

STATE RESPONSIBILITY FOR TERRORIST GROUPS

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ABSTRACT

This note argues that the Security Council resolutions passed in the wake of the September 11, 2001, terrorist attacks changed the primary rules of international law, but not the secondary rules of state responsibility. The primary rules establish the standards of legal conduct, while the secondary rules define the conditions under which a state is responsible for violating these standards. Under the current legal regime, states do not engage full international responsibility for the acts of terrorist groups that are not de jure or de facto state organs or agents. Rather, states are responsible for the separate delict of their failure to comply with their negative or positive obligations.

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INTRODUCTION

"We will make no distinction between the terrorists who committed the attacks and those who harbor them."

– President George W. Bush, Presidential Address to the Nation (Sept. 11, 2001)¹

In the wake of the September 11, 2001 terrorist attacks,² the United States invoked the right of self-defense to justify military action against Afghanistan. In doing so, the United States advanced two arguments: (1) the September 11 attacks constituted an "armed attack" within the meaning of the UN Charter; and (2) the attack was attributable to Al Qaeda and the United States could target the Taliban regime because it "harbored" and "supported" them.

The North Atlantic Treaty Organization (NATO) and the Organization of American States (OAS) accepted this approach,³ and the United States Congress authorized the President to use force against nations that harbored those responsible for the attacks.⁴ The UN Security Council also passed a series of resolutions arguably supporting the United States' position. It

¹ President George W. Bush, Presidential Address to the Nation (Sept. 11, 2001), *in* GEORGE W. BUSH, WE WILL PREVAIL: PRESIDENT GEORGE W. BUSH ON WAR, TERRORISM, AND FREEDOM, at 3 (2003).

² While there is not an unequivocal definition of terrorism, for the sake of clarity, this note refers to terrorism as defined by Article 2 of the International Convention for the Suppression of the Financing of Terrorism. Under this definition, terrorism is (a) anything covered by relevant UN Conventions and Protocols or (b) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act. International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270 (2000).

³ See Press Release, North Atlantic Treaty Organization, Statement by the North Atlantic Council (Sept. 12, 2001), <http://www.nato.int/docu/pr/2001/p01-124e.htm>; North Atlantic Treaty Organization, Invocation of Article 5 Confirmed (Oct. 2, 2001), <http://www.nato.int/docu/update/2001/1001/e1002a.htm>; North Atlantic Treaty Organization, Statement by NATO Secretary General, Lord Robertson of 2 October 2001, <http://www.nato.int/docu/speech/2001/s011002a.htm>; Resolution of the Twenty-Fourth Meeting of Consultation of Ministers of Foreign Affairs: Terrorist Threat to the Americas, OAS Doc No RC24/Res1/01 (Sept. 21, 2001), <http://www.oas.org/OASpage/crisis/RC.24e.htm>.

⁴ Authorization for the Use of Military Force, Pub. L. No. 107-40, 225 Stat. 224 (2001) ("[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.").

regarded the attacks “as a threat to international peace and security,”⁵ and recognized “the inherent right of individual or collective self-defense in accordance with the Charter.”⁶ The Security Council also created new requirements of state conduct and established what became the Counter-Terrorism Committee (CTC) to monitor compliance.⁷ Under the new obligations, all member states shall, *inter alia*, refrain from giving “active or passive” support to terrorist groups; deny “safe haven to those who finance, plan support, or commit terrorist acts, or provide safe havens” and prevent those who do from operating within their territories; and ensure the application of adequate criminal law to terrorists, their financiers and supporters.⁸

This Note will focus on the second prong of attribution. If the response of the international community represents an acceptance of the “emergent ‘harboring’ or ‘supporting’ rule,” then there has been a significant departure from the customary law of state responsibility.⁹ Traditionally, state responsibility for actions of individuals is grounded in attribution; it attaches only when the individuals qualify as *de jure* or *de facto* organs or agents of the state, so that the acts can be said to have been perpetrated by the state.¹⁰ As applied by the International Court of Justice (ICJ), this requires that the state exercise a degree of direction or control over a private actor beyond merely harboring or supporting them before the state engages full international responsibility for the private actor’s conduct.¹¹ A state may engage responsibility if it violates an obligation to prevent, or abstain from any support for, private harm. However, under traditional principles, “[u]nless the private terrorist operatives function on behalf of the State, the State can be answerable only for violating its distinct duties to prevent, and

⁵ S.C. Res. 1368, ¶ 1, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

⁶ *Id.*

⁷ S.C. Res. 1373, ¶ 6, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

⁸ *Id.*

⁹ Derek Jinks, *State Responsibility for Sponsorship of Terrorist and Insurgent Groups: State Responsibility for the Acts of Private Armed Groups*, 4 CHI. J. INT’L L. 83, 90 (2003); TAL BECKER, *TERRORISM AND THE STATE: RETHINKING THE RULES OF STATE RESPONSIBILITY* (2006).

¹⁰ See Int’l Law Comm’n, Report of the International Law Commission on the Work of its Fifty-Third Session, at 38, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc A/56/10 (2001) [hereinafter *ILC Articles*] (“Thus, the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State.”)

¹¹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Feb. 26, 2007, 46 I.L.M. 188 (2007) [hereinafter *Genocide Convention Case*]; Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) [hereinafter *Nicaragua Case*], See also Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment (July 15, 1999) [hereinafter *Tadic Case*].

abstain from supporting, terrorist activities. It is not answerable in law for the terrorist act itself.”¹²

Not surprisingly, the United States’ position has generated considerable political and academic controversy.¹³ However, recent scholarly discussions on the legality of the use of force in response to the terrorist attacks have shown an “unfortunate tendency of conflating the rules of state responsibility with those of primary international law.”¹⁴ As described by Derek Jinks, the primary rules define the content of the legal obligations, “that is, [they] establish particular standards of conduct (for example, do not take property without adequate compensation). In contrast, the secondary rules of state responsibility define the general conditions under which states are to be considered responsible for internationally wrongful actions or omissions.”¹⁵ Thus, there is an important distinction between the primary rules, which define the obligations of state conduct, and the secondary rules, which are rules of state responsibility and govern the ways in which responsibility applies when the primary rules are violated. Since common-law countries lack a general regime of legal responsibility,¹⁶ this division has been largely absent from works by American legal commentators.¹⁷ Nevertheless, as stated by Roberto Ago, Chairman of the Sub-Committee on State Responsibility, it is an “essential fact that it 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 of the violation.”¹⁸

¹² BECKER, *supra* note 9, at 3.

¹³ See, e.g. Greg Travalio & John Altenburg, *State Responsibility for Sponsorship of Terrorist and Insurgent Groups: Terrorism, State Responsibility, and the Use of Military Force*, 4 CHI. J. INT’L L. 97 (2003); José Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT’L L. 873 (2003); Vincent-Joël Proulx, *Babysitting Terrorists: Should States Be Strictly Liable for Failing to Prevent Transborder Attacks?*, 23 BERKELEY J. INT’L L. 615 (2005).

¹⁴ Marko Milanovic, *State Responsibility for Genocide*, 17 EUR. J. INT’L L. 553, 583-84 (2006).

¹⁵ Jinks, *supra* note 9, at 83.

¹⁶ Daniel Bodansky & John R. Crook, *Symposium: The ILC’s State Responsibility Articles*, 96 AM. J. INT’L L. 773, 780 (2002) (“In common-law countries, there is no general regime of legal responsibility. Substantive rules are classified by their subject matter (e.g., criminal law, tort, contracts, property, family law), each characterized by its own regime of ‘responsibility’ with its own remedies, rules of attribution and invocation, and so forth.”).

¹⁷ But see Jinks, *supra* note 9 (“this expansion of liability was achieved not by refashioning any ‘primary rules’ defining the content of state obligations, but rather by relaxing the ‘secondary rules’ defining state responsibility for breaches of any such obligation.”).

¹⁸ Robert Ago, *Second Report on State Responsibility: The Origin of International Responsibility*, ¶ 7, delivered to the Int’l Law Comm’n, U.N. Doc. A/CN.4/233, reprinted in [1970] 2 Y.B. Int’l L. Comm’n 177, 178, U.N. Doc. A/Cn.4/SER.A/1970/Add.1.

Those who maintain the distinction between primary and secondary rules disagree over the extent to which either has changed since 2001. Many scholars contend, both descriptively and prescriptively, that the secondary rules have changed and that a state that harbors or supports a terrorist group engages full international responsibility for the acts of the terrorists. For example, Derek Jinks has argued that the scope of state responsibility for terrorist groups has expanded “not by refashioning any ‘primary rules’ defining the content of state obligations, but rather by relaxing the ‘secondary rules’ defining state responsibility for breaches of any such obligation.”¹⁹ Jinks bases his conclusion on the US position, the *opinio juris* surrounding the use of force in Afghanistan, and the response of the UN Security Council, NATO, and OAS.²⁰ Similarly, Greg Travalio and John Altenburg argue that the traditional rules of state responsibility “are inadequate in the context of transnational terrorism” and that “the rules have surely changed.”²¹ Travalio and Altenburg look to the absence of an academic consensus, “the increasing attention of the United Nations to the issue of transnational terrorism, and its increasing willingness to condemn the actions of states that harbor and support terrorism,” and the world community’s response, or lack thereof, to the US position.²²

In contrast, this Note argues that the Security Council resolutions passed in the wake of the September 11, 2001 terrorist attacks changed the primary rules of state obligations, but not the secondary rules of state responsibility. As such, states do not engage full international responsibility for the acts of terrorist groups that are not *de jure* or *de facto* state organs or agents. Rather, states are responsible for the separate delict of their failure to comply with their negative or positive obligations. Part I considers the current status of the rules of state responsibility under international law, as defined by the ICJ in the Genocide Convention case.²³ Part II examines how these rules may have changed after September 11, 2001, with a focus on relevant UN Security Council resolutions. Specifically, I conclude that the UN Security Council resolutions alter the primary rules of international law by heightening state obligations relating to terrorism, but their ambiguous language and the single instance of the use of force in Afghanistan are not sufficient to support an instantaneous change to the customary law of state responsibility. The Conclusion assesses the current legal regime and possible approaches for the future.

¹⁹ Jinks, *supra* note 9.

²⁰ *Id.* at 84-88.

²¹ Travalio & Altenburg, *supra* note 13, at 104, 107.

²² *Id.* at 104-111.

²³ *Genocide Convention Case*, *supra* note 11.

I. STATE RESPONSIBILITY UNDER TRADITIONAL INTERNATIONAL LAW

Since its inception, the ICJ has faced issues relating to state responsibility for the conduct of private actors.²⁴ While its decisions are formally binding only to the parties in each dispute,²⁵ the Court nonetheless has tremendous influence in the field of international law and state practice.²⁶ As stated by Pierre-Marie Dupuy, “everyone accepts that [the ICJ’s] judicial interpretations are for the most part binding on all the subjects of international law.”²⁷ In 2007, the Court made history by conducting a trial of a sovereign state for genocide – “a milestone in the development of international law.”²⁸ The Genocide Convention case resolved conflicting precedents and represents the preeminent legal standard of state responsibility for private conduct under international law.

In the Genocide Convention case, the ICJ considered the responsibility of Serbia, formerly the Federal Republic of Yugoslavia, for genocide in the area of Srebrenica in Bosnia and Herzegovina. During the Bosnian War, soldiers of the army of the Republika Srpska, acting under the command of General Mladić, massacred the adult male population of the Bosnian Muslim community in Srebrenica. The Court found that Serbia was not responsible for the commission of genocide, conspiracy or incitement to commit genocide, or complicity in genocide.²⁹ Serbia was, however, responsible for failing to prevent the genocide and to cooperate adequately with criminal prosecutions of suspected génocidaires, thereby violating the Genocide Convention.³⁰ Serbia was also found to have failed to comply with provisional measures, issued by the Court in 1993, which required Serbia to “take all measures within its power to prevent genocide.”³¹

A. *The International Law Commission’s Articles on State Responsibility*

In issuing its judgment, the Court accepted the International Law Commission’s (ILC) State Responsibility Articles. In 1953, the General

²⁴ *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 22-23 (Apr. 9) (A State violates international law, and thus assumes responsibility for acts within its territory, if it knows of the existence of a threat and fails to act to prevent the danger.) [hereinafter *Corfu Channel Case*].

²⁵ Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1055, T.S. 993.

²⁶ Rachel Lorna Johnstone, *State Responsibility: A Concerto for Court, Council, and Committee*, 37 DENV. J. INT’L L. & POL’Y 63, 64 (2008).

²⁷ Pierre-Marie Dupuy, *A Doctrinal Debate in the Globalisation Era: On the “Fragmentation” of International Law*, 1 EUR. J. LEGAL STUD. 1, 5 (2007).

²⁸ Milanovic, *supra* note 14, at 553.

²⁹ *Genocide Convention Case*, *supra* note 11, ¶ 471(2-4).

³⁰ *Id.*, at ¶ 471(5-6).

³¹ *Id.*, at ¶ 471(7).

Assembly invited the International Law Commission to embark on an attempt to codify the rules of state responsibility. The project became “one of the Commission’s longest running and most controversial studies.”³² When the ILC completed the draft articles in 2001, following more than thirty reports and the efforts of five special rapporteurs, the articles were both derided as “a bland gruel not likely to upset the most dyspeptic government official,”³³ and hailed as the ILC’s most important product.³⁴ Despite the controversy, Articles 4-11, which address the rules of attribution, are “generally traditional and reflect a codification rather than any significant development of the law.”³⁵ Articles 4, 8, and 11 are relevant to this note and are as follows:

Article 4. 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.³⁶

Article 8. Conduct directed or controlled by a State

1. The conduct of a person or group of persons shall be considered an act of the 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.³⁷

Article 11. Conduct acknowledged and adopted by a State as its own

1. Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an

³² Bodansky & Crook, *supra* note 16, at 773.

³³ Philip Allott, *State Responsibility and the Unmaking of International Law*, 29 HARV. INT’L L.J. 1, 2 (1988).

³⁴ Bruno Simma, *Presentation by Bruno Simma*, in UNITED NATIONS, THE INTERNATIONAL LAW COMMISSION FIFTY YEARS AFTER: AN EVALUATION 43 (2000).

³⁵ Bodansky & Crook, *supra* note 16, at 783.

³⁶ *ILC Articles*, *supra* note 10, art. 4.

³⁷ *Id.* art. 8.

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.³⁸

The ILC also drafted an article to reinforce these principles, stating, “[t]he conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.”³⁹ While the proposed article was ultimately not included, on the basis that it lacked any independent content,⁴⁰ “this omission can in no way be interpreted as casting doubt on the accepted authority of the rule.”⁴¹ Rather, its deletion “emanated not from any perceived change in this rule, but from the sense that its content was so embedded in the fabric of the ILC’s principles of attribution, that its explicit articulation was superfluous. . . [The deletion was] testimony to the prominent status the rule had acquired.”⁴² Furthermore, the commentary of the Draft Articles still refers to this principle as a “corollary” to the general rule that a state is only responsible for the acts of its organs and agents.⁴³

In the Genocide Convention case, the ICJ accepted Articles 4 and 8 as “customary international law” without further discussion.⁴⁴ Although the Court did not consider Article 11, which was not relevant to the case at hand, the Article is based on the Court’s previous decision in the Iran Hostage case.⁴⁵ The Court also did not find that the rules of state responsibility for genocide were *lex specialis*.⁴⁶ While the Genocide

³⁸ *Id.* art. 11.

³⁹ ILC Draft Article 11, (1975) 2 Y.B. Int’l L. Comm’n 70, U.N. Doc A/CN.4/SER.A/1975/Add.1.

⁴⁰ James Crawford, *First Report on State Responsibility*, (1998) U.N. Doc. A/4/490/Add.5 (“The issue in such cases is not whether the acts of private individuals as such are attributable to the State (they are not), but rather, what is the extent of the obligation of the State to prevent or respond to those acts.”).

⁴¹ BECKER, *supra* note 9, at 45.

⁴² *Id.*

⁴³ *ILC Articles*, *supra* note 10, Commentary to Part 1, Ch. II, ¶ 3. (“As a corollary, the conduct of private persons is not as such attributable to the State.”)

⁴⁴ *Genocide Convention Case*, *supra* note 11, ¶¶ 385, 398.

⁴⁵ *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3, 12 (May 24) [hereinafter *Iran Hostage Case*] (The Court considered whether the actions of Iranian students who had occupied the United States embassy and taken hostages were attributable to the Iranian State. The Court held that the initial takeover was not attributable because the students were not acting on behalf of the state. However, after the takeover, Ayatollah Khomeini publicly approved the occupation and stated that the hostages were “under arrest.” Since organs of the Iranian State expressly adopted the actions of the perpetrators, the Court held that Iran had engaged international responsibility for the subsequent occupation.).

⁴⁶ *Genocide Convention Case*, *supra* note 11, ¶ 401.

Convention contains primary rules of state conduct, the secondary rules of state responsibility for violating those obligations are general.⁴⁷

B. Responsibility for the Crime Itself: ILC Article 4 & State Organs

In order to determine whether Serbia was responsible for the commission of genocide, the ICJ considered whether the perpetrators qualified as either *de jure* or *de facto* state organs. Under Article 4(2), a *de jure* organ of the state includes any person or entity which has that status in accordance with the internal law of the state.⁴⁸ The perpetrators were not *de jure* organs because they were not organs of the state under Serbia's internal law.⁴⁹

The Court looked to its own precedent to determine the legal standard for equating a private actor with a *de facto* state organ. In the *Nicaragua* case, concerning the responsibility of the United States for the actions of the Contras, an armed opposition group in Nicaragua, the ICJ established the "complete dependence" test.⁵⁰ The Court established a strict formulation, believing that, "to equate persons or entities with state organs when they do not have that status under internal law must be exceptional."⁵¹ Under this test, the non-state actor must be "lacking any real autonomy,"⁵² and "the bond between the state and non-state actor must be shown to be so substantial and pervasive that it is virtually indistinguishable from the legal relationship between a state and its own officials."⁵³

Therefore, the question became whether the Serbian government had such close ties to the perpetrators so as to render them completely dependent on the government. The Court acknowledged that the government in Belgrade had provided both military and financial support in the form of weapons and salaries.⁵⁴ The Court also considered the close ethnic, political and financial links between the Serbian government and the perpetrators.⁵⁵ However, although the perpetrators relied on Serbian support, "without which it could not have 'conduct[ed] its crucial or most significant military and paramilitary activities,'" the perpetrators also maintained a "qualified,

⁴⁷ *Id.*

⁴⁸ *ILC Articles*, *supra* note 10, art. 4.

⁴⁹ *Genocide Convention Case*, *supra* note 11, ¶¶ 386-389.

⁵⁰ *Nicaragua Case*, *supra* note 11. The "complete dependence" test is also known as the "strict control" test. See Stefan Talmon, *The Responsibility of Outside Powers for Acts of Secessionist Entities*, 58 INT'L & COMP. L.Q. 492, 498-502 (2009).

⁵¹ *Genocide Convention Case*, *supra* note 11, ¶ 393.

⁵² *Id.* ¶ 394.

⁵³ BECKER, *supra* note 9, at 69.

⁵⁴ *Genocide Convention Case*, *supra* note 11, ¶¶ 238-239, 388.

⁵⁵ *Id.* ¶¶ 240, 422.

but real, margin of independence.”⁵⁶ Ultimately, the Court held that the remaining margin of autonomy was decisive, so that the perpetrators did not qualify as *de facto* organs of the state of Serbia.⁵⁷

C. Responsibility for the Crime Itself: ILC Article 8 & Agents of the State

After determining that the perpetrators of the genocide were not organs of the state, the Court considered whether the perpetrators met the criteria for agents of the state. Under Article 8, the conduct of a person or a group of persons can be attributable to a state if the person or group is acting on the instructions of, or under the direction or control of, that state in carrying out the conduct.⁵⁸ The Court considered two differing approaches to establish direction and control: (1) the ICJ’s effective control test from the *Nicaragua* case,⁵⁹ and (2) the ICTY’s overall control test from the *Tadic* case.⁶⁰

The ICJ established the effective control test in the *Nicaragua* case as essentially a “subsidiary test” to determine an agency relationship that the Court resorts to only when the non-state actor cannot be proven to be a *de facto* organ of the state under the complete dependence test.⁶¹ Unlike the complete dependence test, the effective control test does not attribute the non-state actor’s conduct as a whole to the state. Rather, it must be shown “that this ‘effective control’ was exercised, or that the state’s instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.”⁶² The effective control test requires a partial dependency that may be inferred from the provision of financial, logistical, intelligence, or military support; however, “[c]ontrol must not be confused with ‘support.’”⁶³ The state must control the operation from beginning to end: planning the operation, choosing targets, issuing directives, and providing support.⁶⁴ Although the effective control test is less onerous than the complete dependence test, “in practice it is still extremely difficult to establish the exercise of effective control by the outside power over individual operations or activities” of a non-state actor.⁶⁵ In fact, “few principles which are as clear in theory pose as great a difficulty

⁵⁶ *Id.* ¶ 394 (quoting the *Nicaragua Case*, *supra* note 11, ¶ 111).

⁵⁷ *Id.*

⁵⁸ *ILC Articles*, *supra* note 10, art. 8.

⁵⁹ *Nicaragua Case*, *supra* note 11.

⁶⁰ *Tadic Case*, *supra* note 11.

⁶¹ Stefan Talmon, *supra* note 50, at 502.

⁶² *Genocide Convention Case*, *supra* note 11, ¶ 400.

⁶³ Stefan Talmon, *supra* note 50, at 502-503.

⁶⁴ *Nicaragua Case*, *supra* note 11, ¶ 112.

⁶⁵ Stefan Talmon, *supra* note 50, at 503.

or as rare an exception in practice.”⁶⁶

Responding to the practical difficulties of the effective control test, the ICTY Appeals Chamber developed an alternative test of “overall control.” The ICTY is empowered to consider, *inter alia*, “grave breaches” of the Geneva Conventions of August 12, 1949, which must have been committed in an international armed conflict.⁶⁷ Thus, in the *Tadic* case, the ICTY’s jurisdiction was dependent on a determination that the actions of a Bosnian Serb secessionist group within Bosnia and Herzegovina were attributable to the Federal Republic of Yugoslavia, transforming an internal conflict into an international conflict.⁶⁸ The Appeals Chamber “partly discarded” the ICJ’s effective control test, holding it not “persuasive” in cases of organized groups.⁶⁹ The Appeals Chamber differentiated between the degree of control required for the attribution of acts of “private individuals” and those of “individuals making up an organized and hierarchically structured group” – a slight to the ICJ’s *Nicaragua* holding as the Contras were organized and hierarchically structured.⁷⁰ In the later cases, the Appeals Chamber built upon this distinction and propounded the overall control test, which requires the provision of financial, logistical, and military assistance and participation in the organization, coordination, or planning of operations.⁷¹ In contrast to the effective control test, the state is not required to have directed the particular operation, identified targets, or given specific orders; instead, the non-state actor can maintain autonomy over means and tactics while participating in a common strategy with the state.⁷²

Confronted with the two possible tests, the *Genocide Convention* Court reaffirmed its support for the effective control test. The Court held that a state would be responsible for non-state actors to the extent that “they acted in accordance with that State’s instructions or under its effective control.”⁷³ In doing so, the ICJ distinguished the extent to which the *Tadic* judgment

⁶⁶ BECKER, *supra* note 9, at 71.

⁶⁷ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, art. 2, S/RES/827 (1993), Annex.

⁶⁸ *Tadic Case*, *supra* note 11.

⁶⁹ Stefan Talmon, *supra* note 50, at 505; *Tadic Case*, *supra* note 11, ¶ 115. The ICTY Appeals Chamber misread the *Nicaragua* case as creating a single test of complete dependence – with effective control as a subsidiary requirement of the test, rather than two independent tests. *Id.* ¶ 112.

⁷⁰ *Tadic Case*, *supra* note 11, ¶¶ 120, 124, 125, 128, 145.

⁷¹ *Id.* ¶¶ 131, 137, 138, 145.

⁷² *Id.* ¶¶ 131, 132, 137, 145. See also Prosecutor v. Delalic, Case No. ICTY-96-21-A, Judgement, ¶ 42, 47 (Feb. 20, 2001).

⁷³ *Genocide Convention Case*, *supra* note 11, ¶ 400.

bears on state responsibility.⁷⁴ The Court suggested that the ICTY Appeals Chamber should not consider “issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it.”⁷⁵ Furthermore, the ICJ noted that the overall control test would have “the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf.”⁷⁶ The Court also rejected the argument that the crime of genocide by its nature required alterations to the effective control test, holding that “[t]he rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*.”⁷⁷

Thus, the *Nicaragua* effective control test was “confirmed as the correct one and is thus further entrenched in international law.”⁷⁸ Applying the test, the Court determined that Serbia would be responsible for the acts of the perpetrators only if “the physical acts constitutive of genocide that have been committed by organs or persons other than the State’s own agents were carried out, wholly or in part, on the instructions or directions of the state, or under its effective control.”⁷⁹ Under this test, the Court held that the perpetrators of the genocide did not qualify as state agents because there was no proof that the Belgrade authorities had issued instructions to commit the massacres and or that they exercised effective control over the operations, in the course of which the massacres were perpetrated.⁸⁰ Therefore, Serbia was not responsible for the actions of the perpetrators.

⁷⁴ The ILC Commentary does not take a position regarding the two approaches, but also suggests that issues of State responsibility are beyond the purview of the ICTY. *See* Int’l L. Comm’n, Report of the International Law Commission on the Work of its Fifty-Third Session, cmt. to art. 8, ¶ 5, at 106, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001). (“But the legal issues and the factual situation in the *Tadic* case were different from those facing the Court in that case. The tribunal’s mandate is directed to issues of individual criminal responsibility, not State responsibility, and the question in that case concerned not responsibility but the applicable rules of international humanitarian law.”).

⁷⁵ *Genocide Convention Case*, *supra* note 11, ¶ 403. The ICJ understood the overall control test to be a replacement for the effective control test for agency, but the ICTY Appeals Chamber applied the overall control test in lieu of the complete dependence test for *de facto* State organs. *Id.*, ¶ 404. *See Tadic Case*, *supra* note 11, at ¶ 167.

⁷⁶ *Genocide Convention Case*, *supra* note 11, ¶ 406.

⁷⁷ *Id.* ¶ 401.

⁷⁸ Johnstone, *supra* note 26, at 70.

⁷⁹ *Genocide Convention Case*, *supra* note 11, ¶ 401.

⁸⁰ *Id.* ¶ 413-414.

D. Responsibility for Complicity Under ILC Article 16

After determining that Serbia was not responsible for the commission of genocide, the Court considered whether Serbia was complicit in the genocide. The Court distinguished complicity from an agency relationship; unlike many national systems where an individual who gives instructions to commit a crime is guilty of complicity, an individual who gives instructions to an agent to commit genocide is directly responsible for the crime under international law.⁸¹ To define complicity, the Court looked to ILC Article 16, which states:

Article 16. Aid or assistance in the commission of an internationally wrongful act

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.⁸²

Accepting “aid or assistance” as a starting point for a definition of complicity, the Court examined its *actus reus* and *mens rea* requirements. In contrast to its previous conclusions that a state organ or agency relationship had not been established, the Court found that Serbia satisfied the *actus reus* requirement for complicity. The Court weighed evidence of the substantial financial, political, and military aid that Serbia had begun providing to the perpetrators “long before” the commission of genocide and continued to supply during the massacres.⁸³ Thus, there was “little doubt that the atrocities in Srebrenica were committed, at least in part, with the resources which the perpetrators of those acts possessed as a result of the general policy of aid and assistance pursued towards them by the [Federal Republic of Yugoslavia].”⁸⁴

Having fulfilled the *actus reus* requirement, the Court turned to the standard for *mens rea*. The ICJ incorporated the knowledge requirement from ILC Article 16 into the definition of complicity in genocide as requiring knowledge on the part of an organ of Serbia.⁸⁵ The Court interpreted knowledge as being “clearly aware” that “not only were

⁸¹ *Id.* ¶ 419.

⁸² *Id.* ¶ 420; *ILC Articles*, *supra* note 10, art. 16.

⁸³ *Genocide Convention Case*, *supra* note 11, ¶ 422.

⁸⁴ *Id.*

⁸⁵ *Id.* ¶ 420.

massacres about to be carried out or already under way, but that their perpetrators had the specific intent characterizing genocide, namely, the intent to destroy, in whole or in part, a human group, as such.”⁸⁶ While Serbia had provided material support to the perpetrators, the Court was not convinced that the Belgrade authorities were aware of the decision to eliminate the adult male Muslim population of Srebrenica.⁸⁷ Therefore, organs of the Serbian state could not have supplied aid to the perpetrators with awareness that the aid would be used to commit genocide and Serbia did not engage international responsibility for acts of complicity in genocide.⁸⁸ The high bar that the Court set for the *mens rea* standard of complicity discourages similar charges in other areas, including state complicity in terrorism.⁸⁹

E. Responsibility Under Positive Duties to Prevent and Punish Wrongs

Article 1 of the Genocide Convention also mandates positive duties for states to prevent and punish genocide.⁹⁰ Though not responsible for the genocide itself, Serbia was found to have violated both of these obligations.⁹¹

The Court stated that the duty to prevent genocide is an obligation of conduct and not of result. Therefore, a state does not incur responsibility simply because it fails to prevent genocide. “[R]esponsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide.”⁹² In making this assessment, the Court turned to the notion of due diligence, which it considered “of critical importance.”⁹³ The standard of due diligence varies based on the primary rules at stake; sometimes the standard is that of a “civilised” or “well-organized” state, while at other times, such as in the care of foreign dignitaries, performance must be excellent.⁹⁴ However, due diligence is always a standard of

⁸⁶ *Id.* ¶ 422.

⁸⁷ *Id.* ¶ 423.

⁸⁸ *Id.* ¶¶ 423-424.

⁸⁹ See BECKER, *supra* note 9, at 229 (There has been “minimal consideration” of a complicity approach to terrorism).

⁹⁰ *Id.*, ¶ 425; *Genocide Convention Case*, *supra* note 11, ¶ 425; Convention on the Prevention and Punishment of the Crime of Genocide, art. 1, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277; See also, International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (2001).

⁹¹ *Genocide Convention Case*, *supra* note 11, ¶¶ 438, 450.

⁹² *Id.* ¶ 430.

⁹³ *Id.*

⁹⁴ Riccardo Pisillo-Mazzechi, *The Due Diligence Rule and the Nature of the International*

international law, regardless of the degree of care a state takes in its own domestic affairs.⁹⁵

In assessing due diligence, the Court considered the state's capacity to influence effectively the action of the perpetrators, based on its relationship to and distance from the perpetrators and any limits under international law.⁹⁶ The Court held as irrelevant the question of whether the state would not have been able to prevent the genocide even if it had employed all means reasonably at its disposal.⁹⁷ A state, however, can engage responsibility for a failure to prevent genocide only if the genocide was actually committed, limiting the scope of the Court's inquiry to matters relating to the massacre at Srebrenica.⁹⁸ This does not mean that a state's obligation to prevent genocide only arises once genocide commences, but that a state cannot be held responsible for a genocide that never occurred.⁹⁹

Finally, the Court distinguished the applicable standard from that of complicity in both its *actus reus* and *mens rea* requirements. The *actus reus* of complicity must be a positive act, whereas responsibility to prevent genocide can be engaged by an omission.¹⁰⁰ The act or omission does not depend on fault attributable to a particular state organ, but rather an objective standard based on the actions and omissions of the state as a whole.¹⁰¹ The fault could even be that the appropriate state organ does not exist. Since the higher standard for the *actus reus* of complicity was already satisfied, the Court did not consider fully the lower standard for the failure to prevent genocide.¹⁰² However, the Court did note that the Belgrade government was "in a position of influence" over the perpetrators "unlike that of any of the other States parties to the Genocide Convention owing to the strength of the political, military and financial links" between the state and the perpetrators.¹⁰³

Similarly, while the *mens rea* requirement for complicity in genocide must consist of a proven knowledge of the genocidal intentions and actions of the perpetrators, the intent for the failure to prevent genocide requires only that the state was aware, or should normally have been aware, of a "serious danger that acts of genocide would be committed."¹⁰⁴ In applying

Responsibility of States, 35 German Y.B. Int'l L. 9, 41-42 (1992).

⁹⁵ Johnstone, *supra* note 26, at 74.

⁹⁶ *Genocide Convention Case*, *supra* note 11, ¶ 430.

⁹⁷ *Id.*

⁹⁸ *Id.* ¶ 431.

⁹⁹ *Id.*

¹⁰⁰ *Id.* ¶ 432.

¹⁰¹ *Id.*

¹⁰² *Genocide Convention Case*, *supra* note 11, ¶ 422.

¹⁰³ *Id.* ¶ 434.

¹⁰⁴ *Id.* ¶ 432.

this standard, the Court reaffirmed its conclusion that the Belgrade authorities were not aware of the decision to eliminate the adult male Muslim community of Srebrenica, which was significant to negate the *mens rea* for complicity.¹⁰⁵ However, under the standard for the prevention of genocide, the Court held that, “given all the international concern about what looked likely to happen at Srebrenica, given President Milošević’s own observations to General Mladić, which made it clear that the dangers were known and that these dangers seemed to be of an order that could suggest intent to commit genocide, unless brought under control, it must have been clear that there was a serious risk of genocide in Srebrenica.”¹⁰⁶ Since Serbia had not shown any action on its part to prevent the atrocities, the state violated its obligation to prevent the Srebrenica genocide in such a manner as to engage its international responsibility.¹⁰⁷

In a separate analysis, the Court also found that Serbia engaged international responsibility for its failure to prosecute the perpetrators. Because the genocide took place outside of Serbian territory, the state was not obligated to try the perpetrators in its own courts.¹⁰⁸ However, Article 6 of the Genocide Convention requires that persons charged with genocide be tried by a competent tribunal of the state in which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction.¹⁰⁹ The Court thus determined that Serbia was under an obligation to cooperate with the ICTY by virtue of the Dayton Agreement and its duties as a member state of the United Nations.¹¹⁰ The Court also found that Serbian officials were aware that General Mladić, who had been indicted by the ICTY for genocide, had ventured onto Serbian territory and remained in Serbia at the time of the *Genocide Convention* decision.¹¹¹ Since Serbian authorities had failed to do “what they could and can reasonably do” to arrest a high-level perpetrator, the state violated its duty to punish genocide.¹¹² Bosnia and Herzegovina received “reparation in the form of satisfaction,” or a declaration from the ICJ that Serbia had failed to comply with its obligations.¹¹³

¹⁰⁵ *Id.* ¶ 423.

¹⁰⁶ *Id.* ¶ 438.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* ¶ 442.

¹⁰⁹ Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 90, art. 6.

¹¹⁰ *Genocide Convention Case*, *supra* note 11, ¶ 449.

¹¹¹ *Id.* ¶ 448.

¹¹² *Id.* ¶¶ 448-450.

¹¹³ *Id.* ¶ 463. The Court held that there was not a sufficient causal nexus to entitle the Applicant to financial compensation. *Id.* ¶ 462.

F. Responsibility Under the Separate Delict Rule

The ICJ's *Genocide Convention* decision establishes the separate delict rule in public international law. Under this rule, if a state fails to fulfill a legal obligation to prevent wrongful conduct by private individuals, the state is "responsible for having violated not the international obligation with which the individual's action might be in contradiction, but the general or specific obligation imposing on its organs a duty to provide protection."¹¹⁴ In the *Genocide Convention* case, the ICJ distinguished between a state's responsibility for the actions of its *de jure* or *de facto* organs or agents and that for its failure to comply with its positive obligations. In the latter case, the state "will not be held responsible for any genocide or attempted genocide that follows their inaction or ineptitude, but only for the separate delict of their failure to intervene."¹¹⁵

The separate delict rule has become increasingly pervasive since the earlier decades of the 20th century.¹¹⁶ Although other theories were "prevalent at the turn of the 20th century, the views of these commentators have since been overwhelmed by scholarly works that adopt, in express or implied terms, the separate delict theory."¹¹⁷ International legal bodies, such as Iran-US Claims Tribunal,¹¹⁸ and the Eritrea-Ethiopia Claims Commission,¹¹⁹ have applied the separate delict theory. The separate delict theory has historically influenced arbitral awards, codification efforts, state practice, and the works of legal commentators.¹²⁰ Not surprisingly, the ICJ has applied the separate delict principle since its inception.¹²¹

As applied today, the separate delict theory is consistent across a variety

¹¹⁴ Robert Ago, "Fourth Report on State Responsibility" (1972) 2 YB Int'l L. Comm'n 71, 123 UN Doc A/CN.4/264.

¹¹⁵ Johnstone, *supra* note 26, at 113.

¹¹⁶ BECKER, *supra* note 9, at 24.

¹¹⁷ BECKER, *supra* note 9, at 36.

¹¹⁸ *Short v. Islamic Republic of Iran*, 16 Iran-US Claims Trib. Rep. 76, 85 (1987) (The private acts of supporters of the Islamic revolution who were not acting under instruction were not attributable to the Iranian government, despite anti-American statements from Ayatollah Khomeini.).

¹¹⁹ Eritrea-Ethiopia Claims Commission, Civilian Claims, Ethiopia's Claim No 5, 17 Dec. 2004, p. 11, available at <http://www.pcacpa.org/ENGLISH/RPC/EECC/ET%20Partial%20Award%20Dec%202004.pdf> (Concluding that Eritrea was responsible for failing to ensure that Ethiopian civilians were protected during hostilities from private violence.).

¹²⁰ *Id.* at 24-36.

¹²¹ *Corfu Channel Case*, *supra* note 24, at 22 (The ICJ held Albania responsible for the separate delict of failure to notify shippers of the existence of a minefield in Albanian territorial waters, of which the State was aware.); *See also* Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) 2005 I.C.J. 116 (Dec. 2005) (Finding Uganda responsible, *inter alia*, for failing to prevent violations of international humanitarian law by non-state actors in the Ituri district.).

of legal bodies. Under this “modern view,” a state is not responsible for the acts of private individuals, but solely for the “failure of the state to perform its international duty of preventing the unlawful act, or failing that, to arrest the offender and bring him to justice.”¹²² As such, “[t]he delinquency of the private individuals is no longer taken as a basis of State responsibility, but as merely the occasion for calling into operation certain duties of the state.”¹²³

G. Limits to Positive Duties: Crimes in the Absence of a Functioning State

A state’s positive obligations to prevent wrongs may still exist even in the absence of a functioning government or in territory not under the state’s control. In the absence of an official state government, such as during a revolution, armed conflict or foreign occupation, responsibility partially shifts to persons exercising governmental authority. In these cases, the ILC Articles provide:

Article 9. Conduct carried out in the absence or default of the official authorities

1. 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 exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.¹²⁴

For example, the Iran-U.S. Claims Tribunal found that the Revolutionary Guard, in “maintaining” law and order and immigration control, were acting “in the absence of official authorities, in operations of which the new Government must have had knowledge and to which it did not specifically object.”¹²⁵ Similarly, scholars have argued that some of the rebel groups in the Democratic Republic of the Congo have exercised governmental authority by acting as signatories in the Lusaka Ceasefire Agreement and collecting taxes in areas under their control.¹²⁶ These are exceptional cases

¹²² Eduardo Jiménez de Aréchaga, *International Responsibility*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 531, 560 (Max Sørensen ed., 1968).

¹²³ *Id.*

¹²⁴ *ILC Articles*, *supra* note 10, art. 9.

¹²⁵ *Yeager v. Iran*, 17 Iran-U.S. Claims Trib. Rep. 92, 104 (1987).

¹²⁶ Stephanie A. Barbour & Zoe A. Salzman, “*The Tangled Web*”: *The Right of Self-Defense Against Non-State Actors in the Armed Activities Case*, 40 N.Y.U. J. INT’L L. & POL. 53, 96 (2008).

that occur only rarely.¹²⁷

Even in these cases, a state government retains some responsibility. While there is limited precedent on the topic, the European Court of Human Rights has addressed the issue. In the *Ilascu* case, the Court considered Moldovan nationals who were convicted and, in the case of one political leader, sentenced to death by the Supreme Court of the Moldavian Republic of Transdniestria, a region of Moldova that declared its independence in 1991.¹²⁸ While the Court found that the Russian Federation's responsibility was engaged in respect of the unlawful acts committed by the Transdniestrian separatists,¹²⁹ this did not excuse Moldova of all responsibility. The Court emphasized the positive obligations of contracting states to take appropriate measures to ensure respect for rights and freedoms within its territory, even when the exercise of the state's authority is limited within its territory.¹³⁰ Since Moldova is "the only legitimate government of the Republic of Moldova under international law," then, "even in the absence of effective control over the Transdniestrian region, Moldova still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention."¹³¹

Although Moldova did not cease to have jurisdiction within the meaning of Article 1 of the European Convention over territory subject to the control of secessionist groups or foreign powers, the factual situation did affect the Court's interpretations of Moldova's responsibilities.¹³² The Court found:

[S]uch a factual situation reduces the scope of that jurisdiction in that the undertaking given by the State under Article 1 must be considered by the Court only in the light of the Contracting State's positive obligations towards persons within its territory. The State in question must endeavour, with all the legal and diplomatic means

¹²⁷ *ILC Articles*, *supra* note 10, Commentary to art. 9, ¶ 1.

¹²⁸ ECtHR, *Ilascu & others v. Moldova & the Russian Federation*, with Romania intervening, 48787/99, Judgment, 8 July 2004 [hereinafter *Ilascu Case*].

¹²⁹ *Id.* ¶ 382.

¹³⁰ *Id.* ¶ 313.

¹³¹ *Id.* ¶¶ 330-331. *But see*, ECtHR, *Loizidou v. Turkey*, Application No. 15318/89, Judgment, 18 December 1996, para. 49. (By affirming the applicant's reasoning that not holding Turkey accountable for territory it occupied in the Republic of Cyprus would create "a vacuum as regards responsibility for violations of human rights," the Court suggested that the Republic of Cyprus no longer had any obligation regarding the occupied territory.)

¹³² *Ilascu Case*, *supra* note 128, ¶ 333.

available to it *vis-à-vis* foreign States and international organisations, to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention.¹³³

The Court accepted that Moldova had made diplomatic and additional efforts and could do little else at the time. However, the Court found that “[t]he ceasefire agreement of 21 July 1992 ended the first phase of Moldova’s efforts to exercise its authority throughout its territory.”¹³⁴ Moldova began to “adopt an acquiescent attitude, maintaining over the region of Transnistria a control limited to such matters as the issue of identity cards and customs stamps.”¹³⁵ Since one of the applicants was released after Moldova’s efforts weakened, Moldova failed to discharge its positive duties under the European Convention.

Under this standard, a state remains subject to the newly heightened positive obligations to prevent terrorism, even in areas not fully under its control. For example, Pakistan must continue to act diligently to prevent terrorism despite the Taliban presence in Waziristan, and Colombia retains responsibility for territory under control of the Revolutionary Armed Forces of Colombia. However, the factual situation may lessen the due diligence standard.

In summary, under current international legal standards, a state engages responsibility for the acts of non-state actors if the actors are *de jure* or *de facto* state organs, the actors are agents under the direction or control of the state, or the state clearly and unequivocally adopts the private conduct as its own. Otherwise, the state is not responsible for private acts, although the state “may be responsible for its own acts or omissions in relation to that private conduct where it is subject to a separate legal obligation to prevent, punish or otherwise regulate that conduct.”¹³⁶ Thus, there remains a “strict division between the public and private sphere that is broken only in the rare instances when private conduct is unmistakably elevated to the public domain through the establishment of a principal-agent relationship between the State and the non-state actor.”¹³⁷

II. STATE RESPONSIBILITY FOR TERRORIST GROUPS: THE RESPONSE TO SEPTEMBER 11, 2001

The September 11, 2001 terrorist attacks called into question traditional

¹³³ *Id.*

¹³⁴ *Id.* ¶ 328.

¹³⁵ *Id.* ¶ 329.

¹³⁶ BECKER, *supra* note 9, at 78.

¹³⁷ *Id.* at 79.

rules of state responsibility for private conduct. While the use of terrorism as a tactic “has rarely been absent from history,”¹³⁸ the attacks were “spectacular events of an unprecedented symbolic and substantive magnitude.”¹³⁹ They demonstrated the capacity of contemporary terrorist groups to engage in large-scale, transnational acts of violence with fluidity and anonymity. In contrast, the international legal system is generally grounded in a system of fixed sovereign states, allowing for “some measure of reciprocity and with the benefit of some degree of deterrence.”¹⁴⁰ These non-state actors had the potential to “engage in State-like violence without bearing the burden of state-like responsibility.”¹⁴¹

Following the attacks, the UN Security Council issued a series of counterterrorism resolutions and several states participated in military action in Afghanistan. These measures focused on state responsibility for terrorist groups, which “thrive on State inaction, on governmental toleration or acquiescence in their activities, and on weak counter-terrorist infrastructures.”¹⁴² Attribution was crucial both in justifying military and other coercive action against alleged state sponsors of terrorism and in adapting the terrorist threat to a traditional framework of sovereign states.¹⁴³ I argue these resolutions established a series of new responsibilities for states regarding terrorists groups that operate within state territory. However, the extent to which these actions altered the international legal rules of state responsibility is unclear.

A. Self-Defense and the Use of Force: The U.S. Position

While alterations to the primary obligations of state conduct were relatively straightforward, military action in Afghanistan and the implications for the future use of force were more contentious. Under the UN Charter, the use of force in self-defense must be in response to an “armed attack” that is attributable to the target state.¹⁴⁴

¹³⁸ Walter Laqueur, *Left, Right, and Beyond: The Changing Face of Terror*, in HOW DID THIS HAPPEN: TERRORISM AND THE NEW WAR 71 (James F. Hoge Jr. & Gideon Rose eds., 2001).

¹³⁹ Richard Falk, *Encroaching on the Rule of Law: Post-9/11 Policies within the United States*, in NATIONAL INSECURITY AND HUMAN RIGHT: DEMOCRACIES DEBATE COUNTERTERRORISM 20 (Alison Brysk & Gershon Shafir eds., 2007).

¹⁴⁰ BECKER, *supra* note 9, at 1.

¹⁴¹ *Id.*

¹⁴² *Id.* at 2.

¹⁴³ Cf. William Rosenau, *US Counterterrorism Policy*, in HOW STATES FIGHT TERRORISM: POLICY DYNAMICS IN THE WEST 133-156 (Doron Zimmermann and Andreas Wenger eds., 2007) (Discussing US counterterrorism policy under the Reagan administration, which identified terrorist organizations as proxies of the Soviet government.).

¹⁴⁴ U.N. Charter art. 51.

Previously, armed attacks have only been recognized as such when committed by states. While the text of Article 51 does not specify whether an armed attack must be committed by a state,¹⁴⁵ the traditional understanding is that the state requirement is implicit and, therefore, that a state may not respond in self-defense against a non-state actor.¹⁴⁶ According to Judge Kooijmans, this “has been the generally accepted interpretation for more than 50 years.”¹⁴⁷ This view is reflected in the draft definition of aggression for the International Criminal Court and by the ICJ, which has held that Article 51 only recognizes “an inherent right of self-defense in the case of armed attack *by one State against another State*.”¹⁴⁸ Thus, scholars, such as Antonio Cassese, argue that only acts attributable to a state qualify as armed attacks that justify self-defense.¹⁴⁹

A number of scholars have rejected the traditional state requirement, although, as delineated by Tal Becker, there are two schools of thought regarding the appropriate.¹⁵⁰ In the first school, the victim state may freely target a responsible non-state actor, such as a pirate ship on the high seas.¹⁵¹ However, in accordance with the traditional view, Oscar Schachter has argued that the victim state may not respond on the territory of a state that is not also directly responsible for the attacks.¹⁵² As Greg Travalio and John

¹⁴⁵ *Id.*

¹⁴⁶ Jutta Brunnée, *The Security Council and Self-Defence: Which Way to Global Security?*, in *THE SECURITY COUNCIL AND THE USE OF FORCE* 122 (Niels Blokker & Nico Schrijver eds., 2005); Frédéric Mégre, ‘War?’ *Legal Semantics and the Move to Violence*, 13 *EUR. J. INT’L L.* 361 (2002).

¹⁴⁷ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 198, Separate Opinion of Judge Kooijmans, ¶ 35 (July 9) [hereinafter *Wall case*].

¹⁴⁸ Int’l Crim. Ct., Assembly of States Parties, Resumed seventh session, *Report of the Special Working Group on the Crime of Aggression*, ICC-ASP/7/SWGCA/2 (Feb. 9-13, 2009); *Wall case*, *supra* note 147; *See also* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 45 I.L.M. 271 (Dec. 19, 2005) (holding that Article 51 did not permit Uganda to use force against guerillas within the Democratic Republic of Congo because the acts of those guerillas were not attributable to the State).

¹⁴⁹ Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 *EUR. J. INT’L L.* 993 (2001); *See also* Murphy, *Protean Jus ad bellum*, in *A WISER CENTURY? JUDICIAL DISPUTE SETTLEMENT, DISARMAMENT AND THE LAWS OF WAR 100 YEARS AFTER THE SECOND HAGUE PEACE CONFERENCE* (T. Giegerich and A. Zimmermann eds., 2009) (Arguing that the *Nicaragua* decision “seems to have passed into the corpus of accepted jurisprudence” as a required standard of attribution.); Mark A. Drumbl, *Judging the 11 September Terrorist Attack*, 24 *HUM. RTS. Q.* 323, 330 (2002) (“the basic legal test... is whether the state had ‘effective control’ over the wrongdoers”).

¹⁵⁰ Becker divides the views into three schools, with the traditional view as an additional school. BECKER, *supra* note 9, at 159-165.

¹⁵¹ *Id.* at 160.

¹⁵² Oscar Schachter, *The Lawful Use of Force by a State Against Terrorists in Another*

Altenburg explain, “[b]ecause an attack against the terrorists violates the territorial integrity of the host state the ‘armed attack’ of the terrorists must be attributable to that state. Only then can force be used against the terrorists in that state or against the forces of that state itself.”¹⁵³

Members of the second school support self-defense against a non-state actor in the territory of another state, regardless of whether the target state is directly responsible for the attacks.¹⁵⁴ Yoram Dinstein contends that international law must not require a state to “patiently endure painful blows, only because no sovereign State is to blame for the turn of events.”¹⁵⁵ However, even under this school of thought, “the use of military force against the state, as opposed only to the non-state terrorists, would be impermissible.”¹⁵⁶ Ruth Wedgwood cautions that self-defense in these cases should not target the “independent assets of the host countries” and should be limited to the “direct instrumentalities of the armed attack.”¹⁵⁷

Since both schools prohibit the use of force in self-defense against the institutions of state that is not directly responsible for an armed attack, attribution becomes “a critical issue.”¹⁵⁸ Historically, the actions of a non-state actor are attributable to a state only if the actor is a *de jure* or *de facto* state organ, the actor is an agent under the direction or control of the state, or the state clearly and unequivocally adopts the private conduct as its own.¹⁵⁹ While the government of Afghanistan was alleged to have harbored and supported members of the Al Qaeda terrorist group, the US government did not accuse the state of exercising direction or control over the group. The use of force in Afghanistan therefore suggested a determination that:

[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

Country, in *TERRORISM & POLITICAL VIOLENCE: LIMITS & POSSIBILITIES OF LEGAL CONTROL* 243, 249 (Henry H. Han ed., 1993).

¹⁵³ Travalio & Altenburg, *supra* note 13, at 102.

¹⁵⁴ BECKER, *supra* note 9, at 161.

¹⁵⁵ YORAM DINSTEIN, *WAR AGGRESSION AND SELF-DEFENSE* (3rd ed. 2001); *See also* Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT’L L. 839, 840 (2001).

¹⁵⁶ Jordan Paust, *Use of Armed Force against Terrorists in Iraq, Afghanistan and Beyond*, 35 CORNELL INT’L L.J. 533, 540 (2002) (limiting the use of force against the state to cases where “the state is organizing, fomenting, directing, or otherwise directly participating in armed attacks by non-state terrorists.”).

¹⁵⁷ Ruth Wedgwood, *Responding to Terrorism: The Strikes against Bin Laden*, 24 YALE J. INT’L L. 559, 566 (1999).

¹⁵⁸ Travalio & Altenburg, *supra* note 13, at 102.

¹⁵⁹ *See* Discussion *supra* Section I.

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).¹⁶⁰

Since this rule had never been previously endorsed,¹⁶¹ such an assertion would represent a “dramatic shift” in the rules of international law.¹⁶²

The US government responded affirmatively to both issues: (1) characterizing the terrorist acts as an “armed attack,” as defined under the UN Charter, and (2) maintaining that the use of force against Afghanistan was permitted because it was legally responsible for the armed attack. In doing so, the US government rejected the first school of thought regarding armed attacks by non-state actors. US officials avoided distinguishing between the other schools of thought regarding the range of permissible targets by arguing that Afghanistan had engaged international responsibility for the attacks. President Bush advocated holding the state responsible for the attacks because they were “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.”¹⁶³ Thus, the use of force on Afghan soil and against Afghan institutions became acceptable. The US Congress adopted this view, declaring:

[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.¹⁶⁴

This view, known by some commentators as the “harbor or support” rule,¹⁶⁵ is a rejection of the tradition doctrine of state responsibility. The US government advocated holding the Taliban directly responsible for the attacks “because it ‘allowed’ Al-Qaeda to operate not because it directed or

¹⁶⁰ Alvarez, *supra* note 13, at 879.

¹⁶¹ *Id.*

¹⁶² Johnstone, *supra* note 26, at 113.

¹⁶³ UN Security Council, Letter From the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, (Oct. 7, 2001), on file with U.N. Doc No. S/2001/946 (2001).

¹⁶⁴ See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

¹⁶⁵ Jinks, *supra* note 9, at 92.

controlled their activities.”¹⁶⁶ Under this standard, the “regime and the terrorists who support it are now virtually indistinguishable.”¹⁶⁷

The “harbor and support” rule did receive some international support in the wake of the attacks. NATO interpreted the September 11 attacks as “armed attacks” directed from “abroad” against the United States, invoking the collective self-defense provision in Article 5 of NATO’s founding treaty.¹⁶⁸ Specifically, NATO found that al Qaeda conducted the attacks and that the Taliban regime worked in concert with al Qaeda by protecting Osama bin Laden and his “key lieutenants.”¹⁶⁹ OAS took a similar position. OAS “implicitly interpreted” the terrorist attacks as “armed attacks.”¹⁷⁰ The organization also recognized the inherent right of self-defense and invoked the collective self-defense provision of the Inter-American Treaty of Reciprocal Assistance.¹⁷¹

B. Alterations to the Primary Obligations of State Conduct

Following the September 11 attacks, the UN Security Council reconsidered the international legal standard for state responsibility for terrorist groups. Before 2001, the Security Council resolutions condemned state-sponsored terrorism, declaring:

[E]very 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.¹⁷²

After the attacks, the Security Council acted to “[enhance] the

¹⁶⁶ BECKER, *supra* note 9, at 5.

¹⁶⁷ President George W. Bush, Remarks by the President from Speech to the United Nations General Assembly (Nov. 10, 2001), in GEORGE W. BUSH, WE WILL PREVAIL: PRESIDENT GEORGE W. BUSH ON WAR, TERRORISM, AND FREEDOM, at 69 (2003).

¹⁶⁸ See Press Release, North Atlantic Treaty Organization, Statement by the North Atlantic Council (Sept 12, 2001), <http://www.nato.int/docu/pr/2001/p01-124e.htm>; North Atlantic Treaty Organization, Invocation of Article 5 Confirmed (Oct 2, 2001), available at <http://www.nato.int/docu/update/2001/1001/e1002a.htm>.

¹⁶⁹ Lord Robertson, NATO Secretary General, Statement for North Atlantic Treaty Organization, Statement by, (Oct. 2 2001), available at <http://www.nato.int/docu/speech/2001/s011002a.htm>.

¹⁷⁰ Jinks, *supra* note 9, at 87.

¹⁷¹ Resolution of the Twenty-Fourth Meeting of Consultation of Ministers of Foreign Affairs: Terrorist Threat to the Americas, OAS Doc No RC24/Res1/01 (Sept 21, 2001), available at <http://www.oas.org/OASpage/crisis/RC.24e.htm>.

¹⁷² S.C. Res. 748, pmbl. ¶ 6, U.N. Doc. S/RES/748 (Mar. 31, 1992).

accountability not just of the terrorists that perpetrate these atrocities but also of the States that are charged to protect individual citizens against them.”¹⁷³ The resulting resolutions marked “a change in the primary rules” of state conduct.¹⁷⁴

On September 12, 2001, the Security Council passed Resolution 1368. Dispensing with the conventional show of hands, the Security Council stood together “in a show of unity in the face of the scourge of terrorism.”¹⁷⁵ Resolution 1368 called on all “States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and stresses that *those responsible for aiding, supporting, or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable.*”¹⁷⁶ Although discussing responsibility, the Resolution does not specify whether offending states will be held accountable for the acts of the terrorist group or for the separate delict of aiding, supporting, and harboring. Moreover, the phrase “those responsible” could be “broad enough to be interpreted as referring to non-state actors who shall be held accountable by states in domestic judicial process,” particularly because the identity of the perpetrators was unclear at the time.¹⁷⁷

Two weeks later, the Security Council comprehensively overhauled the international counterterrorism infrastructure by creating a series of primary obligations on states.¹⁷⁸ Resolution 1373 was the result of a Security Council meeting that lasted five minutes without any state remarks.¹⁷⁹ The Resolution mandated that states “shall” prevent the funding of terrorism by criminalizing the provision or collection of funds, freezing existing funds, and prohibiting the donation of funds.¹⁸⁰ All states “shall” also refrain from giving any “active or passive” support to terrorist groups; suppress recruitment and arms transfers to terrorists; cooperate in the exchange of intelligence and share “early warnings” to other states; “[d]eny safe haven to those who finance, plan, support or commit terrorist acts, or provide safe havens” and prevent the same from operating or freely moving in their territories; and ensure adequate criminal law and its application against terrorists, their financiers and supporters.¹⁸¹ It also “calls upon” states to exchange pertinent information, to cooperate in matters of criminal justice,

¹⁷³ BECKER, *supra* note 9, at 2.

¹⁷⁴ Johnstone, *supra* note 26, at 89.

¹⁷⁵ U.N. SCOR, 56th Sess., 4370th mtg. at 8, U.N. Doc. S/PV.4370 (Sept. 12, 2001).

¹⁷⁶ S.C. Res. 1368, ¶ 3, U.N. Doc. S/RES/1368 (Sept. 12, 2001) (emphasis added).

¹⁷⁷ Johnstone, *supra* note 26, at 81.

¹⁷⁸ S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

¹⁷⁹ U.N. SCOR 56th Sess., 4385th mtg., U.N. Doc. S/PV.4385 (Sept. 28, 2001).

¹⁸⁰ S.C. Res. 1373, *supra* note 178, ¶ 1.

¹⁸¹ *Id.* ¶ 2.

to ensure that asylum systems are not abused by participants in terrorism, and to ratify relevant Conventions.¹⁸² Finally, the Security Council “[n]otes with concern” connections between international terrorism and other international crimes, such as illegal trafficking in drugs, arms, and nuclear material, and emphasizes, without mandating, the need for cooperation.¹⁸³ Resolution 1373 also establishes the Counter-Terrorism Committee (CTC), consisting of one representative of each Council member, to monitor compliance with the new obligations.¹⁸⁴

Resolution 1373 extended the power of the Security Council beyond the scope of any previous resolution. Earlier efforts, such as those regarding Taliban involvement with terrorist groups, either created binding obligations that were confined to a specific threat,¹⁸⁵ or addressed terrorism generally with voluntary recommendations.¹⁸⁶ In comparison, Resolution 1373 was “a general prescription of conduct to all member states, rather than a specifically targeted executive order directed to a particularly mischievous state that is thought to pose a threat to international peace and security. Further, it is without limit of time.”¹⁸⁷ The Resolution placed the Security Council in an unusual “legislative” role, dictating provisions for states to incorporate into their domestic legislation.¹⁸⁸ The Security Council also surpassed previous bounds by requiring states to ratify various Conventions. For example, the Resolution not only requires ratification of the International Convention for the Suppression of the Financing of Terrorism, but also adopts certain provisions.¹⁸⁹ At the time the Resolution was passed, however, only four countries (Botswana, Sri Lanka, the United Kingdom, and Uzbekistan) were parties to the Convention.¹⁹⁰ The Security Council also neglected to incorporate the Convention’s “the safety-net provisions” for the benefit of suspects; the “‘alleged offender’ of the Convention loses the presumption, or at least possibility, of innocence to become simply the ‘person[] involved in terrorist acts’ in the Council Resolution.”¹⁹¹

¹⁸² *Id.* ¶ 3.

¹⁸³ *Id.* ¶ 4.

¹⁸⁴ *Id.* ¶ 6.

¹⁸⁵ S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999).

¹⁸⁶ S.C. Res. 1269, U.N. Doc. S/RES/1269 (Oct. 19, 1999).

¹⁸⁷ Johnstone, *supra* note 26, at 83.

¹⁸⁸ Paul C. Szasz, *The Security Council States Legislating*, 96 AM. J. INT’L L. 901, 905 (2002).

¹⁸⁹ International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270 (2000) [hereinafter Terrorism Financing Convention of 1999].

¹⁹⁰ James Martin Ctr. for Nonproliferation Studies, Appendix XII: *U.N. Conventions on Terrorism, Inventory of International Nonproliferation Organizations and Regimes 2002*, at 358-63 (Nov. 19, 2007), available at <http://cns.miis.edu/inventory/pdfs/apmunterII>.

¹⁹¹ Johnstone, *supra* note 26, at 84; Compare International Convention for the Suppression

Despite the revolutionary nature of Resolution 1373, the response from the member states was overwhelmingly positive. The CTC received unprecedented cooperation as all 191 states submitted the first round reports called for by the Resolution, a stark contrast to previous reporting requests.¹⁹² A vast majority of member states also began to ratify the relevant Conventions.¹⁹³ In the UN General Assembly, Cuba stood as the lone dissenter, arguing:

The Security Council has been pushed to give its legal support to the hegemonic and arbitrary decisions of the dominant Power. Those decisions violate the Charter and international law and encroach upon the sovereignty of all States. In this, the Council is once again usurping the functions of the General Assembly, which is the only organ whose universal membership and democratic format could legitimize such far-reaching decisions. The Council uses the unusual method of imposing on all States some of the provisions found in the conventions against terrorism, to which individual States have the right to decide whether or not they wish to be signatories.¹⁹⁴

However, any other objectors remained silent or expressed their concerns behind doors, while outwardly complying with the Resolution.

The UN Security Council has reaffirmed its initial response to the September 11 attacks. However, the Security Council has also begun to alter its approach to incorporate human rights norms, and has softened its language in legally significant ways. In 2004, the Security Council created additional obligations on states: to deny assistance to non-state actors attempting to obtain biological, chemical, or nuclear weapons,¹⁹⁵ to amend or enforce their domestic laws to prevent non-state actors handling such weapons,¹⁹⁶ to complete mandatory reports on compliance,¹⁹⁷ and to do so

of the Financing of Terrorism, art. 3, Dec. 9, 1999, 39 I.L.M. 270 (2000), with S.C. Res. 1373, ¶ 2(a), U.N. Doc. S/RES/1373 (Sept. 28, 2001).

¹⁹² Eric Rosand, *Current Developments: Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism*, 97 AM. J. INT'L L. 333, 337 (Apr. 2003).

¹⁹³ U.N. Secretariat, Office of the High Comm'r for Human Rights, *Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body*, at 19, U.N. Doc. HRI/MC/2006/2 (Mar. 22, 2006).

¹⁹⁴ U.N. GAOR, 56th Sess., 13th plen. mtg. at 16, U.N. Doc. A/56/PV.13 (Oct. 1, 2001) (speech by Mr. Rodríguez Parrilla of Cuba).

¹⁹⁵ S.C. Res. 1540, ¶ 1, U.N. Doc. S/RES/1540 (Apr. 28, 2004).

¹⁹⁶ *Id.* ¶ 5.

regardless of obligations in any relevant non-proliferation treaties.¹⁹⁸ But, unlike previous resolutions, Resolution 1540 did not express the Security Council's willingness to ensure compliance by "all necessary steps." Rather, the Resolution expresses the Security Council's "intention to monitor closely the implementation of this resolution and, at the appropriate level, to take further decisions which may be required to this end."¹⁹⁹ Also unlike previous resolutions, member states largely complied, but expressed their concerns with the legislative aspects of the Resolution.²⁰⁰ In response, later counterterrorism resolutions began to "call upon" states to act, rather than "deciding that States shall" act.²⁰¹ Resolutions, such as those targeting the "glorification of terrorist acts" and "incitement" to terrorism, also began to incorporate some free speech and human rights concerns.²⁰²

The UN sanctions regime, originally a product of the response to the Taliban's involvement with terrorist groups, also underwent a series of evolutions.²⁰³ The Security Council acted to extend the sanctions and reporting requirements and sought to improve cooperation between the 1267 sanctions committee and the CTC.²⁰⁴ As time passed, however, the Security Council began to alter the sanctions regime to reflect human rights concerns. The Security Council permitted a loosening of the sanctions regime in individual cases to respect basic necessities and allow for payment of debts,²⁰⁵ and reminded states of their obligations under international law, particularly those regarding human rights.²⁰⁶ In 2006, with challenges

¹⁹⁷ *Id.* ¶ 4.

¹⁹⁸ *Id.* ¶ 3.

¹⁹⁹ *Id.* ¶ 11.

²⁰⁰ Roberto Lavalle, *A Novel, if Awkward, Exercise in International Law-Making: Security Council Resolution 1540*, 51 NETH. INT'L L. REV. 411, 426-428 (2004).

²⁰¹ S.C. Res. 1624, ¶ 4, U.N. Doc. S/RES/1624 (Sept. 14, 2005) (Calling upon States to improve passenger screening in international transport.); S.C. Res. 1566, ¶ 3, U.N. Doc. S/RES/1566 (Oct. 8, 1982), ¶ 2 ("Calls upon States to cooperate fully in the fight against terrorism, especially with those States where or against whose citizens terrorist acts are committed, in accordance with their obligations under international law, in order to find, deny safe haven and bring to justice, on the basis of the principle to extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens.").

²⁰² S.C. Res. 1624, *supra* note 201, pmbl. ¶ 5, 7, ¶ 1.

²⁰³ S.C. Res. 1267, *supra* note 185.

²⁰⁴ S.C. Res. 1735, ¶¶ 1, 29, U.N. Doc. S/RES/1735 (Dec. 22, 2006); S.C. Res. 1617, ¶¶ 1, 15, U.N. Doc. S/RES/1617 (July 29, 2005); S.C. Res. 1526, ¶¶ 1-3, 10, 14-15, U.N. Doc. S/RES/1526 (Jan. 30, 2004); S.C. Res. 1455, ¶¶ 1, 3-4, U.N. Doc. S/RES/1455 (Jan. 17, 2003); S.C. Res. 1390, ¶¶ 1 to 2(a)-(c), U.N. Doc. S/RES/1390 (Jan. 16, 2002).

²⁰⁵ S.C. Res. 1452, ¶¶ 1-2, U.N. Doc. S/RES/1452 (Dec. 20, 2002).

²⁰⁶ S.C. Res. 1456, ¶ 6, U.N. Doc. S/RES/1456 (Jan. 20, 2003).

looming before the European Court of Justice,²⁰⁷ the Security Council finally created a system for “delisting” innocent persons from the sanctions regime.²⁰⁸

In the first years after 2001, the CTC underwent more subtle changes. Outwardly, the Security Council acted to reinforce the CTC. Over several years, the Security Council bolstered the provisions in Resolution 1373,²⁰⁹ and restructured and strengthened the CTC, authorizing additional powers, such as assisting states in complying with their counterterrorism obligations and conducting state visits.²¹⁰ In theory, the CTC’s mandate and the tenor of relevant resolutions, such as the alarming provision in Resolution 1373 indicating the Security Council’s “determination to take all necessary steps in order to ensure the full implementation” of counterterrorism obligations, would support an aggressive role with possible enforcement action by the UN Security Council.²¹¹ However, CTC Chairman Greenstock took a more moderate, “nonthreatening” approach.²¹² From the beginning, “States were assured that the Council would adopt a non-confrontational, consensus-based approach that is focused on assisting each government in developing its counter-terrorism capacities.”²¹³ Declaring cooperation as “the first hallmark of the CTC’s modus operandi,” Chairman Greenstock fashioned the CTC as a partner that assist states with compliance without judgment or sanctions.²¹⁴ The CTC has maintained its capacity-based approach role and, unlike the 1267 Committee, does not report states that are not in compliance with their obligations to the Security Council.²¹⁵

The Security Council also began to adapt their response to other terrorist attacks. In 2004, the Security Council passed a controversial resolution in response to the Madrid bombings.²¹⁶ Resolution 1530 rushed to attribute responsibility for the bombings to the Euskadi Ta Askatasuna

²⁰⁷ See Joined Cases C-402/05 and C-415/05, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, 2008 E.C.R. I-06351.

²⁰⁸ S.C. Res. 1735, ¶¶ 13-14, U.N. Doc. S/RES/1735 (Dec. 22, 2006).

²⁰⁹ S.C. Res. 1377, annex ¶ 13-15, U.N. Doc. S/RES/1377 (Nov. 12, 2001).

²¹⁰ *Id.*; S.C. Res. 1566, *supra* note 201, ¶ 8; S.C. Res. 1535, ¶¶ 1-3, U.N. Doc. S/RES/1535 (Mar. 26, 2004).

²¹¹ S.C. Res. 1373, *supra* note 178, ¶ 8.

²¹² For a full discussion of the Counter-Terrorism Committee’s development, see Rosand, *supra* note 192.

²¹³ BECKER, *supra* note 9, at 125.

²¹⁴ U.N. SCOR, 57th Sess., 4618th mtg. at 5 (Oct. 4 and 8, 2002), UN Doc. S/PV.4561; see also, Chairman Greenstock’s remarks at U.N. SCOR, 57th Sess., 4561st mtg., at 2 (June 27, 2002), UN Doc. S/PV.4561.

²¹⁵ S.C. Res. 1267, *supra* note 185, ¶ 6(d).

²¹⁶ S.C. Res. 1530, ¶ 1, U.N. Doc. S/RES/1530 (Mar. 11, 2004).

(ETA), a Basque nationalist and separatist group, clear evidence.²¹⁷ However, “[i]t quickly emerged that this was a case of mistaken identity.”²¹⁸ The Security Council did not rush to judgment in response to the London bombings a year later, condemning the “perpetrators, organizers and sponsors of these barbaric acts” without attributing the acts to a specific group or individual.²¹⁹

C. Positive Duties and Due Diligence

UN Security Council resolutions have reaffirmed the primary obligations of states to abstain from and prevent terrorism, “though its component elements have been considerably clarified and intensified.”²²⁰ Just as the Genocide Convention mandates positive duties for states to prevent genocide and punish the perpetrators,²²¹ the UN Security Council confirmed that states have “positive duties to prevent terrorism,” which have become “stricter and more precise.”²²² States are required to prevent acts of terrorism, including incitement, financing, recruitment, weapons acquisition or transfer, and the free movement of terrorist groups.²²³

These positive obligations to prevent terrorism are subject to a due diligence standard.²²⁴ Courts have long since recognized “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.”²²⁵ Breaches of these obligations give rise to international responsibility,²²⁶ but “the degree of diligence due, or the standard of care, expected of a state varies depending on the primary rule in play.”²²⁷ When a state does not act with due diligence concerning its positive

²¹⁷ *Id.*

²¹⁸ Therese O’Donnell, *Naming and Shaming: The Sorry Tale of Security Council Resolution 1530 (2004)*, 17 EUR. J. INT’L L. 945, 945 (2007).

²¹⁹ S.C. Res. 1611, ¶ 3, U.N. Doc. S/RES/1611 (July 7, 2005).

²²⁰ BECKER, *supra* note 9, at 130.

²²¹ *Id.* ¶ 425; Convention on the Prevention and Punishment of the Crime of Genocide, art. 1, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

²²² Johnstone, *supra* note 26, at 113.

²²³ BECKER, *supra* note 9, at 130.

²²⁴ See e.g., ROBERT P. BARNIDGE, JR., NON-STATE ACTORS AND TERRORISM: APPLYING THE LAW OF STATE RESPONSIBILITY AND THE DUE DILIGENCE PRINCIPLE (2008); Pisillo-Mazzechi, *supra* note 94.

²²⁵ *Corfu Channel Case*, *supra* note 24, at 22.

²²⁶ *ILC Articles*, *supra* note 10, art. 12. (stating there 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). While the commentary to Article 12 does not specifically list UN Security Council resolutions as a source of such obligations, the ILC does not claim to provide an exhaustive list.

²²⁷ Johnstone, *supra* note 26, at 89.

obligations, “the Government of that State will be accused of having failed to fulfill its international obligations with respect to vigilance, protection and control, of having failed in its specific duty not to tolerate the preparation in its territory of actions which are directed against a foreign Government or which might endanger the latter’s security, and so on.”²²⁸ The UN Security Council resolutions indicate that the degree of diligence due for counterterrorism obligations is higher today than before 2001.²²⁹

While these responsibilities have been heightened, they remain obligations of conduct, not of result. Positive obligations generally require a state to act diligently, but do not require perfection. Rather than imposing “an absolute duty on the State to guarantee that no act of terrorism will emanate from its territory,” a due diligence standard requires a state to use all means at its disposal to prevent and suppress terrorist activity. If the state meets the due diligence standard but the private terrorist activity nevertheless occurs, no state responsibility is engaged.²³⁰ For example, states have a positive duty to prevent the financing of terrorist groups.²³¹ If the state acts diligently, in accordance with its primary obligations, and “some funds still reach terrorists within its jurisdiction, the state will have satisfied the requirements of due diligence and will not engage responsibility as it will not have committed any ‘wrongful act.’”²³² However, if the state fails to act diligently, it will be in breach of its obligations regardless of whether financing of a terrorist group, or even an act of terrorism, occurs.²³³ As in the Genocide Convention case, however, the issue of damage may be relevant to the award of a material remedy.²³⁴ While the law concerning terrorism might evolve into a *lex specialis* exception to these traditional legal principles, the language in current UN Security Council resolutions does not indicate that such a change has occurred.

D. Application of the Separate Delict Rule

Until recently, the scholarship on state responsibility has “widely

²²⁸ Roberto Ago, *Fourth Report on State Responsibility: The International Wrong Act of the State, Source of International Responsibility*, [1972] 2 Y.B. Int’l L. Comm’n 70, 120 ¶ 135, U.N. Doc. A/CN.4/264.

²²⁹ Compare S.C. Res. 1373, *supra* note 178, ¶ 3, and S.C. Res. 1540, *supra* note 195, ¶ 1-3, and S.C. Res. 1566, *supra* note 201, ¶ 2, with S.C. Res. 748, *supra* note 172, ¶ 4-6.

²³⁰ BECKER, *supra* note 9, at 132.

²³¹ Terrorism Financing Convention of 1999, *supra* note 189.

²³² Johnstone, *supra* note 26, at 85-86.

²³³ *Id.*; see also, Robert Ago, *Second Report on State Responsibility: The Origin of International Responsibility*, ¶ 7, delivered to the International Law Commission, U.N. Doc. A/CN.4/233, reprinted in [1970] 2 Y.B. Int’l L. Comm’n 177, 178, U.N. Doc. A/Cn.4/SER.A/1970/Add.1.

²³⁴ Genocide Convention Case, *supra* note 11, ¶ 463.

rejected the view that a failure to prevent terrorist attacks or even toleration for them justifies direct State responsibility for the attacks themselves.”²³⁵ As noted by Steven Ratner, if the international community adopts the “harboring or supporting rule,” it would have profound effects on the law of state responsibility, the law on the recourse to force, or *jus ad bellum*, and the law on the conduct of hostilities, or *jus in bello*.²³⁶ Such a dramatic change would require a *lex specialis* exception from the separate delict theory for the rules relating to terrorism. As reaffirmed by the ICJ in the 2007 *Genocide Convention* case, a state is traditionally only responsible for the acts of its organs or agents or for the separate delict of a failure to fulfill an international legal obligation.²³⁷ While there have been “innumerable cases in which States have been held responsible for damage caused by individuals [these cases] are really cases of responsibility of the State for omissions by its organs: the State is responsible for having failed to take appropriate measures to prevent or punish the individual’s act.”²³⁸ A state’s failure to act diligently to comply with its positive obligations, such as the duty to prevent terrorism, “is not an act of aggression but only a breach of the autonomous rule of customary law, which binds the State to prevent, in its territory, the organization of acts of force against foreign States.”²³⁹ Since the “first and essential condition” to the use of force in self-defense is an international wrongful act attributable to the target state,²⁴⁰ when a state fails to discharge its counterterrorism obligations, but is not directly responsible for a terrorist attack, “the attack will not become the State’s act, so there can be no question of a forcible response to it.”²⁴¹

Legal scholars who support a *lex specialis* exception to the separate delict theory in cases of terrorism base their arguments on the *opinio juris* surrounding the use of force in Afghanistan, the application of sanctions to states that fail to comply with counterterrorism duties, and relevant UN Security Council resolutions.²⁴² However, none of these factors is, as of yet,

²³⁵ BECKER, *supra* note 9, at 219.

²³⁶ Steven R. Ratner, *Jus ad Bellum and Jus in Bello after September 11*, 96 AM. J. INT’L L. 905 (2002).

²³⁷ *Genocide Convention Case*, *supra* note 11, ¶ 400; *See also Corfu Channel Case*, *supra* note 24.

²³⁸ Robert Ago, *Second Report on State Responsibility: The Origin of International Responsibility*, ¶ 35, delivered to the International Law Commission, U.N. Doc. A/CN.4/233, reprinted in [1970] 2 Y.B. Int’l L. Comm’n 177, 178, U.N. Doc. A/Cn.4/SER.A/1970/Add.1.

²³⁹ Pisillo-Mazzeschi, *supra* note 94, at 36.

²⁴⁰ Report of the International Law Commission to the General Assembly (1980) 2 (2) Y.B. Int’l L. Comm’n 1, 53, UN Doc A/CN.4/SER.A/1980/Add.1.

²⁴¹ Antonio Cassese, *The International Community’s “Legal” Response to Terrorism*, 38 INT’L & COMP. L. Q. 589, 597 (1989).

²⁴² A small number of commentators have argued such factors are superfluous because

sufficient to support such an exception. The *opinio juris* surrounding the US-led invasion of Afghanistan is not conclusive for future situations. Some commentators have argued that the US position “has enjoyed broad general support in the international community,” and therefore “substantial evidence suggests that the international legal response to the terror attacks signaled a subtle, but important shift in the law of state responsibility.”²⁴³ Others caution that it “would be dangerous . . . to read too much into one example of intervention in Afghanistan by a group of strong states against a very weak state at an emotionally and politically charged moment in World history.”²⁴⁴ The invasion and international response were legally significant events that should not be dismissed out of hand, as the “legal assumptions about the way State responsibility issues are actually addressed in practice cannot remain unaffected by the actual conduct of States.”²⁴⁵

Nevertheless, a shift in the international legal regime is difficult to establish because customary international law not only allows for exceptions, but also generally requires a significant amount of state practice.²⁴⁶ Since reaction to the use of force in response to terrorist acts in the past has varied, from tacit support for US bombings in Sudan in response to attacks on US embassies to controversy over Israeli actions against the Palestine Liberation Organization, *opinio juris* can vary over time depending on the political climate and the actors involved. As such, a single military action should not, by itself, be taken as a signal of the “emergence of a new instantaneous custom.”²⁴⁷

While *opinio juris* in the wake of the September 11 attacks has an uncertain legacy, the Security Council resolutions have a more permanent effect. However, while the resolutions create new primary obligations of state conduct, they do not clearly alter the secondary rules of state responsibility. The resolutions express the Security Council’s readiness to use force or apply sanctions, but they do not specify whether these actions

military action in Afghanistan required no adjustments to existing law, based on broad interpretations of the ILC’s State responsibility articles, the ICTY’s overall control test, or the Taliban’s “espousal” of the attacks. See, Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT’L L. 839 (2001); Yoram Dinstein, *Comments on the Presentations by Nico Krish and Carsten Stahn*, in *TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW LIBERTY?* 915, 920 (C. Walter, et al eds., 2004); Carsten Stahn, *Terrorist Acts as “Armed Attack”: The Right to Self-defence, Art 51(1/2) of the UN Charter and International Terrorism*, 27 FLETCHER F. WORLD AFF. 35, 47 (2003). However, these positions have largely been dismissed. See, Alvarez, *supra* note 13, at fn. 34; Becker, *supra* note 9.

²⁴³ Jinks, *supra* note 9, at 88.

²⁴⁴ Johnstone, *supra* note 26, at 91.

²⁴⁵ BECKER, *supra* note 9, at 221.

²⁴⁶ *Nicaragua Case*, *supra* note 11, ¶ 186.

²⁴⁷ BECKER, *supra* note 9, at 221.

are to be directed at the terrorist groups themselves, the states that exercise direct control over such groups, or the states that knowingly or unknowingly harbor or support such groups. Even if the Security Council authorizes sanctions or the use of force against a state that is harboring or supporting a terrorist group, this does not necessarily indicate that the state is responsible for the terrorist acts. Rather the state may be responsible for the separate delict of failing to comply with its positive duties to prevent terrorism.

Similarly, whether the UN Security Council resolutions espouse a new general rule concerning self-defense or simply “evinced collective acquiescence in a member’s self-help in a discrete case,”²⁴⁸ they do not necessarily indicate a change in the secondary rules. Security Council support for the intervention in Afghanistan is not indicative of and “should not be confused with the matter of whether Afghanistan is ‘responsible’ for those attacks.”²⁴⁹ Marko Milanovic argues that:

A state may well *harbour* terrorists (or *genocidaires*) and it would certainly bear state responsibility for *its own act* of harbouring these persons. The *jus ad bellum* may even allow a state attacked by these terrorists to respond against the harbouring state, though neither state practice nor the ICJ provide much clarity on the issue of self-defence to attacks by private actors. But this does not mean that the harbouring state has automatically assumed state responsibility for all acts committed by the terrorists²⁵⁰

Otherwise stated, “the possible development of special primary rules on state sponsorship of terrorism does not depend on a simultaneous change of traditional rules of state responsibility.”²⁵¹

Without further developments, the UN Security Council resolutions and *opinio juris* do not establish an exception to the separate delict rule. The primary rules have been strengthened; a state that harbors or supports terrorist groups can be held liable for failing to comply with its duty to prevent terrorism and may therefore be subject to political or economic sanctions,²⁵² international claims for reparations,²⁵³ or even, if there has been

²⁴⁸ Alvarez, *supra* note 13, at 879.

²⁴⁹ Cassese, *supra* note 149 [pin].

²⁵⁰ Milanovic, *supra* note 14, at 584.

²⁵¹ *Id.* at fn. 167.

²⁵² W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT’L L. 3, 35-36, 54 (1999).

²⁵³ Jordan J. Paust, *Use of Armed Force against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT’L L.J. 533, 540 (2002).

a change in the *jus ad bellum*, to the use of force. However, contrary to the US position, the state only engages responsibility for its “own violation of a separate and distinct duty to exercise due diligence,”²⁵⁴ and not for the actions of the terrorist group it harbors or supports.

E. The UN Security Council Response

The US position that a state engages international responsibility for an “armed attack” by non-state actors that it harbors or supports is not clearly supported by the language of relevant Security Council resolutions, particularly Resolution 1373. The preamble of Resolution 1373 states that the September 11 attacks “constitute a threat to international peace and security,” and reaffirms both “the inherent right of individual or collective self-defense as recognized by the Charter of the United Nations” and “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.”²⁵⁵ As portions of the preamble, these statements were not legally binding or directed at the membership as a whole and “were not undertaken with an eye to any express general legislative effect.”²⁵⁶ Nonetheless, commentators have argued that this language demonstrates that the Security Council “went out of its way to give its prior consent to the invocation of self-defense by the United States itself.”²⁵⁷ Given the universal awareness of pending military action in Afghanistan and the lack of international objections at the time, this interpretation is reasonable. However, the implications for future actions and the effects on the secondary rules of state responsibility are unclear.

While Resolution 1373 recognizes the inherent right of individual or collective self-defense, it defines the September 11 attacks as a “threat to peace,” rather than an “armed attack.” Since the Council has explicitly referred to an “armed attack” when invoking self-defense in resolutions before and after September 11, 2001, this is a potentially significant omission.²⁵⁸ The General Assembly was even more cautious; although condemning the “heinous acts of terrorism,” the General Assembly did not even characterize these acts as “attacks” or recognize a right of self-defense.²⁵⁹ Instead, the General Assembly called for “international cooperation to bring to justice the perpetrators, organizers and sponsors” of

²⁵⁴ BECKER, *supra* note 9, at 24,

²⁵⁵ S.C. Res. 1373, *supra* note 178, pmbl; *See also*, S.C. Res. 1368, *supra* note 176, pmbl.

²⁵⁶ Alvarez, *supra* note 13, at 879.

²⁵⁷ *Id.*

²⁵⁸ Jinks, *supra* note 9, at 85.

²⁵⁹ G.A. Res. 1, U.N. GAOR, 56th Sess., 1st plen. mtg., Agenda Item 8 ¶ 3, U.N. Doc. A/RES/56/1 (2001).

the incidents, suggesting a response to a criminal act rather than an armed attack.²⁶⁰

If Resolution 1373 is read as an authorization for the use of force in Afghanistan, the September 11 attacks must qualify as armed attacks to fulfill the necessary prerequisite to self-defense. However, since the Security Council did not even include the term “armed attack,” the implications are unclear. The September 11 attacks could be considered an armed attack perpetrated by a non-state actor for which no state is directly responsible. This could justify military action on the territory of Afghanistan, but confined to military targets, or could include the use of force against state officials and institutions. Alternatively, the September 11 attacks could be considered an armed attack committed by a state, implying that the state of Afghanistan is legally responsible. The determination could also be based on factors independent of the identity of the perpetrators, such as the scale of the attacks.

While the legal requirements of self-defense might be unclear, Resolution 1373 remains firmly grounded in the UN Charter system. This system allows states to use force to prevent or respond to terrorist acts on the territory of another state only with Security Council authorization, a valid claim of self-defense, or with the explicit permission of the state in question. Resolution 1373 is consistent with this system. The Security Council defines the September 11 attacks “as a threat to international peace and security” and expresses the need to “combat” such threats “by all means, in accordance with the Charter of the United Nations.”²⁶¹ While such threats can justify the invocation of the Security Council’s power under Chapter VII to take military action to restore international peace and security, they do not authorize the use of force on the territory of another state without Security Council approval.²⁶² The Security Council has used identical language in series of resolutions condemning other terrorist acts. Since 2001, the Security Council has defined attacks in Indonesia,²⁶³ Russia,²⁶⁴ Kenya,²⁶⁵ and Colombia,²⁶⁶ as threats to international peace and security that the international community must combat by all means. However, while all of these attacks were defined as threats to international peace and security and all, except the bombing in Colombia, either threatened or claimed the lives

²⁶⁰ *Id.*

²⁶¹ S.C. Res. 1368, *supra* note 176, ¶ 1; S.C. Res. 1373, *supra* note 178, pmbl.

²⁶² The legality of a State’s use of force against terrorist groups on its own territory is subject to national law, human rights law, and humanitarian law and is beyond the scope of this Note.

²⁶³ S.C. Res. 1438, pmbl, ¶ 1, U.N. Doc. S/RES/1438 (Oct. 14, 2002).

²⁶⁴ S.C. Res. 1440, pmbl, ¶ 1, U.N. Doc. S/RES/1440 (Oct. 24, 2002).

²⁶⁵ S.C. Res. 1450, pmbl, ¶ 1, U.N. Doc. S/RES/1450 (Dec. 13, 2002).

²⁶⁶ S.C. Res. 1465, pmbl, ¶ 1, U.N. Doc. S/RES/1465 (Feb. 13, 2003).

of foreign citizens, there was little question of any of these resolutions being used as an authorization for the use of force on the territories of these states without their permission.²⁶⁷ Rather, the focus was on the need to “find and bring to justice the perpetrators, organizers and sponsors” of these attacks. In fact, Colombia’s incursion on Ecuadorian territory in pursuit of terrorist groups, which provoked the deployment of Ecuadorian and Venezuelan troops, illustrates the potentially destabilizing consequences of such attempts. Articles 2(2) and 33 of the UN Charter recognize the need to settle international disputes “by peaceful means in such a manner that international peace and security, and justice, are not endangered.”²⁶⁸ An international system that allows states to use force on foreign territory without UN Security Council authorization and unconstrained by the requirements of self-defense would not serve these purposes.

Some commentators have looked to paragraph 2(b) of the Resolution, which requires that all states *shall* “[t]ake the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information,” as an authorization for states to use force on their own to prevent terrorism.²⁶⁹ They equate “necessary steps” with “all necessary means,” the customary signifier for the use of force, interpreting this language as an “almost unlimited mandate to use force.”²⁷⁰ This would, however, both signify a departure from the usual language of “all necessary means” and would logically result in “an extraordinary requirement to use force.”²⁷¹ This could free states from the self-defense requirements and potentially from the entire UN Charter system, allowing states to use force even, as argued by former Secretary of Defense Rumsfeld, when “we don’t know what we don’t know.”²⁷² Such a dramatic change, in a Resolution that otherwise focuses on financial and criminal sanctions and provides sharing information as an example of “necessary steps,” “strongly suggests that paragraph 2(b) was probably not intended to be a general mandate to use force.”²⁷³

While it did not authorize individual countries to engage in military action, the Security Council did express its own willingness to use force. Resolution 1368 expressed the Security Council’s “readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and

²⁶⁷ However, the resolutions have raised serious concerns about violations of human rights law and humanitarian law by the States themselves.

²⁶⁸ U.N. Charter arts. 2(2), 33.

²⁶⁹ S.C. Res. 1373, *supra* note 178, ¶ 2(b).

²⁷⁰ Michael Byers, *Terrorism, the Use of Force and International Law After 11 September*, 51 INT’L & COMP. L.Q. 401, 402 (2002).

²⁷¹ Alvarez, *supra* note 13, at 879.

²⁷² Secretary of Defense Rumsfeld, quoted in Alvarez, *supra* note 13, at 881.

²⁷³ *Id.*

to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations.”²⁷⁴ In Resolution 1373, the Security Council states its willingness to take “all necessary steps” to ensure compliance with obligations of state conduct, without detailing specific consequences for failure to fulfill these obligations.²⁷⁵ However, the Security Council also softened its rhetoric in other areas, stating “the need to combat by all means . . . in accordance with the Charter” international terrorism without reaffirming the previous commitment to taking “all necessary steps.”²⁷⁶ As with the definition of “armed attack,” the implications of such statements are uncertain. Resolution 1373 does not specify the prerequisites for the use of force to combat terrorism. Therefore, it is unclear whether the Security Council’s readiness to take all necessary steps is directed at the terrorist groups themselves, the states that exercise direct control over such groups, or the states that knowingly or unknowingly harbor or support such groups.

CONCLUSION

As the international community continues to adapt to the threat of terrorism, alterations to the current legal regime might be justified. A successful counterterrorism response requires ensuring “the accountability not just of the terrorists that perpetrate these atrocities but also of the states that are charged to protect individual citizens against them.”²⁷⁷ If devastating terrorist attacks reoccur, aided by continued developments in technology, communications, and global economics, countries might experience “an increased willingness to attribute the action of terrorists to the states that sponsor them.”²⁷⁸

With this in mind, legal commentators have proposed a range of possible alternative standards of state responsibility for non-state actors. At one end of spectrum, Antonio Cassese has proposed returning to the *Tadic* test of overall control, rather than the *Nicaragua* effective control test, in cases of terrorism. Cassese grounds the argument in practical evidentiary concerns, but also notes that, “flexible ways of linking states to terrorist organizations are better suited at the *international* level than traditional methods, if one intends to target not only terrorist organizations and their members but also those states that increasingly avail themselves of their

²⁷⁴ S.C. Res. 1368, *supra* note 176, ¶ 5.

²⁷⁵ S.C. Res. 1373, *supra* note 178, ¶ 8.

²⁷⁶ *Id.* pmbl; S.C. Res. 1368, *supra* note 176, ¶ 5.

²⁷⁷ BECKER, *supra* note 9, at 2.

²⁷⁸ Travalio & Altenburg, *supra* note 13, at 106, 109.

barbarous methods.”²⁷⁹ Alternatively, Tal Becker advocates a causation-based approach, which would substantially expand state responsibility for terrorist groups.²⁸⁰ In a more extreme approach, Vincent-Joël Proulx argues that attribution should be circumvented entirely: “international mechanisms should remain unfettered by secondary rules and the case for a responsibility-expanding regime should be more radical.”²⁸¹ Proulx supports a two-tiered strict liability mechanism, so that “once a terrorist attack has been launched from a host-state, that state is automatically indirectly responsible for the attack. In other words, a successful cross-border terrorist strike establishes a *prima facie* case of responsibility against the host-state.”²⁸²

On the other hand, at least in the near future, “[r]esponsibility seems more likely to arise through the operation of primary rules, such as customary or conventional rules prohibiting aggressive uses of territory or harboring terrorists, and binding Security Council resolutions.”²⁸³ While the traditional rules of state responsibility are constraining, Derek Jinks argues that “the revision of trans-substantive secondary rules is a clumsy, and typically ineffective, device for vindicating specific policy objectives,” which risks several perverse collateral consequences, including the overapplication and underapplication of the primary rules. Thus, the “most effective strategy to restrain and deter state support for, or toleration of, terrorism is to define more clearly the primary obligations of states and the consequences for noncompliance with those obligations.”²⁸⁴ States may hesitate to change the secondary rules for political, as well as practical concerns. As argued by Michael Byers, “[e]ven today, most States would not support a rule that opened them up to attack whenever terrorists were thought to operate within their territory.”²⁸⁵

Regardless of the ongoing normative discussion and the reaction to the September 11 terrorist attacks, the secondary rules of state responsibility remain unchanged. Under the current legal regime, states do not engage full international responsibility for the acts of terrorist groups that are not *de jure* or *de facto* state organs or agents. Rather, states are responsible for the separate delict of their failure to comply with their negative or positive

²⁷⁹ Antonio Cassese, *Symposium: Genocide Human Rights and the ICJ: The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 EUR. J. INT’L L. 649, 666 (2007).

²⁸⁰ BECKER, *supra* note 9, at 285-360.

²⁸¹ Proulx, *supra* note 13, at 645.

²⁸² *Id.* at 656.

²⁸³ Bodansky & Crook, *supra* note 16, at 784.

²⁸⁴ Jinks, *supra* note 9, at 83-84.

²⁸⁵ Michael Byers, *Terrorism, The Use of Force and International Law After 11 September*, 51 INT’L & COMP. L. Q. 401, 408 (2002).

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obligations. While the effectiveness of the current counterterrorism regime remains uncertain, at least in theory, it ensures that “[n]o State can claim the rights of sovereignty without accepting the responsibilities it imposes to ensure that conduct on its territory conforms with the law and does not endanger the fair realization of rights in the territory of others.”²⁸⁶

²⁸⁶ BECKER, *supra* note 9, at 2.