendered compensation to the injured State could properly be made the target of countermeasures for failing to provide satisfaction as well." See Crawford, INTERNATIONAL LAW COMMISSION, *supra* note 228, at 358, para. 8.

[1778] See, e.g., Frédéric Mégret, *The International Criminal Court and the Failure to Mention Symbolic Reparations*, Unpublished paper, 13 August 2008, available online at http://ssrn.com/abstract=1275087 (last visited on 19 January 2009). Interestingly, in the context of repressing terrorism, some scholars query whether "the goal of punishment [is] something more communicative and pedagogical—namely, what I call *expressivism*—to augment the moral value of law, stigmatize those who break it, and establish an authoritative public, and transnational, narrative regarding the heinousness of terrorist violence". See Mark A. Drumbl, *The Expressive Value of Prosecuting and Punishing Terrorists*: *Hamdan, the Geneva Conventions, and International Criminal Law*, 75 GEORGE WASHINGTON LAW REVIEW 1165, 1170 (2007).

Therefore, whilst central in public international law, it is important to avoid casting the role of state responsibility too broadly with regard to transnational terrorism. Indeed, to envisage that regime as a holistic solution, or even as a consistently effective recourse against transnational terrorism, erroneously frames the legal tools associated with state responsibility repertoire and runs the risk of overemphasizing, or inflating, its potential contributions to counterterrorism policy. Conversely, and for the reasons advocated above and throughout this study, its importance cannot be understated either. After all, for several commentators who do not entirely subscribe to Kelsen's vision of the international legal system as a necessarily coercive order, state responsibility for the commission of internationally wrongful acts amounts to a sanction in and of itself.[1779] In that spirit, it is at least fair to ponder whether it is sometimes sufficient for a host-state to be branded as a violator of international law for some degree of international justice to be fulfilled. In addition, even if one accepts that state responsibility can play a role in the prevention and suppression of terrorism, the prospect of developing general rules of responsibility applicable to all breaches of the obligation to prevent terrorism is no small task. This challenge is further compounded by the difficulty of generalizing terrorism, which is briefly discussed in this next section.

### 2. Generalizing Terrorism and State Responsibility

Based on the foregoing, it becomes clear that 'terrorism' constitutes a particularly intractable case study for any project aiming to revisit the formal rules of international law. Not only does 'terrorism', on its face, remain an acutely polymorphic phenomenon, but the sheer volume of precedents of terrorist activity involving some transnational dimension impedes any attempt to streamline and coordinate legal responses thereto. Whilst specific instances of transnational terrorism were invoked throughout this study in order to better expose the

[1779] See, e.g., Brigitte Bollecker-Stern, LE PREJUDICE DANS LA THÉORIE DE LA RESPONSABILITÉ INTERNATIONALE 20-21 (1973); Charles Leben, LES SANCTIONS PRIVATIVES DE DROITS OU DE QUALITÉ DANS LES ORGANISATIONS INTERNATIONALS SPÉCIALISÉES 49-52 (1979); Paul Reuter, *Principes de droit international public*, 103 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 425, 590, 595 (1961-II); Michel Virally, LA PENSÉE JURIDIQUE 108 (1960) (framing the question in general theory of law).

challenges and intricacies of state-based involvement in that activity, any project exploring the realm of state responsibility in this context cannot escape some sense of methodological arbitrariness. After all, according to the Popperian approach to scientific justification, what is at stake here is not so much the infallibility of the methodology, but rather any potential falsification of the dissertation's hypothesis. However, this argument must be appreciated with caution, as every hypothesis is prone to some degree of falsification and one would be hard-pressed to conjure up a perfect, airtight hypothesis.[1780] More importantly, that is the nature of the beast: so many precedents of terrorism exist and can be distinguished on a factual basis, thereby making the identification of any one dominant model of transnational violence rather elusive. The policy and deterrence model ultimately put forth in the present dissertation attempted to bear this in mind by advocating a fact-sensitive, context-specific approach – particularly epitomized in the second tier of the strict liability-infused inquiry – so as to better gauge the level of involvement of host-states in terrorism and, correspondingly, to determine their level of responsibility on the international plane.[1781]

In addition to the politically volatile nature of the subject-matter, the legal uncertainty surrounding the notion of 'terrorism' is likely what drove the ICJ to eschew the question altogether in both the *Nicaragua* and *Tehran Hostages* cases.[1782] By the same token, this approach prevented the Court from further elaborating the rules of state responsibility governing transnational violence carried out by non-state actors. In fact, that stance certainly aligns with the Court's reluctance to distance itself from a very onerous application of attribution principles when confronted with non-state actors, especially in the post-9/11 legal landscape. For instance, in the *Armed Activities* case the ICJ was called upon to ascertain whether the actions of an armed band operating out of the territory of the

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[1780] See, generally, Karl Popper, THE LOGIC OF SCIENTIFIC DISCOVERY (Routledge 1992) (1959). The contributions of Popper's methodological approach in the context of moral argument are also explored in Richard Mervyn Hare, FREEDOM AND REASON 87-93 (1963). See also Jeremy Waldron, *Community and Property -- For Those Who Have Neither*, 10 THEORETICAL INQUIRIES IN LAW 161, 170 (2009).

[1781] See *supra* Chapter 4.

[1782] For a discussion of that aspect of those cases, see *supra* Conclusion to Part II.

Democratic Republic of Congo (DRC) -- namely the Allied Democratic Forces (ADF) -- could be attributed to that state.[1783] On this point, the Court held that Uganda could not invoke a right to self-defence against the DRC because it had harboured the armed militia on its territory.[1784] At the outset, this posture seems at odds with post-9/11 state practice – spearheaded by U.S. action in Afghanistan and further bolstered by the quasi-unanimous support such response received – and runs counter to the paradigm shift identified above in Chapter 2, Section D).[1785]

With this in mind, Judge Kooijmans reiterated the position he initially endorsed in the *Wall Advisory Opinion* and lamented the majority's approach to this question in the *Armed Activities* case, rather expounding that recent Security Council resolutions ground a right of self-defence against an armed attack carried out by private actors "without any reference to an armed attack by a State".[1786] It should be recalled that, whilst highly relevant for present purposes because dealing squarely with transborder terrorism, the *Wall Advisory Opinion* ultimately fell short in advancing the intellectual discourse on this issue. In the General Assembly on 20 October 2003, Israel defended the construction of the wall by declaring that Security Council resolutions "have clearly recognized the right of States to use force in self-defence against terrorist attacks" and further stated that it must "therefore surely recognize the right to use non-forcible measures to that end."[1787] Consequently, Higgins highlights that "[t]his opened the door to counsel appearing in the Advisory Opinion case…to fashion their arguments on self-defence within the parameters of the law of State responsibility generally and of countermeasures specifically."[1788] The Court ultimately ruled that the scope of

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[1783] *Armed Activities* case, *supra* note 1043.
[1784] *Ibid*, at paras. 131-135, 146. For discussion of the case, see James Gathii, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (International Decision)*, 101 AMERICAN JOURNAL OF INTERNATIONAL LAW 142 (2007).
[1785] See also Stephanie A. Barbour and Zoe A. Salzman, *"The Tangled Web"*: *The Right of Self-Defense Against Non-State Actors in the Armed Activities Case*, 40 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 53, 74-75 (2008); Mohan V., *Terrorism*, *supra* note 109, at 218-219.
[1786] See Separate Opinion of Justice Kooijmans in *Armed Activities* case, *supra* note 1043, at 28.
[1787] See A/ES-10/PV.21, at 6.
[1788] Higgins, *The International Court of Justice*, *supra* note 208, at 271-286. [Emphasis added.]

Article 51 and of the inherent right of self-defence found in the *UN Charter* was confined to cases of armed attacks by one state against another.[1789] Not surprisingly -- and betraying some degree of sympathy for a more pluralistically-inclined international community, unfettered by overzealous state-centrism -- Judge Higgins took issue with this finding in her Separate Opinion,[1790] whilst the Court also put forth the following clarification: "[h]owever, Israel does not claim that the attacks against it are imputable to a foreign State."[1791] Once again, Judge Higgins "doubted the pertinence – or the realism – of this observation, observing that '[t]he question is surely where responsibility lies for the sending of groups and persons who act against Israeli civilians.'"[1792] These considerations are important for at least one reason. In particular, the Court's recalcitrance to address the issue of a potential right to respond with force is indicative of a broader trend within its own jurisprudence, connoting an almost palpable inflexibility in adapting the rules governing the use of force between states to scenarios involving non-state actors and states. In many ways, similar logic animates the critiques of state responsibility's seemingly limited potential in responding to novel transnational phenomena. Whilst this charge has been most vociferously levelled on issues lying at the intersection of war and commerce, specifically, there is every indication that more liberal interpretations of the rules governing these legal fields now underpin proposals for policy reform in the area of counterterrorism.[1793]

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[1789] *Wall Advisory Opinion*, *supra* note 521, at p. 136, at para. 139.
[1790] Separate Opinion of Judge Higgins in *Ibid*, at para. 33.
[1791] *Ibid*, at para. 139.
[1792] Higgins, *The International Court of Justice*, *supra* note 208, at 276-277. See also the Separate Opinion of Judge Higgins in the *Wall Advisory Opinion*, *supra* note 521, at para 34.
[1793] For instance, James Thuo Gathii underscores that, "while on the public side international law has a norm of especially higher normativity prohibiting the use of force between States, on the private side there is no equivalent norm prohibiting to the same extent the use of violence at the intersection of war and commerce." See *Slippages of the Public/Private in Resource Wars*, Unpublished Paper, available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1357349 (last visited on 7 April 2009), at 38. He also acknowledges that different considerations likely govern the debate surrounding the adaptation of those international rules to counterterrorism policy. In that regard, he adds that his "claim is limited to cases at the intersection of war and commerce where there is generalized state collapse or ineffective control by a State such as in the Democratic Republic of Congo. There are instances in which the conduct of irregular forces or non-State actors can be much more readily attributable to an effective State". *Ibid*, at 38 n.111.

As a corollary, it urgently paves the way for the need to rethink the extant rules of state responsibility away from the *Nicaragua* model with a view to devising a flexible and contextual regime far better suited to the intricate nature and subtleties underlying modern host-state-terrorist dynamics. One commentator rightly underscores that "[t]he effective control test is an "all-or-nothing" approach to State responsibility that leaves no room for the more complex forms of State involvement illustrated by the DRC case. In Military and Paramilitary Activities, the absence of sufficient proof to demonstrate that the Contras were the de facto agents of the U.S. government meant that the United States escaped any responsibility for the Contras' actions."[1794] Interestingly, in his Dissenting Opinion in the *Armed Activities* case, Judge *ad hoc* Kateka opined that the Court's persistent reliance on a legal threshold embedded with the notion of "substantial involvement" actually promotes impunity.[1795] Along similar lines, critics of the seemingly-too-onerous standards of state responsibility -- especially the 'effective control' test -- expound that such criteria allow host-states assisting or tolerating terrorists and other armed militia to elude liability.[1796] Not surprisingly, this jurisprudential trend has been maintained recently by the ICJ in its controversial *Genocide* judgment, and has been a central incubator for discussion throughout this project.[1797]

The difficulty in devising general guidelines for the application of state responsibility to counterterrorism is further exacerbated by the very form of the most authoritative instrument on the matter, namely the ILC's *Articles*. Granted that the General Assembly intends on converting what amounts, at least partially, to a codification of existing rules of international customary law into a

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[1794] Barbour and Salzman, *"The Tangled Web"*, *supra* note 1785, at 74. [References omitted.] See also Jackson Nyamuya Maogoto, BATTLING TERRORISM: LEGAL PERSPECTIVES ON THE USE OF FORCE AND THE WAR ON TERROR 158 (2005). In *Nicaragua*, for instance, the Court held that Nicaragua could not be deemed responsible for the importation of arms into El Salvador and originating from its territory. See *Nicaragua*, *supra* note 119, at 86.

[1795] See Dissenting Opinion of Judge Kateka in the *Armed Activities* case, *supra* note 1043, at para. 34 (also expounding that such standard will be invoked "by culprits to avoid responsibility for wrongful acts").

[1796] See, e.g., Maogoto, BATTLING TERRORISM, *supra* note 1794, at 157 (also citing works by Abraham D. Sofaer and Yoram Dinstein).

[1797] See, particularly, *supra* Chapter 1: Sections C)2. and C)3.

convention,[1798] it nonetheless follows that the *Articles*, in their current form, exert some kind of diffused influence on the development of that body of law, even in subject matter-specific areas. However, as Professor Provost underscores, this arrangement also cuts the other way: "codification can provoke doctrinal sclerosis, dissuading creative and critical analysis by imposing a set of basic assumptions as the necessary starting point of any study on state responsibility."[1799] The present study has attempted to push those boundaries whilst also trying to re-conceptualize certain tenets of state responsibility within that regime's existing boxes, so to speak.

Admittedly, an additional layer of complexity pervades the very gradual development of state responsibility law. It must be recalled that the ILC's *Articles* are the result of almost 60 years of intense debates, of extensive revisions, of a veritable succession of differing and ideologically-driven special rapporteurs and of conflicting views –all with an end product that was conceived within a political safe place providing the opportunity for the ILC to sidestep the development of issue-specific standards of state responsibility (e.g. in the fields of transnational terrorism, environmental law, and so on).[1800] This can also be partially explained by states' "unwillingness to foster the development of legal principles that might one day be applied against them", thereby providing some justification as to why nations routinely exclude state responsibility for environmental degradation, for example, via the adoption of alternate legal regimes (e.g. diplomatic means, negotiation and adoption of specific agreements).[1801] An additional explanation for both the overarching generality of the formal rules of state responsibility and states' preference for alternate regimes over state responsibility in the environmental sector most likely stems from potential tensions arising between the application of state responsibility law and

[1798] See the discussion and sources cited, *supra*, at note 1498 and accompanying text.
[1799] Provost, *Introduction*, *supra* note 77, at XX.
[1800] See, e.g., Philippe Cullet: *Liability and Redress for Human-Induced Global Warming*: *Towards an International Regime*, 43A STANFORD JOURNAL OF INTERNATIONAL LAW 99, 107 (2007); *Liability and Redress for Human-Induced Global Warming*: *Towards an International Regime*, 26A STANFORD ENVIRONMENTAL LAW JOURNAL 99, 107 (2007).
[1801] *Ibid* (noting that states "have usually preferred to use other mechanisms to solve their disputes. In the case of the environment, states seem to have been even more reluctant to use the mechanism of state responsibility to address the consequences of environmental damage").

state sovereignty over natural resources.[1802] All these factors significantly impede the development and interpretation of state responsibility rules that could be analogized or transposed to the global struggle against terror and, correspondingly, enhance prevention.

Moreover, the intellectually incestuous relationship characterizing the ILC-ICJ institutional dialogue – a dynamic that appears sometimes far too insular – has also affected, perhaps adversely, the further development of state responsibility. The *Gabčíkovo-Nagymaros Project* and *LaGrand* cases constitute striking examples of a problematic or, at least, stagnating practice whereby the ILC invokes ICJ precedents in substantiating its constructions of state responsibility, whilst the ICJ in turn cites the *ILC Articles on State Responsibility* to bolster its findings.[1803] Aside from perhaps granting a questionable monopoly over the development of state responsibility law to the ICJ in an age of legal pluralism and fragmentation, this relationship prompts Professor Reisman to ponder whether this practice is tantamount to a "citation carousel", an apt characterization indeed.[1804] This incestuous dynamic is further reinforced by what some scholars term the 'ILC-ICJ feedback loop', whereby a common career trajectory dictates that ILC members -- initially involved in the development and codification of state responsibility rules -- are ultimately appointed by their home states and elected to the ICJ, where they engage in the judicial interpretation of those same rules (e.g. Roberto Ago, Bruno Simma, Mohamed Bennouna, Awn S. Al-Khasawneh, Jiuyong Shi, Peter Tomka, Abdul G. Koroma, Bernardo Sepúlveda-Amor, etc.).[1805] To some, this institutional practice sometimes breeds intractable patterns of decision-making or, at the very least, colours judicial interpretation of state responsibility rules as embodied, for example, in the

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[1802] See, e.g., Don Mayer, *Deforestation and Global Warming*: *The Conflict Between State Responsibility and Sovereignty Over Natural Resources*, 9 MIDWEST LAW REVIEW 4 (1990).

[1803] For instance, one author summarizes this incestuous relationship perfectly in the context of the *LaGrand* judgment. See Scott Sullivan's remarks in *Changing the Premise of International Legal Remedies*: *The Unfounded Adoption of Assurances and Guarantees of Non-Repetition*, 7 UCLA JOURNAL OF INTERNATIONAL LAW AND FOREIGN AFFAIRS 265, 300-301 (2002/2003).

[1804] Michael Reisman, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 899-900 (2nd Edition, 2004).

[1805] See *Ibid*, at 900.

restrictive construction of the proportionality requirement for the application of countermeasures in the *Gabčíkovo-Nagymaros Project* case and Article 51.[1806]

Whilst there is some scholarly support for the further elaboration of general and specific principles applicable to state-based breaches of international obligations (i.e. if the rules are too generalized or abstracted, they lead to a sort of interpretative paralysis),[1807] the previous pages have also demonstrated that it is impossible to fit all terrorist strikes or all obligations of prevention, for that matter, within a single legal matrix. In fact, it is precisely this delicate balance between, on one hand, developing general rules and guidelines applicable to all breaches of the obligation of prevention (i.e. a state's failure to prevent a terrorist strike triggers a *prima facie* presumption of indirect responsibility) and, on the other hand, the acknowledgement that certain policy considerations will have to govern the ensuing legal and fact-intensive analysis of that terrorist attack (i.e. a variable construction of the obligation of prevention) that this dissertation sought to achieve.[1808] Therefore, it is clear that the intellectual inquiry exploring the relationship between state responsibility and the prevention/suppression of terrorism requires some modulated response –a case-by-case approach nonetheless articulated around certain key organizing principles. In particular, the second portion of the two-tiered strict liability approach advocated in Chapter 4 was specifically tailored with a view to accommodating a fact-intensive and policy-informed analysis of terrorist strikes, so as to ensure that a host-state's responsibility remains commensurate with its wrongdoing. In striking the balance between devising rules of general application to all normative breaches and accommodating the complex nature of transnational terrorism, careful attention should also be paid to whatever benefits may be derived from drawing legal analogies, be they domestically-driven or internationally-based.

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[1806] For instance, Bederman's critique seems on target and redolent of Reisman's own reservations on the topic. See David J. Bederman, *Counterintuiting Countermeasures*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 817, 819 (2002).

[1807] See, e.g., Baxter, *Reflections on Codification*, *supra* note 1287, at 747-748; Lillich, *The Current Status*, *supra* note 1287, at 21; McDougal *et al*., HUMAN RIGHTS, *supra* note 1287, at 762 n.92.

[1808] See the two-tiered strict liability model developed *supra* in Chapter 4.

### 3. Drawing Different Analogies

Throughout this project, several domestic law analogies – ranging from the common law-inspired 'effective breach' doctrine,[1809] to strict liability standards,[1810] to insurance policies[1811] – have been invoked in the search for a workable and effective regime of state responsibility vis-à-vis transnational terrorism.[1812] The purpose here is not to review the potential contributions of these parallels, or even to exhaust all possible analogies that may be drawn from domestic law, but rather to briefly highlight two additional analogies that may be brought to bear upon future developments in the field of state responsibility. In particular, the main analogies invoked in the body of this project have originated predominantly from domestic legal structures. Yet, parallels and analogies can also be extracted from other philosophically relevant areas of public international law so as to better shape potential prevention and suppression models in the context of counterterrorism policy. This is certainly the case with regard to global warming and the precautionary principle.

#### a) The Case of Global Warming[1813]

Whilst it has been argued in this study that the dominant model of transnational terror can seldom be dissociated from territorial solace or from some kind of governmental toleration or acquiescence,[1814] there is something to be said about taking the territorial component of terrorism out of the equation when crafting potential legal responses. Setting aside the growing phenomenon of 'homegrown' terrorists,[1815] it is no secret that the prospect of operating within 'ungoverned spaces' -- or unmonitored areas -- undoubtedly constitutes an increasingly attractive option for terrorist networks in preparing and executing

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[1809] See, particularly, *supra* Chapter 4, Section B)5.b).
[1810] See, particularly, *supra* Chapter 4, Section B)4.b).
[1811] See, particularly, *supra* note 333 and *infra* notes 1846-1847.
[1812] See *supra* Chapter 4, Section B)4.
[1813] I am indebted to Bart Szewczyk for sparking my interest in the notion of 'ungoverned spaces'.
[1814] See *supra* Chapter 2, Section D)1.
[1815] *Cf.* the remarks of Eric Rosand in *The UN-Led Multilateral Institutional Response to Jihadist Terrorism*: *Is a Global Counterterrorism Body Needed?*, 11 JOURNAL OF CONFLICT & SECURITY LAW 399, 401 (2006) (discussing the emergence of homegrown terrorism and linking it to both the Madrid and London bombings, along with the assassination of Theo van Gogh).

their attacks. As one commentator highlights, "[a]s sovereignty erodes and it becomes harder to control borders, Black Holes, the ungoverned spaces, become breeding grounds for all forms of illicit commodities and provide succor for international terrorism."[1816] Indeed, it becomes clear that some instances of terrorism move towards a more deterritorialized or decentralized model, thereby seemingly weakening the points of rapprochement with the law of state responsibility. In fact, it is no secret that many terrorist networks prey on weak governments or seek refuge in sanctuary states operating within weak or ineffective counterterrorism structures.

This opportunism is further exacerbated in cases of 'failed' or government-less states, such as in Somalia, Yemen or certain areas of sub-Saharan Africa, a reality that was thoroughly canvassed above.[1817] Consequently, there is a renewed emphasis in both national and international (preemptive and reactive) policy-making on the notion of 'ungoverned spaces'.[1818] One commentator aptly frames the issue by underscoring that, "[t]he continuing problem is that ungoverned space will be filled by chaos [i.e. terrorist networks] because frayed, faux, and failed states lack the capacity to monopolize power."[1819] Although not directly on point, it is nonetheless useful to note that one of the concerns originally voiced on Kosovo, in different circles, was that it had the propensity to become a rump Islamist state.[1820] Similarly, in the U.S. the African command of the Pentagon is being set up because of similar situations, most

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[1816] Harvey Rishikof, *Long Wars of Political Order -- Sovereignty and Choice*: *The Fourth Amendment and the Modern Trilemma*, 15 CORNELL JOURNAL OF LAW AND PUBLIC POLICY 587, 618 (2006). See also Jane Gilliland Dalton, *The United States National Security Strategy*: *Yesterday, Today, and Tomorrow*, 52 NAVAL LAW REVIEW 60, 62 (2005) (underscoring that "[a]n "arc of instability" stretching from the Western Hemisphere, through Africa and the Middle East, and extending to Asia serves as a "breeding ground"" for such activities).

[1817] See *supra* Chapter 4, Section B)6.b).

[1818] See, e.g., Robert M. Gates, *A Balanced Strategy*: *Reprogramming the Pentagon for a New Age*, FOREIGN AFFAIRS (January/February 2009), available online at http://www.foreignaffairs.org/20090101faessay88103/robert-m-gates/a-balanced-strategy.html (last visited on 28 January 2009). This is also particularly true in the case of counterinsurgency strategy. See, e.g., David Kilcullen, COUNTER-INSURGENCY REDUX: SURVIVAL 111-112 (Winter 2006-2007).

[1819] Charles H. Norchi, *The Legal Architecture of Nation-Building*: *An Introduction*, 60 MAINE LAW REVIEW 281, 290 (2008).

[1820] Sheri P. Rosenberg, *Promoting Equality After Genocide*, 16 TULANE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 329, 337 n.20 and accompanying text (2008); Norman Cigar, GENOCIDE IN BOSNIA: THE POLICY OF "ETHNIC CLEANSING" 42-43 (1995).

notably in Somalia and Ethiopia; the focus is, therefore, shifting to ungoverned spaces in states that are not formally at war with the U.S.[1821]

Under these lights, transnational terrorism is more akin to the problem of global warming, thereby warranting a truly transnational and resolute response. At the very least, the legal struggle against transnational terrorism calls for parallels to be drawn with transboundary pollution. In that regard, this study was replete with analogies extracted from the international environmental field, an exercise that proves helpful when attempting to devise effective counterterrorism policies.[1822] In fact, this trend also pervades legal scholarship, with many commentators merging terrorism and environmental concerns – especially global warming and climate change – into one, integrated legal inquiry.[1823] For example, in a recent and widely discussed book, Richard Posner examines apocalyptic catastrophes "that threaten the survival of the human race", thereby subsuming pandemics, nuclear fallout, terrorism, and irreversible environmental degradation under that rubric.[1824] As discussed *supra* in Chapter 4, since strict liability standards are often enshrined in international environmental obligations,[1825] what is to say that they can't carry over to the conceptually adjacent field of counterterrorism?

After all, both areas strive to thwart potentially catastrophic transnational activity whilst also attempting to prevent future harmful activity flowing from the original harm or from related activities. If strict liability is an adequate governing

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[1821] See, e.g., Barton Gellman, *Secret Unit Expands Rumsfeld's Domain*, WASHINGTON POST, January 23, 2005, at A1.

[1822] See, particularly, *supra* Chapter 4, Section C)1. For the consideration of environmental questions in the elaboration of the ILC's work on state responsibility, see José Juste Ruiz, *Les Considérations relatives à l'environnement dans les travaux de codification sur la responsabilité internationale de l'État*, in Domenico Amirante *et al.* (eds.), POUR UN DROIT COMMUN DE L'ENVIRONNEMENT: MÉLANGES EN L'HONNEUR DE MICHEL PRIEUR 181-205 (2007).

[1823] See, e.g., Sumudu Atapattu, *Sustainable Development and Terrorism*: *International Linkages and a Case Study of Sri Lanka*, 30 WILLIAM & MARY ENVIRONMENTAL LAW & POLICY REVIEW 273 (2006); Cass R. Sunstein, *Irreversible and Catastrophic*: *Global Warming, Terrorism, and Other Problems*, 23 PACE ENVIRONMENTAL LAW REVIEW 3 (2005-2006); Cass R. Sunstein, *On the Divergent American Reactions to Terrorism and Climate Change*, 107 COLUMBIA LAW REVIEW 503, 515-16 (2007).

[1824] Richard A. Posner, CATASTROPHE: RISK AND RESPONSE 6, 21-91 (2004).

[1825] See, e.g., Alexandre Kiss, *Strict Liability in International Environmental Law*, in Martin Führ, Rainer Wahl, Peter von Wilmowsku (eds.), UMWELTRECHT UND UMWELTWISSENSCHAFT: FESTSCHRIFT FÜR ECKARD REHBINDER 213-221 (2007); Kiss and Shelton, *Strict Liability*, *supra* note 1362, at 1131-1151.

principle for a dam on a river or for a satellite launched into outer space,[1826] why shouldn't it also apply to terrorism, a practice presumably susceptible to produce -- if not more acute or large-scale, then at least more immediate -- deleterious consequences than environmental degradation?[1827] An initial response to this argument invariably resides in the fact that strict or absolute liability regimes are often tailored to govern sectors over which host-states are expected to exert an almost, if not complete, level of control and influence (e.g. aerospace industry, high-risk water dams, nuclear facilities, ultra-hazardous activities). That is their impetus, therefore, for redirecting public funds to ensure that those activities are carefully monitored. As a corollary, states can sometimes derive various monetary benefits from controlling such sectors of the industry, a reality that does not transpose so well to reaping benefits from controlling terrorism (i.e. if one believes that enhancing security and stability in and outside the state and respecting international obligations are not directly convertible into financially assessable benefits). In response to this line of thinking, the present study has identified a paradigm shift toward a law of indirect responsibility vis-à-vis terrorism, *supra* Chapter 2, a conclusion that necessarily operates on a shared understanding that governmental behaviour needs to be strengthened with a view to enhancing counterterrorism structures, that transnational cooperation need be augmented, and that states now inherit a heavier burden of precaution in preventing terrorism. This burden can, in turn, be offset or alleviated by the safeguards developed in the factual analysis of the second tier advocated *supra* in Chapter 4, Section C)2.

But if we are truly to analogize transnational terrorism to global warming, we must inevitably ponder whether state responsibility is adequately suited to

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[1826] See, e.g., Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 24 U.S.T. 2389, 961 U.N.T.S. 187.

[1827] This argument must be appreciated with some degree of caution, as some commentators actually opine that global warming poses a more pressing, and potentially more damaging, challenge to the global community and legal order. New York City Mayor, Michael Bloomberg, aptly summarized this position in the following terms: "[t]errorists kill people, weapons of mass destruction have the potential to kill enormous numbers of people. Global warming, long-term, has the potential to kill everybody." See Benny Avni, *Mayor Compares Threat of Global Warming to Terrorism*, THE NEW YORK SUN, February 12, 2008, http://www.nysun.com/article/71103 (last visited on 22 January 2009).

govern breaches of international law contributing to global warming and, correspondingly, extend that rationale to counterterrorism. Whilst state responsibility might be the international legal regime best suited to address some aspects of global warming, its invocation inexorably runs up against the problem of state consent. As one author underscores, "while state responsibility may theoretically be a more effective instrument to address global warming damages, particularly from the point of view of small developing countries, there is little hope that all states would agree to be bound by a regime of state responsibility."[1828] This concern can be easily transposed, at least upon first glance, to counterterrorism policy –many host-states, especially those that have weak counterterrorism structures, might not agree to sign on to a treaty embodying the disciplines of state responsibility for failing to prevent transborder terrorism.

However, it must be recalled that the extant scheme of state responsibility constitutes the bare minimum, a sort of safety net in international relations, and recalcitrant states may be hard-pressed to refute the customary character of the 'international breach – attribution – legal consequences' mechanism in the event that they violate their obligation of prevention. Furthermore, there is significant scholarly support for the idea that the law of state responsibility can be brought to bear upon the responses to global warming.[1829] Even in 1991, influential scholarly voices opined that "[i]nternational practice shows that the States have now accepted a general principle that they must answer for environmental harm caused by activities they have carried out or allowed within their own territory or

[1828] Cullet, *Liability and Redress for Human-Induced Global Warming*, *supra* note 1800, at 100. Cuellet also frames the shortcomings of state responsibility in terms of a lack of substantive development at the state level: "the unwillingness of states to develop the law of state responsibility sufficiently means that it is unlikely to provide an effective tool to compensate for damages". See *Ibid*, at 107.

[1829] See, e.g., Roda Verheyen, CLIMATE CHANGE DAMAGE AND INTERNATIONAL LAW -- PREVENTION DUTIES AND STATE RESPONSIBILITY 225-332 (2005). But, for a more nuanced appraisal, *Cf.* Voigt, *State Responsibility*, *supra* note 871, at 1-22. For a recent empirical assessment of both tort law/causal standards of obligations and strict liability regimes for climate change, see David A. Weisbach, *Responsibility for Climate Change, by the Numbers*, January 8, 2009, Reg-Markets Center Working Paper No. 09-04, available online at http://ssrn.com/abstract=1327099 (last visited on 11 February 2009).

by activities that are under their control."[1830] As the present study attempted to demonstrate, especially in Chapter 4, there is no reason why this logic should not be extended to those cases of transnational terrorism that bear resemblance to transnational pollution.

More importantly, as discussed above, Article 47(1) was adopted specifically to provide for such contingencies, namely where an internationally wrongful act spans over several territories and, therefore, engages the responsibility of more than one host-state.[1831] Whilst there are some detractors to the idea that the principle of joint and several liability could be borrowed from the common law and civil law traditions and analogized to this setting (i.e. if a handful of states are not responsible for the 'same wrongful act'),[1832] this provision is undoubtedly relevant in the face of both global warming and some instances of transnational terrorism. In such cases, and given the fashion in which Article 47(1) was crafted, state responsibility law erects relatively few conceptual barriers to making every government involved in that chain of events accountable. Rather, the problem is one of evidence: how can the exact 'wrongful act – ensuing/commensurate responsibility' ratio be precisely ascertained for every single source of harmful activity, be it in the case of the emission of toxic pollutants or the toleration by a state of terrorist activity percolating on its territory and leading to a transnational attack? The answer to these questions will, obviously, remain grounded in a careful and fact-intensive analysis of every case of transnational terrorism that arises. In so doing, a delicate balance should be struck between vindicating specific policy objectives underlying counterterrorism and international law and justice, more generally, and enhancing transnational cooperation on both state responsibility issues and counterterrorism efforts. The

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[1830] Riccardo Pisillio-Mazzeschi, *Forms of International Responsibility for Environmental Harm*, in Francesco Francioni and Tullio Scovazzi (eds.), INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM 15 (1991).

[1831] For a discussion of the impact of this provision, see *supra* Chapter 4, notes 1688-1694 and accompanying text.

[1832] See, e.g., Brownlie, PRINCIPLES OF INTERNATIONAL LAW, *supra* note 1747, at 189; Voigt, *State Responsibility*, *supra* note 871, at 19 (both arguing that there is little state practice and academic support justifying the importation of joint/several liability into international law).

second tier of the proposed model of strict liability, developed *supra* in Chapter 4, has attempted to heed and internalize these concerns.

Keeping in the spirit of the opening remarks of this chapter, and of the broader philosophy underlying the present dissertation, state responsibility can, again, play some limited role in the prevention of global warming and transnational terrorism. But the key aspect is that it can play *some* role, however incremental it may be. Surely, analogies can be drawn from global warming in order to identify potential deterrence and prevention models for terrorism. Yet, whilst global warming is, as the detractors of invoking state responsibility to fight terrorism have vehemently asserted, a highly deterritorialized and decentralized phenomenon, compelling arguments nonetheless militate in favour of harnessing state responsibility with a view to stamping out this problematic trend. As discussed above, invoking a state-centric legal regime to combat a transnational problem is only part of the equation; the role of states in preventing/failing to prevent terrorism must be assessed on its own merits, alongside the participation of actual terrorists, other non-state actors (e.g. international civil society, the media),[1833] informal and implicit networks of governance, etc., in the grander scheme of transnational activity. More importantly, in this setting the further elaboration of state responsibility principles must continuously be pursued in tandem with transnational cooperation and tactical multilateralism on counterterrorism initiatives. One commentator quintessentially embodies this impetus, observing that, although "the principles [of state responsibility] and liability for harm provide a useful starting point for dealing with the issue of global warming…international cooperation will provide a more effective solution".[1834] At the end of the day, the interpretation and elaboration of international legal norms will be shaped by the ways in which both states and the international community -- be it through its institutions or through more passive or symbolic patterns of influence -- will internalize the risks posed by

[1833] Although not directly on point, consider Stephen J. Toope, *Public Commitment to International Law*: *Canadian and British Media Perspectives on the Use of Force*, in Christopher P.M. Waters (ed.), BRITISH AND CANADIAN PERSPECTIVES ON INTERNATIONAL LAW 13-25 (2006).
[1834] Ved P. Nanda, *Global Warming and International Environmental Law-A Preliminary Inquiry*, 30 HARVARD INTERNATIONAL LAW JOURNAL 375, 385 (1989).

transnational pollution and terrorism. As such, this very notion of 'risk' leads impeccably into the next international and municipal legal analogy warranting brief consideration for the purposes of the present discussion.

**b) The Precautionary Principle**

The notion of risk has been a recurrent theme throughout the present dissertation and remains inextricably linked to any effective counterterrorism policy. In fact, the topic studied above has been cast as a delicate exercise in risk assessment and risk management. As a corollary and as discussed in the foregoing pages, a noteworthy legal development operates in tandem with this idea, that is to say that the international community is imposing a heavier burden of precaution upon states in complying with their counterterrorism obligations. More importantly, the main policy thrust of the preceding sections has articulated around the vital notion of *prevention*, a concept highly reconcilable with a precautionary approach to the assessment of risk. Therefore, when further exploring the role of the law of state responsibility in preventing and suppressing terrorism, significant legal ammunition could certainly be drawn from the precautionary principle, a concept highly developed in the field of international environmental law. Indeed, certain scholars infer that both prevention and precaution operate symbiotically.[1835] Similarly, ICJ Judge Mohamed Bennouna declares that, "[l]'obligation de prévention est renforcée par le principe de précaution destiné à parer aux incertitudes scientifiques inhérentes à certains projets industriels et à leur impact sur l'environnement ou sur la santé des populations."[1836] At the end of the day, the costs-benefits analysis will hinge, to a large extent, on whether states sufficiently internalize the risk of terrorist activity emanating from their territory in order to divert and inject funds into counterterrorism policy, so as to avoid international scrutiny and responsibility. In short, a delicate balancing act between compliance/state consent and self-interest/sovereign prerogatives must be struck; that is not to say, however, that by

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[1835] See, e.g., Nathalie Horbach and Pieter Bekker, *State Responsibility for Injurious Transboundary Activity in Retrospect*, L NETHERLANDS INTERNATIONAL LAW REVIEW 327-371 (2003).

[1836] Bennouna, *Réflexions*, *supra* note 8, at 376.

diverting funds to combat terrorism within its territory, a state will *only* be sacrificing sovereignty over compliance with its international obligations. Much to the contrary, a compelling case can be made that compliance with counterterrorism obligations is not only beneficial to states within the geographical radius of the host-state in question but also, arguably, on the international plane as well. Mutual interests therefore translate into a shared understanding that combating terrorism can promote political stability and human security on both a regional and global basis.[1837]

But stepping aside from purely extrapolating the benefits of state responsibility law in the counterterrorism debate, it is imperative to recall that any policy ultimately implemented by states will depend on their *perception* of the risk involved. Needless to say, the costs of actually shifting policy infrastructures and diverting funds to counterterrorism measures in the low or unlikely probability that the risk of a terrorist strike might materialize weighs in the balance when making cost-sensitive policy decisions. Conversely, the prospect of incurring international responsibility -- and, correspondingly, of having to compensate the victim state for having failed to prevent terrorism -- also amounts to a (potentially significant) cost in the costs-benefits analysis, irrespective of the fact that a terrorist risk can seldom be assessed *à priori* or even quantified with any degree of precision. In a highly discussed book, Cass Sunstein recently echoed this position vis-à-vis both terrorism and global warming: "[i]n the context of terrorist threats, it makes sense to adopt a kind of Precautionary Principle against dangers whose probability cannot be assessed but that would be devastating if they materialized. In the context of global warming, the risk of catastrophe, if it cannot be ruled out as insignificant, might similarly justify costly precautions."[1838]

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[1837] See, e.g., the discussion on the role of state responsibility in stabilizing international relations, *supra* Chapter 4, Section B)7.a).

[1838] Cass R. Sunstein, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE 61 (2005). For a thoughtful and critical take on the role of risk in Sunstein's framework, and on the precautionary principle more generally, *Cf.* Jaye Ellis, *Overexploitation of a Valuable Resource? New Literature on the Precautionary Principle*, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW 445 (2006).

It follows, therefore, that an obligation of prevention stems in large part from the risk incurred, as perceived by the host-state, by virtue of available information and knowledge at its disposal. The ICJ's reasoning in the *Genocide* case without doubt bolsters this statement, albeit in the context of the obligation to prevent genocide.[1839] Indeed, the Court opined that, "a State may be found to have violated its obligation to prevent even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way; for it to incur responsibility on this basis it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed."[1840] Conversely, the precautionary principle nonetheless applies in the event that such risk cannot be ascertained or established by virtue, precisely, of the lacuna of information or knowledge on the impact of the risk-generating activities.[1841] Whilst this principle is usually associated with new and relatively unknown fields of activity, there is no reason to preclude transnational terrorism from its purview. In short, and philosophically compatible with the proposed shift in onus and two-tiered model advocated in Chapter 4, it amounts to a politico-moral principle that shifts the burden of justification onto the party wanting to adopt a behaviour that could engender serious or irreversible damage to the public order or to the environment, absent any dispositive scientific consensus justifying the proposed measure or behaviour.[1842] Whilst scientific uncertainty remains the analytical linchpin under the precautionary principle, the possible transplantation of that approach to the present context is nonetheless particularly apt. More specifically, weighing the potential policy benefits of the precautionary principle seems logical given that its underlying rationale may be extended, with few conceptual barriers, to the factual

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[1839] For a recent and thoughtful deconstruction of the obligation to prevent genocide in light of the International Court of Justice's *Genocide Case*, see Paola Gaeta, *On What Conditions Can a State Be Held Responsible for Genocide?*, 18 EUROPEAN JOURNAL OF INTERNATIONAL LAW 631-648 (2007).

[1840] *Genocide Case*, *supra* note 100, at para. 432.

[1841] See, e.g., Bennouna, *Réflexions*, *supra* note 8, at 376.

[1842] See, e.g., Carolyn Raffensperger and Joel Tickner (eds.), PROTECTING PUBLIC HEALTH AND THE ENVIRONMENT: IMPLEMENTING THE PRECAUTIONARY PRINCIPLE (1999).

uncertainty characterizing the exploration of legal responses to transnational terrorism.

Interestingly, the idea of precaution also pervaded the discussion in earlier chapters and its relation to the perception of risk is also mirrored in domestic settings. For instance, attention was drawn to the fact that the costs of insurance against terrorist threats in the context of landowner liability are more acute, precisely because of this perception of risk-to-factual-uncertainy ratio.[1843] Similarly, the impact of the precautionary principle can be best illustrated by connecting people's reaction or perception of risk to a 'visualization' or 'imagery' of the involved risk.[1844] It follows that, in the event that the visualization of a negative result is attainable (i.e. terrorist strike), that image will arouse anxiety about that risk and, correspondingly, propel precautionary considerations to the fore of the decision-making process.[1845] A salient example can be extracted from flight insurance scenarios: when asked how much they are willing to disburse for 'terrorism' flight insurance, customers are invariably inclined to pay more than for insurance covering losses resulting from all causes.[1846] As Sunstein explains, "[t]he evident explanation for this peculiar result is that the word "terrorism" evokes vivid images of disaster, thus crowding out probability judgments."[1847] When transposed to the law of state responsibility -- itself envisaged as a sort of insurance policy tailored to safeguard common interests (i.e. the right to be protected against terrorist strikes) -- the precautionary principle can certainly generate interesting contributions and compel governments to i) act and prevent terrorism before an over-imposing threat has materialized or; ii) even worst, to act after the fact or in reaction to a completed terrorist attack so as to prevent future excursions (i.e. similarly to the way in which precaution militates in favour of regulation in the environmental field, even if no scientific consensus convincingly

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[1843] See *supra* Chapter 2, note 333 and accompanying text.
[1844] See, e.g., Paul Slovic *et al.*, *Violence Risk Assessment and Risk Communication*, 24 LAW AND HUMAN BEHAVIOUR 271 (2000). The terminology is borrowed from Sunstein, LAWS, *supra* note 1838, at 40.
[1845] See, e.g., Sunstein, LAWS, *supra* note 1838, at 40
[1846] See, e.g., Eric J. Johnston *et al*., *Framing, Probability Distortions, and Insurance Decisions*, 7 JOURNAL OF RISK AND UNCERTAINTY 35 (1993).
[1847] Sunstein, LAWS, *supra* note 1838, at 40.

supports the adoption of the measure). This application of the principle seems congruent with the idea of shifting *good* counterterrorism incentives to governments in combating terrorism advocated throughout the present dissertation, especially in the two-tiered strict liability model put forth in Chapter 4.

Conversely, the potential contributions of the precautionary principle cannot be overstated. Indeed, international institutions, individual states and the international community are all likely to overdramatize -- or to 'over-visualize' to invoke previous parlance -- the perceived risk and, as a result, are prone to overreaction.[1848] In other words, the devising of an applicable scheme of state accountability for failing to prevent terrorism should also gauge the role of other important and competing interests in the equation (e.g. the respect for human rights when instituting domestic measures to suppress terrorist activity in order to better fulfill international counterterrorism obligations). Indeed, in developing the core model of strict state liability for failing to prevent transborder terrorism, the present study has attempted to weigh the protection of domestic and international human rights as an important competing interest in the balance.[1849] The invocation of the precautionary principle in this setting is also impeded by the fact that virtually all international jurisdictions routinely refuse to classify it as a rule of customary law, be they the ICJ,[1850] the WTO's Dispute Settlement Body,[1851]

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[1848] See, generally, John E. Mueller, *Terrorism, Overreaction, and Globalization*, in Richard N. Rosecrance and Arthur A. Stein (eds.), NO MORE STATES? GLOBALIZATION, NATIONAL SELF-DETERMINATION, AND TERRORISM 47-74 (2006).

[1849] See, e.g., *supra* Chapter 4, Section B)6.a). This concern becomes particularly relevant in light of the International Commission of Jurist's recent report – the product of a 3-year extensive study and the most comprehensive undertaken as of yet – detailing human rights abuses perpetrated by democratic states in combating terrorism. See ASSESSING DAMAGE, URGING ACTION: REPORT OF THE EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, available online at http://www.icj.org/news. php3?id_article=4453&lang=en (last visited on 15 February 2009).

[1850] *Cf.* Judge Weeramantry's Dissenting Opinion in *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, Order of 22 September 1995, ICJ REPORTS 288, at pp. 342-344; Dissenting Opinion of Judge Palmer in *Ibid*, p. 381, at 412; Individual Opinion of Judge Koroma in *Gabčíkovo-Nagymaros*, *supra* note 250, at p. 152.

[1851] See, e.g., *European Communities — Measures Concerning Meat and Meat Products (Hormones)*, Appellate Body Report, 16 January 1998, WT/DS26/AB/R, WT/DS48/AB/R, at para. 123; *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, Panel Report, 29 September 2006, WT/DS291/R, WT/DS292/R, WT/DS293/R, at paras.

the International Tribunal for the Law of the Sea,[1852] and various arbitral tribunals.[1853] Needless to say, the normative status of the precautionary principle under international law has been a rather divisive issue in scholarship, with some calling for the acknowledgment of its customary character,[1854] and others flat-out rejecting it.[1855]

The confusion surrounding the normative status of the precautionary principle is further exacerbated by the uncertainty surrounding its actual contents and contours. In fact, no consensus has been reached on both the substance and scope of the precautionary principle. In that regard, Sands rightly underscores that "[t]here is no uniform understanding of the meaning of the precautionary principle among States and other members of the international community."[1856] That said, and despite the fact that some authors cast it as an « elusive

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7.86-7.89; *Australia — Measures Affecting Importation of Salmon (submitted by Canada)*, Panel Report, 12 June 1998, WT/DS18/R; *Japan — Measures Affecting Agricultural Products*, Panel Report, 27 October 1998, WT/DS76/R; *Japan — Measures Affecting Agricultural Products*, Appellate Body Report, 22 February 1999, WT/DS76/AB/R; *India — Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, Panel Report, 6 April 1999, WT/DS90/R; *Japan — Measures Affecting the Importation of Apples*, Panel Report, 15 July 2003, WT/DS245/R.

[1852] See, e.g, *Southern Bluefin Tuna Cases (New Zealand v. Japan, Australia v. Japan)*, International Tribunal for the Law of the Sea, Order of 27 August 1999, Request for Provisional Measures, at paras. 75, 77, 79; *The MOX Plant Case (Ireland v. United Kingdom)*, International Tribunal for the Law of the Sea, Order of 3 December 2001, at paras. 75 and 89.

[1853] See, e.g., *Bluefin Tuna Cases (Australia and New Zealand v. Japan)*, Arbitral Tribunal of the International Centre for Settlement of Investment Disputes, Award on Jurisdiction and Admissibility, 4 August 2000, at para. 72.

[1854] See, e.g., James Cameron and Juli Abouchar, *The Status of the Precautionary Principle in International Law*, in David Freestone and Ellen Hey (eds.), THE PRECAUTIONARY PRINCIPLE AND INTERNATIONAL LAW: THE CHALLENGE OF IMPLEMENTATION 29-53, 45 (1996); Harald Hohmann, PRECAUTIONARY LEGAL DUTIES AND PRINCIPLES OF MODERN INTERNATIONAL ENVIRONMENTAL LAW – THE PRECAUTIONARY PRINCIPLE: INTERNATIONAL ENVIRONMENTAL LAW BETWEEN EXPLOITATION AND PROTECTION 184 (1994); Alexandre Kiss, *Émergence de principes généraux du droit international et d'une politique internationale de l'environnement*, in Ivo Rens (dir.), LE DROIT INTERNATIONAL FACE À L'ÉTHIQUE ET À LA POLITIQUE DE L'ENVIRONNEMENT 30 (1996).

[1855] See, e.g., Patricia Birnie and Alan Boyle, INTERNATIONAL LAW AND THE ENVIRONMENT 98 (1992); Daniel Bodansky, *Remarks*: *New Development in International Environmental Law*, 85th ASIL PROCEEDINGS 410 (1991); Laurence Boisson de Chazournes *et al.*, PROTECTION DE L'ENVIRONNEMENT 19 (1998); Pierre-Marie Dupuy, *Où en est le droit international de l'environnement à la fin du siècle?*, REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 889 (1997); Malgosia Fitzmaurice, *International Environmental Law as a Special Field*, 25 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 220 (1994).

[1856] Philippe Sands, PRINCIPLES OF ENVIRONMENTAL LAW 212 (1995).

concept »[1857] or, similarly, expound that it "at present…is not a term of art ",[1858] the precautionary principle nonetheless comprises a conceptual core that may facilitate its application irrespective of its uncertain legal status. After all, 'terrorism', whilst not defined internationally, is understood broadly enough to warrant and underlie studies, regulation (national and international), political and judicial decisions granted, of course, that, contrary to the precautionary approach, it is not a legal principle or doctrine but rather a method or tactic. Even in the face of a judicial vacuum as to its customary character, the precautionary principle nevertheless underpins the elaboration of various national, international and regional legal policies.[1859] For instance, it has been consecrated as a general and mandatory principle of law under European Union structures. Furthermore, it has also been enshrined in several international instruments, most notably in Principle 15 of the *Rio Declaration on Environment and Development*,[1860] the *Vienna Convention for the Protection of the Ozone Layer*,[1861] the 1990 *Bergen Ministerial Declaration on Sustainable Development*,[1862] the *Convention on the Protection*

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[1857] Lothar Gundling, *The Status in International Law of the Precautionary Principle*, V INTERNATIONAL JOURNAL OF ESTUARINE AND COASTAL LAW 25 (1990); Lothar Gundling, *The Status in International Law of the Precautionary Principle*, in David Freestone and Ton Ijilstra (eds.), THE NORTH SEA: PERSPECTIVES ON REGIONAL ENVIRONMENTAL CO-OPERATION 23-30 (1990).

[1858] Gunther Handl, *Environmental Security and Global Change*: *The Challenge of International Law*, in Gunther Handl (ed.), 1 YEARBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 3-33, 23 (1990).

[1859] See, e.g., Julien Chaisse and Tiziano Balmelli (eds.), ESSAYS ON THE FUTURE OF THE WORLD TRADE ORGANIZATION: VOLUME I: POLICIES AND LEGAL ISSUES 382 (2008).

[1860] Principle 15 reads as follows:

> In order to protect the environment, *the precautionary approach shall be widely applied by States* according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

The text of the Convention is available online at http://www.unep.org/Documents.multilingual/ Default.asp?DocumentID=78&ArticleID=1163 (last visited on 27 January 2009). [Emphasis added.]

[1861] The Vienna Convention for the Protection of the Ozone Layer of 22 March 1985 and the Montreal Protocol (1987) to that Convention both allude to "precautionary measures" in their respective preambles. See also the preamble of the 1994 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions, available online at http://www.unece.org/env/ lrtap/full%20text/1994.Sulphur.e.pdf (last visited on 27 January 2009).

[1862] Report of the Economic Commission for Europe on the Bergen Conference (8–16 May 1990), A/CONF.151/PC/10, annex I, at para. 7 (stating that its objective of sustainable development must

*and Use of Transboundary Watercourses and International Lakes*,[1863] the 1992 *Convention on Biological Diversity*,[1864] and the 1992 *United Nations Framework Convention on Climate Change*.[1865] Similarly, the Commentary to Article 10c) of the ILC's Draft articles on Prevention of Transboundary Harm from Hazardous Activities also consecrates the precautionary principle, noting that concerned states take several factors into consideration, including "the risk of significant harm to the environment and the availability of means of preventing such harm, or minimizing the risk thereof or restoring the environment".[1866]

In sum, it becomes clear that the precautionary principle can be brought to bear on the future development of state responsibility law in relation to counterterrorism, subject to the few caveats identified above. Whilst the principle needs further elaboration and has yet to attain the status of a binding international

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be achieved by adopting measures that are in conformity with the precautionary principle). The document also provides that "environmental measures must anticipate, prevent and attack the cause of environmental degradation", while also incorporating a portion of the wording of Principle 15 of the *Rio Declaration*.

[1863] Article 2.5.a) provides that members must be guided by "[t]he precautionary principle, by virtue of which action to avoid the potential transboundary impact of the release of hazardous substances shall not be postponed on the ground that scientific research has not fully proved a causal link between those substances, on the one hand, and the potential transboundary impact, on the other hand". The Convention is available at http://www.unece.org/env/water/ pdf/waterconf.pdf (last visited on 26 May 2009).

[1864] The text of the Convention is available at http://www.cbd.int/convention/convention.shtml (last visited on 26 May 2009). It should be mentioned, however, that the preamble of this instrument does not expressly refer to the precautionary principle. For more background on this treaty, see Michael Bowman and Catherine Redgwell, INTERNATIONAL LAW AND THE CONSERVATION OF BIOLOGICAL DIVERSITY (1995).

[1865] The text of the Convention is available at http://unfccc.int/resource/docs/convkp/conveng.pdf (last visited on 26 May 2009). See, particularly, Article 3(3) of that instrument. See also Article 130R of the *Treaty on European Union*, Official Journal C 191, 29 July 1992, available at http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html (last visited on 26 May 2009); Article 4(3) of the 1991 *Bamako Convention on the Ban of the Import Into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa*, available at http://www.iss.co.za/ AF/RegOrg/unity_to_union/pdfs/oau/treaties/Bamako_Convention.pdf (last visited on 27 May 2009); Articles 5 and 6 of the *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, A/Conf.164/37, 8 September 1995, available at http://daccessdds.un.org/doc/UNDOC/GEN/N95/ 274/67/PDF/N9527467.pdf? OpenElement (last visited on 27 May 2009).

[1866] Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, 2001, at 161-163, available online at http://untreaty.un.org/ilc/texts/instruments/ english/commentaries/ 9_7_2001.pdf (last visited on 27 January 2009).

obligation,[1867] it nevertheless aligns with the arguments espoused in the present dissertation, perhaps even militating in favour of more drastic means of prevention and a heavier burden of precaution incumbent upon host-states. The pivotal element thus lies in the fact that the lack of scientific evidence or knowledge should not impede the prospect of adopting certain measures aimed at counteracting activities that may engender serious or irreversible effects. When transposed to the specific context of counterterrorism, the notion of informational lacuna readily translates into the lack of knowledge –knowledge about imminent terrorist attacks, about terrorist activity taking place on a state's territory, about funding/ fundraising of terrorist organizations taking place on the same territory, and so on.

In the proposed model, therefore, the lack of specific knowledge by a state about an impeding terrorist strike is not, in and of itself, sufficient to completely dissipate the *prima facie* presumption of indirect responsibility arising against it when it fails to prevent that attack. The emphasis is squarely placed on vigilance and diligence; states should seek inspiration in the precautionary principle so as to devise pro-active counterterrorism measures, judiciously tailored to achieve a balance between respecting their international commitments and upholding their internal political and legal equilibrium. In this quest, the idea of knowledge will undoubtedly become paramount. In the second tier of the framework put forth in Chapter 4, a mitigating factor was ascertained in that regard: in the absence of actual knowledge about possible terrorist activity, if a state nonetheless undertakes reasonable and earnest measures to monitor potential terrorist plots/activities within its territory, its responsibility will be attenuated in the event that it fails to prevent a terrorist strike emanating from its territory.[1868]

Of course, this interpretation of knowledge still requires some fine-tuning and what standard of 'constructive' knowledge, exactly, is to be preferred remains

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[1867] See, e.g., Laurence Boisson de Chazournes, *Precaution in International Law*: *Reflection on Its Composite Nature*, in Tafsir Malick Ndiaye, Rüdiger Wolfrum (eds.), LAW OF THE SEA, ENVIRONMENTAL LAW AND SETTLEMENT OF DISPUTES 21-34 (2007).

[1868] For further discussion of the role of knowledge in the post-breach environment in the present study, see, specifically, the following sections in Chapter 4, *supra*: B)2.a); B)4.b); B)5.d); B)6.c); C)1.; C)2.

to be explored. At any rate, the potential contributions of the precautionary principle in the field of counterterrorism are numerous, not the least at the level of primary international legal norms. As a corollary, because of its conceptual core identified above, there is no doubt that the precautionary principle could act as a substantive foundation for the further development of customary law.[1869] Yet, it seems that, like in the case of many other relevant analogies, the invocation of the precautionary principle in this setting might trigger evidentiary challenges (ironically, in the case of the precautionary principle, scientific proof/evidence cannot serve as an obstacle when vindicating specific counterterrorist policy objectives, provided its application is ultimately accepted). More relevantly, the notion of evidentiary challenge pervades much of the debate at hand and, even once a breach of the obligation of prevention is established, the deployment of secondary rules of international responsibility is compounded by several factors. The dissertation now turns to some of those challenges.

### B) Next Steps and Challenges in Further Defining the Law of State Responsibility

Considerable efforts have been deployed above in underscoring the potential contributions of state responsibility to the suppression and prevention of transnational terrorism and, concomitantly, in highlighting the shortcomings of that body of law in the very same debate. However, even when one accepts that state responsibility can play a role in neutralizing asymmetrical power dynamics and in enhancing transnational cooperation on counterterrorism issues, the very application of the secondary rules of responsibility -- be it triggered via the more traditional unilateral/inter-state model of countermeasures or via an institutionalized vehicle, such as the Security Council -- engenders logistical,

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[1869] See, e.g., Alain Pellet, RECHERCHE SUR LES PRINCIPES GÉNÉRAUX DE DROIT EN DROIT INTERNATIONAL PUBLIC 428 (thèse, Paris, 1974); Michel Virally, *Le rôle des principes dans le développement du droit international*, dans I.U.H.E.I. de Genève, RECUEIL D'ÉTUDES DE DROIT INTERNATIONAL EN HOMMAGE À PAUL GUGGENHEIM 531-554, 546 (1968); Hans Kelsen, *Théorie du droit international public*, 84 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 182 (1953-III); Serge Sur, *Quelques observations sur les normes juridiques internationales*, REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 906 (No. 4, 1985); Prosper Weil, *Le Droit international en quête de son identité-Cour général de droit international public*, 237 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 9-370, 148-151 (1992-VI).

conceptual and political impediments during the post-breach appraisal.[1870] Whilst the purpose here is not to exhaustively canvass all potential post-breach obstacles to the deployment of state responsibility, it is nonetheless useful to briefly frame a few major issues that inevitably crop up at that stage –more specifically, in the general application of legal consequences to the breach of international obligations.

### 1. Legal Consequences of an Internationally Wrongful Act

Ample reference has been made throughout this dissertation to the application of secondary rules of responsibility once a state's obligation of prevention has been violated. The legal consequences of an internationally wrongful act are also expressly enshrined in the ILC's codified rules of state responsibility. A particularly intractable dimension of this set of norms undoubtedly lies in the idea of compensation or restitution for failure to fulfill the obligation of prevention explored above in Chapter 4. When dealing with the legal consequences of having failed to prevent transnational terrorism, an obvious difficulty inexorably crops up at the outset: how do you put a dollar figure on the deleterious repercussions of a terrorist attack? Granted, the focal point of this dissertation has predominantly gravitated towards the protection of civilian life and attempted to tease out the theoretical and rational implications of trying to quantify the loss of human life and human collateral damage stemming from terrorist strikes. However, the aim of this line of argument was not, by any means, to delegitimize the economic loss and property damage that can accrue from terrorist activity. In fact, as 9/11 has shown, private transnational subversion can engender deleterious economic repercussions, both in terms of property

[1870] Conversely, the fact that the parties to an international dispute sidestep a judicial and/or arbitral avenue in resolving the situation does not signify that the substance of the dispute fails to hinge on state responsibility law considerations. See, e.g., *Reparation for Injuries Advisory Opinion*, *supra* note 788, at 177-178. As a corollary, mediation and diplomacy can lead to the peaceful settlement of such disagreements in the same manner that judicial settlement of international disputes seeks to achieve. See, e.g., *Free Zones of Upper Savoy*, *supra* note 869, at 13 (equating the judicial settlement of international disputes with "an alternative to the direct and friendly settlement of such disputes between the Parties").

damage and more intangible financial consequences.[1871] In addition, some terrorist attacks – for instance, those perpetrated in cyberspace – can sometimes only engender financial or economic losses without any corresponding physical harm to individuals. For example, such was the case following a series of nebulous cyber-attacks launched primarily from Russia and targeting online interests in Estonia in April-May 2007, as explored above in Chapter 4, Section C)2.a). As a result of one wave of attacks specifically targeting Estonia's largest bank, losses exceeding one million dollars were incurred in a single day.[1872]

Furthermore, the confusion surrounding the computation of actual damages for the failure to prevent terrorism is mirrored in the formulation ultimately espoused by the ILC in Article 36(2), which provides that "compensation shall cover any financially assessable damage."[1873] As discussed above, the *Chorzów Factory* case injected into the fold the notion that some correlation between the state's wrongdoing and the harm ultimately suffered by the victim can animate the calculation of compensation amounts. On this issue, the PCIJ proclaimed that "[t]he 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*".[1874] Whilst this correlation could potentially be cast as the imposition of punitive damages in international law, this idea has acquired little traction in the

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[1871] See, e.g., Adam Rose and S. Brock Blomberg (eds.), *The Economic Impacts of the September 11th, 2001, Terrorist Attacks*, 15 PEACE ECONOMICS, PEACE SCIENCE AND PUBLIC POLICY (2009), available online at http://www.bepress.com/peps/vol15/iss2/ (last visited on July 14, 2009), including contributions on the following topics: *Further Observations on the Economic Effects on New York City of the Attack on the World Trade Center; Property Damage and Insured Losses from the 2001 World Trade Center Attacks*; *The Economic Impacts of the September 11 Terrorist Attacks*: *A Computable General Equilibrium Analysis*; *Macroeconomics and Industry Impacts of 9/11*: *An Interindustry Macroeconomics Approach*; *Identifying the Regional Economic Impacts of 9/11*; *Estimating the Macroeconomic Consequence of 9/11*; *The Economic Impact of 9/11 on the New York City Region*; *The Macroeconomic Impacts of the 9/11 Attack*: *Evidence from Real-Time Forecasting*.

[1872] For more background on this episode, see Landler and Markoff, *Digital Fears*, *supra* note 1609, at A1.

[1873] *Articles*, *supra* note 76. For a discussion on the speculative and theoretical character of determining compensation/restitution damages following a terrorist strike, see *supra* Chapter 4, Section B)5.c).

[1874] *Chorzów Factory* case – Indemnity, *supra* note 628, at 28. [Emphasis added.]

literature.[1875] Rather, leading publicists in the field resign themselves to the idea that putting a dollar figure on governmental wrongdoing is an inherently 'flexible' and somewhat 'arbitrary' exercise, and that different degrees of governmental omissions or wrongdoing respectively command different levels of compensation.[1876] Indeed, institutionalized precedents of the application of the law of state responsibility -- especially the practice of the United States and Mexico Mixed Claims Commission -- further support the arbitrary nature of the post-breach calculation of reparation. In that context, one commentator remarks that "[t]he Commission's theory is useful, however, because it is analytically correct and because it recognizes various degrees of governmental delinquency…[t]he difficulty will always remain of measuring or computing such degrees of delinquency…[t]hat must, in any event, be arbitrary."[1877] Moreover, the compensatory uncertainty and speculative character of determining reparation are further exacerbated when a terrorist strike is planned or executed over the territories of multiple states, thereby engaging the Article 47(1) considerations discussed above.[1878]

From a practical standpoint and invoking, yet again, the 9/11 attacks as an example, let's assume that the responsibility of Afghanistan is engaged for failing to prevent those excursions. The question of reparation under the ILC's *Articles* becomes seemingly difficult when dealing with such a politically-charged situation. Would Afghanistan be responsible for shouldering the millions of dollars in damages resulting from the 9/11 terrorist strikes? Upon first glance, it might seem farfetched to think so. However, as discussed in Chapter 3, an interesting parallel can be drawn with the Security Council's treatment of Iraq's international responsibility in the context of its invasion of Kuwait. Following that initial wrongful act, the Council imposed a broad-ranging obligation of

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[1875] See, e.g., Stephan Wittich, *Awe of the Gods and Fear of the Priests*: *Punitive Damages and the Law of State Responsibility*, 3 AUSTRIAN REVIEW OF INTERNATIONAL AND EUROPEAN LAW 101 (1998).

[1876] See Becker, TERRORISM AND THE STATE, *supra* note 2, at 22.

[1877] Edwin Borchard, *Important Decisions of the Mixed Claims Commission United States and Mexico*, 21 AMERICAN JOURNAL OF INTERNATIONAL LAW 516, 518 (1927).

[1878] For a discussion of the impact of this provision, see *supra* Chapter 4, notes 1688-1694 and accompanying text.

reparation upon Iraq, proclaiming that it "*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".[1879] More controversially, the Council established a Commission and a compensation fund aiming to indemnify victims of the conflict.[1880] It thus instituted a mechanism seeking to redress massive violations of international law and, in so doing, transacted colossal compensatory amounts. Whilst the implementation of that Commission was highly controversial,[1881] it is not inconceivable that similar mechanisms could be developed in the future and applied to to the failure to prevent large-scale transnational terrorism. The Iraq-Kuwait scenario certainly provides a strong precedent -- coupled with relevant conceptual tools -- that may be harnessed with a view to diversifying reparative options under secondary liability norms, even if it is only to apply them on a more modest scale. There is no reason to exclude, as a matter of course, analogous logic or the deployment of similar legal responses from the treatment of the breach of the obligation to prevent terrorism.

Whilst on the topic of the application of diversified secondary norms of responsibility, it is also useful to briefly recall the tension that pervaded much of the discussion when dealing with the relationship between international law and domestic counterterrorism. Indeed, when devising a workable scheme of state responsibility, competing interests will inexorably come into conflict; such is the case of sovereignty and combating terrorism efficiently, a tension that has been recurrent throughout the present study. Exemplified, *inter alia*, by the 1982

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[1879] United Nations Security Council Resolution 687 of 3 April 1991, at para. 16. [Emphasis added.]

[1880] *Ibid*, at paras. 18-19.

[1881] For instance, certain scholars opined that the Security Council overstepped the bounds of its powers in instituting the Commission and compensation fund. See, e.g., Graefrath, *International Crimes*, *supra* note 492, at 244-245. For more background and divergent views on the efficiency of the UN Compensation Commission for Iraq, see, e.g., Bederman, *The United Nations Compensation*, *supra* note 625, at 33-34; Christenson, *State Responsibility*, *supra* note 624, at 348-358; Gilles Cottereau, *De la responsabilité de l'Irak selon la résolution 687 du Conseil de sécurité*, ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 105 (1991); Kolliopoulos, LA COMMISSION, *supra* note 864, at 5, 232-233.

Israel-Lebanon conflict, the quintessential scenario was depicted in rather straightforward terms. All agree that Lebanon, for instance, has an international obligation to prevent terrorist excursions emanating from its territory. However, what if it is unable to completely repel or contain the threat? What if it has relinquished control over the southern portion of its territory, in which terrorist bases are located and operating? What if we are seeking ways to contain subsequent terrorist attacks originating from its territory after Lebanon has violated its primary obligation of preventing an initial terrorist strike (thereby triggering both the application of the general set of secondary rules and, more specifically, the provisions of ILC Article 14(3) given the continuing violation of the obligation to prevent terrorism)?[1882] Should we expect it to allow extraneous forces or law enforcement units on its territory to repel the threats, thereby infringing state sovereignty in favour of combating terrorism more efficiently?[1883]

A range of possible solutions to these questions has been advanced, depending on the interlocutor and the school of thought underpinning the argument. As a general rule, all seem to agree that sacrificing sovereignty in favour of combating terrorism should have some kind of mitigating or attenuating effect on state responsibility, a reality directly embedded in the factual/policy tier of the proposed model advocated above.[1884] Interestingly, some commentators frame the issue as one of capacity-building. For instance, Tal Becker's causation-based treatment of state responsibility for terrorism essentially equates liability with capacity.[1885] In other words, his proposed regime contemplates a state's responsibility for failing to prevent terrorism as inversely proportionate to the capacity that it had or ought to have ensured in conducting its counterterrorism operations. Similar views were echoed by others, with some authors even advocating that states are under a duty of counterterrorism capacity-building that includes a requirement to seek external assistance should they become unable to adequately pursue counterterrorism operations within their own borders. Failure

[1882] This dimension of state responsibility law was explored *supra* in Chapter 4, Section B)3.a).
[1883] This line of argument was thoroughly canvassed *supra* in Chapter 2, Section D)3.a), especially at notes 450-457 and accompanying text.
[1884] See *supra* Chapter 4, Section C)2.b).
[1885] For more sustained discussion on his approach, see *supra* Chapter 4, Section A).

to do so, in their view, could signal a state's failure to meet its obligations and, correspondingly, point to the commission of an internationally wrongful act.[1886] Additional support for this proposition can certainly be substantiated via recent Security Council practice, especially when contemplated through the prescriptions enshrined in Resolution 1373 and the ensuing requirements of counterterrorism capacity-building.[1887]

In short, when grappling with these difficult policy questions, the choice will often oscillate between sacrificing sovereignty and upholding a rigid and state-centric conception of the nation-state, perhaps at the detriment of more effective counterterrorism structures. According to one reading of competing legal regimes that may be juxtaposed with the present inquiry, such as the Responsibility to Protect Doctrine, a sounder counterterrorism policy would be achieved by resolving the above tension in favour of sacrificing sovereignty (especially if Lebanon, for example, cannot efficiently thwart terrorist threats emanating from its territory).[1888]

Following Pakistan's provision of sanctuary to the terrorists that carried out the recent Mumbai attacks, similar arguments were canvassed in the political mainstream. Particularly radical proponents of the idea of circumventing sovereignty in favour of combating terrorism advocated the deployment of invasive legal responses to Pakistan's failure to prevent terrorism, loosely grounding their proposals in general international law and in the R2P Doctrine.[1889] Implicit in their argument is the idea that sovereign rights are, by no means, absolute and need to be deserved in this day and age. Equally vocal -- and symptomatic of the neo-conservative canon of foreign policy thought that clearly

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[1886] See, e.g., Trapp, *Back to Basics*, *supra* note 1423, at 147 n.33; Nolkaemper, *Attribution*, *supra* note 248, at 161.

[1887] See Quénivet, *You Are the Weakest Link*, *supra* note 1424, at 390-391.

[1888] See the remarks, *supra*, Chapter 2, Section D)3.a), especially at notes 450-457 and accompanying text. For a similar discussion in the context of 'failed' states, see *supra* Chapter 4, Section B)6.b).

[1889] For a recent and critical appraisal of the *R2P Doctrine*, see Carlo Focarelli, *The Responsibility to Protect Doctrine and Humanitarian Intervention*: *Too Many Ambiguities for a Working Doctrine*, 13 JOURNAL OF CONFLICT AND SECURITY LAW 191 (2008). For a recent Canadian perspective on the matter, see Jutta Brunnée, *International Law and Collective Concerns*: *Reflections on the Responsibility to Protect*, in Tafsir Malick Ndiaye and Rüdiger Wolfrum (eds.), LAW OF THE SEA, ENVIRONMENTAL LAW AND SETTLEMENT OF DISPUTES 35-51 (2007).

dominates this line of thinking -- is Robert Kagan's like-minded solution in addressing Pakistan's involvement in, and failure to prevent, the terrorist attacks in Mumbai. His proposal strikes at the very core of what was surveyed above and illustrates the complexities and potential political pitfalls in devising unconventional secondary obligations of state responsibility following the commission of an internationally wrongful act. Following the Mumbai attacks and in the face of increasing transnational non-state terrorist networks and actors, he framed his solution in the following terms:

> Rather than simply begging the Indians to show restraint, a better option could be to internationalize the response. Have the international community declare that parts of Pakistan have become ungovernable and a menace to international security. Establish an international force to work with the Pakistanis to root out terrorist camps in Kashmir as well as in the tribal areas. This would have the advantage of preventing a direct military confrontation between India and Pakistan. It might also save face for the Pakistani government, since the international community would be helping the central government reestablish its authority in areas where it has lost it. But whether or not Islamabad is happy, don't the international community and the United States, at the end of the day, have some obligation to demonstrate to the Indian people that we take attacks on them as seriously as we take attacks on ourselves?
>
> Would such an action violate Pakistan's sovereignty? Yes, but nations should not be able to claim sovereign rights when they cannot control territory from which terrorist attacks are launched. If there is such a thing as a "responsibility to protect," which justifies international intervention to prevent humanitarian catastrophe either caused or allowed by a nation's government, there must also be a responsibility to protect one's neighbors from attacks from one's own territory, even when the attacks are carried out by "non-state actors."
>
> In Pakistan's case, the continuing complicity of the military and intelligence services with terrorist

> groups pretty much shreds any claim to sovereign protection.[1890]

Whilst there are, undoubtedly, myriad philosophical, logistical and political problems associated with this course of action,[1891] Kagan's proposed model nonetheless foreshadows the intellectual payoffs of entertaining a dialogue outside of the existing state responsibility boxes (i.e. by identifying secondary obligations extending beyond purely monetary indemnification or symbolic reparation, so as to shift the focus on preventing future terrorist attacks).[1892] As advanced under the second tier of the strict liability-infused mechanism put forth in Chapter 4, in demonstrating that it fulfilled its obligation of prevention, a state might expose itself to alternate counterterrorism arrangements, as opposed to full-scale military invasion, such as the deployment of law enforcement units to capture suspected terrorists.[1893] Other similar arrangements could also contribute to increasing a host-state's due diligence capital in refuting a presumption of indirect responsibility directed against it.

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[1890] Robert Kagan, *The Sovereignty Dodge*: *What Pakistan Won't Do, the World Should*, WASHINGTON POST, December 2, 2008.

[1891] For a searing critique of Kagan's position, see Daniel L. Davis, *America the Arbiter? Hubris Has No Place in Foreign Relations*, WASHINGTON TIMES, December 12, 2008, at A23.

[1892] That said, compensation and restitution still play a central role in normalizing international relations between sovereign states. See, e.g., Daniel Butt, RECTIFYING INTERNATIONAL INJUSTICE: PRINCIPLES OF COMPENSATION AND RESTITUTION BETWEEN NATIONS (2009). For a critique of the broader concept of reparation, see Cristiano D'Orsi, *L'Obligation de réparation dans le projet d'articles sur la responsabilité de l'État*: *Une analyse critique*, 58 REVUE HELLÉNIQUE DE DROIT INTERNATIONAL 115-143 (2005).

[1893] See Baker, *Terrorism*, *supra* note 275, at 40. See also Byers, *Letting the Exception*, *supra* note 1452.

## CONCLUSION TO PART IV

As demonstrated in this chapter, state responsibility is not always a politically relevant or viable option. For instance, its application has been completely eschewed in massive cases of transnational pollution where it could have been instrumental in devising partial compensatory or symbolic resolutions. When state responsibility is set in motion, however, it is nonetheless not always governed by clear precedents or uniformly-applied principles, as the specific facts of the case at hand inform the deployment of restitutive justice mechanisms. Even a cursory review of recent incidents involving transnational terrorism or public international law reveals both the absence of uniform and consistent application of state responsibility principles, along with a highly varied and diversified record of terrorist strikes. As a result, the very fact that many terrorist activities can be distinguished in scope, method and execution obfuscates the prospect of developing specific rules of state responsibility or, more generally, of public international law, even if those new principles are tentatively framed within the furrow of a *lex specialis* dealing with transnational terrorism. Hence, the exercise of generalizing terrorism is anything but a straightforward one, thereby militating in favour of the adoption of flexible and context-sensitive international legal rules.

It is with striking this normative equilibrium in mind that the present dissertation has operated, especially in the policy reform advocated under Chapter 4. In short, further defining primary rules on counterterrorism might prove challenging and ultimately lead to a deadlock. Undoubtedly, this confusion is further exacerbated by the lack of a universally agreed-upon definition of 'terrorism', thereby making the elucidation of primary obligations on an undefined term that much more convoluted. What is more, the ICJ arguably perpetuated this apparent definitional and legal opacity in cases where it could have provided some guidance on the concept of 'terrorism', most notably in *Nicaragua*, *Teheran Hostages* and the *Armed Activities* case. This precedential dearth is sometimes accompanied by a similar reluctance to advance the law of state responsibility within that forum, although the ICJ's posture can conversely

be construed as one of tactical judicial restraint. For instance, the Court's perhaps uncritical reading of ILC Article 8 in the recent *Genocide* case has been interpreted by some as paving the way for state practice to fill the void and, perhaps, to marshal in new tests of attribution.[1894]

Conversely, a contrary argument can certainly be advanced to the effect that primary counterterrorism norms are sufficiently defined -- whether 'terrorism' is construed as a term of pure political convenience or, alternatively, is deemed to have acquired sufficient legal status -- to commission specific behaviour under international law. The premise that can be extracted from this conclusion is relatively straightforward: states have a positive duty to prevent terrorist attacks emanating from their territory. Yet, how this obligation is to be fulfilled or deployed remains largely fact-driven and generates controversy, obviously depending on the interlocutor assessing its normative strength. As such, the present study has attempted – particularly in Chapter 4 – to bypass the sometimes-futile debates over the content of primary counterterrorism obligations so as to give credence to the notion that the obligation of prevention is now firmly implemented in international law. The more relevant exercise is rather establishing how the obligation is breached and ascertaining the repercussions flowing from that violation, the latter proposition having underpinned the central argument in the present chapter. Therein undoubtedly lays the crux of the analytical challenge in this field. Indeed, as Roberto Ago famously declared, "[i]t is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences."[1895] The present dissertation has elected to shed some light on this issue by contemplating the obligation of prevention on a variable scale and by placing significant analytical emphasis on the mechanics and policy implications of secondary rules of state responsibility. Put another way, the policy objectives driving the proposed reform centre on instilling some enforceability into the obligation of prevention, promoting incentives for compliance with

[1894] See, e.g., Milanović, *State Responsibility for Acts*, *supra* note 901, at 321.
[1895] YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1970, Volume II, p. 306, at para. 66(c).

counterterrorism obligations, and compelling both multilateralism and transnational cooperation.

If the present chapter has taught us anything, it is that no one dominant model of privately-inflicted transnational violence may be identified, thereby militating in favour of acute contextual sensitivity in applying the secondary rules of state responsibility. Furthermore, even if a highly contextualized approach is ultimately endorsed, the actual mechanics of state responsibility are further compounded by the fact that the application of that body of law is frequently contingent on states' unilateral determination of unlawful conduct, a process marred by autoqualification and self-judging. In order to partly counteract this unilateral dimension, proposals have been put forth towards institutionalizing the implementation of state responsibility for failing to prevent terrorism, most notably in Chapter 3 above. Alternatively, some scholars advocated the implementation of a third-party objective institution in the hopes of somewhat allaying disproportionately political or vindictive self-help initiatives, a school of thought within which Kelsen's own vision featured prominently.[1896]

It is evident that, whether seen through the possible institutionalization of the implementation of state responsibility via the Security Council, or contemplated through the lens of instituting a third-party institution mandated with overseeing the application of liability mechanisms, it will be impossible to entirely dissociate political considerations from the application of state responsibility. Even in analogizing the "war" on terror with other transnational legal phenomena, such as global warming and precautionary approaches, this chapter revealed that state responsibility is often synonymous with an uneven mix of normative and political, depending on the facts of each case and the internationally wrongful acts (and gravity, intensity, etc.) to which it is applied. In addition, it would also be naïve to attempt excising the process of self-judging altogether from the equation. The seizure of a third party objective institution

[1896] See Hans Kelsen, THE LEGAL PROCESS AND INTERNATIONAL ORDER 18 (1935); Hersch Lauterpacht, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 424 (1933). On this issue, Marry Ellen O'Connell's recent remarks seem apposite. See *Controlling Countermeasures*, *supra* note 744, at 53.

would necessarily entail self-judging of the internationally wrongful act by at least one party at the pre-adjudicative stage, which may or may not be reinforced or exacerbated by international public perception. Similarly, if by some magical twist of fate two states agreed to submit a dispute involving the failure to prevent transnational terrorism to the ICJ, the very *compromis* by which the judicial apparatus is triggered would be premised on one's state self-judging of the harm it sustained. Granted, the whole purpose of institutional objective adjudication is to provide some authoritative judicial pronouncement on the dispute in question but this exercise may nonetheless fail to dissipate the political dimensions present in states' unilateral self-judging of an unlawful act. However, the institutional decisional outcome may actually be less one-sided, which is probably a step in the right direction in some cases. In sum, therefore, the concern does not lie with completely reducing self-judging nor does it lie with necessarily decreasing the political undertones pervading this field of international law. Rather, the objective is to reduce unilateralism so as to increase the chances of combating transnational terrorism effectively and cooperatively, whilst also enhancing multilateralism and generating desirable governmental incentives in compelling compliance with international legal undertakings. To that end, this chapter has attempted to demonstrate that the law of state responsibility can offer a partial politico-legal solution to this issue in some instances.

As forewarned by Roberto Ago, the existence of primary counterterrorism obligations may be relatively uncontroversial. Indeed, few would contest the idea that states have a duty to prevent terrorist attacks emanating from their territory. The true legal challenge, therefore, will rather crop up at the stage of ascertaining a breach of the obligation of prevention and, most importantly, when devising potential legal consequences to redress the internationally wrongful act. It is precisely the prospect of legal consequences that infuses state responsibility with some modicum of bindingness and, in turn, also promotes compliance with international law at the pre-breach stage.[1897] Absent a third-party arbitrator or

[1897] Of course, this line of argument should be contrasted, and ultimately nuanced, in light of earlier discussion dealing with state responsibility's and, more generally, international justice's potential for devising symbolic reparations and resolutions. See, e.g., *supra* notes 1437, 1770-

decision-maker pronouncing on a dispute, and remaining firmly within the furrow of a self-adjudicative paradigm, a state's unilateral determination of an internationally wrongful act perpetrated by another rings pretty hollow politically, unless that state wields significant influence on the world stage or, perhaps, when the facts of the case are particularly sympathetic to the aggrieved state. In many cases, however, it is likely that the victim-state will need to generate a constituency of conscience and garner international support in order to bolster its invocation of remedial mechanisms under international law, especially in the field of counterterrorism. But even when this threshold is met, the range of available reparation schemes lends to state responsibility law a particularly rarefied quality.

As noted in this chapter, in many instances the traditional assessment of compensatory damages in the face of deleterious transnational activity – be it terrorism or pollution – can hardly escape some sense that it remains a speculative endeavour. Whilst the exercise of carving out international liability mechanisms for failing to prevent terrorism might be politically desirable, perhaps even objectively founded or verifiable in some regards, actually deploying those regimes in the face of transnational subversion might prove subjectively unenforceable. For instance, while the international responsibility of a host-state may be ascertained by virtue of the proposed model under Chapter 4, implementing the consequences of that determination might prove politically or logistically improbable. One would be hard-pressed to expect compensation or restitution from uncooperative states involved in state support of terrorism or waging surrogate warfare through proxies, such as Syria or Iran.[1898] What is more, expectations of reparation should be equally quelled vis-à-vis attempts to obtain redress from weak or ineffective states, such as Sudan or Somalia. In such cases, can it be said that the true benefits of state responsibility law might have met their match, as one can only hope for some symbolic acknowledgement of the

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1779 and accompanying text. On state responsibility's ability to generate incentives for governments to comply with international obligations before any violation of the law is registered, see Zemanek, *Does the Prospect*, *supra* note 50, at 125-134.

[1898] Even prior to 9/11, Iran's support of terrorist factions had been widely reported, coupled with a deep cynicism regarding the prospect of entertaining a politically viable dialogue with that host-state in the hopes of reducing such sponsorhip. See, e.g., Robert Litwak, ROGUE STATES AND U.S. FOREIGN POLICY 4, 161, 174, 186-188 (2000).

host-state's wrongful conduct without any effective, corresponding sanction? In such scenarios, it should be recalled that the remedy of satisfaction – embodied, *inter alia*, in the expression of diplomatic and official apology – can play some cathartic role but fail to register any restitutive impact. In addition, sometimes the very declaration of a host-state's violation of international law can suffice in providing some level of reparation – albeit symbolic – much in the spirit of some non-judicial equivalent of a declaratory judgment. Even when transposed to international judicial settings, this eventuality can ring true. Indeed, this seemed to animate part of the ICJ's reasoning in the *Genocide* case. After holding that Serbia could not be held to the principle of *restitutio in integrum* in the particular circumstances because of an absence of a nexus connecting its failure to prevent genocide and the events perpetrated at Srebrenica, the Court nonetheless opined that the Applicant was entitled to reparation in the form of satisfaction. In fact, as per the Applicant's own suggestion, the Court acknowledged that such reparation could take on the form of a declaration, in its judgment, that Serbia had failed to comply with its obligation of prevention.

More controversially, a radical brand of legal consequences lies at the other end of the spectrum of secondary rules of state responsibility. In fact, it is no secret that a recurrent tension between upholding sovereignty and combating terrorism efficiently has pervaded many of the policy considerations in this chapter and in the broader project. Indeed, policy and legal choices will often oscillate between sacrificing sovereignty and upholding state or territorial sanctity; difficult tradeoffs will have to be made in order to combat the transnational scourge of terrorism effectively. As such, various unconventional and controversial manifestations of secondary rules of state responsibility will have to be canvassed in future scholarly explorations on the topic, ranging from the implementation of international trusteeships -- potentially in the tribal regions of Pakistan and the ungoverned spaces in Yemen, where terrorist planning and activity is rampant[1899] -- to an exploration of the relationship between the R2P Doctrine and state responsibility for failing to prevent terrorism. Decidedly, the

[1899] See, e.g., *supra* Sections A)3.a; B)1. See also, *supra*, Chapter 4, Sections B)2.a; B)6; C)2.a.

most contentious area of response to the failure to prevent transnational terrorism undoubtedly resides in the field of recourse to force, which extends beyond the scope of the present project. Consequently, legal scolars addressing these issues in the future will inevitably have to grapple with the thorny relationship between state responsibility and forcible state responses, while also placing significant emphasis on self-defence in the analysis.

## CONCLUDING OBSERVATIONS

As seen above, the current politico-legal zeitgeist raises significant challenges to the task of devising effective legal responses to the transnational scourge of terrorism. Whilst the political evolution of the modern concept of terrorism might have crystallized in the 70s and 80s, the threats now posed by private transnational violence have taken on a form of their own, which, ironically, is polymorphic in scale and makeup but unequivocally dangerous for the international legal order. The terrorism of past decades relied heavily on state support and favoured a model of execution predominantly actuated through transborder aggressions or through escalating guerilla warfare within regional or bilateral armed conflicts. It is no surprise, therefore, that international law was somewhat resistant to harbour state accountability mechanisms for purely private conduct.

Indeed, when traced back through time, the law of state responsibility remained painstakingly dependent on state-centrism and on a bilateral typology of international wrongful acts. As seen in Part I of the dissertation, it is undoubtedly with this in mind that public international law gradually developed towards a stringent and dominant model of agency in regulating the responsibility of the state for transnational violence, whilst unmistakably also bearing the influence of other competing theories such as the 'separate delict' doctrine and the notion of 'collective guilt'.[1900] Whilst some might have construed the application of attribution principles in such settings as extending to the acts of non-state actors, to cast such legal scheme as a law of state responsibility *for* private conduct might, in fact, have been a misnomer. Indeed, the whole purpose of agency – embodied in the *Nicaragua* case and in ILC Article 8, for instance – was precisely to connect the acts of seemingly non-state actors to the formal state apparatus via customary law-inspired normative operations involving attribution logic, along with some inconsistently applied considerations grounded in causality and fault. However, the overarching social objective underpinning such standards could

[1900] See generally Becker, TERRORISM AND THE STATE, *supra* note 2.

certainly not be construed as targeting purely private unlawful conduct; in fact, it eschewed more subtle cases of indirect state involvement, which may have boiled down to tacit acquiescence or passive toleration by a sanctuary state of terrorists on its territory. Put another way -- and short of egregious and active/direct state support for transnational terrorism by a subsidizing government -- establishing a host-state's responsibility for failing to prevent such excursions was next to impossible and remained narrowly intertwined with the onerous legal demonstration of a relationship of principal and agent connecting the non-state actors and the originating state. In turn, this standard engendered considerable evidentiary impediments and arguably promoted an attitude of *laissez-faire* since host-states could become complacent in light of the unlikely prospect of being branded internationally responsible.

However, today we live in a post-agency world and the threats now posed on a global scale have unquestionably compounded the equation of the international liability of sanctuary states. The prevalent model of terrorism – whilst difficult to precisely pin down – actually ramifies into various permutations and bolsters the assertion that a willfully blind or overly tolerant host-state not only fails to meet its due diligence obligations, but might also be benefiting politically from the use of its territory as a launch pad for terrorist operations (i.e. by doing indirectly what it cannot do directly). As seen on 9/11, the most noxious type of terrorism has far-reaching effects and can engender deleterious consequences across borders and across cultures. Regardless of the structural components of specific terrorist organizations, the threat is becoming increasingly transnational in the same vein as other contemporary problems, such as global warming. In this light, we are now witnessing the proliferation of criminal 'networks', with many terrorists now operating with a wide degree of autonomy and exploiting both ungoverned spaces or host-states with weak counterterrorism structures (e.g. Western Sahara, Lebanon, Yemen) and, to a lesser extent, stronger states (e.g. Britain, Canada), which are more suited for the clandestine cellular

structure of some organizations.[1901] In addition, some of those terrorist networks have the capacity to wield state-like power and influence, which entails that they may both challenge international legal rules and exert force on a level once falling under the exclusive dominion of sovereign states. As shown above, this reality is further exacerbated by new technologies, like the Internet, and by new weaponry, like biological and nuclear weapons, which may considerably affect potential deterrence models including those rooted in international responsibility mechanisms.[1902]

In contrast with terrorism of past decades and in addition to a newly acquired enhanced transnational capacity, modern-day organizations like Al Qaeda and Lashkar-e-Taiba have the ability to self-finance in a sometimes untraceable manner -- through such means as the *hawala* underground banking system and charitable subterfuges[1903] -- and to self-direct without much host-state input, if any at all. Organizations like Hezbollah have the ability to conceal some of their operations behind a veil of political legitimacy whilst simultaneously seeking solace for their armed wing on a territory where there is no strict control over terrorist factions. As seen in the scenarios canvassed in Part I, it becomes clear that many terrorist organizations are relying on their host-states' passive toleration or acquiescence in order to operate; as a result, absent the prospect of covertly waging surrogate warfare through proxies, the extent of those states' support is of a logistical nature, at best. Yet, there is something patently unjust about allowing host-states to evade international responsibility by hiding behind perhaps outdated legal standards that will obfuscate the connection between

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[1901] On the cellular structure of the Al Qaeda organization, see Gunaratna, INSIDE AL QAEDA, *supra* note 3.

[1902] See, e.g., Barry Kellman, *State Responsibility for Preventing Bioterrorism*, 36 THE INTERNATIONAL LAWYER 29-38 (2002). On the relationship between the law of state responsibility and nuclear counter proliferation in the context of Iran, see N. Jansen Calamita, *Sanctions, Countermeasures, and the Iranian Nuclear Issue*, 42 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 1393 (2009). For a pre-9/11 account, see Paul Rubenstein, *State Responsibility for Failure to Control the Export of Weapons of Mass Destruction*, 23 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 319 (1993). On the nuclear issue as it relates to Iran, generally, see Yaël Ronen, THE IRAN NUCLEAR ISSUE (2010).

[1903] Indeed, one of the inherent characteristics of the *hawala* underground banking system lies in the fact that it makes some transactions virtually untraceable or imperceptible to allies in the global struggle against transnational terrorism. See, generally, Wechsler, *Strangling the Hydra*, *supra* note 1491, at 129-143.

private transnational terrorism and the means that such states could have harnessed to prevent avoidable excursions. Consequently, the legal focus has considerably shifted from questions of state complicity or condonation with non-state terrorism to the imposition of primary obligations to act and intervene. This evolution remains informed by calls to enhance states' counterterrorism obligations and, once those obligations are violated, by the possible endorsement of a responsibility-expansive application of the ensuing legal consequences. As demonstrated above, recent Security Council and state practice appear to corroborate such new legal inclination.

Put another way, the analytical crux of the inquiry – which was formerly so dependent on notions of control by the state over, and interdependence with, the principal misfeasors for the purposes of triggering state responsibility – is now morphing into the acknowledgment that the *failure to control* such irregular units may also engage international liability. In that regard, Part I has identified – both descriptively and prescriptively – a paradigm shift towards more indirect modes of state responsibility, a reality that is also being noted in other dimensions of international law, such as individual international responsibility mechanisms and international criminal regimes.[1904] These changes are also mirrored within municipal legal orders as states are increasingly criminalizing behaviour that, formerly, only amounted to evidentiary elements (e.g. enrolment in flight schools, literary materials on bomb-making, the right of association with certain groups, and so on), thereby increasing their due diligence capital in complying with primary counterterrorism obligations. As a corollary, these domestic legal commitments also signal that the prospect of incurring international responsibility may, in fact, incentivize governments to divert public funds, law enforcement and policy infrastructures with a view to enhancing compliance with international law. With this in mind, it has been argued that, whilst immensely instructive in the discussion, the oft-discussed *Nicaragua* line of cases also presents considerable shortcomings, one key aspect being that its interpretation can exacerbate the confusion engendered by merging state responsibility and use of force repertoire.

[1904] See generally Lehto, INTERNATIONAL RESPONSIBILITY, *supra* 48.

The purpose here was not to completely disavow that line of jurisprudence but, simply, to recognize that an equally – if not more – relevant strand of cases could animate the intellectual discourse and foment new deterrence models based on the law of state responsibility. Indeed, it has been argued that *Corfu Channel* convincingly grounds a primary obligation for states to prevent terrorist attacks emanating from their territory.

With the shift in international law now firmly geared towards indirect state responsibility, the inquiry raised two considerable challenges – i.e. the establishment of state responsibility and the ensuing enforcement gap, along with a policy-driven reform of secondary rules of responsibility – which were unpacked and analyzed sequentially in Parts II and III. In their attempt to capture the extant customary scheme of state responsibility, the *ILC Articles on State Responsibility* ultimately relegated to inter-state devices the tasks of ascertaining violations of international law and of applying corresponding legal consequences to those breaches. This codification choice necessarily entails a process of self-judging and autoqualification by aggrieved states, along with the idiosyncratic application of secondary rules of responsibility within the loosely coordinated context of disparate – and often asymmetric – diplomatic relations. That said, it does not mean that the potential intercession of international organizations did not weigh heavily in the debate, or that those bodies failed to contribute to the advancement and further development of that body of law. In this light, Part II of the dissertation concerned itself with shedding light on alternate routes to the dominant vision enshrined within the ILC's text and explored the possible institutionalization of the implementation of state responsibility, in order to better address the enforcement gap and the structural inequities that may ensue from unilateral implementation.

In particular, the present study first attempted to briefly explore the role of both the UN General Assembly and the International Court of Justice in advancing the intellectual discourse in this field. Whilst the General Assembly is decidedly not best suited to address questions of international responsibility, the Court did make significant advances in this regard, most notably through its

seminal jurisprudence on attribution principles and primary obligations related to international prevention. Yet, the application of state responsibility remains – like many things 'international' – marred by the absence of a compulsory jurisdictional decision-maker. Thus, the potential involvement of the Security Council – whilst not uncontroversial – attracted significant consideration in the inquiry. By invoking past and prospective involvement of the Council in this field, the argument tended to demonstrate that state responsibility provides an environment in which political decisions can be made against a legal backdrop. However, in canvassing both Council and Court involvement in making determinations of international responsibility, considerable resistance was exhibited to the idea that such debate should inexorably pit 'political' and 'judicial' functions against each other. Neither was that ever the claim espoused throughout the present work by considering the potential role of political organs in the debate at hand. Rather, the picture that emerges is far more complex and entails interplay between complementary norms and institutions, which can be best described as a mix of political and normative, of state and non-state and of unilateral and multilateral.

Whilst the application of international law by the Council has been random and arbitrary in the past, the *Lockerbie* precedent nonetheless illustrates perfectly the complex web of interlocking factors and dimensions at play described above. Indeed, it provides a working example whereby the application of state responsibility involved the intercession of both the Council and the Court at different stages of the dispute, coupled with an extension of state responsibility principles within Council decision-making. What is more, the implication of those bodies failed to generate dispositive political resolution of the dispute and supplementary international pressure and diplomatic means were required to fully harness state responsibility repertoire with a view to finding common ground. Ultimately, the situation was resolved via diplomacy and compensation was tendered by Libya in order to redress its internationally wrongful act. In addition to demonstrating that the deployment of secondary rules may entail the involvement of various actors – institutional, individual, political or judicial – this

scenario also corroborates the trend aimed at better integrating non-state actors within the furrow of public international law.

Other incursions by the Council into the realm of state responsibility have also been extraordinarily influential for the purposes of the debate at hand. For instance, the Council's involvement in assessing Iraq's unlawful invasion of Kuwait induced that organ to hand down particularly binding manifestations of the state responsibility-derived notions of reparation and guarantees of non-repetition. More compellingly, the Council's application of secondary norms of responsibility proved to be quite extensive as it delineated an international border following Iraq's initial wrongful act. Granted, a comprehensible degree of political pragmatism calls for pondering whether any of the Permanent five would accept such determination for their own borders. At any rate, such precedents indicate that the Council can have some impact in ascertaining the commission of internationally wrongful acts where the deployment of attribution principles proves to be nebulous in connecting private acts to a host-state.[1905] The international response to 9/11 provides a case in point, in that several states accorded significant importance to Council resolutions.[1906] Arguably, such deference signals that states are increasingly concerned with subsuming their actions within the furrow of United Nations authority instead of resorting to unilateral initiatives.[1907] However, this is a far cry from the Council consistently delivering formal findings of international responsibility, since it more usually focuses its enforcement action on the maintenance of international peace and security.[1908] Whilst a case-by-case method seems to animate its decision-making, the Council's exercise of its functions can, arguably, be reconciled with the logic underpinning state responsibility in some instances.[1909] Needless to say, the Council's action will frequently involve a response to a breach of international legal obligations leading it, in some circumstances, to formally assess an

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[1905] See, e.g., Nolkaemper, *Attribution*, *supra* note 248, at 166.
[1906] See, e.g., Nigel D. White, *The Will and Authority of the Security Council After Iraq*, 17 LEIDEN JOURNAL OF INTERNATIONAL LAW 645, 656 (2004).
[1907] See, e.g., Franck, RECOURSE, *supra* note 120, at 67.
[1908] See, e.g., Gray, INTERNATIONAL LAW, *supra* note 844, at 96-97.
[1909] See, generally, *supra* Chapter 3 and authorities cited therein.

internationally wrongful act and to invoke the discipline of state responsibility.[1910] At any rate, should such practice elude the Council, it should be recalled that principles of state responsibility law may nonetheless provide considerable guidance whenever that decisional body is faced with the task of connecting the attacks of non-state actors to sanctuary states. As argued in Chapter 3, the Council's role in promoting international peace and security straddles common terrain with current counterterrorism objectives, thereby making a rapprochement between that organ's functions and the implementation of state responsibility more palatable.

Whilst the prospect of institutionalizing state responsibility was thoroughly explored, any study of state responsibility must also come to grips with the dominant model of implementation espoused by the *ILC Articles on State Responsibility*, namely through inter-state mechanisms. Keeping in mind the abovementioned objectives of better integrating non-state actors under international law and enhancing compliance with counterterrorism obligations, a policy-oriented reform of secondary rules of state responsibility was set out in Part III, which favoured a critical appraisal of the centrality of attribution principles under the ILC's *Articles*. In light of the paradigm shift towards indirect state responsibility advocated in Part I, paired with a new legal focus on states' failures to prevent transnational terrorism and to control the activities of non-state actors, particular resistance was also exhibited to the notion of 'control' as enshrined in the *Articles*. More specifically, recent academic discussion surrounding the attribution of questionably private acts to states has predominantly been framed within the furrow of ILC Article 8, including in the controversial *Genocide* case. In response, the present study has put forth a series of arguments – ranging from policy considerations, to hermeneutics, to rationalism, to structural realism, to legal pragmatism, to legal pluralism – in

[1910] See, e.g., Security Council Resolution 262, UN Doc. S/RES/362 (1968), at para. 4 (pertaining to the situation in the Middle East); Security Council Resolution 687, UN Doc. S/RES/687 (1991) (on Iraq's invasion of Kuwait); Security Council Resolution 1304, UN Doc. S/RES/1304 (2000), at para. 14 (applying that rationale to the situation in the Democratic Republic of the Congo). On some of those precedents' alignment with the prescriptions found in the *UN Charter*, see Lauterpacht, ASPECTS, *supra* note 726, at 42-43.

order to identify more viable bases for attribution under the law of state responsibility, so as to fully implement Security Council resolutions on counterterrorism issues.[1911] One of the potential legal avenues promoted within this framework was the legal device of international responsibility for failing to prevent terrorism by sole reference to ILC Article 12, which is persuasively mirrored in the reasoning extracted from both the *Corfu Channel* and *Tehran Hostages* cases.

More importantly, the adoption of a potential model of international responsibility for failing to prevent terrorism – drawing heavily on domestic law analogies, rationalist legal theory and an international policy thrust aiming at imposing more stringent counterterrorism obligations upon states – was expressly put forth in Part III of the dissertation. In sum, it argued for the establishement of a *prima facie* finding of indirect state responsibility whenever a state fails to prevent a transnational terrorist attack emanating from its territory. Replacing the mechanism of attribution, this normative operation – which could plausibly be analogized to a version of automatic imputation – would then shift the onus of refuting the presumption of indirect responsibility squarely upon the host-state. Whilst this model seeks considerable grounding in domestic manifestations of tort law, other municipal legal analogies and international environmental law, it is probably fair to conclude that it is strongly influenced by strict liability undertones without embodying the full range of that legal standard as it has become to be understood, at least in domestic settings.[1912] In short, the crux of the policy reform is animated by a "rebuttable presumption of responsibility followed by a shift in the burden of proof",[1913] which, amongst other pressing politico-

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[1911] Presumably, other commentators are also calling for a context-sensitive construction of Article 8, which could increase government accountability for the actions of non-state actors. See, e.g., Albrecht Randelzhofer, *Use of Force*, in Bruno Simma *et al*. (eds.), THE UNITED NATIONS: A COMMENTARY 788, 801-802 n.32 (2nd Edition, 2002).

[1912] For an analysis of this position, as expressed in a previous account, see, e.g., Johnstone, *Unlikely Bedfellows*, *supra* note 910, at 28 (2009) (highlighting that this model "prescriptively argues that the rules of attribution should be circumvented altogether in favor of a form of "strict liability" for terrorism", but adding that the reform "mitigates this slightly by introducing a possible defense for states whose territory is used by terrorists to prepare attacks, allowing them to exclude their liability should they successfully demonstrate that they have exercised due diligence to prevent the attacks").

[1913] *Ibid*.

social considerations, purports to allay some of the concerns associated with fact-finding performed by international institutions along with other evidentiary hurdles plaguing the law of state responsibility, especially within the practice of the International Court of Justice.

Bearing this potential deterrence model in mind, Part IV of the present study attempted to tease out the theoretical and practical implications of further delineating the secondary rules of state responsibility, while also identifying potential challenges for future international legal scholarly investigations of the topic and engaging in other interrogations not falling within the ambit of the primary scope of analysis. In particular, whatever becomes the prevalent model of state responsibility ultimately endorsed by the international community, sensible consideration should be accorded to whether a responsibility-expansive regime can be equally applied to both weaker and powerful states. Needless to say, a shared understanding that compliance with international counterterrorism obligations is politically desirable – coupled with the prospect of incurring international responsibility for failing to prevent transnational terrorism – might induce governments to engage in a delicate assessment of whether they should divert their resources and policy infrastructures to combat the scourge of terrorism. However, in contrast with other hazardous fields of activity such as nuclear energy and outer space exploration, terrorism does not generate any immediately tangible benefits to host-states. Therefore, policy enticements militating in favour of enhanced counterterrorism initiatives will have to be furnished to those states that frequently harbour extremist elements. Indeed, the risk assessment and risk management components of the struggle against transnational terrorism bring the tension between the allocation of (sometimes scarce) resources and the issue of political will into sharp relief.

Ultimately, we are working from the premise that the progressive evolution of international law – paired with the prospect of incurring international liability for failing to bring conduct within the parameters of such framework – can induce states to modify their behaviour and inform their internal policy choices. In all modesty, it must be acknowledged that this task can be something

of an uphill political climb when attempting to cast terrorism within the same category as ultra-hazardous fields of activity, such as nuclear programmes or outer space exploration. For instance, the development of nuclear energy falls within narrow state supervision given that considerable benefits may be derived from controlling such sector, thereby prompting states to readily accept the application of more exacting standards of liability in the event of behavioural slippages arising in the context of those operations. Granted, such symmetry is not directly mirrored upon first glance in the present context, as the exploitation of terrorism simply does not yield the same kind of strategic and tangible gains that other activities imply. Conversely, it has been argued on numerous grounds that states do have a shared interest in better controlling terrorism taking root on their territory and, as a corollary, can derive more intangible gains in engaging in enhanced counterterrorism operations (i.e. by accruing both reputational goodwill on the international scene and by increasing their due diligence capital for the purposes of attenuating international responsibility). However, additional policy and legal 'sales pitches' must be envisaged in order to convince states like Iran and North Korea, for example, that bolstering their respective counterterrorism infrastructures may prove comparably advantageous – perhaps even from the perspective of strategic international posturing – when contemplated alongside developing enriched uranium or other nuclear programmes. With this in mind, the present study has attempted to partly fill this enforcement void through an analysis of the concepts of reciprocity (both bilateral and systematized), reputational costs, rationalist choice theory and a pronounced emphasis on both multilateralism and transnational cooperation on counterterrorism issues.

As discussed in Part IV, equally challenging is the imposition of secondary obligations flowing from an internationally wrongful act once the mechanics of establishing state responsibility have been engaged. Aside from the speculative exercise of putting a dollar figure on damages caused by transnational terrorism, the failure to prevent such harm also raises the controversial possibility of invoking some forcible responses. In that regard, the scholarly and policy discussions are often articulated from two conceptual vantage points, namely by

reference to abovementioned ILC Article 8, on one hand, and to the emergence of the 'harbouring and supporting' of terrorists by sanctuary states as indicative of a potential new rule, on the other. Indeed, both frames of reference have begun to merge into a single, consolidated approach with the clarification of legal standards following the logic that Article 8 would have to be tempered, whilst the 'harbouring' or 'toleration' of terrorists might have become stand-alone attribution criteria within the law of state responsibility. For international law to countenance such evolution, there would have to be wide acceptance of a "presumption of conformity between attribution in the law of self-defence and in the law of state responsibility", a threshold easily traversed according to some.[1914]

More controversially, this shift in the law would concomitantly have to operate on the premise that the principle of attribution under state responsibility has been informed and ultimately transformed by parallel developments in the law governing recourse to force –a self-contained regime. If accepted, this premise prompts any interlocutor concerned with the progressive development of state responsibility to ponder whether such pervasive and modulated standard would remain confined to the application of state responsibility *for the unlawful use of force* – be it through equating a state's failure to prevent a transnational terrorist strike with a violation of its Article 2(4) commitments or through more direct state participation in the perpetration of internationally wrongful acts – or whether it would wield transformative influence over the full gamut of secondary norms. Decidedly, little grounding can be persuasively invoked to substantiate this latter position. Indeed, it is highly doubtful that a state that simply 'harbours' or 'tolerates' individuals carrying out transnational credit fraud from its territory or conducting operations engendering transboundary pollution is actually opening itself up to a response involving force for the mere reason that this novel threshold of attribution has been observed. Conversely, should the regime of self-defence wield such commanding influence over international accountability mechanisms – a proposition itself ripe for profound disagreements – such impact would arguably remain limited to the former scenario above. Put another way, in such settings the

[1914] Nolkaemper, *Attribution*, *supra* note 248, at 158.

invocation of self-defence in response to a state's failure to prevent terrorism (i.e. by harbouring or tolerating terrorists on its territory) would constitute a *lex specialis* within the law of state responsibility.[1915] While those eventualities will have to be debated in some other forum, future explorations of the topic will have to bear in mind that the newly implanted paradigm shift towards more indirect modes of international responsibility is actually mirrored in international jurisprudence – perhaps best embodied in the *Corfu Channel* case – and that any corresponding relaxation of attribution principles should invariably be balanced out by a policy-driven, context-sensitive approach such as the one advocated in Part III.

Ultimately, this is undoubtedly the recurrent mantra that should be extracted from an exercise such as the one carried out above: only a fair and balanced approach can guide a fruitful legal analysis, whilst concurrently taking into account the competing stakes involved in incentivizing governments towards better patterns of compliance with counterterrorism duties. Indeed, counterterrorism is not a zero-sum game and entails striking a delicate balance between various competing interests whilst attempting to better integrate various stakeholders in the debate, amongst which non-state actors should feature prominently from the standpoint of both international justice and legal pluralism.

The scholarly and rhetorical reactions to the 9/11 attacks provide an apt concluding case in point. In the last eight years, several interlocutors have uncritically proclaimed that *9/11 changed everything*. Whilst the present study and other similar works have drawn – rather liberally – from that precedent, it is also vital to balance out that viewpoint by entertaining the notion that the response to 9/11 did not necessarily consecrate a novel and binding rule. After all, the response to 9/11 constituted an exceptional response to exceptional circumstances. Whether a new *lex specialis* has been entrenched within the law of state responsibility remains up for debate and likely requires supplementary

[1915] ILC Article 55 provides that "[t]hese 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." See *Articles*, *supra* note 76.

state and institutional practice. More importantly, a lucid construction of the law of state responsibility signifies that we cannot deal in absolutes –we must inexorably take the political with the legal and attempt to make sense of it all with a view to enhancing both prevention and cooperation. Ironically, these concluding observations align somewhat with a rationalist critique of what it perceives as legally idealistic – or politically myopic – accounts exploring the relationship between state responsibility and transnational terrorism. Indeed, one commentator aptly cautions that such endeavours should avoid promoting a deterrence model that "largely ignores the most likely scenario: that nations that approved of or acquiesced in the U.S. invasion of Afghanistan did so for geopolitical reasons and did not believe that they thereby committed themselves to a general legal norm that permits any nation attacked by foreign terrorists—India, Israel, Russia, Iraq—to invade a country that harbored them".[1916]

Granted, political pragmatism is called for at every step of the analysis but this does not mean that the impact of such developments on international law should be disregarded altogether. Whilst it is impossible to precisely assess the incidence of a legal norm in shaping state behaviour or in generating predictable conduct, "[n]either the believers nor the deniers recognize that *multiple factors almost always affect the decisions of policymakers*. In very few situations, probably, is international law wholly determinative of what a state does; but in very few situations, probably, is international law wholly irrelevant."[1917] Hence, again the picture that emerges is one of balance: context is vital and cannot be dissociated from both legal and politico-social realities. Thus, a more equitable and effective narrative on state responsibility for the failure to prevent transnational terrorism can only result from an inclusive process – supplemented by ongoing policy dialogue at domestic, international and transnational levels –

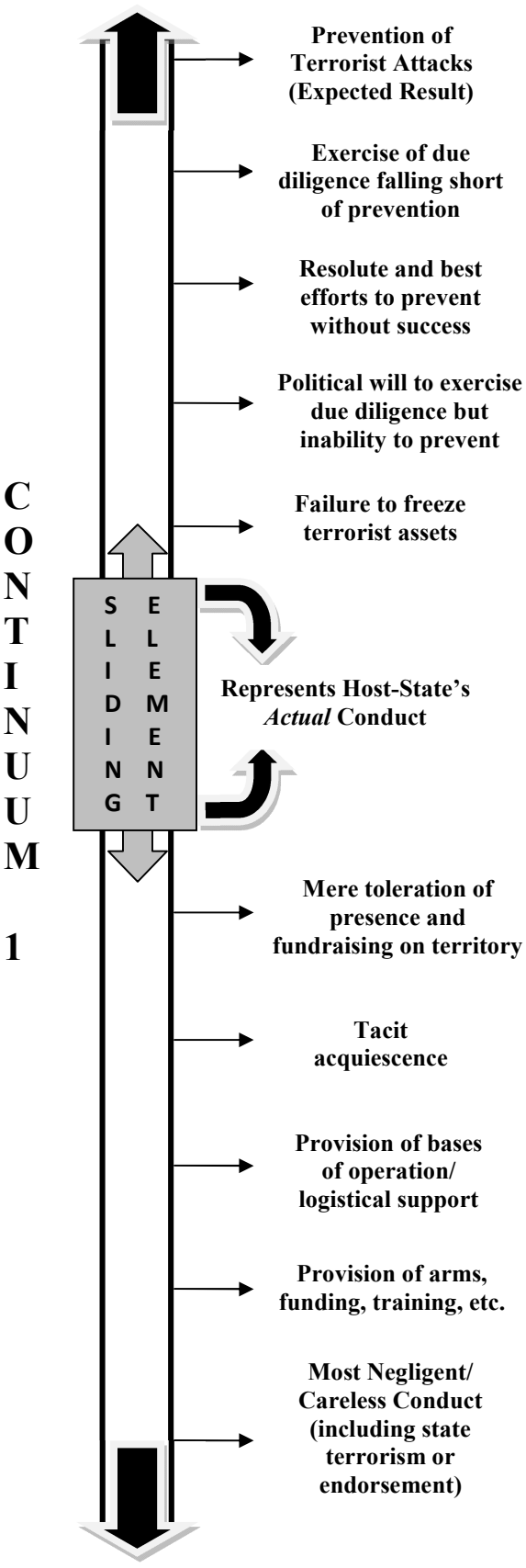
[1916] Eric A. Posner, *Terrorism and the State*: *Rethinking the Rules of State Responsibility*, 121 POLITICAL SCIENCE QUARTERLY 505, 506 (2006) (reviewing Tal Becker's book on the subject of state responsibility and terrorism). See also Litwak, *Containment 2.0*, *supra* note 1494 (essentially arguing that 9/11 did not drastically change the nature of international relations).

[1917] Michael J. Glennon, *Does International Law Matter?*, 98 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 315, 315 (2004). On the imprecision of predicting the impact of international legal norms on the outcome of situations, see *Ibid*, at 316. But for a contrary view, *cf.* Thomas M. Franck, *The Power of Legitimacy and the Legitimacy of Power*: *International Law in an Age of Power Disequilibrium*, 100 AMERICAN JOURNAL OF INTERNATIONAL LAW 88 (2006).

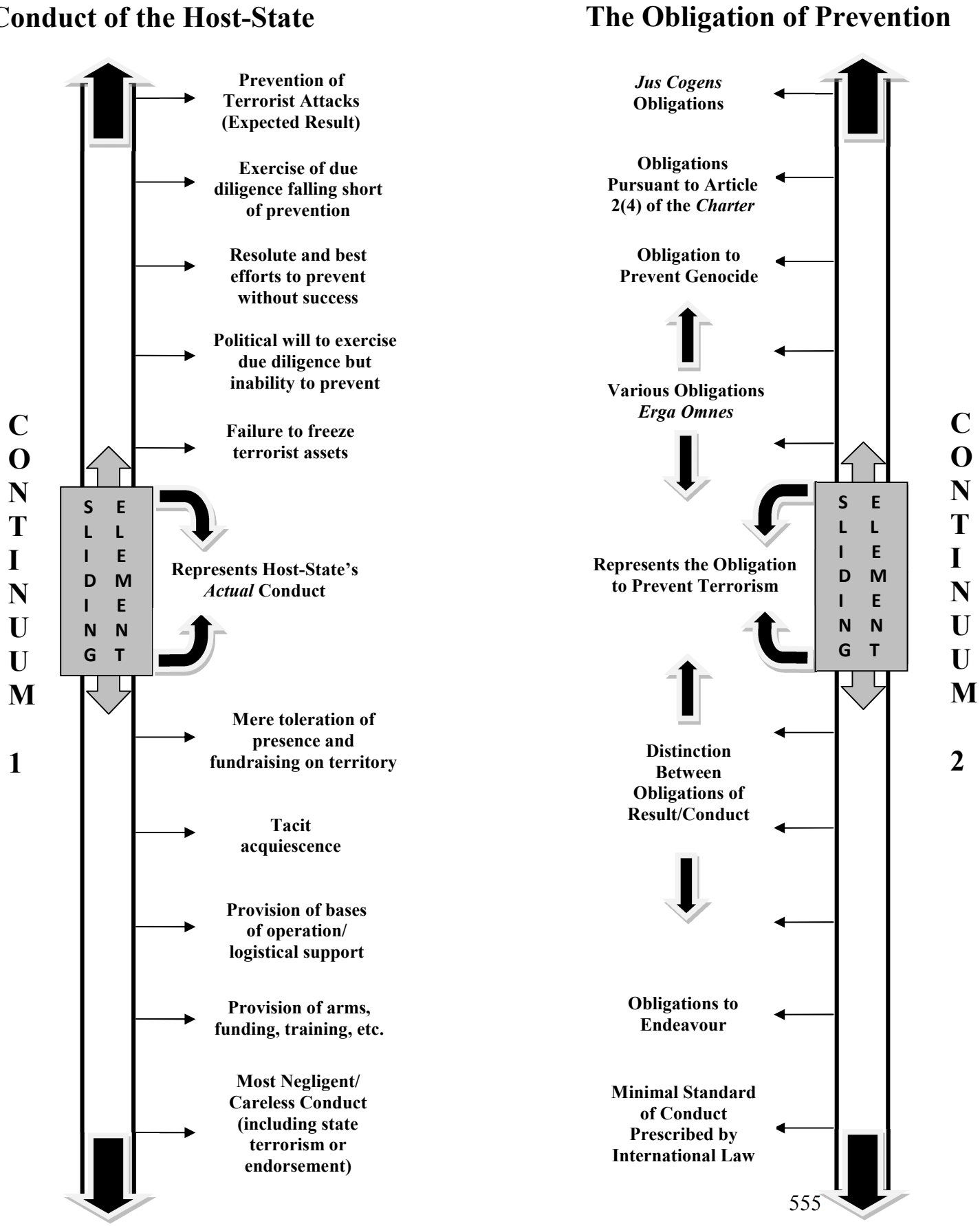
that gives due regard to some practicable middle ground between legal and political dimensions of international relations. And, at the end of the day, is this not what international law should truly be about?

# APPENDIX I

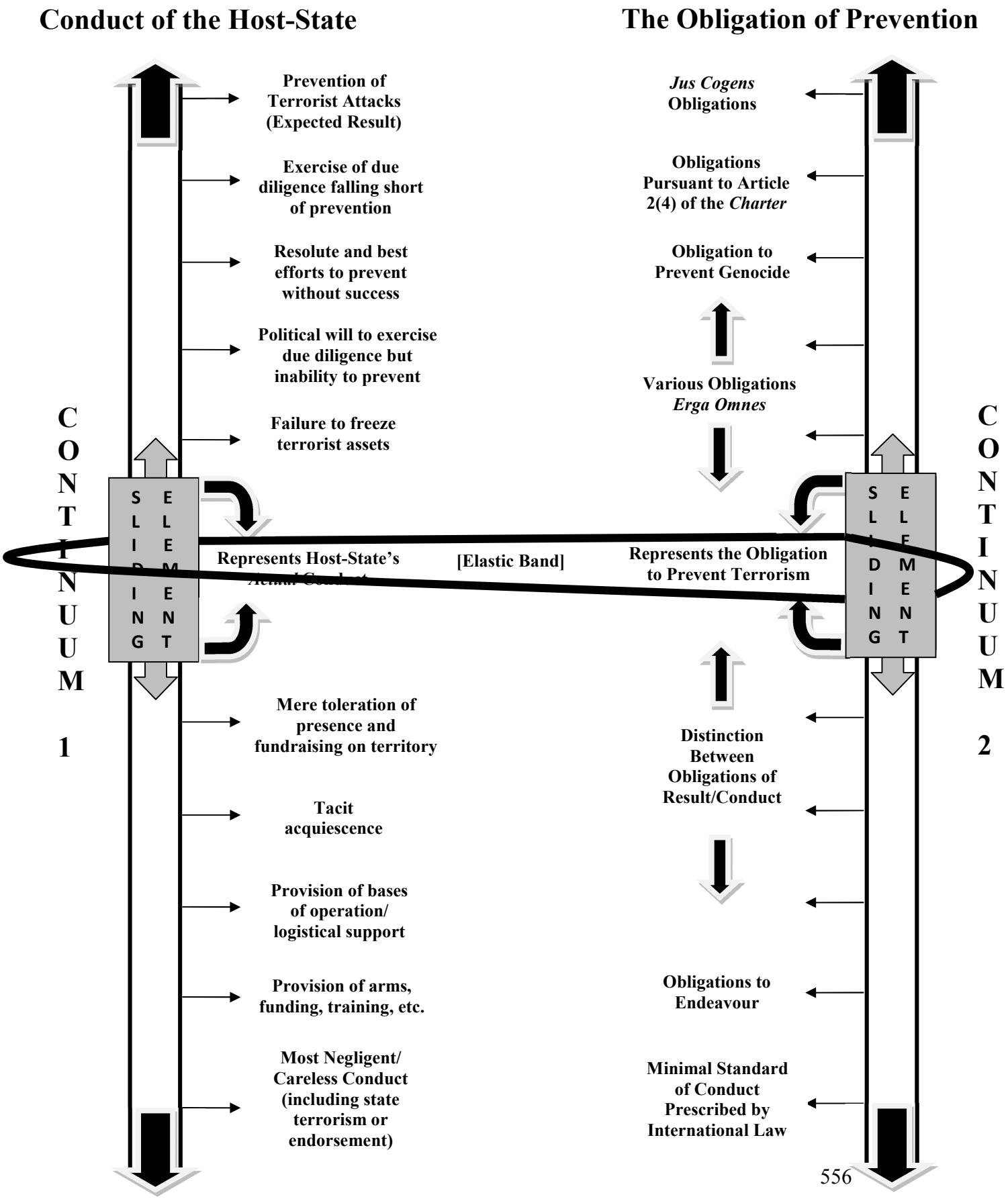
## Conduct of the Host-State



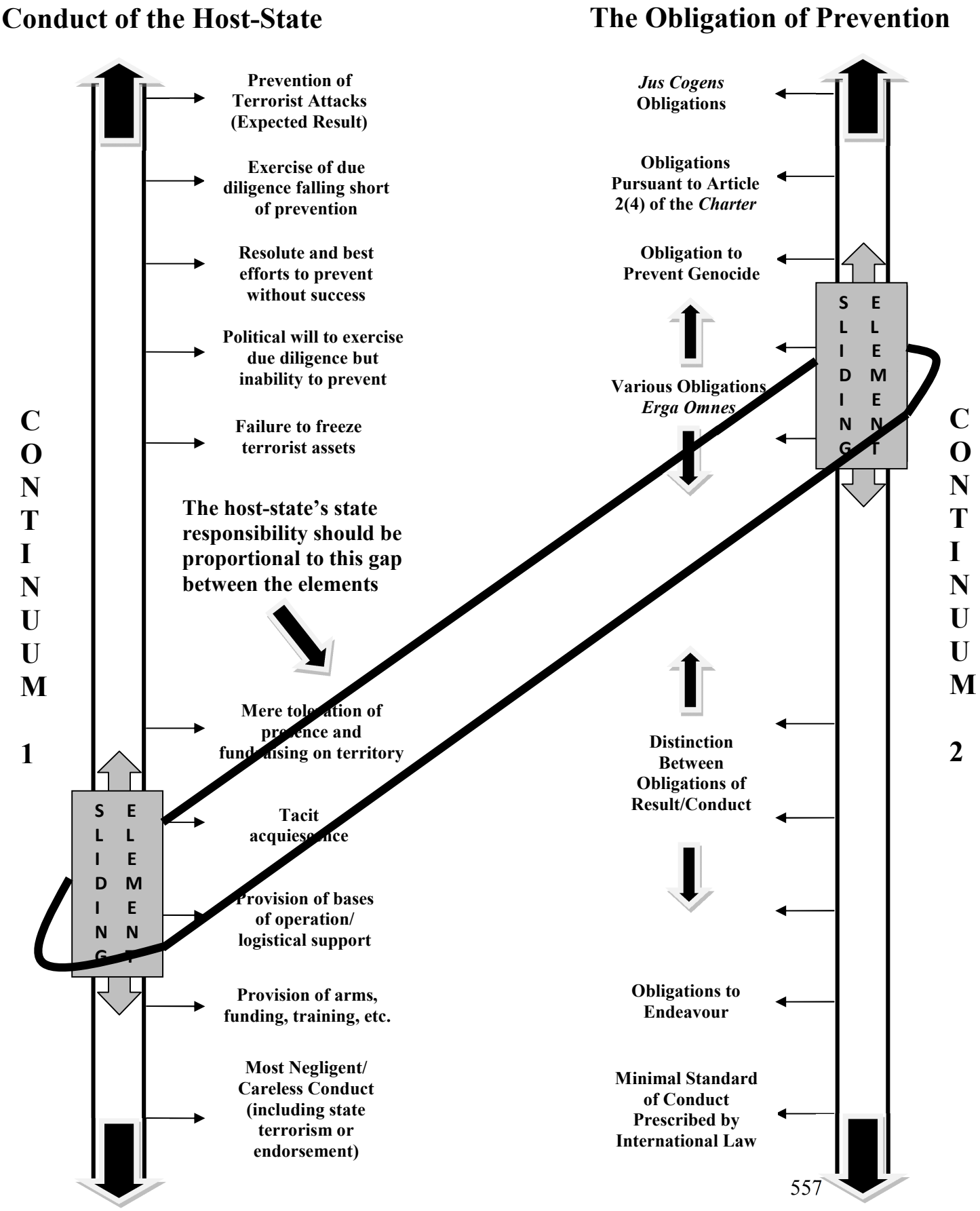
# APPENDIX II


Conduct of the Host-State
The Obligation of Prevention
CONTINUUM 1
CONTINUUM 2
SLIDING ELEMENT
SLIDING ELEMENT
Prevention of Terrorist Attacks (Expected Result)
Exercise of due diligence falling short of prevention
Resolute and best efforts to prevent without success
Political will to exercise due diligence but inability to prevent
Failure to freeze terrorist assets
Represents Host-State's *Actual* Conduct
Mere toleration of presence and fundraising on territory
Tacit acquiescence
Provision of bases of operation/ logistical support
Provision of arms, funding, training, etc.
Most Negligent/ Careless Conduct (including state terrorism or endorsement)
*Jus Cogens* Obligations
Obligations Pursuant to Article 2(4) of the *Charter*
Obligation to Prevent Genocide
Various Obligations *Erga Omnes*
Represents the Obligation to Prevent Terrorism
Distinction Between Obligations of Result/Conduct
Obligations to Endeavour
Minimal Standard of Conduct Prescribed by International Law

# APPENDIX III



# APPENDIX IV


Conduct of the Host-State
The Obligation of Prevention
CONTINUUM 1
CONTINUUM 2
Prevention of Terrorist Attacks (Expected Result)
Exercise of due diligence falling short of prevention
Resolute and best efforts to prevent without success
Political will to exercise due diligence but inability to prevent
Failure to freeze terrorist assets
The host-state's state responsibility should be proportional to this gap between the elements
Mere tolerance of presence and fundraising on territory
Tacit acquiescence
Provision of bases of operation/ logistical support
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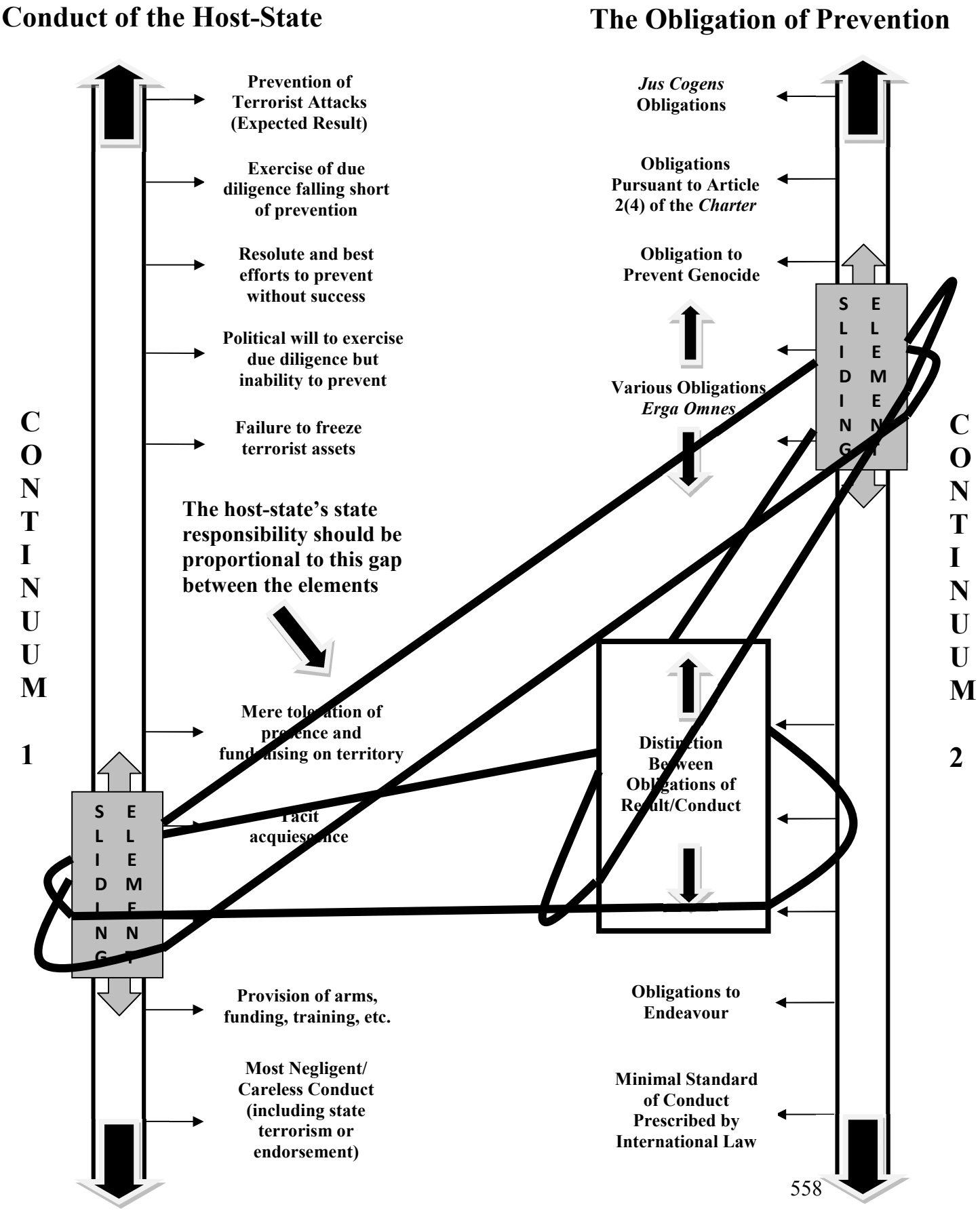
Various Obligations Erga Omnes
Distinction Between Obligations of Result/Conduct
Obligations to Endeavour
Minimal Standard of Conduct Prescribed by International Law
SLIDING ELEMENT

# APPENDIX V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The Obligation of Prevention
CONTINUUM 1
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Obligations to Endeavour
Minimal Standard of Conduct Prescribed by International Law

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