A Legal Perspective on the Fight against International Terrorism

International Terrorism & the Law of State Responsibility, has *Nicaragua* been left aside?

Master Thesis
Master of Laws

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Promotor: Prof. Frank Maes
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“Everybody’s worried about stopping terrorism. Well, there’s a really easy way: stop participating in it.”

Noam Chomsky
This Thesis is the result of my deep interest in public international law. It was therefore a
pleasure and an intellectually challenging experience to write about the possible impact the
fight against international terrorism has had on the law of state responsibility. I chose this
particular subject because it clearly exposes how the presence of non-state actors in the state-
centered structure of international law is able to put the core of every legal system, i.e. its
responsibility regime into question. Moreover, although the question discussed in this Thesis
is of a very theoretical nature, it relates to a very tangible problem in international relations.

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1. Introduction

1.1 Research Question

Terrorism is not a new phenomenon. History of mankind is drenched with evil, indiscriminate violence and brutality in the name of religion or political ideologies. However, globalization has made terrorism evolving to a transnational crime that poses a threat to the world community. International terrorism moreover poses new challenges to international security, including states’ concepts of jurisdiction and law enforcement. The attacks on the United States of 11 September 2001 (hereafter: 9/11) constitute the most ferocious acts of terrorism in recent history which drastically changed the international community. The attacks of 9/11 made the fight against international terrorism to become one of the top priorities of the world community. The 9/11 attacks caused not only human suffering and a more complex world to live in, but also disturbed to some extent, as CASSESE formulates it, “some crucial legal categories of international law”. It is obvious that the events of 9/11 called into question the existing legal frameworks of the law of self-defence and the law of state responsibility. Has the latter been modified due to the events of 9/11?

The main goal of this Master Thesis is to verify to what extent the fight against international terrorism that emerged in the aftermath of 9/11 has affected the law of state responsibility. The so-called ‘harboring theory’ of the Bush Administration considered Afghanistan as a state also to be responsible for the acts of Al Qaeda (i.e. the non-state actor that is held responsible for the events of 9/11) because it merely allowed Al Qaeda to operate on its territory. However, the relationship between Al Qaeda and the Taliban government of Afghanistan wasn’t characterized by any relationship of sufficient direction or control – as required by the law of state responsibility - in order to establish a link of attribution. This obviously meant a radical departure from the existing legal framework of the law of state responsibility. The basic principle of the law of state responsibility implies that a state can only be held

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2 Ibid.
3 Ibid.

responsible for its own actions. However, in this case Afghanistan was held responsible for the actions of a non-state actor. Moreover, this principle also underlies an inter-state reading of art. 51 UN Charter, which only allows the use of force in self-defence against a state which is directly responsible for the initial armed attack.

Despite these reasonable legal objections, the United States nevertheless launched a military operation against Afghanistan in self-defence, i.e. ‘Operation Enduring Freedom’ targeting both Al Qaeda and Taliban units. Furthermore, this military operation was astonishingly endorsed by an overwhelming majority of the international community. Therefore, one can rightly ask oneself whether the law of state responsibility has been modified in one way or another. More precisely, has the law of attribution been softened? In other words, has there been some kind of a downward shift in the attribution threshold with regard to the imputation of behavior of non-state actors to a state? Has the prevailing general ‘effective control’ threshold of the Nicaragua case been upheld, or has a downward evolution to a mere ‘aiding and abetting’ lex specialis threshold been established in this respect? In sum, has the traditional ‘effective control’ test that has been originally introduced by the ICJ in the Nicaragua case of 1986 been maintained or not?

This research will focus exclusively on the complex relationship between the fight against international terrorism and the general law of state responsibility. However, since the use of force against Afghanistan was ‘justified’ on the right of self-defence (art. 51 UN Charter), one also needs to examine the relationship between the Jus ad Bellum and the law of state responsibility to some extent. One must therefore always bear the conceptual distinction between the primary rules of international law and the secondary rules of state responsibility in mind. This distinction is crucial in order to understand the coexistence and subtle interplay between the law of self-defence and the law of state responsibility. An inter-state reading of art. 51 UN Charter - which encloses the basic principle of the law of state responsibility - is the starting point of this research. As already partially set out, an inter-state reading implies that every armed attack needs to be attributed directly to a state before one can use force in self-defence against that state.

5 Subsequently, the controversial question whether or not there exists a so-called right of self-defence against non-state actors in international law does not fall under the scope of the research question.
**Part I** will subsequently further elaborate upon the inter-state reading of art. 51 of the UN Chapter, which is the starting point of this research. This Part will moreover describe how the inter-state approach has been incorporated within a terrorism context. Moreover, the very important relationship between the definition of ‘armed attack’ and the rules of attribution will be briefly discussed.

**Part II** will furthermore elaborate upon the relevant primary rules of *Jus ad Bellum* from an attribution perspective. In this Part the distinction between the *autonomous* obligation to prevent and abstain from any involvement or encouragement in acts of international terrorism and the prohibition of international terrorism *sensu stricto* will be made. The latter is related to the scope and meaning of “armed attack” and the “use of force” as formulated respectively by art. 51 and art. 2 (4) UN Charter within the context of international terrorism. The principle of non-intervention will also be discussed in this respect. At the end of this Part, the current state of the *Jus ad Bellum* will be critically analyzed.

**Part III** will moreover discuss the general rules of state responsibility, paying particular attention on the different attribution threshold(s) which are relevant in a terrorism context. Art. 4 and art. 8 of the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2001 (hereafter: ILC Draft Articles) are of paramount importance in this respect. Relevant case law of the ICJ will be extensively discussed in order to elaborate the existing legal framework of the law of state responsibility. The ICJ *Nicaragua* case of 1986 and the ICTY *Tadic* case of 1999 will therefore be carefully examined, as well as the interrelationship between the ICJ and the ICTY.

**Part IV** will finally discuss to what extent the law of state responsibility has been modified in to the aftermath of 9/11. The scholarly proposition that the ‘effective control’ threshold has been abandoned and subsequently replaced by a so-called ‘aiding and abetting’ test is analyzed critically. This proposition will be examined in light of quasi-legislative resolutions of the United Nations Security Council (hereafter UNSC) - which have been passed in the aftermath of 9/11 - and subsequent state practice and ICJ case law.

The following Chapter 1.2 will discuss the abovementioned distinction between the primary rules of international law and the secondary rules of state responsibility. This conceptual distinction is *crucial* in order to understand the coexistence and subtle interplay between the
law of self-defence and the law of state responsibility. This distinction also constitutes in large part the structure of this research. Whereas Part II deals with the primary rules of international law, i.e. Jus ad Bellum, Part III deals with the secondary rules of state responsibility, i.e. the rules of attribution. In addition, Chapter 1.3 will briefly try to provide a definition of ‘international terrorism’.

1.2. The Distinction between the Primary and Secondary Rules

The structure of this research is based on the distinction between the primary rules of international law and the secondary rules of state responsibility. This distinction has its basis in the ILC Draft Articles (i.e. the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2001). The distinction is reminiscent of the classical distinction between ‘substantive law’ and ‘procedural law’. It needs moreover to be considered as the so-called “Central Organizing Device” of the articles. This distinction is a very important contribution of the codification process of the International Law Commission (hereafter: ILC) to develop a methodology of state responsibility. It allows to maintain a certain ‘methodological sanity’ and conserves the concept of the law of state responsibility as a general body of rules, applicable in all situations with the exception of the presence of a lex specialis rule and without causing prejudice to the UN Charter (see art. 55 and 59 ILC Draft Articles). Therefore, the ILC Draft Articles

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9 However, the existence of this distinction has also been heavily criticized, see M. MILANOVIC, “State Responsibility for Genocide”, 17 European Journal of International Law 2006, 560. (hereafter: M. MILANOVIC, “State Responsibility for Genocide”); J. CRAWFORD, “The ILC’s Articles on Responsibility: A Retrospect”, see supra n. 8, 876.

10 M. MILANOVIC, “State Responsibility for Genocide”, see supra n. 9, 561; J. CRAWFORD, “The ILC’s Articles on Responsibility: A Retrospect”, see supra n. 8, 879; A typical example of a lex specialis attribution threshold is art. 91 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), 1125 United Nations Treaty Series 17512 (hereafter: Additional Protocol I), see in this respect infra Chapter 4.4 of Part IV, n. 647.
operate on a mere *residual* way. One may not forget that the ILC Draft Articles are not (yet) established in treaty form. However, it needs to be stressed that even before 2001, and especially since, they have been referred to a lot of times which provides them a rapidly growing authority as a reflection of customary international law with regard to state responsibility.\(^{11}\) ROBERTO AGo, one of the most influential Special Rapporteurs of the ILC on state responsibility distinguished between:

> “Rule of international law which, in one sector of interstate relations or another, impose particular obligations on States, and which may, in a certain sense, be termed “primary”, as opposed to the other rules – precisely those covering the field of responsibility – which may be termed “secondary”, inasmuch as they are concerned with the determining the consequences of failure to fulfill obligations established by the primary rules”\(^{12}\)

He moreover stated 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”\(^{13}\)

The primary rules thus consist of the *substantive* international obligations under treaty and customary law. The secondary rules consist of the general rules governing the conditions under which a breach of the primary rules is identified and the consequences of any such breach.\(^{14}\) In other words, the secondary rules are intended to interpret, modify and sanction the primary rules.\(^{15}\) As NOLLKAEMPER correctly stated: “*The law on the use of force does not determine responsibility for the wrongful use of force, and the law of state responsibility does not determine conditions for the (un)lawful use of force.*”\(^{16}\) It is clear that the ILC also


\(^{13}\) M. MILANOVIC, “State Responsibility for Genocide”, see supra n. 9, 560; J. CRAWFORD, “The ILC’s Articles on Responsibility: A Retrospect”, see supra n. 8, 876; ILC Yearbook 1970 Vol. II, see supra n. 12, 306.


\(^{16}\) A. NOLLKAEMPER, “Attribution of Forcible Acts to States”, see supra n. 14, 144.
founded this distinction for practical reasons. It indeed allowed the ILC to focus solely on the law of international state responsibility, to the exclusion of the substantive primary rules of international law, which would have entailed a lot of difficulties. However, this distinction has also been often criticized for its rather artificial character. This criticism is based on the idea that one simply can’t formulate general rules of state responsibility which are always applicable in an identical way, independently of the applicable primary rule. The opponents of the distinction argue that the process of attribution is intrinsically linked to the primary rule, and that attribution processes may vary according to the primary rule at stake. This critique needs however to be nuanced. One may not forget the existence of art. 55 and 59 ILC Draft Articles in this respect. Art. 55 formulates a *lex specialis* exception. Art. 59 on the other hand acknowledges the supremacy of the UN Charter as reflected by art. 103 of the UN Charter. Moreover, the presence of so-called special rules of attribution, *i.e. lex specialis* rules which accompany certain primary rules and govern their execution is rather exceptional. In sum, the general secondary rules of state responsibility, *i.e. the rules of attribution as formulated by the ILC* are thus very useful and provide an important added value to international law.

The determination of a violation of a primary rule is very important for the question discussed in this research. A violation of a primary rule of *Jus ad Bellum* by a state can indeed only exist after an attribution process whereby the armed activities of a non-state actor have been successfully linked to a state. This violation of *Jus ad Bellum* will subsequently be qualified as an “armed attack” which will consequently entitle the attacked state to use force in self-

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17 E. DAVID “Primary and Secondary Rules” see *supra* n. 7, 28.
19 “These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.”
20 “These articles are without prejudice to the Charter of the United Nations.” This implies that the Articles cannot modify the obligations that states have under the Charter. When there is a conflict between the ILC Draft Articles and the Charter, the latter prevails. It is however important to note that despite art. 59, an interplay between the two instruments is possible. V. GOWLLANDS-DEBBAS, “Responsibility and the United nations Charter” in J. CRAWFORD, A. PELLET, S. OLLESON (eds.), *The Law of International Responsibility*, Oxford, Oxford University Press, 2010, 117, 120.
defence. To establish a violation of a primary rule, the secondary rules thus are indispensable. There is obviously a constant interplay between the primary rules of *Jus ad Bellum* and secondary rules. Theoretically, for the purpose of this study, one should ask oneself continuously the three following questions. Who carried out the contested actions? Do these actions constitute a violation of the primary rules? If the answer to this last question is affirmative, a third question comes into play. To whom these actions can be attributed under the secondary rules, *i.e.* were the perpetrators acting on their own behalf or not? Translated concretely to the issue discussed in this research, these three questions merge into one single question: under which precise circumstances armed activities carried out by non-state actors can be attributed to a state? Once these circumstances are established (see *infra* Part III), this research will verify whether the threshold has changed due to rise of international terrorism and the subsequent international struggle to oppose it (see *infra* Part IV).

1.3 Defining ‘International Terrorism’

1.3.1 The Absence of a Universally Accepted Definition

If the international community wants to oppose international terrorism, it seems logical that a definition of terrorism is a preliminary condition to achieve this goal. How to fight an enemy without knowing who or what he is? However, defining international terrorism is not an easy task. The international community has struggled in vain over decades to establish a universally recognized definition of terrorism. The ongoing debate is paralyzed by some major points of controversy. The first point concerns the question whether acts committed in national liberation wars and in resistance to foreign occupation should be considered as acts of terrorism. The second point concerns the question whether attacks on government agents and property with the purpose to compel the government to do or abstain from a certain act

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24 The complex relationship between the primary and secondary rules will be discussed in Part I.
should also be covered by the definition (i.e. acts which are normal and allowed during an armed conflict). Another point of discussion relates to the question whether also a state can be an actor of terrorist acts, i.e. does ‘state-terrorism exist’? There is thus clearly no international consensus in this respect. This subsequently explains why there does not exist a universally recognized definition of an act of terrorism nowadays. It is obvious that the huge diverging opinions and clashes that exist in international relations and politics explain why it is extremely difficult to find a consensus on a fundamentally subjective notion such as terrorism. The notion of terrorism has surely for every state (or region) a different meaning. The well-known aphorism; ‘One man’s terrorist is another man’s freedom fighter’ explains in a nutshell what’s the controversy all about. The difficulty in finding an international consensus on the scope and meaning of international terrorism is reminiscent of other difficult struggles, such as the difficulty to define on an international level legal concepts like ‘minority’, ‘intervention’ or ‘aggression’.

There are however some interesting neutral academic definitions of terrorism which don’t have any legal value though, nor are they universally accepted. Those academic definitions can be useful in providing an objective working definition of terrorism without being a priori politicized. J. M. LUTZ AND B. J. LUTZ provide a detailed and exhaustive working definition of terrorism consisting of six major components.

“Terrorism involves political aims and motives. It is violent or threatens violence. It is designated to generate fear in a target audience that extends beyond the immediate victims of the violence. The violence is conducted by an identifiable organization. The violence involves a non-state actor or actors as either the perpetrator, the victim of the violence, or both. Finally, the acts of violence are designed to create power in situations in which power previously had been lacking (i.e., the violence attempts to enhance the power base of the organization undertaking the actions).”

28 M. SASSOLI, A. A. BOUVIER, A. QUINTIN, How does law protect in war?, see supra n. 27, 128.
29 A. SAMBEI, A. DU PLESSIS, M. POLAINE, Counter-Terrorism Law and Practice, see supra n. 1, 6; G.L. NEUMAN, “Humanitarian Law and Counterterrorist Force”, see supra n. 27, 288.
30 M. SASSOLI, A. A. BOUVIER, A. QUINTIN, How does law protect in war?, see supra n. 27, 128; A. SAMBEI, A. DU PLESSIS, M. POLAINE, Counter-Terrorism Law and Practice, see supra n. 1, 6.
31 A. SAMBEI, A. DU PLESSIS, M. POLAINE, Counter-Terrorism Law and Practice, see supra n. 1, 3.
32 A. SAMBEI, A. DU PLESSIS, M. POLAINE, Counter-Terrorism Law and Practice, see supra n. 1, 3; J. SOREL, “Some Questions About the Definition of Terrorism and the Fight Against Its Financing”, 14 European Journal of International Law, 367.
MEISELS however concludes with a more concise definition:\textsuperscript{35}

\begin{quote}
“Terrorism, is roughly, the intentional random murder of defenseless non-combatants, with the intent of instilling fear of mortal danger amidst a civilian population as a strategy designed to advance political ends”
\end{quote}

1.3.2 A Quest for a Universal Definition

The absence of a general consensus does not mean there weren’
\textsuperscript{36}t any attempts to establish a universal definition.\textsuperscript{36} Indeed, there are some historical attempts which are briefly worth mentioning.\textsuperscript{37} Article 1 of the Convention for the Prevention and Punishment of Terrorism of 16 November 1937 adopted by the League of Nations contained the first universal definition ever.\textsuperscript{38} This Convention however never entered into force (it was only ratified by India).\textsuperscript{39}

\begin{quote}
“criminal acts directed against the State and intended to create a state of terror in the minds of particular persons, or a group of persons or the general public”
\end{quote}

In 1972 an Ad Hoc Committee on Terrorism of the United Nations General Assembly (hereafter: UNGA) was established in order to set up a Draft Comprehensive Convention and a definition. The action of this committee was completely blocked due to the cold war and decolonization context. It wasn’t therefore a surprise that the report submitted by the committee in 1979 did not include any definition at all.\textsuperscript{40} After the end of the cold war the debate on terrorism restarted.\textsuperscript{41} The UNGA adopted on 9 December 1994 the important Declaration on Measures to Eliminate International Terrorism by adopting resolution 49/60:\textsuperscript{42}

\textsuperscript{37} A. SAMBEI, A. DU PLESSIS, M. POLAINE, Counter-Terrorism Law and Practice, see supra n. 1, 6-8; H. NEUHOLD, “Post-Cold War Terrorism: Systemic Background, Phenomenology and Definitions”, see supra n. 33, 29.
\textsuperscript{39} A. SAMBEI, A. DU PLESSIS, M. POLAINE, Counter-Terrorism Law and Practice, see supra n. 1, 6.
\textsuperscript{40} A. SAMBEI, A. DU PLESSIS, M. POLAINE, Counter-Terrorism Law and Practice, see supra n. 1, 7; H. NEUHOLD, “Post-Cold War Terrorism: Systemic Background, Phenomenology and Definitions”, see supra n. 33, 29.
\textsuperscript{41} A. SAMBEI, A. DU PLESSIS, M. POLAINE, Counter-Terrorism Law and Practice, see supra n. 1, 18.
\textsuperscript{42} B. SAUL, “Civilising the Exception: Universally Defining Terrorism”, see supra n. 36, 82; A. SAMBEI, A. DU PLESSIS, M. POLAINE, Counter-Terrorism Law and Practice, see supra n. 1, 7.
This resolution defined terrorism as:

“Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them”\(^{43}\)

This formulation seems at first sight to have found a solution for two major points of controversy. Firstly, it excludes “good causes” as a form of justification for acts of terrorism. This implies that acts of terrorism need to be effectively considered as acts terrorism even when those acts have been carried out by someone’s freedom fighter or someone’s law-enforcement agent.\(^{44}\) Stating the opposite, namely that acts of terrorism could be justified when committed for the achievement of a ‘good cause’, e.g. guerilla warfare against a colonial power or illegal occupier in order to obtain national liberation, obviously violates the fundamental distinction between \textit{Jus ad Bellum} and \textit{Jus in Bello}.\(^{45}\) Secondly, section I.1 of the resolution mentions the important formulation “by whomever committed”:

“The States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism, as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize the friendly relations among States and peoples and threaten the territorial integrity and security of States;”\(^{46}\)

This formulation seems to have overcome the issue of so-called ‘state terrorism’.\(^{47}\) The ‘solution’ provided by the formulation of this resolution is rather more theoretical than practical. The abovementioned points of controversy are still jeopardizing the establishment of a universal consensus about a definition of terrorism (see \textit{infra}).\(^{48}\) Moreover, the legal added value of this definition needs to be nuanced. This resolution cannot be entirely seen as a reflection of existing legal views because it explicitly stresses the need of a further progressive development and codification of the law on terrorism.\(^{49}\) This resolution thus does not reflect customary law as such.


\(^{44}\) C. WALTER, “Terrorism”, see supra n. 26, 909.

\(^{45}\) M. SASSOLI, A. A. BOUVIER, A. QUINTIN, \textit{How does law protect in war?}, see supra n. 27, 128; see supra

\(^{46}\) 1.1 A/Res/49/60.

\(^{47}\) C. WALTER, “Terrorism”, see supra n. 26, 909.

\(^{48}\) A. SAMBEI, A. DU PLESSIS, M. POLAINE, \textit{Counter-Terrorism Law and Practice}, see supra n. 1, 8.

\(^{49}\) IV. 12 A/Res/49/60; B. SAUL, “Civilising the Exception: Universally Defining Terrorism”, see supra n. 36, 82.
In 1996 the establishment of an Ad Hoc Committee was realized by the adoption of UNGA resolution 51/210 on Measures to eliminate international terrorism “that Decides to establish an Ad Hoc Committee, open to all States Members of the United Nations or members of specialized agencies or of the International Atomic Energy Agency, to elaborate an international convention for the suppression of terrorist bombings and, subsequently, an international convention for the suppression of acts of nuclear terrorism, to supplement related existing international instruments, and thereafter to address means of further developing a comprehensive legal framework of conventions dealing with international terrorism”.

In 1999 the General Assembly requested the Ad Hoc Committee to continue elaborating a comprehensive convention on international terrorism. The Committee started with negotiations in 2000 but the situation is blocked due to the aforementioned points of controversy. The Committee however succeeded in making some progress. Article 2 of the draft comprehensive convention provides a good starting point.

“Article 2
1. Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes:
(a) Death or serious bodily injury to any person; or
(b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or
(c) Damage to property, places, facilities, or systems referred to in paragraph 1 (b) of this article, resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act. (…)
"

On the 9th of December 1999 the International Convention for the suppression of the Financing of Terrorism was established by the adoption of UNGA resolution 54/109. The definition that this Convention provides is now and then considered to be a generic definition. This Convention however only relates to the mere financing of terrorism, not terrorism as such. State practice furthermore doesn’t seem to have deducted a wider, general definition of terrorism of this Convention. Article 2, first paragraph, b reads as follows:

51 A. SAMBEL, A. DU PLESSIS, M. POLAINE, Counter-Terrorism Law and Practice, see supra n. 1, 19, K. N. TRAPP, State Responsibility for International Terrorism, see supra n. 6, 15-16.
52 A. SAMBEL, A. DU PLESSIS, M. POLAINE, Counter-Terrorism Law and Practice, see supra n. 1, 19.
54 B. SAUL, “Civilising the Exception: Universally Defining Terrorism”, see supra n. 36, 82.
“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.”

The UN Special Tribunal for Lebanon provided an interesting judgment which is worth mentioning in this respect. The Tribunal stated that there exists a customary law crime of terrorism that consists of three elements:55

“(1) The perpetration of a criminal act (such as murder kidnapping, hostage-taking, arson, and so on), or threatening such an act; (2) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (3) when the act involves a transnational element”56

However, state practice does not seem to recognize a customary law crime of terrorism. SAUL concludes that on the basis of an extensive research of all relevant treaties, United Nations resolutions, national laws and national judicial decisions, there cannot exist a customary law crime of terrorism as presented by the Tribunal.57 Subsequently, because neither the international community, neither international customary law has succeeded to establish an all-inclusive definition of terrorism, a so-called ‘piecemeal’, ‘sector-specific’ approach towards terrorism was adopted.58 There thus exist a lot of treaties which address particular forms of terrorism, without establishing a comprehensive and universal definition of terrorism which applies in every case. There are also a lot of terrorism conventions established on a regional level.59 Those are characterized by a huge diversity of conceptions of terrorism.60 This proves once more that apparently every state and region of the world has a different understanding of the scope and meaning of terrorism. It is plain that the international community isn’t ready yet to overcome the difficult political stumbling blocks which block the quest for a general definition. However, the ‘piecemeal’ and regional approach seem

57 B. SAUL, “Civilising the Exception: Universally Defining Terrorism”, see supra n. 36, 80-81.
58 B. SAUL, “Civilising the Exception: Universally Defining Terrorism”, see supra n. 36, 81; A. SAMBEI, A. DUPERESSIS, M. POLAINE, Counter-Terrorism Law and Practice, see supra n. 1, 7.
59 B. SAUL, “Civilising the Exception: Universally Defining Terrorism”, see supra n. 36, 82.
60 Ibid.
however to provide a solution to some extent. Nevertheless, it cannot be said that these approaches provide a structural and long-term solution for this disturbing absence of a comprehensive definition.

Finally, for the sake of completeness, the definition of terrorism by the Bush Administration should be briefly mentioned. The position of the Bush Administration is very important for this research (see infra Part IV). The Bush Administration defined terrorism in its National Security Strategy 2002 (NSS) as "premeditated, politically motivated violence perpetrated against innocents." The National Strategy for combating Terrorism 2003 changed this definition by adding the actors of terrorism. Terrorism is thus according to the Bush administration:

"premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents."

1.3.3 Conclusion

One can therefore conclude that despite several attempts, there does not exist a universally accepted definition of terrorism in international law. However, there are a lot of specific conventions addressing well-defined manifestations of terrorism (the so-called ‘piecemeal approach’) as well as regional conventions which establish legal frameworks to combat terrorism on a regional level. This research is however not aiming at discussing extensively the challenging issue of defining international terrorism in international law. The scope of this research does not allow us to elaborate upon this question extensively. However, despite the lack of a universal agreement on what exactly needs to be considered as an act of terrorism, one could reduce terrorism to its core element: deliberate violence against civilians. Civilians are in general the principal targets of terrorist actions. If one takes the biggest common denominator of all possible definitions of terrorism - regardless whether this

61 A. SAMBEI, A. DU PLESSIS, M. POLAINE, Counter-Terrorism Law and Practice, see supra n. 1, 20.
64 Defining international terrorism in international law is a very complex and challenging issue. For further reading, see BEN SAUL, Defining Terrorism in International Law, Oxford, Oxford University Press, 2006.
violence is carried out by private or state actors or whether this conduct can be justified in certain circumstances - one could cautiously conclude that the deliberate killing or wounding of civilians constitutes the foundation of what an act of terrorism is, or should be.\textsuperscript{67}

It needs to be said that even this point of view isn’t accepted universally. There is no consensus whether the definition of terrorism should \textit{not only} cover violence against civilians \textit{but also} violence against government agents and property.\textsuperscript{68} In any case, even under this latter more extensive approach, deliberate violence against civilians certainly falls under the scope of terrorism. The biggest common denominator thus still comprises violence against civilians. To avoid never-ending semantic discussions about the scope of terrorism and given the fact that a well-defined concept of terrorism is not of paramount importance for the purposes of this research, violence against civilians, constituting the biggest common denominator of all possible definitions, will be considered as being the core element of terrorism in this research.

\textsuperscript{67} These acts acquire logically an international character when they are carried out beyond national boundaries, \textit{i.e.} international terrorism.

\textsuperscript{68} M. SASSOLI, A. A. BOUVIER, A. QUINTIN, \textit{How does law protect in war?}, see supra n. 27, 128.
Part I: An Inter-State Reading of Art. 51 UN Charter.

1. Introduction

The starting point of this research is founded on an inter-state reading of art. 51 UN Charter. Art. 51 reads as following:

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations (...)

An inter-state reading considers art. 51 as a state-centered norm. This implies that only if a state is the victim of an armed attack committed by another state, the victim state shall have an inherent right of individual self-defence against that attacking state. As ZANARDI points out; “the notion of ‘armed attack’ denotes a use of armed force that possesses the characteristics of an international wrongful act and must therefore be attributable to a State”. The concept of “armed attack” is thus under this traditional point of view reduced to an attack by one state against another state (i.e. a so-called attribution-based definition of “armed attack”). Judge KOÖJMANS stated that this “has been the generally accepted interpretation for more than 50 years”. Despite the fact that art. 51 does not mention expressis verbis that only armed attacks by states fall under the scope of self-defence, this approach is the only one that seems to be in accordance with the logic of the UN Charter. Art. 51 needs moreover to be read in conjunction with other provisions of the UN Charter.

69 It must be noted that an inter-state approach of art. 51 UN Charter is not an universally accepted approach. There are other schools of thought about the scope and meaning of self-defence as formulated in the UN Charter. However, the author wishes to start his research within the framework of this traditional point of view.


73 A. NOLLKAEMPER, “Attribution of Forcible Acts to States”, see supra n. 14, 145; M. KOWALSKI, “Armed Attack, Non-State Actors and a Quest for the Attribution Standard”, see supra n. 23, 102; See infra Part II for an elaboration of the scope of “armed attack”.

74 Separate opinion of Judge KOÖJMANS, ICJ, Legal Consequences of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, para. 35.

mainly with art. 2 (4) UN Charter, in order to substantiate this inter-state reading.\textsuperscript{76} Art. 2 (4) prohibits the threat or use of force by \textit{states} in their \textit{international} relations.\textsuperscript{77} Art. 51 is consequently an exception to art. 2 (4).\textsuperscript{78}

“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

This inter-state approach seems also to have been solidly endorsed by the ICJ (at least to a certain extent).\textsuperscript{79} Whereas the ICJ in the \textit{Nicaragua} case of 1986 did not elaborate unambiguously upon the relationship between the law on the use of force and the law of state responsibility, there are some authors who interpret the Court’s judgment as clearly establishing an inter-state approach towards the concept of ‘Armed Attack’ within the law of self-defence.\textsuperscript{80} In addition, in the \textit{Oil Platforms} case of 2003 the ICJ stated that:

“(…) Therefore, in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States has to show that attacks had been made upon it for which Iran was responsible; and that those attacks were of such a nature as to be qualified as "armed attacks" within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force.(…)”\textsuperscript{81}

The Court concluded in this case that, due to the lack of conclusive evidence of attribution, Iran did not carry out an armed attack and the US subsequently didn’t have any lawful right of

\textsuperscript{76} M. KOWALSKI, “Armed Attack, Non-State Actors and a Quest for the Attribution Standard”, see \textit{supra} n. 23, 122; Y. DINSTEIN, \textit{War, Aggression and Self-Defence}, see \textit{supra} n. 78, 161.
\textsuperscript{77} M. KOWALSKI, “Armed Attack, Non-State Actors and a Quest for the Attribution Standard”, see \textit{supra} n. 23, 122.
\textsuperscript{79} M. KOWALSKI, “Armed Attack, Non-State Actors and a Quest for the Attribution Standard”, see \textit{supra} n. 23, 102.
\textsuperscript{80} C.J. TAMS, “The Use of Force against Terrorists”, see \textit{supra} n. 71, 369; A. NOLLKAEMPER, “Attribution of Forcible Acts to States”, see \textit{supra} n. 14, 145, 152.; O. SCHACHTER, \textit{International Law in Theory and Practise}, see \textit{supra} n. 66, 164, 172 The United States implicitly endorsed an inter-state reading of art. 51 by claiming a right of self-defence against Nicaragua and \textit{not} against the El Salvadorian rebels. Therefore, the Court wasn’t asked to discuss the latter possibility. The U.S. accused Nicaragua of having carried out an armed attack by its substantial support and direction of these rebels from Nicaraguan territory. The United States could have departed from this inter-state approach by formulating their claim otherwise, which they didn’t. Therefore, the Court wasn’t asked to discuss the latter possibility.
\textsuperscript{81} ICJ, \textit{Case Concerning Oil Platforms} (Islamic Republic of Iran v. United States of America), Judgment, \textit{ICJ Reports} 2003, para. 51 (hereafter: ICJ \textit{Oil Platforms Case}).
self-defence towards Iran. Moreover, in the *Wall Opinion* of 2004 the ICJ stated very briefly and clearly the following:

“(…) Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State (…)”

Whereas Israel has argued in this case that the construction of the security fence was in accordance with its right of self-defence, the Court noted that Israel didn’t claim the attacks against it to be imputable to a foreign state. Therefore, the Court rejected Israel’s self-defence reasoning. Finally, in the *Armed Activities* case the ICJ argued that:

“146. It is further to be noted that, while Uganda claimed to have acted in self-defence, it did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC. The “armed attacks” to which reference was made came rather from the ADF. The Court has found above (paragraphs 131-135) that there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of General Assembly resolution 3314 (XXIX) on the definition of aggression, adopted on 14 December 1974. The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC.

147. For all these reasons, the Court finds that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present (…)”

It is thus plain that the case law of the ICJ can be interpreted in a way which entails an interstate reading of art. 51. In general, the Court’s case law sticks to a very restrictive and state-centered reading of art. 51. However, ICJ case-law can always to some extent be put into question in one way or another. One could for instance question the meaning and scope of the Court’s formulation. Moreover, the presence of several separate and dissenting opinions can

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82 *ICJ Oil Platforms Case*, see *supra* n. 81, para. 72; A. NOLLKAEMPER, “Attribution of Forcible Acts to States”, see *supra* n. 14, 139-140.
83 *ICJ, Legal Consequences of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports* 2004, para. 139 (hereafter: *ICJ Wall Opinion*).
84 *ICJ Wall Opinion*, see *supra* n. 83, para. 138-139; T. BECKER, *Terrorism and the State*, see *supra* n. 94, 159; A. NOLLKAEMPER, “Attribution of Forcible Acts to States”, see *supra* n. 14, 142.
86 M. MILANOVIC, “State Responsibility for Genocide”, see *supra* n. 9, 584.
87 T. RUYIS, ‘Armed Attack and Article 51 of the UN Charter’, see *supra* n. 15, 473.
88 Like NOLLKAEMPER does to some extent, A. NOLLKAEMPER, “Attribution of Forcible Acts to States”, see *supra* n. 14, 152.
put the authority of the ICJ’s rulings into question. The uncontested position of the ILC, which also supports an inter-state reading, nevertheless substantiates additionally this point of view. The ILC has stated the following in this respect:

“(…) In other words, for action of the State involving recourse to the use of armed force to be characterized as action taken in self-defence, the first and essential condition is that it must have been preceded by a specific kind of internationally wrongful act, entailing wrongful recourse to the use of armed force, by the subject against which the action is taken. The great majority of writers agree that, unlike the case of state of necessity, to be able to invoke self-defence it is indispensable that the State against which measures of self-defence are taken shall have committed an internationally wrongful act.”

2. An Inter-State Reading and Terrorism?

In a terrorism context however, the international community has been confronted with non-state actors which are also capable of committing extremely serious attacks against states. How can one reconcile this development with an inter-state reading of art. 51? As already mentioned in the previous Chapter, the attribution-based definition of armed attack requires that these armed attacks be attributed to a state. In other words, by fulfilling this requirement, an armed attack carried out by a non-state actor can also trigger a right of self-defence. It is moreover generally accepted that actions of irregular forces (i.e. non-state actors) can also constitute an armed attack. However, the controversy lies in the question what precise degree of state involvement is required to attribute these armed attacks to a state, which would subsequently allow the use of force in self-defence against that attacking state.

89 T. Ruys, ‘Armed Attack’ and Article 51 of the UN Charter, see supra n. 15, 473.
92 The 9/11 attacks indeed did not constitute an armed conflict between two or more states. On the contrary, on 9/11 the world was confronted with a serious attack by a non-state actor against a state, A. CasseSE, “Terrorism is Also Disrupting Some Crucial Legal Categories of International Law”, see supra n. 4, 1.
It has been contended in this respect - even under an inter-state approach - using armed force in self-defence against these non-state actors (i.e. terrorist groups) within the territory of a consenting state or on the high seas wouldn’t cause therefore any legal difficulties. In other words, only when a state, which has been the victim of an armed attack carried out by a non-state actor from the territory of another state, wants to use force in self-defence against a non-cooperative state from which the initial armed attack emanated, the armed attack needs to be directly attributable to that state.94

It is moreover very important to note that the requirement of direct attributability is based on the core idea that any forcible action against a third state (even when specifically focused at terrorist groups) implies ipso facto a violation of that state’s sovereignty and territorial integrity.95 This violation could however be justified when an attacked state is making use of its inherent right of self-defence. However, only when the target state is directly responsible for the initial armed attack (i.e. when the armed attack is attributable to that state), the attacked state can resort lawfully to the use of force in self-defence.96 As TRAVALIO and ALTENBURG have clearly explained; “Because an attack against the terrorists violates the territorial integrity of the host state, the "armed attack" of the terrorists must be attributable to that state. Only then can force be used against the terrorists in that state or against the forces of that state itself."97 This implies a contrario that a mere indirect responsibility due a state’s own failure to prevent or abstain from any involvement or encouragement of terrorist acts will not suffice to justify the use of force in self-defence against that state.98 This is the logical consequence of the basic concept of the law of state responsibility, namely that a state is only responsible for its own actions.99 In other words, the fact that a state has failed to

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95 Even if one should assume an armed attack as an autonomous source of armed attack in the meaning of art. 51, the attribution problem always re-enters the debate. When one exercises its right of self-defence against the state in which the non-state actors are territorially located, one automatically violates the territorial sovereignty of that state, M. KOWALSKI, “Armed Attack, Non-State Actors and a Quest for the Attribution Standard”, see supra n. 23, 103; C.J. TAMS, ‘The Use of Force against Terrorists”, see supra n. 71, 385; However see Chapter 4.4 of Part IV for a different point of view.
96 T. BECKER, Terrorism and the State, see supra n. 94, 158.

respect its obligation to prevent and abstain doesn’t make the (terrorist) attacks as such attributable to it.  

It is therefore plain that under this approach a determination of direct state responsibility is an absolute *conditio sine qua non* to justify a lawful use of force in self-defence. Attribution becomes thus a very “critical issue” in this respect. In addition, it becomes clear that the inter-state approach is to some extent a mere instantiation of the fundamental principle of the law of state responsibility (a state can only be held responsible for its own actions) within the law of self-defence.

As previously mentioned, the main controversy lies however in the degree of state involvement which is required to attribute actions of non-state actors to a state, which would subsequently trigger a right of self-defence. It is thus necessary to explore under which conditions an armed attack carried out by private individuals can be attributed to a state. Therefore, the secondary rules of state responsibility now come into play, more precisely the rules of attribution. Before one can continue discussing the importance of the rules of attribution, one must firstly know what is being exactly understood by ‘attribution’. Attribution or imputation has been defined in international law as being:

“An intellectual operation necessary to bridge the gap between the individual or a group of individuals who perpetrated an unlawful act under international law and the attribution of the breach of an obligation and the responsibility to the state.”

CONDORELLI and KRESS provide a more extensive and detailed definition:

“The term used to denote the legal operation having as its function to establish whether given conduct of a physical person, whether consisting of positive action or an omission, is to be characterized from the point of view of international law, as an “act of the State” (or the act of any other entity possessing international legal responsibility). In other words, by the term “attribution”, reference is made to the

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101 T. BECKER, *Terrorism and the State*, see supra n. 94, 160.


103 See supra n. 93.


body of criteria of connection and the conditions which have to be fulfilled, according to the relevant principles of international law, in order to conclude that it is a State (or other subject of international law) which has acted in the particular case.  

When this process of attribution has been successfully completed, a terrorist attack carried out by non-state actors shall be considered as an “armed attack” in the meaning of art. 51 UN Charter. To entail state responsibility for private actions, it is generally required for these private actors to act as de facto agents or organs. When doing so, the law of state responsibility (i.e. law of attribution) will consider the state as the author of the private conduct. The rules of attribution are thus the key to link an armed attack carried out by non-state actors to a state and to subsequently justify the use of armed force in self-defence against the attacking state. In sum, the rules of attribution are the instrument to preserve an inter-state reading of self-defence - which already is to some extent an instantiation of the fundamental principle of the law of state responsibility - within a terrorism context. Art. 8 ILC Draft Articles which establishes a “direction and control” standard is absolutely crucial in this respect. The relevant rules of attribution will be discussed extensively in Part. III.

3. An Apparent ‘Merger’ between Substantive- and Attribution Rules

It is moreover very important to note in this respect that an inter-state reading of art. 51 UN Charter could in fact constitute to a certain extent a ‘merger’ between the primary rules of Jus ad Bellum and the secondary rules of state responsibility. In other words, the proposition that an “armed attack” can only constitute an “armed attack” in the meaning of art. 51 when it has been carried out by a state (i.e. the attribution-based definition of “armed attack”), could be considered to some extent as a form of an incorporation of attribution rules into the substantive rule itself.

In the first place, one needs to acknowledge that in general any rule of attribution can be theoretically incorporated into the primary rules. The rules of attribution (i.e. the secondary rules) can thus be incorporated into the rules governing the use of force (i.e. the primary rules). This would make these primary rules more complex, but in essence, there wouldn’t be

106 L. CONDORELLI and C. KRESS, “The Rules of Attribution: General Considerations”, see supra n. 18, 221.
107 C.J. TAMS, “The Use of Force against Terrorists”, see supra n. 71, 368-369; A CASSESE, “The International Community’s “Legal” Response to Terrorism”, see supra n. 100, 589.
108 T. BECKER, Terrorism and the State, see supra n. 94, 3, 42.
109 M. MILANOVIC, “State Responsibility for Genocide”, see supra n. 9, 584.
any change of substance. The substance of a certain principle is of main importance, its theoretical classification as a primary or secondary rule is of subordinate importance.\footnote{A. NOLLKAEMPER, “Attribution of Forcible Acts to States”, see supra n. 14, 148.} This incorporation can take place through the formulation of the primary rule itself (i.e. through definitions). In case of the inter-state approach this seems to have occurred through the definition of “armed attack” as formulated by art. 51 UN Charter.\footnote{A. NOLLKAEMPER, “Attribution of Forcible Acts to States”, see supra n. 14, 145; The next Part will deal more extensively with the precise scope of the notion of “Armed Attack”.} Art. 1 of UNGA resolution 3314 on the Definition of Aggression of 1974 defines ‘aggression’.

“Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, (...)”.

Art. 3 (g) further defines aggression as:

“The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.”\footnote{Art. 3 (g) Resolution 3314 (XXIX) of the United Nations General Assembly, 14 December 1974 UN Doc. A/Res/3314.}

As a matter of fact, this definition of aggression is a compromise between a broad concept of aggression, including also indirect aggression, i.e. acts of state sponsored or supported terrorism and a more restrictive approach. The broad concept was mainly defended by Western states. The restrictive approach on the other hand was mainly defended by Third World countries.\footnote{K. N. TRAPP, State Responsibility for International Terrorism , see supra n. 6, 25-26; O. CORTEN, F. DUBUISSON, “Operation ‘Liberté Immuable’ Une Extension Abusive du Concept de Legitime Defense”, R.G.D.I.P. 2002., 57 (hereafter: O. CORTEN, F. DUBUISSON, “Operation ‘Liberté Immuable’”).} At the end, the final definition of aggression which was reached after years of difficult negotiations did not address the issue of terrorism at all.\footnote{K. N. TRAPP, State Responsibility for International Terrorism, see supra n. 6, 25-26.} In sum, no form of indirect aggression falls under the scope of this definition.\footnote{However, one should mention that there exists disagreement with respect to the question whether or not indirect aggression falls under the scope of the definition of aggression, and consequently of armed attack, A. RANDZIELHOFER, G. NOLTE, “Article 51” in B. SIMMA, D. KHAN, G. NOLTE, A. PAULUS, N. WESSENDORF (eds.) The Charter of The United Nations A Commentary, Oxford, Oxford University Press, 2012, 1414 (hereafter: A. RANDZIELHOFER, G. NOLTE, “Article 51”).} Indeed, art. 1 of UNGA resolution 3314 clearly mentions “the use of armed force by a state” and is thus limited to acts of direct aggression (i.e. acts which are attributable to a state). However, the use of armed force needs not necessarily to be carried out by the regular military force of a state itself. The definition of aggression thus also considers as acts of aggression the use of armed force

112 A. NOLLKAEMPER, “Attribution of Forcible Acts to States”, see supra n. 14, 145; The next Part will deal more extensively with the precise scope of the notion of “Armed Attack”.
113 Art. 3 (g) Resolution 3314 (XXIX) of the United Nations General Assembly, 14 December 1974 UN Doc. A/Res/3314.
115 K. N. TRAPP, State Responsibility for International Terrorism, see supra n. 6, 25-26.
carried out by “the sending by or on behalf of a State” and its “substantial involvement therein”. 117

In the Nicaragua judgment, the ICJ clearly cited expressis verbis art. 3 (g) of UNGA resolution 3314 to define “armed attack”. The Court reaffirmed this in the Armed Activities case. 118 Moreover, The Court considered this definition to reflect international customary law. 119 The definition of armed attack includes thus also the “sending by or on behalf” and “substantial involvement” criteria. 120 Furthermore, the ICJ confirmed that acts of indirect aggression do not fall under the scope of “armed attack” by stating that “(…) the Court does not believe that the concept of armed attack includes (…) also assistance to rebels in the form of the provision of weapons or logistical or other support.” 121 The relevant considerations of the ICJ in the Nicaragua case with respect to the rules of Jus ad Bellum in a terrorism context will be elaborated more extensively in the next Part.

It must be acknowledged that within a terrorism context, there are diverging approaches towards this definition of “armed attack”. Whereas a majority of the scholars adhere to the understanding that armed attacks carried out by non-state actors should be attributed to a state through the general rules of attribution (i.e. the ILC Draft Articles), there are authors who consider the definition of “armed attack” to provide lex specialis attribution standards. 122 One should bear in mind in this respect that the ILC Draft Articles operate on a mere residual way. 123 According to a third position (i.e. the so-called constructive approach), the definition of armed attack does not provide at all any attribution-specific elements, but rather entails an autonomous assessment of state conduct which could constructively be equated to an armed

117 K. N. TRAPP, State Responsibility for International Terrorism, see supra n. 6, 26-27.
118 ICJ Armed Activities Case, see supra n. 85, para. 146.
120 M. KOWALSKI, “Armed Attack, Non-State Actors and a Quest for the Attribution Standard”, see supra n. 23, 109; S. Cenic, “State Responsibility and Self-Defence in International Law Post 9/11” ; supra n. 119, 204; Y. DINSTEIN, War, Aggression and Self-Defence, see supra n. 78, 181.
121 ICJ, Nicaragua Case, see supra n. 119, para. 195; T. RUYTS, ‘Armed Attack’ and Article 51 of the UN Charter, see supra n. 15, 417-418, 486, 529; O. CORTEN, F. DUBUISSON, “Operation ‘Liberté Immuable’”, see supra n. 114, 57; Y. DINSTEIN, War, Aggression and Self-Defence, see supra n. 78, 182.
122 T. BECKER, Terrorism and the State, see supra n. 94, 170-173.
123 See art. 55 ILC Draft Articles which provides a lex specialis exception; See supra Chapter 1.2 of introduction
attack. In sum, either it is assumed that the “sending by or on behalf” and “substantial involvement” criteria are instantiations of the concept of armed attack which need to be assessed through the general rules of attribution, or it is claimed that these criteria constitute *lex specialis* attribution thresholds. Finally it has also been contended that principles of attribution aren’t relevant at all because art. 3 (g) constitutes conduct which in *itself* constitutes an *autonomous* armed attack.

According to TRAPP for instance, because the “sending by or on behalf” and “substantial involvement” criteria are not included in the ILC Draft Articles, these criteria need to be considered as *lex specialis* thresholds for attributing the actions of armed bands to the sending state. CORTEN and DUBUISSON argue in the same line by stating that the formulation of art. 3 (g) serves as *lex specialis*, whereas the general rules of state responsibility have a mere subordinate and complementary role. TRAPP however acknowledges on the other hand that these criteria are very closely related to the scope of art. 8 ILC Draft Articles. Indeed, the “sending by or on behalf” criterion requires a close relationship between the sending state and the private actor that is very similar to, or even the same as a *de facto* actor/organ relationship as envisaged by art. 8 ILC Draft Articles. With regard to the rather vague “substantial involvement” requirement, ZANARDI argues that the term “substantial” can only have any legal significance by providing a threshold of state involvement which transforms private individuals into *de facto* organs. According to CORTEN and DUBUISSON, “substantial involvement” presupposes that a state is informed about a future commission of an act of aggression and its participation therein. The state’s participation needs moreover to be substantial in this respect, which excludes a mere incidental or accessory involvement. A *fortiori* and *a contrario*, the mere toleration of armed groups on one state’s territory – which nevertheless constitutes illegal state conduct possibly entailing state responsibility – does not

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124 M. KOWALSKI, “Armed Attack, Non-State Actors and a Quest for the Attribution Standard”, see supra n. 23, 107; T. BECKER, *Terrorism and the State*, see supra n. 94, 170, 176.
125 K. N. TRAPP, *State Responsibility for International Terrorism*, see supra n. 6, 27.
126 O. CORTEN, F. DUBUISSON, “Operation ‘Liberté Immuable’”, see supra n. 144, 64, 68.
127 K. N. TRAPP, *State Responsibility for International Terrorism*, see supra n. 6, 27; Part III will elaborate more extensively upon the precise scope and meaning of art. 8 ILC Draft Articles.
129 L. ZANARDI, “Indirect Military Aggression”, see supra n. 72, 115.
suffice in this respect.\textsuperscript{131} As previously stated, the ICJ advocated moreover in the Nicaragua case that assistance to rebels by the provision of weapons or logistical support isn’t enough to amount to an “armed attack”.\textsuperscript{132} It hereby implicitly excluded the toleration or harboring of private armed groups on one state’s territory from the scope of “armed attack”.\textsuperscript{133} The term “substantial” needs thus to be understood rather restrictively.\textsuperscript{134}

BECKER on the contrary doesn’t consider the “sending by or on behalf” and “substantial involvement” criteria to be standards of attribution. He rather considers these elements to constitute in itself an armed attack. In other words, he considers the wording of art. 3 (g) as formulating the autonomous conditions under which a state commits an act of aggression, instead of an elaboration of attribution principles with respect to an act of aggression. He argues that there is no textual basis for the latter point of view. He refers \textit{inter alia} to the Nicaragua case, which is strengthening this point of view according to him. The ICJ used after all art. 3 (g) to define what an armed attack constitutes.\textsuperscript{135} He also pinpoints that the Court made in that respect the important distinction between the responsibility of the US for its own conduct (\textit{i.e. a Jus ad Bellum} violation where no attribution assessment was required) and the responsibility of the US for the conduct of the Contras (\textit{i.e. violations of Jus in Bello} which nevertheless needed to be attributed to the US in order to entail the responsibility of the US for these actions).\textsuperscript{136} The essence of this constructive approach towards “armed attack” is based on the idea that a determination of a \textit{Jus ad Bellum} violation is not dependent on the question whether or not the private act is attributable to a state.\textsuperscript{137} According to TRAPP’S point of view, this position is completely ignoring art. 1 of UNGA resolution 3314. She considers that the acts enumerated in art. 3 (including point g) need to be read \textit{within} the meaning of art. 1. Therefore the “sending of armed bands” cannot in itself constitute an armed attack.

In other words, according to her point of view the armed force carried out by these armed bands needs to be attributed to the state, on the basis of the “sending” requirement.\textsuperscript{138}

\textsuperscript{131} T. Ruys, ‘Armed Attack’ and Article 51 of the UN Charter, see supra n. 15, 417-418, 486, 529; O. Corten, F. Dubuisson, “Operation Liberté Immuable'”, see supra n. 114, 56.
\textsuperscript{132} ICJ, Nicaragua Case, see supra n. 119, para. 195.
\textsuperscript{133} See supra n. 131; the controversial ‘harboring theory’ will be discussed more extensively in the last Part.
\textsuperscript{134} T. Ruys, ‘Armed Attack’ and Article 51 of the UN Charter, see supra n. 15, 415; T. Ruys, S. Verhoeven, “Attacks by Private Actors and The Right of Self-Defence”, see supra n. 128, 303, 314; The Nicaragua case will be discussed more extensively in the following Part.
\textsuperscript{135} T. Becker, Terrorism and the State, see supra n. 94, 171, 176-177.
\textsuperscript{136} Ibid; The Nicaragua judgment will be discussed more extensively in the following Parts.
\textsuperscript{137} T. Becker, Terrorism and the State, see supra n. 94, 183.
\textsuperscript{138} K. N. Trapp, State Responsibility for International Terrorism, see supra n. 6, 27.
Nevertheless, one may not forget that a majority of legal scholars prefers to apply the general rules of international state responsibility also in a terrorism context. Authoritative scholars such as *inter alia* AGO, CONDORELLI, CASSESE, BROWNIE and ALEXANDROV adhere to this point of view (whether or not in a nuanced way).

However, despite the existing conflicting views, one could purely *theoretically* and very *cautiously* conclude that the wording of this definition illustrates at the very least to a certain extent a so-called ambiguous “*interpenetration*” of primary and secondary rules. The line between “sending by or on behalf” and “substantial involvement” as instantiations of the legal concept armed attack or as special attribution thresholds seems to be very thin. However, it is absolutely not clear whether the rules of attribution have perpetrated into the substantive use of force rules at all.

Indeed, at first glance it is impossible to ignore the fact that the act of sending by or on behalf of a state of non-state actors to carry out acts of armed force against another State, or its substantial involvement therein seem to be defined as autonomous instances of the act of aggression. In addition, there doesn’t seem to be any compelling reasons not to use the standard principles of international responsibility to these acts. In any event, if on the one hand one considers “sending by or on behalf” and “substantial involvement” to form part of the primary rule, recourse to the secondary rules of attribution is thus still necessary to assess the more concrete degree of the required state involvement. This research is precisely dealing with this latter aspect. Moreover, on the assumption that the primary definition of armed attack already seems to contain some attribution-specific provisions, the distinction between primary and secondary rules doesn’t seem to be as impermeable as sometimes

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141 A CASSESE, “The International Community’s “Legal” Response to Terrorism”, see supra n. 100, 597.
143 S.A. ALEXANDROV, *Self-Defense Against the Use of Force in International Law*, see supra n. 90, 182-183.
144 T. BECKER, *Terrorism and the State*, see supra n. 94, 172-173.
145 M. KOWALSKI, “Armed Attack, Non-State Actors and a Quest for the Attribution Standard”, see supra n. 23, 108.
146 T. BECKER, *Terrorism and the State*, see supra n. 94, 184.
147 M. KOWALSKI, “Armed Attack, Non-State Actors and a Quest for the Attribution Standard”, see supra n. 23, 108.
contended.\textsuperscript{149} In addition, one could again very cautiously conclude that the ‘distinction’
between primary and secondary rules is not a solid and rigid one. It rather constitutes a subtle
and osmotic relationship between the primary and secondary rules.

A further analysis of the very complex relationship between the substantive use of force rules
and the rules of attribution would go far beyond the scope of this research. It is however very
important for the purposes of this research to be able to distinguish the different approaches
towards the concept of “armed attack” as formulated in art. 3 (g).

\textbf{4. Conclusion}

One can briefly conclude that according to an inter-state reading of art. 51 UN Charter only
armed attacks \textit{between states} can lawfully imply the use of armed force in self-defence. In
addition, an inter-state approach is to some extent an instantiation of the fundamental
principle of the law of state responsibility according to which a state only bears responsibility
for its own actions. However, in a terrorism context it has been generally accepted that also
non-state actors are capable of carrying out armed attacks. These armed attacks need therefore
to be attributed to a state through the rules of attribution. It is furthermore important to note in
this respect that a state needs to be \textit{directly} and not mere \textit{indirectly} responsible for an armed
attack carried out by a non-state actor to be attributed to it. This approach seems to be in line
with case-law of the ICJ.

In addition, one can conclude that there are multiple diverging points of view with regard to
which attribution rules are applicable towards the concept of armed attack in a terrorism
context. The majority position states that the general rules of state responsibility also need to
be applied in this respect. There are however authors who discern \textit{lex specialis} attribution
thresholds in the definition of aggression, whereas other contend that attribution doesn’t come
into play at all. Moreover, one could very cautiously conclude that an inter-state reading
seems to incorporate to a certain extent the secondary rules of state responsibility within the
substantive primary rules of the use of force. Despite the absence of a consensus with regard
to this proposition, one cannot simply ignore the ambiguous \textit{interpenetration} of primary and

\textsuperscript{149} M. KOWALSKI, “Armed Attack, Non-State Actors and a Quest for the Attribution Standard”, see \textit{supra} n. 23,
secondary rules in the definition of armed attack. The distinction between the primary and secondary rules is thus not clear-cut but rather constitutes a subtle interplay.

The following two Parts will elaborate upon the substantive rules of the law of self-defence and the rules of attribution. When verifying whether acts of international terrorism carried out by non-state actors are sufficiently linked to a state for the victim state to resort lawfully to the use of armed force in self-defence, one needs to fall back on criteria and principles which are dispersed among the substantive rules of *Jus ad Bellum* and the rules of attribution (*i.e.* secondary general rules of international responsibility).\(^{150}\)

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PART II: The Primary Rules of *Jus ad Bellum*

1. Introduction

This Part will succinctly describe the relevant substantive rules of *Jus ad Bellum* from an attribution perspective. The primary rules consist of the substantive international obligations under treaty and customary law.\(^{151}\) The prohibition of international state terrorism as such has a *twofold* character. On the one hand, the state as such is the *subject* of the prohibition of state terrorism.\(^{152}\) In other words, a state should not participate *itself* in acts of international terrorism. The scope and meaning of the prohibition of acts of international state terrorism *sensu stricto* should be examined through the concepts of “armed attack” in the meaning of art. 51 UN Charter and “use of force” as formulated in art. 2 (4) UN Charter.\(^{153}\) The scope of the so-called principle of non-intervention also needs to be elaborated in this respect. It is plain that the prohibition of international terrorism in this respect is a mere instantiation of these concepts which regulate the use of force in international law.\(^{154}\)

On the other hand, the other aspect of the prohibition of international state terrorism does not consider the state as the *subject* of the prohibition; but rather as a *control mechanism* to curb individual terrorist activities.\(^{155}\) This aspect thus consists of an obligation to prevent and refrain from any involvement or encouragement in acts of international terrorism.\(^{156}\) The obligation of states to prevent and abstain from the involvement in acts of terrorism is strongly rooted in international law. As a matter of fact, these obligations are the logical corollaries of the fundamental concept of sovereignty in international law and the due diligence principle. This general obligation has been confirmed multiple times by prominent scholars and international practice.\(^{157}\) The Latin maxim “*sic utere tuo ut alienum non laedas*”, (i.e. “So use your own as not to injure another's property”) covers in a nutshell the essence of this obligation.

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\(^{151}\) K. N. TRAPP, *State Responsibility for International Terrorism*, see supra n. 6, 3; A. NOLLKAEMPER, “Attribution of Forcible Acts to States”, see supra n. 14, 144; See supra chapter 1.2 of Introduction.

\(^{152}\) K. N. TRAPP, *State Responsibility for International Terrorism*, see supra n. 6, 63.

\(^{153}\) See Chapter 1 of Part I for their interrelationship.

\(^{154}\) K. N. TRAPP, *State Responsibility for International Terrorism*, see supra n. 6, 14, 24-25.

\(^{155}\) K. N. TRAPP, *State Responsibility for International Terrorism*, see supra n. 6, 63.

\(^{156}\) Ibid.

\(^{157}\) T. BECKER, *Terrorism and the State*, see supra n. 94, 118.
It has been *inter alia* contended in the *Island of Palmas* arbitration case that:

> Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory. *'*\(^{158}\)

As already elaborated, a mere *indirect* responsibility due a state’s own failure to prevent or abstain will not suffice to justify the use of force in self-defence against that state.\(^{159}\) Indeed, as a state only bears responsibility for its *own* actions, this won’t make the terrorist act as such attributable to the state. For the terrorist act to be attributed to a state, *direct* responsibility is required.\(^{160}\) The focus on the necessary link of attribution between a state and a non-state actor is therefore of utmost importance for this research. However, it is *extremely* important to acknowledge the *autonomous* existence of the separate and primary obligation of every state to prevent and abstain from acts of international terrorism in order to be capable of answering the research question. The prohibition of international terrorism *sensu stricto* will be discussed more extensively in Chapter 3 whereas the obligation to prevent and abstain from international terrorism will be treated rather succinctly in Chapter 2. Finally, the current state of *Jus ad Bellum* will be analyzed critically in Chapter 4.

### 2. The Obligation to Prevent and Abstain from International Terrorism

#### 2.1 A Positive Obligation to Prevent

The positive obligation to prevent acts of international terrorism is a specific instantiation of the general obligation to prevent which has been laid down by the ICJ in its *Corfu Channel* case. The Court stated clearly in this case that every state has an obligation "*not to allow knowingly its territory to be used for acts contrary to the rights of other states.*"\(^{161}\) As a matter of fact, the obligation to prevent in a terrorism context does not differ fundamentally from similar obligations in e.g. international environmental law and

\(^{158}\) Island of Palmas Case (US v Netherlands), 4 April 1928, Reports of International Arbitral Awards Vol. II, 839.

\(^{159}\) T. BECKER, *Terrorism and the State*, see supra n. 94, 160.

\(^{160}\) T. BECKER, *Terrorism and the State*, see supra n. 94, 3-4, 160.

international human rights law.\textsuperscript{162} Counter-terrorism obligations are thus the logical corollaries of the general obligation of prevention, which forces each state to avert the emanation of any harm to other states from its territory.\textsuperscript{163} In addition, it is very important to acknowledge that this obligation to prevent is an obligation of conduct (i.e. the contrary of an obligation of result). This obligation to prevent is therefore circumscribed by a due diligence standard of conduct.\textsuperscript{164} In other words, compliance with this obligation needs to be assessed through a due diligence standard of conduct.\textsuperscript{165} Moreover, the duty to prevent obviously is - in contrast to the duty to refrain - a positive duty because it imposes obligations to the state to adopt a preventive policy towards potential terrorist threats.\textsuperscript{166}

In addition, it must be mentioned that the responsibility for breaching a positive obligation is not fault-based. A very important characteristic of positive obligations in general is their objective standard.\textsuperscript{167} There is therefore no need to attribute specific attributable faults to a particular state organ for state responsibility to take place. The objective standard is based on a general assessment of the state actions and omissions as a whole.\textsuperscript{168} In sum, when there is a positive obligation that has not been respected, the state which had to act but failed to do so bears ipso facto state responsibility in this respect. It is crucial to acknowledge this important characteristic for the purpose of this research.\textsuperscript{169}

\begin{quote}
"The point is not that some organ or agent has acted in such a way as to violate international law, but rather that no organ or agent has acted, when one ought to have done so."
\end{quote}

The obligation of prevention therefore implies a relative and flexible test which is very dependent on the specific factual circumstances of each case.\textsuperscript{171} Assessing whether a state did comply with its due diligence obligation is not an easy task. Compliance needs to be

\begin{flushleft}
\textsuperscript{162} T. BECKER, \textit{Terrorism and the State}, see supra n. 94, 170.
\textsuperscript{163} T. BECKER, \textit{Terrorism and the State}, see supra n. 94, 140.
\textsuperscript{164} K. N. TRAPP, \textit{State Responsibility for International Terrorism}, see supra n. 6, 64; T. BECKER, \textit{Terrorism and the State}, see supra n. 94, 141.
\textsuperscript{165} K. N. TRAPP, \textit{State Responsibility for International Terrorism}, see supra n. 6, 80; T. BECKER, \textit{Terrorism and the State}, see supra n. 94, 132.
\textsuperscript{166} T. BECKER, \textit{Terrorism and the State}, see supra n. 94, 131.
\textsuperscript{167} This objective standard may not be confused with the due diligence standard.
\textsuperscript{169} See infra Part IV.
\textsuperscript{170} R.L. JOHNSTONE, “State Responsibility: A Concerto for Court, Council and Committee”, see supra n. 168, 74.
\textsuperscript{171} K. N. TRAPP, \textit{State Responsibility for International Terrorism}, see supra n. 6, 65-66; T. BECKER, \textit{Terrorism and the State}, see supra n. 94, 141-142.
\end{flushleft}
constantly evaluated in the light of the state’s knowledge (or what the state ought to have known) about the magnitude of the potential terrorist threats emanating from its territory and the state’s capacity to handle these threats. Knowledge and capacity are thus two crucial elements when assessing this due diligence obligation in a specific situation. The ICJ therefore acknowledged in the *Corfu Channel* case - besides the element of knowledge - also the element of capacity by stating that “it was perfectly possible for the Albanian authorities to use the interval of almost two hours that elapsed before the explosion affecting Saimznevz (14.53 hours or 14.55 hours) to warn the vessels of the danger into which they were running.” In the *ICJ Tehran Hostages* case, the Court made a similar reasoning by emphasizing Iran’s proven capacity to prevent and end attacks on other embassies when arguing that Iran had violated the due diligence principle by its failure to prevent the attacks on the US embassy.

BECKER summarizes very well the essence of the due diligence obligation of prevention in a terrorism context as “*a duty on the State to use all the administrative, legal and security measures at its disposal to prevent and suppress terrorist and related activity as effectively as possible.*” The due diligence obligation of prevention thus obliges every state to take all reasonable measures at its disposal to prevent terrorist attacks emanating from its territory and violating other states’ rights. However, it needs to be noted that when terrorist activities nevertheless succeed to emanate from one state’s territory, *despite* the state’s fulfillment of its due diligence obligation, no state responsibility is incurred. The obligation of prevention is thus only violated when a terrorist attack has effectively taken place *and* the preventive measures did not reach the appropriate due diligence threshold. The negative obligation to refrain differs a lot in this respect.

In the aftermath of the events of 9/11 some very important UNSC resolutions have been passed such as *inter alia* UNSC resolution 1373. This resolution is rather unique because it is the very first time that the UNSC used its powers under Chapter VII of the UN Charter to

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173 ICJ *Corfu Channel Case*, see supra n. 161, 23; T. BECKER, *Terrorism and the State*, see supra n. 94, 142.
175 T. BECKER, *Terrorism and the State*, see supra n. 94, 142.
176 K. N. TRAPP, *State Responsibility for International Terrorism*, see supra n. 6, 80; T. BECKER, *Terrorism and the State*, see supra n. 94, 132.
177 K. N. TRAPP, *State Responsibility for International Terrorism*, see supra n. 6, 81.
create universally binding obligations. In other words, this resolution is addressing a specific issue of international peace and security in a legislative way towards the whole international community without any temporal or geographical limitations, i.e. \textit{erga omnes}. The significant impact of this resolution and other UNSC resolutions on the abovementioned positive obligation to prevent will be extensively discussed in Chapter 4.3 of Part IV.

\textbf{2.2 A Negative Obligation to Refrain}

Furthermore, one needs to note that next to the positive obligation to prevent international terrorism, there also exists a \textit{negative} obligation to abstain in this respect. This obligation seems to overlap at least partially with the scope of the prohibition of the use of force which forms part of the prohibition of international terrorism \textit{sensu stricto}. This negative obligation has been formulated in UNGA resolution 2625 of 1970, \textit{i.e.} Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (hereafter: UNGA resolution 2625 of 1970 on Friendly Relations):

\begin{quote}
"Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force."\end{quote}

The ICJ stated in the \textit{Armed Activities} case that the duty to refrain from acquiescing as formulated by this Resolution is an expression of international customary law. The obligation to refrain has been moreover reaffirmed in UNGA resolution 46/60 of 9 December 1994 with regard to measures to eliminate international terrorism:

\begin{quote}
"States, guided by the purposes and principles of the Charter of the United Nations and other relevant rules of international law, must refrain from organizing,\end{quote}

\begin{footnotes}
\item T. BECKER, \textit{Terrorism and the State}, see supra n. 94, 122.
In contrast to the positive due diligence obligation, the negative obligation to refrain is an absolute obligation of result. In other words, the obligation to refrain is not circumscribed by a due diligence standard of conduct. Whenever a state adopts a behavior consisting of any form of support, facilitation or toleration of terrorist activities, this state thus violates ipso facto its obligation to refrain. In contrast to the abovementioned obligation to prevent, a violation of the obligation to refrain does not require the execution of a terrorist attack. This obligation can thus be violated without any materialization of a terrorist threat. Moreover, after the events of 9/11, the UNSC stated clearly in resolution 1373 of September 28 2001 the following:

“Decides also that all States shall: Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists”

2.3 Conclusion

One can thus conclude succinctly that the obligation to prevent and abstain constitutes of two conceptually different legal obligations. The obligation to prevent is a positive obligation which needs to be assessed by a due diligence standard of conduct. The obligation to abstain is a negative obligation which is an obligation of result. An execution of a terrorist action is necessary for the obligation to prevent to be violated, whereas this isn’t the case with respect to the obligation to abstain. A violation of these obligations definitely incurs state responsibility, but does not imply the attribution of the terrorist attacks to the state. In other words, violating these obligations implies an indirect responsibility of the state, whereas a direct responsibility is required for attribution to occur under an inter-state approach perspective.

184 II. A/Res/49/60.
185 K. N. TRAPP, State Responsibility for International Terrorism, see supra n. 6, 80; T. BECKER, Terrorism and the State, see supra n. 94, 132.
186 Ibid.
187 K. N. TRAPP, State Responsibility for International Terrorism, see supra n. 6, 81.
It is very important for the purpose of this research to be aware of the existence of the obligation to prevent and abstain (and the possible indirect responsibility it can entail) and to be subsequently able to distinguish it from the prohibition of international terrorism as such, which will be treated below. The ICJ Genocide case clearly exemplifies this distinction in a genocide context. The Court didn’t hold Serbia to be responsible for the genocide itself, however Serbia did fail to comply to its positive and autonomous obligation to prevent and punish acts of genocide.\(^{189}\)

**3. The Prohibition of International Terrorism Sensu Stricto**

**3.1 “Armed Attack” in the Meaning of Art. 51 UN Charter**

**3.1.1 The 1974 UNGA Resolution 3314 on the Definition of Aggression**

The most important issues related to the definition of aggression, i.e. armed attack have already been set out in Part II. This chapter will therefore be limited to a very brief repetition of the core issues. Art. 1 of UNGA resolution 3314 on the Definition of Aggression of 1974 defines “aggression”. This definition of aggression clearly includes only acts carried out by a state:

> “Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, (…)”.

Art. 3 (g) further defines aggression as:

> “The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.”\(^ {190}\)

According to art. 4 of this resolution, all the acts enumerated in art. 3 are not exhaustive. These acts (which are enumerated in art. 3) amount moreover to acts of aggression within the meaning of art. 1.\(^ {191}\)


\(^{190}\) See supra n. 113.
3.1.2 The ICJ Nicaragua Judgment of 1986

The ICJ gave for the first time a definition of armed attack in its 1986 *Nicaragua* judgment:

“(…) There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" (inter alia) an actual armed attack conducted by regular forces, "or its substantial involvement therein". This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces.(…)”

The Court clearly cited *expressis verbis* art. 3 (g) of UNGA UNGA resolution 3314 on the Definition of Aggression of 1974 to define “armed attack”, which is moreover considered to reflect international customary law. By doing so, the ICJ equated - at least to some extent - the concept of aggression with the concept of armed attack in the self-defence meaning.

The ICJ stated that when a state is sending armed groups into the territory of another state within the meaning of art. 3(g) of the UNGA resolution 3314 of the Definition of Aggression, this amounts to an armed attack in the meaning of art. 51. The ICJ made furthermore clear that this entitles the attacked state to use of force in self-defence against the sending state.

This point of view has been recently confirmed in the *Armed Activities* case. As already mentioned in the previous part, there are diverging opinions on how to link this definition with the rules of attribution. However, the majority opinion states that the general rules of state responsibility also need to be used in a terrorism context. The rules of attribution which provide the thresholds for attributing private conduct to a state will be extensively discussed in the following Part.

191 K. N. TRAPP, *State Responsibility for International Terrorism*, see supra n. 6, 27.
192 ICJ, *Nicaragua Case*, see supra n. 119, para. 195.
196 ICJ *Armed Activities Case*, see supra n. 85, para. 146.
In sum, an armed attack is thus not merely an action by the regular armed forces, but also the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another state of such gravity as to amount to an actual armed attack conducted by regular forces or its substantial involvement therein. What precise degree of state involvement is required to justify the use of force in self-defence against the sending state is however a difficult question. It is therefore the aim of this research to provide an answer to the crucial question what precise degree of state involvement is required for imputing acts of non-state actors to a state, and its possible modification after the events of 9/11.

It is however important to note that the Court did not consider the supply of arms and any other support to armed bands to amount to an armed attack (i.e. indirect aggression). In other words, state assistance to private terrorist groups, harboring, tolerating or acquiescing terrorist groups certainly entails state responsibility, but is not considered as an armed attack as such. The next chapter will further clarify this finding.

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197 ICJ, Nicaragua Case, see supra n. 119, para. 195; K. N. TRAPP, State Responsibility for International Terrorism, see supra n. 6, 27; S. CENIC, “State Responsibility and Self-Defence in International Law Post 9/11”, see supra n. 119, 205.
198 See supra Chapter 2 of Part I, n. 93.
199 ICJ, Nicaragua Case, see supra n. 119, para. 195; Y. DINSTEIN, War, Aggression and Self-Defence, see supra n. 78, 182; O. CORTEN, F. DUBUISSON, “Operation ‘Liberté Immuable’”, see supra n. 114, 57.
3.2 The “Use of Force” as Formulated in Art. 2 (4) UN Charter

3.2.1 UNGA Resolution 2625 of 1970 on Friendly Relations

As the preamble of the UNGA resolution 2625 of 1970 on Friendly Relations states, it aims at achieving the progressive development and codification of art. 2 (4) UN Charter. This resolution considered the prohibition of terrorism as an instantiation of the prohibition on the use of force by considering *inter alia* the following as its First Principle:

“Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.”

“Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.”

These provisions are declaratory of customary international law. When the armed activities of a non-state actor in another state are attributable to a certain state, that state is violating art. 2 (4) because states are obliged to refrain from “participating” in terrorist acts abroad. Moreover, the threshold of “organizing” terrorist acts is closely related to the concepts of “direction or control” as formulated in art. 8 ILC Draft Articles. When the organizational behavior of a state towards the armed activities of non-state groups meets the thresholds of art. 8, these armed activities will logically become attributable to that state. This will be further examined in part III, which deals with the rules of attribution.

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201 Art. 2 (4) UN Charter, see supra n. 70; K. N. TRAPP, *State Responsibility for International Terrorism*, see supra n. 6, 28.
203 ICJ *Armed Activities Case*, see supra n. 85, para. 162.
204 K. N. TRAPP, *State Responsibility for International Terrorism*, see supra n. 6, 29.
3.2.2 The ICJ Nicaragua Judgment of 198640

The ICJ further reconfirmed in its famous paragraph 195 of the Nicaragua judgment of 1986 the idea of the First Principle of UNGA resolution 2625 of 1970 on Friendly Relations - without however referring *expressis verbis* to it – by stating the following:206

“(…) Court does not believe that the concept of "armed attack" includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States (…)”.207

It is important to note in this respect that the conduct of harboring, tolerating or acquiescing terrorist groups on a state’s territory certainly entails state responsibility (*i.e.* violation of the prohibition of the use of force and/or the principle of non-intervention as well as a violation of the obligation to prevent and abstain), but is not considered by the Court as an armed attack.208 The Court made thus a clear *distinction* between actions of non-state actors that may fall under the scope of armed attack and state assistance to those actors which do not fall under the scope of armed attack, but however still can amount to a violation of the use of force or the principle of non-intervention.209

“(…) the Court has indicated that while the concept of an armed attack includes the despatch by one State of armed bands into the territory of another State, the supply of arms and other support to such bands cannot be equated with armed attack. Nevertheless, such activities may well constitute a breach of the principle of the non-use of force and an intervention in the internal affairs of a State, that is, a form of conduct which is certainly wrongful, but is of lesser gravity than an armed attack.(…)”210

The Court furthermore distinguished between two types of possible support. While training and supporting armed bands clearly constitutes a violation of the prohibition of the use of

206 The ICJ however referred *expressis verbis* UNGA resolution 2625 of 1970 on Friendly Relations while formulating the scope of assistance that amounts to a prohibited use of force, see ICJ, Nicaragua Case, see supra n. 119, para. 228; In the Armed Activities case of 2005, the ICJ referred *expressis verbis* to UNGA resolution 2625 of 1970 on Friendly Relations when it discussed its view - which already has been expressed in its Nicaragua judgment - concerning assistance to irregular armed groups as a prohibited use of force. The Court further confirmed that the provisions thereof are declaratory of customary international law, ICJ Armed Activities Case, see supra n. 85, para. 162.

207 ICJ, Nicaragua Case, see supra n. 119, para. 195.

208 J. Pautz, “Use of Armed Force against Terrorists in Afghanistan, Iraq and Beyond”, see supra n. 200, 541.

209 M. Kowalski, “Armed Attack, Non-State Actors and a Quest for the Attribution Standard”, see supra n. 23, 109; Y. Dinstei, War, Aggression and Self-Defence, see supra n. 78, 182.

210 ICJ, Nicaragua Case, see supra n. 119, para. 247.
force, financial support however does only constitutes a violation of the principle of non-intervention. This approach by the Court has not been uncontested.  

“(...) In the view of the Court, while the arming and training of the contras can certainly be said to involve the threat or use of force against Nicaragua, this is not necessarily so in respect of all the assistance given by the United States Government. In particular, the Court considers that the mere supply of funds to the contras, while undoubtedly an act of intervention in the internal affairs of Nicaragua, as will be explained below, does not in itself amount to a use of force.”

3.3 The Principle of Non-Intervention

3.3.1 UNGA Resolution 2625 of 1970 on Friendly Relations

The Third Principle of UNGA resolution 2628 of 1970 on Friendly Relations also elaborates upon the so-called principle of non-intervention in the domestic affairs of another state. The relevant provisions of the Third Principle for Research are the following:

“(...) No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law (...) Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State (...)”

It is plain that acts of terrorism fall under the scope of the prohibition to intervene in the domestic affairs of another state.

3.3.2 The ICJ Nicaragua judgment of 1986

The ICJ has elaborated on the scope of this principle in the Nicaragua case. The Court stated that the principle of non-intervention is a corollary of the principle of the sovereign equality of states. This principle is considered to be part of international customary law.
One could ask oneself in what respect the principle of non-intervention and the prohibition of the use of force differ, since these two concepts seem to be very similar substantively, if not, as good as identical.\textsuperscript{218} The answer to this question can be found in the purpose or objective of the terrorist acts which are being supported.\textsuperscript{219}

When the purpose of objective of the sponsored activities aims at interfering in “matters in which each State is permitted, by the principle of State sovereignty to decide freely”,\textsuperscript{220} the principle of non-intervention has been violated.\textsuperscript{221} It is clear that the scope of the principle of non-intervention is very broad. The criterion of an interventionist requirement thus doesn’t really provide a lot of added value in assessing the conceptual difference between the principle of non-intervention and the prohibition of the use of force.\textsuperscript{222} However, when a state is militarily supporting terrorist activities which aim at interfering in the domestic affairs of another state, thereby breaching the prohibition of the use of force, the principle of non-intervention and the prohibition of the use of force will be both violated.\textsuperscript{223}

“(...) The Court concludes that acts constituting a breach of the customary principle of non-intervention will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations.”\textsuperscript{224}

It is thus plain that acts of armed intervention can fall under the broad scope of the principle of non-intervention.\textsuperscript{225} The prohibition of the use of force and the principle of non-intervention are two important principles of international law which can sometimes overlap.\textsuperscript{226} The Court confirmed this view in its \textit{Armed Activities} judgment while referring to the abovementioned paragraph of the ICJ \textit{Nicaragua} judgment.\textsuperscript{227} It is important to note that

\textsuperscript{216} Art. 2, §1 UN Charter, see supra n. 70; ICJ, \textit{Nicaragua Case}, see supra n. 119, para. 202.
\textsuperscript{217} The ICJ stated in the \textit{Nicaragua} judgment the following: “The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law”. ICJ, \textit{Nicaragua Case}, see supra n. 119, para. 202.
\textsuperscript{218} K. N. TRAPP, \textit{State Responsibility for International Terrorism}, see supra n. 6, 31.
\textsuperscript{219} Ibid.
\textsuperscript{220} ICJ, \textit{Nicaragua Case}, see supra n. 119, para. 205.
\textsuperscript{221} K. N. TRAPP, \textit{State Responsibility for International Terrorism}, see supra n. 6, 31.
\textsuperscript{222} Ibid.
\textsuperscript{223} ICJ, \textit{Nicaragua Case}, see supra n. 119, para. 209; K. N. TRAPP, \textit{State Responsibility for International Terrorism}, see supra n. 6, 31.
\textsuperscript{224} ICJ, \textit{Nicaragua Case}, see supra n. 119, para. 209.
\textsuperscript{225} M. KOWALSKI, “Armed Attack, Non-State Actors and a Quest for the Attribution Standard”, see supra n. 23, 112.
\textsuperscript{226} Ibid.
\textsuperscript{227} ICJ \textit{Armed Activities} Case, see supra n. 85, para. 164.
not every violation of the principle of non-intervention implies a priori a violation of the
prohibition of the use of force, but a violation of the prohibition on the use of force implies
ipso facto a violation of the principle of non-intervention.\textsuperscript{228} As already mentioned above,
according to the Court, the mere financial support of the US for the Contras did not amount to
a prohibited use of force. This does not affect the finding that this financial support still
amounts to a violation of the principle of non-intervention.\textsuperscript{229}

TRAPP suggests that the distinction made by the Court between military and financial support
is based on the fact financing terrorist activities is expressis verbis mentioned (see supra) in
the UNGA Declaration on friendly relations as an instantiation of the prohibition of the
principle of non-intervention, but not as an instantiation of the prohibition on the use of
force.\textsuperscript{230} The UNGA Declaration on friendly relations indeed only mentions the financing of
terrorist activities when elaborating the principle of non-intervention (third principle). TRAPP
however further mentions that the travaux préparatoires of the UNGA Declaration on
friendly relations do not seem to provide any evidence for a deliberate distinction.\textsuperscript{231} In any
case, this finding could help us at least to a certain extent to try understand the ‘artificial’
distinction made by the ICJ.

4. Some Critical Remarks on the Current State of the Jus ad Bellum

4.1 An Unequal Treatment of “Armed Attack” and “Use of Force”

Every armed attack is ipso facto an illegal use of force, but not every illegal use of force
amounts to an armed attack.\textsuperscript{232} From a policy perspective, this current state of the law has
been criticized. The unequal treatment of “armed attack” and “use of force” would impede
states to protect themselves against violations of the prohibition of the use of force which do
not amount to an armed attack.\textsuperscript{233} It has moreover been contended that the Court’s analysis is
inconsistent and confusing by giving a rather extensive interpretation to the concept “use of

\textsuperscript{228} K. N. TRAPP, State Responsibility for International Terrorism, see supra n. 6, 31.
\textsuperscript{229} ICJ, Nicaragua Case, see supra n. 119, para. 228.
\textsuperscript{230} K. N. TRAPP, State Responsibility for International Terrorism, see supra n. 6, 32.
\textsuperscript{231} Ibid.
\textsuperscript{232} A. RANDZIELHOFER, G. NOLTE, “Article 51”, see supra n. 116, 1401-1402, 1409.
\textsuperscript{233} A. RANDZIELHOFER, G. NOLTE, “Article 51”, see supra n. 116, 1402.
force” and a rather restricted one to the concept “armed attack”. However, is the Court’s approach really that inconsistent as intended by some? The Court stated in the Nicaragua case the following:

“(…) It will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms.(…)”

“(…) the Court (...) has primarily to consider whether a State has a right to respond to intervention with intervention going so far as to justify a use of force in reaction to measures which do not constitute an armed attack but may nevertheless involve a use of force. ”

In other words, state assistance to a non-state actor suffices to amount to a use of force while there isn’t any further need to attribute the acts of the non-state actor to the state. The mere assistance from a state to a non-state actor thus already suffices to be qualified as a use of force. The Court thus does not treat both concepts in the same way, which could cause confusion and inconsistency. However, the prevailing view under leading academic scholars confirms the so-called “gap” between art. 2 (4) and art. 51 UN Charter. Moreover, this unequal treatment has been reconfirmed by the ICJ in the Oil Platforms and Armed Activities case.

A state can thus perfectly violate art. 2 (4) UN Charter and the principle of non-intervention in the complete absence of any attributable armed attack to that state. It is therefore worth mentioning that in the Nicaragua case, the US violated the principle of non-intervention and the prohibition on the use of force by its own conduct (training and arming the contras) and not by the actions of the contras whose attributability to the US doesn’t even come into play in that respect.

This ‘paradoxical’ situation occurred in the Armed Activities case. Despite the fact that it has been established that the conduct of a non-state armed group (MLC) could not be attributed to Uganda, the Court considered Uganda to have violated the prohibition on the use of force and

234 M. KOWALSKI, “Armed Attack, Non-State Actors and a Quest for the Attribution Standard”, see supra n. 23, 110-111.
235 ICJ, Nicaragua Case, see supra n. 119, para. 191.
236 ICJ, Nicaragua Case, see supra n. 119, para. 210.
237 M. KOWALSKI, “Armed Attack, Non-State Actors and a Quest for the Attribution Standard”, see supra n. 23, 110.
238 ICJ Armed Activities Case, see supra n. 85, 146-147; ICJ Oil Platforms Case, see supra n. 81, para. 51; A. RANDZELHOFER, G. NOLTE, “Article 51”, see supra n. 116, 1401-1402; See supra Part I.
the principle of non-intervention through the provision of training and weapons.\textsuperscript{239} Since it is from a legal point of view perfectly possible for a state to violate art. 2 (4) in the absence of any attributable armed attack to it, the victim state cannot exercise its inherent right of self-defence.

"The Court concludes that there is no credible evidence to suggest that Uganda created the MLC. Uganda has acknowledged giving training and military support and there is evidence to that effect. The Court has not received probative evidence that Uganda controlled, or could control (...). In the view of the Court, the conduct of the MLC was not that of "an organ" of Uganda (Article 4, International Law Commission Draft Articles on Responsibility of States for internationally wrongful acts,2001), nor that of an entity exercising elements of governmental authority on its behalf (Art. 5). The Court has considered whether the MLC’s conduct was "on the instructions of, or under the direction or control of" Uganda (Art. 8) and finds that there is no probative evidence by reference to which it has been persuaded that this was the case. Accordingly, no issue arises in the present case as to whether the requisite tests are met for sufficiency of control of paramilitaries (...)\textsuperscript{240}

"The Court would comment, however, that, even if the evidence does not suggest that the MLC’s conduct is attributable to Uganda, the training and military support given by Uganda to the ALC, the military wing of the MLC, violates certain obligations of international law."\textsuperscript{241}

"(...) the Court accordingly concludes that Uganda has violated the sovereignty and also the territorial integrity of the DRC. Uganda’s actions equally constituted an interference in the internal affairs of the DRC and in the civil war there raging. The unlawful military intervention by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter."\textsuperscript{242}

The ICJ adopted however a less explicit point of view compared to the Nicaragua judgment. The Court is here not only referring to assistance to non-state actors, but also to other armed activities.\textsuperscript{243}

"(...) the Republic of Uganda, by engaging in military activities against the Democratic Republic of the Congo on the latter’s territory, by occupying Ituri and by actively extending military, logistic, economic and financial support to irregular forces

\textsuperscript{239} M. KOWALSKI, “Armed Attack, Non-State Actors and a Quest for the Attribution Standard”, see supra n. 23, 111.
\textsuperscript{240} ICJ Armed Activities Case, see supra n. 85, para. 160.
\textsuperscript{241} ICJ Armed Activities Case, see supra n. 85, para. 160.
\textsuperscript{242} ICJ Armed Activities Case, see supra n. 85, para. 165.
\textsuperscript{243} M. KOWALSKI, “Armed Attack, Non-State Actors and a Quest for the Attribution Standard”, see supra n. 23, 111.
KOWALSKI rejects the Court’s ambiguous dichotomy between armed attack and use of force. He confirms that the mere support to a non-state actor can constitute a breach of the prohibition of non-intervention. However, this does not imply a priori a prohibited use of force. He argues that only when the degree of that assistance allows for the attribution of the armed activities of the non-state actor to the state, there can be a prohibited use of force. Under this approach, state support to a non-state actor can only amount to a prohibited use of force when the acts carried out by the non-state actor can be attributed to the state. KOWALSKI is thus putting “armed attack” and “use of force” to the same level, in sharp contrast to the ICJ’s point of view, which is nevertheless the prevailing one. In sum, by putting “armed attack” and “use of force” to the same level, KOWALSKI is avoiding the paradoxical situation in which there is a breach of the prohibition of the use of force but no attributable armed attack.

MICHAEL also seems to share KOWALSKI’S point of view to a certain extent. Namely asserts that the Court has initially asked itself the wrong question by considering whether supplying arms could amount to an armed attack. The Court should have rather asked whether the supply of arms could trigger any responsibility for an actual attack. It is indeed self-evident that there needs to be an actual armed attack before any action in self-defence can be born. Focusing solely on imputing state responsibility for the assistance (violation of the principle of non-intervention, violation of the prohibition of the use of force) is useless, because the assistance is only an (important) element in examining whether there is any link of attribution between the state and the committed acts carried out by the favored non-state actors. The relationship between the actual committed attack and the state is what should be at stake here, not whether the mere assistance to the non-state actors can be attributed to the state. The latter is however an important element in assessing that relationship. It is plain

244 ICJ Armed Activities Case, see supra n. 85, para. 345.
245 M. KOWALSKI, “Armed Attack, Non-State Actors and a Quest for the Attribution Standard”, see supra n. 23, 111.
249 Ibid.
that these authors seem to have been inspired by the dissenting opinions on the *Nicaragua* judgment issued by Judges SCHWEBEL and JENNINGS.

Judge SCHWEBEL indeed considered the imputability of the attack as the very essence, not the imputability of the supply. Judge JENNINGS on the other hand agreed with the Court that the mere provision of arms cannot be said to amount to an armed attack. Though, he considers the provision of arms to be an important element in assessing the scope of an armed attack when this provision is coupled with other types of involvement. The statement that the provision of arms, combined with some kind of logistical or other support does not amount to an armed attack is going way too far for him. He is thus distancing himself from the ambiguous duality between “armed attack” and “use of force”, defended by the majority. His opinion tries to bridge the definition of aggression (*i.e.* art.3 (g)) and the First Principle of UNGA resolution 2625 of 1970 on Friendly Relations, which is an instantiation of the prohibition of the use of force, in a coherent and thoughtful concept of armed attack.

### 4.2 A Legally Justified Unequal Treatment

However, despite some scholarly criticism, the large majority of scholars agree that some kind of state involvement is required to impute actions of non-state actors to a state whereby the mere supply of arms does not suffice. Moreover, one cannot simply ignore the finding that the Court’s approach seems to be in line with the definition of aggression and with long established state practice. As already mentioned in Chapter 3 of Part I, the definition of aggression is a compromise between a broad and restrictive concept towards it. It has also been contended that the definition of aggression does not cover acts of indirect aggression and is thus limited to conduct which is directly attributable to a state. Therefore, under this perspective the Courts distinction between the scope of the prohibition of the use of force and the notion of armed attack isn’t that surprising at all. In other words, arguing that mere state

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250 B. MICHAEL, “Responding to Attacks by Non-State Actors: The Attribution Requirement of Self-Defence”, see supra n. 247, 139.
251 Dissenting Opinion Judge JENNINGS, ICJ, *Nicaragua Case*, 543; T. RUYS, ‘*Armed Attack*’ and Article 51 of the UN Charter, see supra n. 15, 415.
252 T. RUYS, ‘*Armed Attack*’ and Article 51 of the UN Charter, see supra n. 15, 417.
254 K. N. TRAPP, *State Responsibility for International Terrorism*, see supra n. 6, 27; However, as already mentioned in Part I, one must bear in mind that there exists a lot of discussion whether and to what extent indirect aggression falls under the scope of the definition of aggression, see supra Chapter 3 of Part I, n. 116.
assistance to a non-state actor should be considered as an armed attack is the same as saying that acts of indirect aggression are covered by the scope of armed attack, which is a misreading of the definition of aggression. One could thus cautiously conclude that the Court’s approach seems to be in line with the definition of aggression.

In addition, one cannot ignore the basic concept of the law of state responsibility according to which a state can only bear responsibility for its own actions. The proposition that state assistance to non-state actors should amount to an armed attack which is attributable to the supporting state is conflating the abovementioned distinction between the prohibition of international state terrorism sensu stricto (i.e. the state is the subject itself of the prohibition) and the obligation to prevent and abstain from the involvement and encouragement of acts of terrorism. Imputing actions of a non-state actor which has been solely supported by a state to that state is contrary to the abovementioned basic concept of the law of state responsibility. In sum, considering state assistance as being an armed attack is blurring the conceptual distinction between direct and indirect state responsibility.

On can conclude that, the Court’s distinction between what amounts to a prohibited use of force and the scope of the notion of armed attack could come at first sight as being somehow absurd. However this reasoning is nevertheless the prevailing view and seems to be in line with the definition of aggression and the basic idea of the rules of state responsibility. Despite this theoretical correctness, it nevertheless could create the unintended consequence whereby a grave violation of the prohibition the use of force coexists with the absence of any attributable armed attack. From a legal point of view this distinction is acceptable. However, from a policy perspective, one could rightly call this distinction into question.

**4.3 The Odd Distinction between Financial Assistance and Non-Financial Assistance**

Another noteworthy characteristic of the ICJ’s interpretation of UNGA resolution 2625 of 1970 on Friendly Relations is the distinction between the arming, training of irregular groups and the financial assistance towards them. The former amounts to a prohibited use of force while the latter does - strangely enough - only amounts to a mere violation of the principle of

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255 See supra Chapter 2 of Part I, n. 99.
non-intervention.\footnote{ICJ, \textit{Nicaragua Case}, see supra n. 119, para. 228; K. N. TRAPP, \textit{State Responsibility for International Terrorism}, see supra n. 6, 29.} The distinction must therefore lie in the \textit{nature} of the support. This reasoning would imply that each \textit{ancillary} support which is \textit{military} in nature will be considered as a violation of the use of force. In other words, the modalities of the state assistance \textit{as such} should amount to a violation of the prohibition of the use of force. The financing of armed groups has probably in this approach a rather neutral character and is therefore not considered as a violation of the use of force.\footnote{K. N. TRAPP, \textit{State Responsibility for International Terrorism}, see supra n. 6, 29.} However, according to TRAPP this odd distinction is to some extent based upon a misinterpretation by the ICJ of UNGA resolution 2625 of 1970 on Friendly Relations.\footnote{Ibid.}

According to the First Principle of this resolution the \textit{“Organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed toward the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force”} amounts to a violation of the prohibition of the use of force.\footnote{See supra Chapter 3.2.1} TRAPP argues that the phrase \textit{“when the acts referred to in the present paragraph involve a threat or use of force”} is related to the broad formulation of \textit{“the acts of civil strife or terrorist acts in another State”} and not to the rather limited formulation of \textit{“organizing, instigating, assisting or participating in acts of civil strife or terrorist acts”}.\footnote{K. N. TRAPP, \textit{State Responsibility for International Terrorism}, see supra n. 6, 29-30.} TRAPP accordingly argues that \textit{every} kind of support, whether military or financial to a non-state, whose acts amount to a use of force should be regarded as a violation of the prohibition of the use of force.\footnote{K. N. TRAPP, \textit{State Responsibility for International Terrorism}, see supra n. 6, 30.} TRAPP’s reasoning turns out to provide a reasonable explanation for the Court’s ambiguity towards the concepts of armed attack and use of force in general. In addition, one may not forget the explanation according to which the distinction made by the Court between military and financial support is based on the fact that financing terrorist activities is \textit{expressis verbis} mentioned (see supra) in UNGA resolution 2625 of 1970 on Friendly Relations as an instantiation of the prohibition of the principle of non-intervention, but \textit{not} as an instantiation of the prohibition on the use of force.\footnote{K. N. TRAPP, \textit{State Responsibility for International Terrorism}, see supra n. 6, 32.}
The abovementioned dissenting opinion of Judge SCHWEBEL is also focusing on the element of “substantial involvement”. He criticized the Court for having ignored or reduced this concept – in the words of RUYS – “ad absurdum”. He highlighted that an armed attack is not only the sending by a state of irregulars across an international border, but also its substantial involvement therein. SCHWEBEL moreover considers the substantial involvement in the sending of armed bands as a specification of an act of aggression. According to this point of view, the reference to “substantial involvement” in the sending of armed bands could imply that financial and logistical aid for armed bands could possibly fall under the scope of armed attack. GRAY however critically notes in this respect that the drafting history of UNGA resolution 2625 of 1970 on Friendly Relations does not support this point of view. Moreover, she points out that this point of view isn’t reconcilable with SCHWEBEL’s earlier recognition of a distinction between an extensive concept of “aggression” and a more restrictive approach towards “armed attack”.

4.4 Conclusion

It is beyond any doubt that this apparent ‘inconsistent’ approach of the ICJ towards the concepts of “armed attack” and “use of force” did not remain unnoticed. From a policy perspective, the Nicaragua judgment of the ICJ could be viewed critically. However, purely from a legal perspective, the Court’s reasoning seems to be in line with the definition of aggression and the basic idea of the law of state responsibility. TRAPP’S explanation(s) for the odd distinction between financial and non-financial aid seem to be pertinent.

In any event, the Court’s approach is unfortunately capable of causing confusion and amplifying a regrettable alienation between theory and practice. A classic example of the confusion caused by the ICJ’s approach is the flagrant misinterpretation of Judge MOHAMED SHAHABUDDEEN in its separate opinion to the ICTY Tadic case of 1999. He defended the exactly opposite conclusion of the Nicaragua judgment. He argued that the US violated the prohibition of the use of force by the acts of the Contras which would be attributable to the

263 T. RUYS, ‘Armed Attack’ and Article 51 of the UN Charter, see supra n. 15, 416.
264 Dissenting opinion Judge SCHWEBEL, ICJ, Nicaragua Case, para. 176.
265 Dissenting opinion Judge SCHWEBEL, ICJ, Nicaragua Case, para. 170.
266 C. GRAY, International Law and the Use of Force, see supra n. 93, 130.
267 C. GRAY, International Law and the Use of Force, see supra n. 93, 130-131.
268 M. KOWALSKI, “Armed Attack, Non-State Actors and a Quest for the Attribution Standard”, see supra n. 23, 111.
US. However, the opposite proposition is the only correct one. The US violated the prohibition of the use of force solely by their own conduct of supporting the Contras.\footnote{K. N. TRAPP, \textit{State Responsibility for International Terrorism}, see \textit{supra} n. 6, 40., M. KOWALSKI, “Armed Attack, Non-State Actors and a Quest for the Attribution Standard”, see \textit{supra} n. 23, 112; A. CASSESE, “The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia”, 18 \textit{European Journal of International Law} 2007, 652 (hereafter: A. CASSESE, “The Nicaragua and Tadic Tests Revisited”).}
PART III: The Secondary Rules of State Responsibility

1. Introduction

Before one can verify whether the law of state responsibility has been affected due to the fight against international terrorism, one must firstly examine the existing legal framework of the law of state responsibility. The secondary rules of state responsibility consist of the general rules that govern the conditions under which a breach of the primary rules is identified and determine furthermore the consequences of any such breach.\(^{270}\) The characteristics of the secondary rules have already largely been elaborated in Chapter 1.2 of the Introduction. This part will elaborate upon the relevant secondary rules of state responsibility from an international terrorism perspective. First and foremost one may not forget to distinguish between considering a state as being directly responsible for a terrorist act and the mere failure of a state to prevent or abstain from supporting a terrorist activity. Of course, the latter can entail state responsibility \(i.e.\) indirect state responsibility. However, mere indirect responsibility does not make the terrorist act as such attributable to the state.\(^{271}\) An armed attack needs thus to be directly attributed to a state to allow a lawful use of the right of self-defence against that attacking state.\(^{272}\) As already elaborated in Part I, an inter-state reading of art. 51 UN Charter is the starting point of this research.

As a general principle of international law, a breach of an international obligation implies the responsibility of the state concerned.\(^{273}\) A state which is responsible for the violations of its international obligations becomes thus subject to every remedial action which is provided by international law.\(^{274}\) In other words, state responsibility implies the bearing of all legal consequences caused by the breach by the responsible state.\(^{275}\) As the Permanent Court of International Justice (hereafter: PCIJ) already stated in the Chorzow Factory case of 1927:

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“It is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.”^{276}\]

\(^{270}\) See \textit{supra} Chapter 1.2 of the Introduction, n. 14.

\(^{271}\) A CASSESE, “The International Community’s “Legal” Response to Terrorism”, see \textit{supra} n. 100, 597.

\(^{272}\) BECKER, \textit{Terrorism and the State}, see \textit{supra} n. 94, 3-4, 160.

\(^{273}\) I. BROWNLIE, \textit{Principles of Public International Law}, see \textit{supra} n. 11, 540.

\(^{274}\) R. VARK, “State Responsibility for Private Armed Groups in the Context of Terrorism”, see \textit{supra} n. 93, 185.

\(^{275}\) BECKER, \textit{Terrorism and the State}, see \textit{supra} n. 94, 3.

\(^{276}\) PCIJ, \textit{Case Concerning the Factory at Chorzow}, Judgment, Series A17 1928, 29.
A state is furthermore a public legal entity that can only exist in the international legal order by and through the conduct of persons or group of persons.\textsuperscript{277} The PCIJ stated already in 1923 the following in this respect:

\begin{quote}
\textit{“States can act only by and through their agents and representatives”}\textsuperscript{278}
\end{quote}

As already mentioned several times, it is a general rule of international law that a state can only be held responsible for actions which are attributable to it.\textsuperscript{279} In other words, a state can only bear responsibility for its \textit{own} actions. The ICJ has recently reconfirmed this principle in the \textit{Genocide} case.

\begin{quote}
\textit{“a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf.”}\textsuperscript{280}
\end{quote}

\textit{A Contrario,} all acts of private persons who don’t act on behalf of the state, including all acts of state organs when they’re not acting in an official capacity, \textit{i.e.} purely private capacity, cannot be attributed to a state.\textsuperscript{281} This general principle is also called the principle of non-attribution. Attribution as a legal concept thus plays a vital role in international law. It has a \textit{twofold} function. On the one hand, it ensures the responsibility of a state for its actions. On the other hand it protects the state by limiting the actions of a state which can possibly trigger its responsibility.\textsuperscript{282} The relevant question then rises which acts are attributable to a state? In order to find an answer to this crucial question, one needs to consult the rules of attribution. The definition of attribution as formulated by CONDORELLI and KRESS should once more be recalled here:

\begin{quote}
\textit{“The term used to denote the legal operation having as its function to establish whether given conduct of a physical person, whether consisting of positive action or an omission, is to be characterized from the point of view of international law, as an “act of the State” (or the act of any other entity possessing international legal responsibility). In other words, by the term “attribution”, reference is made to the body of criteria of connection and the conditions which have to be fulfilled, according}
\end{quote}

\textsuperscript{277} A. NOLLKAEMPER, “Attribution of Forcible Acts to States”, see \textit{supra} n. 14, 139.
\textsuperscript{278} PCIJ, \textit{Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland}, Advisory Opinion, Series BO6 1923, 22.
\textsuperscript{279} See \textit{supra} Chapter 2 of Part I, n. 99.
\textsuperscript{280} ICJ, \textit{Genocide Case}, see \textit{supra} n. 189, para. 406.
\textsuperscript{281} O. DE FROUVILLE, “Attribution of Conduct to the State: Private Individuals”, see \textit{supra} n. 99, 263; T. BECKER, \textit{Terrorism and the State}, see \textit{supra} n. 94, 42.
\textsuperscript{282} A. NOLLKAEMPER, “Attribution of Forcible Acts to States”, see \textit{supra} n. 14, 140.
The attribution rules (i.e. the rules governing this “legal operation”) will moreover provide the applicable thresholds which will enable to make a distinction between state conduct and private conduct, i.e. a distinction between the ‘state sector’ and the ‘non-state sector’. It is precisely the law of state responsibility with regard to private conduct that is of paramount importance in this research. To entail state responsibility for private actions, it is generally required for these private actors to act as de facto agents or organs. When doing so, the law of state responsibility (i.e. law of attribution) will consider the state as the author of the private conduct. Essentially, the whole idea of state responsibility is thus based on an agency-type relationship between the private actor committing an illicit act and the state, i.e. the so-called agency-based paradigm. In sum, the abovementioned distinction between the public and the private sphere is only broken when private conduct perforates through the public domain through the formation of a principal-agent relationship between the state and the private actor. It is very important to note in this respect that, in the absence of an agency relationship, a state cannot bear any responsibility for the conduct (i.e. terrorist attacks) of third parties (i.e. terrorist groups), even if the state’s failure to prevent or abstain has facilitated to some extent this conduct. Indeed, indirect responsibility does not make the terrorist acts directly attributable to a state.

Chapter II “Attribution of Conduct to a State” of the ILC Draft Articles deals with the challenging legal issue of attributing conduct of private parties to a state. The ILC Draft Articles are considered to reflect customary international law with regard to state responsibility. When acts of international terrorism are carried out by de jure state actors, this will ipso facto incur state responsibility (art. 4.1 ILC Draft Articles). However when these acts have been carried out by non-state actors, there is no automatic link of attribution between these acts and a state. In this case, one must therefore verify to what extent there exists a relationship of sufficient “direction or control” between the state and the non-state actor (art. 8 ILC Draft Articles). Indeed, only when this link has been established, state

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283 L. CONDORELLI and C. KRESS, “The Rules of Attribution: General Considerations”, see supra n. 18, 221.
285 T. BECKER, Terrorism and the State, see supra n. 94, 3, 42.
286 T. BECKER, Terrorism and the State, see supra n. 94, 78-79.
287 T. BECKER, Terrorism and the State, see supra n. 94, 156.
288 I. BROWNIE, Principles of Public International Law, see supra n. 11, 540.
responsibility for non-state actors can be incurred. In addition, if this link has been established successfully within the framework of an armed conflict, these acts of terrorism will be considered as war crimes which need to be prosecuted universally.289 One cannot forget that after all the deliberate killing or wounding of civilians runs directly contrary to the most fundamental principle of international humanitarian law, i.e. the distinction between civilians and combatants.290 However, when this link has not been established within the context of an armed conflict, an act of international terrorism (when committed by de jure or de facto agents) is in any event capable of triggering the emergence of an international armed conflict, making the rules international humanitarian law applicable.291 Moreover, one may not forget in this respect the existence of international criminal law which can bring the perpetrator(s) before justice through international cooperation and law-enforcement mechanisms.

2. Art. 4 ILC Draft Articles

2.1 De Jure State Organs

Art. 4.1 ILC Draft Articles states:

“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.

Art. 4.1 reflects one of the major principle of the law of state responsibility. The conduct, i.e. all actions of an organ of a state is ipso facto attributable to that state. All the individual or collective entities which make up the organization of the state and act on its behalf fall under the scope of “State organ”.292 Moreover, the reference to “State organ” needs to be viewed at a general level. Every organ of the state can trigger the international responsibility of a state, regardless of the classification of the organ, the functions it exercises, and the level in the hierarchy. Furthermore, one does not need to distinguish between legislative, executive, or

289 M. SASSOLI, A. A. BOUVIER, A. QUINTIN, How does law protect in war?, see supra n. 27, 128.
290 G.L. NEUMAN, “Humanitarian Law and Counterterrorist Force”, see supra n. 27, 289.
291 M. SASSOLI, A. A. BOUVIER, A. QUINTIN, How does law protect in war?, see supra n. 27, 128.
292 J. CRAWFORD, The International Law Commission’s Articles on State Responsibility, see supra n. 99, 94.
judicial organs. In other words, art. 4.1 is thus referring first and foremost to *de jure* state organs. However, it is very doubtful whether art. 4.1 is of paramount importance in a state terrorism context. This proposition will be substantiated in the following Chapter(s).

### 2.2 *De Facto* State Organs

Art. 4.2 ILC Draft Articles states:

“2. An organ includes any person or entity which has that status in accordance with the internal law of the State.”

One should however not forget art. 4.2 according to which one could - although rather uncertain and difficult - link the conduct of a *private* group to a state. A private group could be considered as being a *de facto* state organ (or stated differently; a *private* group could be assimilated to a *de jure* organ). As previously discussed, art. 4.1 states that the conduct of any state organ is being considered as being a state act. Furthermore, art. 4.2 refers to the internal law of a state to determine which persons or entities are considered as state organs. However, according to the Commentary, referring to the internal law of a state is not sufficient and could even be misleading. In some legal systems, the qualification of various entities are not only based on law but also on practice. The internal law of a state is thus not the exclusive source of determining the qualification of some entities. According to this point of view, a private armed group which is exercising functions similar to governmental functions, could be considered as a *de facto* organ of that state. In sum, the only concrete difference between a *de facto* state organ and a *de jure* state organ is the absence of such

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293 J. CRAWFORD, *The International Law Commission’s Articles on State Responsibility*, see supra n. 99, 95.


296 R. VÄRK, “State Responsibility for Private Armed Groups in the Context of Terrorism”, see supra n. 93, 189-190.
qualification by the domestic law of the state concerned.\textsuperscript{297} It would be completely unacceptable that a state could escape its responsibility for the acts carried out by its \textit{de facto} organs by ‘shielding’ them through the deceptions of its own domestic law.\textsuperscript{298} This point of view seems to be in line with international case-law.\textsuperscript{299}

Next to the ‘effective control’ test - which will be extensively discussed later on - the ICJ also elaborated in its \textit{Nicaragua} judgment upon the so-called ‘complete dependence’ test in order to verify whether the Contras could be assimilated to \textit{de facto} state organs of the US.\textsuperscript{300} The Court affirmed that the Contras had to be \textit{completely dependent} of the US in order to be considered as \textit{de facto} state organs of the US. This however was not the case in the \textit{Nicaragua} case.\textsuperscript{301} The ICTY on the other hand assimilated the ‘effective control’ test with the ‘complete dependence’ test in the \textit{Tadic} case. The Appeals Chamber considered the ‘effective control’ test to be a part of the ‘complete dependence’ test.\textsuperscript{302} The ICJ however clearly distinguished between these two concepts in the \textit{Genocide} case of 2007.\textsuperscript{303} The Court confirmed in the latter case that the ‘complete dependence’ test is determinative to qualify certain groups as \textit{de facto} state organs. Moreover, therefrom it follows that conduct carried out by \textit{de facto} organs is attributable to a state on the basis of art. 4 ILC Draft Articles.\textsuperscript{304} International case law which is pertinent to the law of state responsibility will be extensively discussed in the following Chapters.

\subsection*{2.3 State Organs and Ultra Vires Conduct}

International law accepts that a state is responsible for the actions of its (\textit{de jure} and \textit{de facto}) organs, even when they’ve acted in an official capacity \textit{beyond} their competence or disobeyed

\begin{thebibliography}{99}
\bibitem{M.Milanovic2009} M. MILANOVIC, “State Responsibility for Genocide”, see \textit{supra} n. 9, 577.
\bibitem{M.Milanovic2009} M. MILANOVIC, “State Responsibility for Genocide”, see \textit{supra} n. 9, 582.
\bibitem{D.Momtaz2009} D. MOMTAZ, “Attribution of Conduct to the State”, see \textit{supra} n. 294, 243.
\bibitem{ICJ2007} ICJ, \textit{Nicaragua Case}, see \textit{supra} n. 119, para. 109-110; K. KIRSS, “Role of the International Court of Justice”, see \textit{supra} n. 300, 151.
\bibitem{ICJ2007} ICJ, \textit{Genocide Case}, see supra n. 189, para. 392, 397; K. KIRSS, “Role of the International Court of Justice”, see \textit{supra} n. 300, 158.
\bibitem{ICJ2007} ICJ, \textit{Genocide Case}, see supra n. 189, para. 392, 397; K. N. TRAPP, \textit{State Responsibility for International Terrorism}, see \textit{supra} n. 6, 39; D. MOMTAZ, “Attribution of Conduct to the State”, see \textit{supra} n. 294, 243.
\end{thebibliography}
instructions, *i.e.* the *ultra vires* principle. Art. 7 ILC Draft Articles states the following in this respect:

“The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.”

Distinguishing between conduct that has been carried out in an official capacity, but *ultra vires*, and purely private conduct (*i.e.* not acting in an official capacity) is very difficult, especially in a terrorism context. State organs who commit acts of terrorism won’t indeed display any visible manifestation of the authority under which they operate. The perpetrators of acts of international state terrorism will logically present themselves as being private individuals, involved in purely private conduct. This implies therefore that this conduct won’t be attributed to the state. To trigger state responsibility in such a case, one needs to establish that the state organs, when committing acts of terrorism, were acting in their actual official capacity and not in their misleading *apparent* purely private capacity. This inquiry shall be determinative for state responsibility to be established. The classic example of this practical difficulty is the *Rainbow Warrior* case.

In 1985 the ‘Rainbow Warrior’, a Greenpeace ship moored in Auckland New-Zealand has been blown up by two French secret service agents. The ship sank and one crew member did not survive the attack. After initially having denied any link, the French authorities admitted that the attack had been ordered by the French secret services. The two secret agents acted as if they were Swiss tourists. If this case would have been brought before an international court, the only finding which could have incurred the state responsibility of France would be the conclusion that acts of terrorism fall within the official scope of functions, entrusted by the French government to the secret agents. The fact that the perpetrators of the act were state

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306 K. N. TRAPP, *State Responsibility for International Terrorism*, see *supra* n. 6, 35; O. DE FROUVILLE, “Attribution of Conduct to the State: Private Individuals”, see *supra* n. 99, 263.

307 K. N. TRAPP, *State Responsibility for International Terrorism*, see *supra* n. 6, 35.

308 Ibid.

309 *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior*, 30 April 1990, Reports of International Arbitral Awards Vol. XX, 215-284; K. TRAPP, *State Responsibility for International Terrorism*, see *supra* n. 6, 36.
organs would most probably have created a certain ‘presumption of attributability’. France would then bear the burden of proof that acts of terrorism do not fall under the scope of official state actions, which would subsequently make art. 7 ILC Draft Articles irrelevant.\textsuperscript{310} The reasoning of the ICTY in the Prosecutor v. Tadic case is also of interest to the \textit{ultra vires} principle. This case shall be discussed extensively in Chapter 5.

\textbf{2.4 Conclusion}

In sum, all the actions of state organs, as well as \textit{de jure} as \textit{de facto} state organs, are \textit{ipso facto} attributable to a state, even when committed \textit{ultra vires}. Moreover, notwithstanding the existence of \textit{de facto} state organs which fall under the scope of art. 4 ILC Draft Articles, one can conclude that in general art. 4 is not of utmost importance in an international terrorism context. Due to the fact that terrorism has an inherent illegal and clandestine character, acts of international terrorism will very rarely be carried out by \textit{de jure} state organs. It is therefore more realistic and obvious to assume that acts of international terrorism are carried out by private persons which don’t form part of the formal structure of a state, but however act on the behalf of a state.\textsuperscript{311} Art. 8 ILC Draft Articles is therefore of much greater importance for the purposes of this research.

\textbf{3. Art. 8 ILC Draft Articles}

Art. 8 ILC Draft Articles is related to conduct directed or controlled by a state and states as following:

\begin{quote}
\textit{The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.}
\end{quote}

Art. 8 refers - in contrast to art. 4 - to the conduct of private persons or entities which do \textit{not} have the status of organ of the state.\textsuperscript{312} As previously mentioned, international law does not

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{311} K. N. TRAPP, \textit{State Responsibility for International Terrorism}, see supra n. 6, 37.
\item \textsuperscript{312} J. CRAWFORD, \textit{The International Law Commission’s Articles on State Responsibility}, see supra n. 99, 94, 110.
\end{enumerate}
\end{footnotesize}
allow in principle the attribution of the conduct of private persons to a state (i.e. application of the principle that states can only be held responsible for their own conduct). However, such conduct could become attributable to a state under certain circumstances whereby a specific factual relationship between the state and those private persons or entities has been established. These individuals or group of individuals then form the so-called ‘longa manus’ of the state without being integrated in the formal organic apparatus of that state (i.e. de facto agents). Article 8 elaborates upon such circumstances. International terrorism should therefore mainly be situated within this specific legal framework. This article is obviously of utmost importance in a terrorism context because of the previously mentioned reasons. If states are willing to commit illegal acts of terrorism, these acts will be carried out by agents or actors which do not fall under the formal structure of a state (see supra). These agents or actors need however to be controlled to a certain extent by the state which will make their acts imputable to the state which controls them.

The Commentary to the ILC Draft Articles and the wording of art. 8 distinguishes between two situations. The first is related to persons acting “on the instructions of” a state. The second is related to the more general situation where persons are acting under the “direction or control” of a state. With regard to the first situation, the Commentary highlights that:

“Most commonly, cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as “auxiliaries” while remaining outside the official structure of the State. (...)”

The first proposition is thus rather uncontroversial. However, it is with regard to the second situation where difficulties have arisen to clarify the precise direction or control. The Commentary formulates furthermore a rather vague description concerning this second situation.

313 See supra Chapter 2 of Part I, n. 99.
315 J. CRAWFORD, The International Law Commission’s Articles on State Responsibility, see supra n. 99, 110.
316 Ibid.
317 The Commentary even provides some examples to clarify this first situation: “individuals or groups of private individuals who, though not specifically commissioned by the State and not forming part of its police or armed forces, are employed as auxiliaries or are sent as “volunteers” to neighbouring countries, or who are instructed to carry out particular missions abroad.”, J. CRAWFORD, The International Law Commission’s Articles on State Responsibility, see supra n. 99, 110-114.
318 M. N. SHAW, International Law, see supra n. 305, 790.
319 Ibid.
“Such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation.”

CASSESE on the other hand, distinguishes between three standards or situations. The first two (i.e. acting on the instructions of or under the direction) are rather specific. These two standards involve the ordering or commanding of persons to carry out a certain conduct. He argues that they indicate on a reasonable way the required state behavior towards an individual or groups of individuals for their actions to be attributed to the state, which makes them easy to apply concretely. However, the scope of the third threshold (i.e. “under the control”) isn’t clear at all. Exercising control implies a certain power or authority over a person. However, the wording of art. 8 ILC Draft Articles, nor its Commentary does give any further specifications with regard to the precise scope of this control.

As previously mentioned, the exact degree of state involvement required to make acts of non-state actors imputable to a state remains a very difficult actual legal question. This research is aiming at providing some clarifications in this respect. To be able to determine the scope of art. 8 ILC Draft Articles (i.e. the precise threshold of the required state involvement), one needs to analyze the relevant case law (and its evolution) of the ICJ as well as judgments of the International Criminal Tribunal for the former Yugoslavia (hereafter: ICTY). This international case law will also allow to better understand the Commentary to the ILC Draft Articles, which refers to this case law.

4. The ICJ Nicaragua Judgment of 1986

The legendary Nicaragua judgment of the ICJ in 1986 constitutes the starting point of the rules of attribution related to conduct of non-state actors. The question before the Court was whether the US bore any responsibility for the actions of the paramilitary Contras in the territory of Nicaragua. The Contras weren’t de jure state organs of the US, the Court thus needed to establish an attribution test with regard to the actions of the Contras. Could the

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320 J. CRAWFORD, The International Law Commission’s Articles on State Responsibility, see supra n. 99, 110-114.
321 A. CASSESE, “The Nicaragua and Tadic Tests Revisited”, see supra n. 269, 663.
322 Ibid.
323 Ibid.
324 See supra Chapter 2 of Part I, n. 93.
325 M. MILANOVIC, “State Responsibility for Genocide”, see supra n. 9, 576.
United States, because of its support (financing, organizing, training equipping and planning of operations) to the Contras (organized military and paramilitary group of Nicaraguan rebels) be accountable for breaches of international humanitarian law carried out by those Contras?\(^{326}\)

In this case the Court distinguished between two important tests, the ‘complete dependence’ test and the ‘effective control’ test. The former is used to determine whether the Contras could be qualified as *de facto* state organs as such. The latter on the other hand is used to determine whether some specific actions of the Contras (*i.e.* violations of international humanitarian law) could be attributed to the US. In other words, the ‘complete dependence’ is related to *de facto organs*, the ‘effective control’ test is related to *de facto agents*.\(^{327}\) In sum, the Court conceived a twofold analysis of state responsibility for acts which weren’t carried out by *de jure* state organs.\(^{328}\)

### 4.1 The General ‘Complete Dependence’ Test (§109-110)

First of all, the Court asked itself whether the Contras as such could amount to a *de facto* state organ of the US.\(^{329}\) To answer this question, the Court developed its general ‘complete dependence’ test. If the necessary conditions of this test are satisfied, it is unnecessary to pass to the second more specific (*i.e.* ‘effective control’) test.\(^{330}\) The question before the Court was:

> “Whether or not the relationship of the contras to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government (...).”\(^{331}\)

The Court refused to acknowledge the Contras as a *de facto* organ of the US by stating that “*Yet despite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf.*”\(^{332}\) Moreover the

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\(^{326}\) See ICTY, *Tadic* 1999, see *supra* n. 302, para. 100. This paragraph formulates in a nutshell the question brought before the ICJ in the *Nicaragua case*; S. CENIC, “State Responsibility and Self-Defence in International Law Post 9/11”, see *supra* n. 119, 205; R. VARK, “State Responsibility for Private Armed Groups in the Context of Terrorism”, see *supra* n. 93, 180.

\(^{327}\) R. VARK, “State Responsibility for Private Armed Groups in the Context of Terrorism”, see *supra* n. 93, 188.

\(^{328}\) K. KIRSS, “Role of the International Court of Justice”, see *supra* n. 300, 151; M. MILANOVIC, “State Responsibility for Genocide”, see *supra* n. 9, 576.

\(^{329}\) K. N. TRAPP, *State Responsibility for International Terrorism*, see *supra* n. 6, 39.

\(^{330}\) M. MILANOVIC, “State Responsibility for Genocide”, see supra n. 9, 581.

\(^{331}\) ICJ, *Nicaragua Case*, see *supra* n. 119, para. 109.

Court stressed that “the evidence available to the Court indicates that the various forms of assistance provided to the contras by the United States have been crucial to the pursuit of their activities, but is insufficient to demonstrate their complete dependence on United States aid.” In other words, for the ‘complete dependence’ test to be satisfied, the dependent group shouldn’t have any real autonomy with regard to the controlling state. The nature and degree of control must be furthermore qualitatively the same as the control a state exercises over its own de jure organs. The only concrete difference between a de facto state organ and a de jure state organ is the absence of such qualification by the domestic law of the state concerned. The Court thus confirmed that the Contras had to be completely dependent on the US in order to be considered as de facto state organs of the US.

This view of the Court has important consequences. Assuming that the Court would have decided that the Contras indeed were de facto state organs, the US would have been a priori responsible for all their actions, including all their violations of international humanitarian law. The existence of the ‘complete dependence’ test has been recently confirmed by the ICJ in the Genocide case of 2007. According to the ICJ, if an entity has been qualified as a de facto state organ, their actions are attributable to the state on the basis of art. 4 ILC Draft Articles. This will be further discussed in the following Chapter 6 which deals with the Genocide case.

4.2 The Specific ‘Effective Control’ Test (§115)

Whereas the Contras couldn’t be equated to de facto state organs, the Court subsequently verified whether specific conduct of the Contras, i.e. violations of international humanitarian law were imputable to the US. This second test has thus a subsidiary and more specific character because the Court didn’t succeed in qualifying the Contras as a de facto state organ

333 ICJ, Nicaragua Case, see supra n. 119, para. 110.
334 M. MILANOVIĆ, “State Responsibility for Genocide”, see supra n. 9, 577. It is contended by CASSESE that the UCLAS (Unilaterally Controlled Latino Assets: persons of unidentified Latin American countries paid by, and acting on the direct instructions of, US Military or intelligence personnel, as defined in para. 75 of the Nicaragua judgment;) are de facto organs because they were under the complete control of the US and thus didn’t have any degree of autonomy. A. CASSESE, “The Nicaragua and Tadic Tests Revisited”, see supra n. 269, 652.
335 M. MILANOVIĆ, “State Responsibility for Genocide”, see supra n. 9, 577.
336 K. KIRSS, “Role of the International Court of Justice”, see supra n. 300, 151.
337 K. N. TRAPP, State Responsibility for International Terrorism, see supra n. 6, 39.
338 ICJ, Genocide Case, see supra n. 189, para. 392, 397; K. N. TRAPP, State Responsibility for International Terrorism , see supra n. 6, 39; D. MOMTAZ, “Attribution of Conduct to the State”, see supra n. 294, 243.
according to the first general test.\textsuperscript{339} It is therefore related to specific actions in the course of which violations have been carried out when the conditions of the first test haven’t been fulfilled.\textsuperscript{340} The question before the Court was whether the control exercised by the US over the Contras was strong enough to impute their actions to the US.\textsuperscript{341} The Court then developed its legendary and very demanding ‘effective control’ threshold.

“The Court has taken the view (paragraph 110 above) that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.”\textsuperscript{342}

Violations of international humanitarian law are thus attributable to a state, if one can provide evidence that the state exercised an ‘effective control’ over the (para)military operations in the course of which these violations have been carried out.\textsuperscript{343} The ‘effective control’ threshold was clearly not met in this case. The violations of international humanitarian law were thus not attributable to the US according to the ICJ.\textsuperscript{344}

One must highlight the twofold analysis concerning the Contras. Despite the fact that the U.S. supported the Contras by “training, arming, equipping, financing, supplying or otherwise

\textsuperscript{339} M. MILANOVIC, “State Responsibility for Genocide”, see supra n. 9, 577.
\textsuperscript{340} Ibid.
\textsuperscript{341} K. KIRSS, “Role of the International Court of Justice”, see supra n. 300, 151.
\textsuperscript{342} ICJ, Nicaragua Case, see supra n. 119, para. 115.
\textsuperscript{343} K. KIRSS, “Role of the International Court of Justice”, see supra n. 300, 152.
\textsuperscript{344} TRAPP comes to the same conclusion by however distinguishing between three categories of potentially attributable conduct in the Nicaragua judgment; the contras’ paramilitary operations as such, specific and identifiable paramilitary operations and violations of international humanitarian law during these specific operations. Concerning the first category, the Court stated in §109 that it didn’t considered the Contras as an organ of the US. Concerning the second category, the ICJ did not develop an attribution threshold for specific operations, but ruled that the US had violated the principle of non-intervention and the prohibition of the use of force by training and arming the contras (§228,§292 (3),(4)). Concerning the third category, the Court elaborated as previously mentioned upon the effective control test which was not met, K. N. TRAPP, State Responsibility for International Terrorism, see supra n. 6, 39-40.
encouraging, supporting and aiding”\(^\text{345}\) them, the ICJ ruled that the US only bore responsibility for violating the principle of non-intervention and the prohibition of the use of force.\(^\text{346}\). With regard to the violations of international humanitarian law carried out by the Contras, the Court did not found the US to bear any responsibility due to the demanding “effective control” test.\(^\text{347}\) This expression of the unequal treatment between “armed attack” and “use of force” has already been extensively elaborated in the previous Part

In sum, the US should have “directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State” for these acts to be attributed to the US.\(^\text{348}\) This threshold, i.e. the ‘effective control’ test is thus a very demanding and rigid threshold since it requires the explicit issuance of directions or the enforcement of the specified actions carried out by non-state actors.\(^\text{349}\) However, according to the ICTY, the ‘complete dependence’ test and the ‘effective control’ test need to be considered as one and the same.\(^\text{350}\)

5. The ‘Overall Control’ Test of the ICTY, Prosecutor v. Tadic Case

The Tadic judgment of 1999 of the Appeals Chamber of the ICTY changed once and for all the legal landscape of state responsibility.\(^\text{351}\) The legal question was a qualification issue. Was there an international or an internal armed conflict in that case? The ICTY was confronted with an armed conflict which appeared \textit{prima facie} to be a civil war between Bosnian Muslims, Croats and Serbs, i.e. a non-international armed conflict.\(^\text{352}\) This distinction is quite fundamental as different set of rules apply for national and international armed conflicts.\(^\text{353}\) This qualification issue was furthermore of utmost importance for the Court’s competence

\(^{345}\) ICJ, Nicaragua Case, see supra n. 119, para 228, 292 (2) (3).
\(^{346}\) A. CASSESE, “The Nicaragua and Tadic Tests Revisited”, see supra n. 269, 652; As already mentioned, the approach by Judge MOHAMED SHAHABUDEEN was incorrect, the US bore responsibility for its own conduct, not for the acts of the Contras, see supra n. 269.
\(^{347}\) ICJ, Nicaragua Case, see supra n. 119, para. 115; A. CASSESE, “The Nicaragua and Tadic Tests Revisited”, see supra n. 269, 652.
\(^{348}\) §115 nicaragua, S. CENIC, “State Responsibility and Self-Defence in International Law Post 9/11”, see supra n. 119, 205.
\(^{349}\) ICJ, Nicaragua Case, see supra n. 119, para. 115; A. CASSESE, “The Nicaragua and Tadic Tests Revisited”, see supra n. 269, 653.
\(^{350}\) K. KIRSS, “Role of the International Court of Justice”, see supra n. 300, 154.
\(^{351}\) See ICTY, Tadic 1999, see supra n. 302.
\(^{352}\) M. MILANOVIC, “State Responsibility for Genocide”, see supra n. 9, 578.
under art. 2 of the ICTY Statute related to the criminal liability of grave breaches of the 1949 Geneva Conventions (i.e. the so-called ‘grave breaches’ regime). Art. 2 does indeed only apply to international armed conflicts and the Trial Chamber had ruled that the conflict was internal. This initial finding of the Trial Chamber resulted in the acquittal of the accused for the charges brought against him under art. 2 of the ICTY Statute. The Prosecution challenged this qualification and the Appeal’s Chamber thus had the task to determine the nature of the conflict.

5.1 Ignoring the Distinction between ‘Complete Dependence’ and ‘Effective Control’

Before further discussing this important judgment, one needs to remark that the ICTY did not distinguish between a ‘complete dependence’ test and an ‘effective control’ test. The Appeals Chamber indeed only deals with the ‘effective control’ test. It thus completely ignored the ‘complete dependence’ test. Moreover, this ‘assimilation’ between these two attribution thresholds had previously been made by the Trial Chamber, according to which the ‘effective control’ test is a mere part of the ‘complete dependence’ test. The Appeals Chamber followed this approach.

“(…) Admittedly, in paragraph 115 of the Nicaragua judgement, where “effective control” is mentioned, it is unclear whether the Court is propounding “effective control” as an alternative test to that of “dependence and control” set out earlier in paragraph 109, or is instead spelling out the requirements of the same test. The Appeals Chamber believes that the latter is the correct interpretation. (…)”

354 Art. 2 Updated Statute of the ICTY, September 2009:
“The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (a) wilful killing; (b) torture or inhuman treatment, including biological experiments; (c) wilfully causing great suffering or serious injury to body or health; (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power; (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; (g) unlawful deportation or transfer or unlawful confinement of a civilian; (h) taking civilians as hostages.”, http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf, (consulted 20/12/2012).

355 ICTY, Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction Appeals Chamber, IT-94-1-AR72, 2 October 1995, paras. 79-84; ICTY, Tadic 1997, see supra n. 105, para. 607-608; ICTY, Tadic 1999, see supra n. 302, para. 83; A. CASSESE, “The Nicaragua and Tadic Tests Revisited”, see supra n. 269, 655; K. KIRSS, “Role of the International Court of Justice”, see supra n. 300, 149.

356 ICTY, Tadic 1997, see supra n. 105, para. 607-608.

357 A. CASSESE, “The Nicaragua and Tadic Tests Revisited”, see supra n. 269, 655.

358 M. MILANOVIC, “State Responsibility for Genocide”, see supra n. 9, 578-579.

359 M. MILANOVIC, “State Responsibility for Genocide”, see supra n. 9, 579.

360 ICTY, Tadic 1997, see supra n. 105, para. 585; K. KIRSS, “Role of the International Court of Justice”, see supra n. 300, 154.

361 ICTY, Tadic 1999, see supra n. 302, para. 112.
However, this approach wasn’t uncontested. Judge McDONALD put the analysis of the ICTY Trial Chamber into question in her separate and dissenting opinion.

“I find that the majority's requirement of effective control for making a determination of agency is founded on a misreading of the findings in Nicaragua and a misapplication of those findings to the facts of the case before the Trial Chamber. I would conclude that the effective control standard was never intended to describe the degree of proof necessary for a determination of agency founded on dependency and control as articulated in paragraph 109 of Nicaragua.”

She thus correctly considered the ‘effective control’ test to be an autonomous and distinct test for establishing state responsibility. The Prosecution also formulated the same critique before the Appeals Chamber.

“According to the Prosecution, in that case the Court applied ‘both an ‘agency’ test and an ‘effective control’ test’ . In the opinion of the Prosecution, the Court first applied the ‘agency’ test when considering whether the contras could be equated with United States officials for legal purposes, in order to determine whether the United States could incur responsibility in general for the acts of the contras. According to the Prosecution this test was one of dependency, on the one side, and control, on the other. In the opinion of the Prosecution, the Court then applied the ‘effective control’ test to determine whether the United States could be held responsible for particular acts committed by the contras in violation of international humanitarian law. This test hinged on the issuance of specific directives or instructions concerning the breaches allegedly committed by the contras.”

Despite the dissenting opinion of Judge McDONALD before the Trial Chamber and the preliminary objection formulated by the Prosecution before the Appeals Chamber, the latter persisted and ignored the correct distinction of the Nicaragua case. Nonetheless, it is simply not true that the Nicaragua case only provided one and only test to attribute conduct of non-state actors to a state. A lot of confusion persisted for a long time until the ICJ confirmed this distinction in its Genocide case of 2007.

362 Separate and Dissenting Opinion of Judge McDONALD regarding the applicability of Article 2 of the Statute, ICTY, Tadic 1997, see supra n. 105, 293; K. Kirss, “Role of the International Court of Justice”, see supra n. 300, 155.
363 ICTY, Tadic 1999, see supra n. 302, para. 106.
364 M. Milanovic, “State Responsibility for Genocide”, see supra n. 9, 579.
365 M. Milanovic, “State Responsibility for Genocide”, see supra n. 9, 581.
366 K. Kirss, “Role of the International Court of Justice”, see supra n. 300, 155, 157-158; See infra Chapter 6.1.
**5.2 Qualifying the Armed Conflict at Stake**

In any event, it is clear that the ‘effective control’ monopoly of the *Nicaragua* case was at least to some extent broken due to the *Tadic* judgment. As already mentioned, the question brought before the Court didn’t relate at all to state responsibility. The question was whether the Bosnian Serb military and paramilitary units acted on behalf of the Federal Republic of Serbia while attacking the Bosnian Muslim community in Bosnia-Herzegovina. If those acts could be attributed to Serbia, one could speak of an *international* armed conflict (Federal Republic of Serbia and Bosnia Herzegovina), as defended by the Prosecution. Subsequently; this would logically trigger the application of art. 2 of the ICTY Statute (i.e. the ‘grave breaches regime’). 367

According to the Court, an internal armed conflict may become international “if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other state.” 368 This last situation was thus the relevant question at stake. The Court tried firstly from the viewpoint of international humanitarian law as *lex specialis* to address this legal question, i.e. under which legal criteria armed forces may be regarded as acting on behalf of a foreign power. 369

“(…) international humanitarian law. This corpus of rules and principles may indeed contain legal criteria for determining when armed forces fighting in an armed conflict which is prima facie internal may be regarded as acting on behalf of a foreign Power even if they do not formally possess the status of its organs. These criteria may differ from the standards laid down in general international law, that is in the law of state responsibility, for evaluating acts of individuals not having the status of State officials, but which are performed on behalf of a certain state.” 370

The Court refers to the criteria of lawful combatancy provided by art. 4 of the Third Geneva Convention of 1949 as a starting point. 371 According to this article, militia’s or paramilitary groups or units can be considered as lawful combatants when they form part of the armed

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367 A. CASSESE, “The Nicaragua and Tadic Tests Revisited”, see *supra* n. 269, 655.
368 ICTY, *Tadic* 1999, see *supra* n. 302, para. 84.
369 ICTY, *Tadic* 1999, see *supra* n. 302, para. 91; K. KIRSS, “Role of the International Court of Justice”, see *supra* n. 300, 152.
370 ICTY, *Tadic* 1999, see *supra* n. 302, para. 90.
forces of a party to the conflict, as well as when they’re belonging to a party to the conflict while satisfying four required:\[372\]

"Art 4. A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
(a) that of being commanded by a person responsible for his subordinates;
(b) that of having a fixed distinctive sign recognizable at a distance;
(c) that of carrying arms openly;
(d) that of conducting their operations in accordance with the laws and customs of war."

The Court argues that one of the logical consequences of the formulation "forming part of" and "belonging to" allows us to distinguish international from internal armed conflicts. When paramilitary units are "forming part of" or are "belonging" to a party different than the one against which they’re fighting, there is obviously an international armed conflict.\[373\] The Court is however very well aware of the fact that the formulation "belonging to a Party to the conflict" is very vague and unclear.\[374\] Moreover, this article is obviously predominantly aimed at establishing the requirements of lawful combatancy.\[375\] The ratio legis behind art. 4 of the Third Geneva Convention is founded on an universal consensus that emerged after World War II. This consensus was based on the idea states should bear the legal responsibility for the actions of irregulars which are being sponsored by them.\[376\] In other words, for irregulars to be considered as lawful combatants and thus being entitled to the prisoner of war status, state control (i.e. a relationship of dependence and allegiance) is being required over those irregulars by a party to a conflict.\[377\]

\[373\] ICTY, Tadic 1999, see supra n. 302, para. 92.
\[374\] ICTY, Tadic 1999, see supra n. 302, para. 93.
\[375\] ICTY, Tadic 1999, see supra n. 302, para. 92.
\[376\] ICTY, Tadic 1999, see supra n. 302, para. 93.
\[377\] ICTY, Tadic 1999, see supra n. 302, para. 94.
In sum, the Appeals Chamber clearly considered that art. 4 of the Third Geneva Convention is implicitly referring to a certain test of control. A certain measure of control over the perpetrators by a state which is a party to the conflict is indeed required to establish criminal responsibility in this case. However, it is indispensable to specify precisely what exact degree of authority or control is required by a state over armed forces acting on its behalf in order to qualify the conflict in this case as an international armed conflict.

Subsequently, the Court pointed out that the rules of international humanitarian law do “not contain any criteria unique to this body of law for establishing when a group of individuals may be regarded as being under the control of a State, that is, as acting as de facto State officials.” Therefore, the Court deemed it necessary to rely on general international law (i.e. the general international rules on state responsibility) to examine the scope of the notion of control by a state over individuals. The Court therefore referred to the ‘effective control’ threshold which has been set out by the ICJ in its notorious Nicaragua judgment.

The Prosecution had however preliminary argued that the general rules on state responsibility were immaterial to the question at stake before the Appeals Chamber. It stated that “the criterion for ascertaining State responsibility is different from that necessary for establishing individual criminal responsibility.” This point of view had been firmly rejected by the Court. The Court argued that the distinction between state responsibility and individual criminal responsibility isn’t relevant for the discussion at stake. What really matters is the process of establishing criteria triggering the legal imputability to a state of actions carried out by persons which don’t have the formal status of state officials. In other words, the question under which precise conditions a person needs to be considered as a de facto agent of a state is what is really at stake in this discussion. These conditions will be logically the same in a

378 ICTY, Tadic 1999, see supra n. 302, para. 95.
379 ICTY, Tadic 1999, see supra n. 302, para. 96.
380 ICTY, Tadic 1999, see supra n. 302, para. 97; A. CASSESE, “The Nicaragua and Tadic Tests Revisited”, see supra n. 269, 656.
381 ICTY, Tadic 1999, see supra n. 302, para. 98; A. CASSESE, “The Nicaragua and Tadic Tests Revisited”, see supra n. 269, 656.
382 ICTY, Tadic 1999, see supra n. 302, para. 98,105.
384 ICTY, Tadic 1999, see supra n. 302, para. 103; A. CASSESE, “The Nicaragua and Tadic Tests Revisited”, see supra n. 269, 656.
385 ICTY, Tadic 1999, see supra n. 302, para. 104; A. CASSESE, “The Nicaragua and Tadic Tests Revisited”, see supra n. 269,656.
386 ICTY, Tadic 1999, see supra n. 302, para. 104.
387 Ibid.
state responsibility context as in an individual criminal responsibility context. In the former case, these conditions will incur the responsibility of a state, in the latter case these conditions will allow to qualify a conflict as having an international character. After having dismissed this objection of the Prosecution, The Appeals Chamber could rely freely on the general rules of state responsibility. However in contrast to the Trial Chamber, it did not consider the Nicaragua threshold to be persuasive on two grounds. These two grounds will be discussed in the following Chapter.

5.3 The ICTY calls the Nicaragua ‘Effective Control’ Threshold into Question

5.3.1 Incompatible with the Logic of the Law of State Responsibility

Firstly, the Court argues that the Nicaragua test - as elaborated by the ICJ - would not be in accordance with the logic of the law of state responsibility (i.e. the ultra vires principle). Hereby the Court refers explicitly to art. 8 ILC Draft Articles and describes the ratio legis behind this important article:

“(…) The rationale behind this rule is to prevent States from escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by State officials, or by claiming that individuals actually participating in governmental authority are not classified as State organs under national legislation and therefore do not engage State responsibility. In other words, States are not allowed on the one hand to act de facto through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law. (…)”

It is extremely important to note that the Court thereafter takes a very flexible position when stating that “the degree of control may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control. The Court argues that “various situations may be distinguished.” By stating this, the Court is clearly distancing

388 ICTY, Tadic 1999, see supra n. 302, para. 104; A. CASSESE, “The Nicaragua and Tadic Tests Revisited”, see supra n. 269, 656.
389 ICTY, Tadic 1999, see supra n. 302, para. 105.
390 ICTY, Tadic 1999, see supra n. 302, para. 115; M. MILANOVIC, “State Responsibility for Genocide”, see supra n. 9, 579-580.
391 ICTY, Tadic 1999, see supra n. 302, para. 116.
392 A. CASSESE, “The Nicaragua and Tadic Tests Revisited”, see supra n. 269, 656.
393 ICTY, Tadic 1999, see supra n. 302, para. 117.
394 Ibid.
itself from the solid and demanding Nicaragua threshold, which does not differentiate at all between different factual situations. By distinguishing between two different situations with respectively two different degrees of control, the Court adopts - in sharp contrast to the ICJ Nicaragua threshold - a very flexible approach regarding the issue of attributability. The Appeals Chamber made thus a very important distinction between actions performed by private individuals and action committed by organized and hierarchically structured groups. For acts performed by private individuals, the ‘effective control’ formula remains applicable.

“One situation is the case of a private individual who is engaged by a State to perform some specific illegal acts in the territory of another State (for instance, kidnapping a State official, murdering a dignitary or a high-ranking State official, blowing up a power station or, especially in times of war, carrying out acts of sabotage). In such a case, it would be necessary to show that the State issued specific instructions concerning the commission of the breach in order to prove – if only by necessary implication – that the individual acted as a de facto State agent. (…)”

However, the added value of the Tadic judgment lies obviously in the second category. For acts performed by organized and hierarchically structured groups, the ‘overall control’ threshold has been established. This implies that no specific instruction for each separate operation is required, however an ‘overall control’ over the group as a whole suffices for attribution to occur. According to the Appeals Chamber, the ‘effective control’ test is too high for organized armed groups, the ‘overall control’ threshold is therefore much better suited to deal with these groups.

“(…) Plainly, an organised group differs from an individual in that the former normally has a structure, a chain of command and a set of rules as well as the outward symbols of authority. Normally a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group. Consequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State.”
It is important to note that by concluding that an ‘overall control’ by the FRY over the Bosnian Serb armed forces was required for considering the conflict at stake as an international armed conflict, the ICTY revealed to a certain extent the scope of this threshold. The Court stated that the control required was an “overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations.”\(^{402}\) On the other hand, the ‘overall control’ does not require “the issuance of specific orders or instructions relating to single military actions.”\(^{403}\) The ‘overall control’ test differs thus a lot in this respect with the ‘effective control’ test.

In addition, for the sake of completeness, the Court distinguished between three different situations. The third situation is however not of great importance for the issue discussed by the Appeals Chamber, nor for this research. This third test which is briefly elaborated by the Court relates to the equation of individuals as state organs, based upon their actual conduct within the structure of a state. This third test is reminiscent of the ‘complete dependence’ test of the *Nicaragua* case. However, the Appeals Chamber did not further elaborate upon this third test in that respect.\(^{404}\) In any event, what is important to remember is that the ICTY mainly distinguished between two situations, *i.e.* private individuals and organized groups. In sum, it applied the ‘overall control’ threshold *only* in case of organized and hierarchically structured groups. In the case of private individuals, the *Nicaragua* formula remained unimpaired.\(^{405}\)

Furthermore, it must be acknowledged that the Court’s analysis is situated within the context of the *ultra vires* principle in the law of state responsibility.\(^{406}\) With regard to the ‘overall control’ test, the Court explicitly referred to the *former* art. 10 of the Draft on State Responsibility which was provisionally adopted by the International Law Commission in 1980, and which formulated the *ultra vires* principle.\(^{407}\) Nowadays, the *ultra vires* principle is no longer formulated by art. 10, but by art. 7 ILC Draft Articles of 2001:

\(^{402}\)ICTY, *Tadic* 1999, see supra n. 302, para. 145.

\(^{403}\)Ibid.

\(^{404}\)ICTY, *Tadic* 1999, see supra n. 302, 141-144; M. MILANOVIĆ, “State Responsibility for Genocide”, see supra n. 9, 580.

\(^{405}\)S. CENIC, “State Responsibility and Self-Defence in International Law Post 9/11”, see supra n. 119, 205-206.

\(^{406}\)Regarding organized groups, see ICTY, *Tadic* 1999, see supra n. 302, 121-123. Regarding private individuals or a group of private individuals, see ICTY, *Tadic* 1999, see supra n. 302, 119.

\(^{407}\)ICTY, *Tadic* 1999, see supra n. 302, para. 121.
“The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.”

According to the Court, an ‘overall control’ by a state over a military group makes that state responsible for any act of that group, independently of any instructions or even contrary to these instructions. This equates this group to a certain extent with a state organ. International law (i.e. the abovementioned art. 7 ILC Draft Articles) ensures that a state is internationally responsible for all the actions of its organs, even when committed ultra vires. The ratio legis of this article is “that a State must be held accountable for acts of its organs whether or not these organs complied with instructions, if any, from the higher authorities.”

If this would not be the case, “States might easily shelter behind, or use as a pretext, their internal legal system or the lack of any specific instructions in order to disclaim international responsibility.”

It is thus obvious that in the case of organized groups, state responsibility is the “objective corollary of the overall control exercised by the State over the group.” In other words, the logical consequence of the Court’s point of view is that when applying the high ‘effective control’ threshold with respect to actions of organized groups, this would violate the ultra vires principle. Indeed, this very demanding attribution threshold wouldn’t allow as good as none of the actions of organized groups to be attributed to a state. This implies that no state could ever incur international state responsibility for the actions of organized groups which acted on its behalf. This situation would contravene the very essence of the law of state responsibility:

“(…) Generally speaking, it can be maintained that the whole body of international law on State Responsibility is based on a realistic concept of accountability, which disregards legal formalities and aims at ensuring that States entrusting some functions to individuals or groups must answer for their actions, even when they act contrary to their directives.”

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408 Ibid.
409 ICTY, Tadic 1999, see supra n. 302, para. 123.
410 Ibid.
411 R. VÄRK, “State Responsibility for Private Armed Groups in the Context of Terrorism”, see supra n. 93, 189.
412 ICTY, Tadic 1999, see supra n. 302, para. 122.
413 ICTY, Tadic 1999, see supra n. 302, para. 121.
5.3.2 Inconsistency towards Judicial and State Practice

The second ground on which the Court’s disapproval of the Nicaragua threshold is founded is related to the absence of the ‘effective control’ threshold in international judicial and state practice.\(^{414}\) However, this statement needs immediately to be refined. International judicial and state practice has indeed accepted the ‘effective control’ test for the conduct of individuals and unorganized groups acting on behalf of a state. However, with regard to organized groups (i.e. military and paramilitary groups), international practice has applied a lower threshold which clearly differs from the ‘effective control’ test.\(^{415}\) The Court referred extensively to international case law to underpin this conclusion.\(^{416}\) But what exact degree of state involvement can one discern from international judicial and state practice in relation to organized groups for a link of attribution to be established? The Court gives a clear answer to this question: \(^{417}\)

“In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the state be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law”\(^{418}\)

Finally, the Court concluded that that the exercise of an ‘overall control’ by the Serbian state over the acts of the Bosnian Serb army sufficed for the accountability of these acts to Serbia. Therefore, this conflict has been qualified as an international armed conflict, which falls under the scope of art. 2 of the ICTY Statute.\(^{419}\)

5.4 Conclusion

In sum, one can conclude that the ICTY in its famous Prosecutor v. Tadic case argued that international law on state responsibility allows for a differentiation of the required degree of

\(^{414}\) ICTY, Tadic 1999, see supra n. 302, para. 124; M. MILANOVIĆ, “State Responsibility for Genocide”, see supra n. 9, 580.

\(^{415}\) ICTY, Tadic 1999, see supra n. 302, para. 124.

\(^{416}\) ICTY, Tadic 1999, see supra n. 302, para. 126-136; K. KIRSS, “Role of the International Court of Justice”, see supra n. 300, 154.

\(^{417}\) M. MILANOVIĆ, “State Responsibility for Genocide”, see supra n. 9, 580.

\(^{418}\) ICTY, Tadic 1999, see supra n. 302, para. 131.

\(^{419}\) ICTY, Tadic 1999, see supra n. 302, para. 162; M. MILANOVIĆ, “State Responsibility for Genocide”, see supra n. 9, 580. see supra
state involvement over armed groups or private individuals.\footnote{ICTY, Tadic 1999, see supra n. 302, para. 137.} The ICTY thus distanced itself from the rigid and very demanding ‘effective control’ threshold, created by the ICJ and which is moreover applicable in every situation. The Appeals Chamber established on the other hand the so-called ‘overall control’ test with regard to organized armed groups, whereas the ‘effective control’ remains uninjured with regard to private individuals. This ‘overall control’ threshold is clearly lower and more flexible than the ‘effective control’ threshold. Nevertheless, it implies a control “going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations.”\footnote{See supra n. 402.} The Court furthermore stresses that the ‘overall control’ test is in accordance with the ultra vires – principle. This cannot be said to be the case with regard to the ‘effective control’ test when it is applied to organized groups. The Court substantiates its finding by referring extensively to international judicial and state practice. The Tadic case clearly broke the ‘effective control’ monopoly. Moreover, one may not forget that in the view of the ICTY, the ‘complete dependence’ test and the ‘effective control’ test were one and the same. However, the ICJ will clarify and confirm this distinction in its Genocide case, hereby eliminating the existing confusion about this distinction.\footnote{See infra Chapter 6.}

Finally, a new question rises, which test prevails? The Nicaragua and Tadic judgments seem to provide different solutions to the same problem.\footnote{M. MILANOVIC, “State Responsibility for Genocide”, see supra n. 9, 576.} Has the ‘effective control’ test been overruled by the ‘overall control’ test? How do these two tests coexist in the international legal order? One needs first to analyze the Commentary to the ILC Draft Articles as well as the judgment of the ICJ in the Genocide case, to be able to answer this question.

The Commentary to art. 8 ILC Draft Articles does not seem to provide a clear-cut position regarding which test should prevail.\footnote{J. CRAWFORD, The International Law Commission’s Articles on State Responsibility, see supra n. 99, 110-112.} In general, it rather seems to prefer the ‘effective control’ over the ‘overall control’ threshold.\footnote{H. H. HOFMEISTER, “When is it Right to Attack so-called ’Host States’?”, see supra n. 398, 77; M. MILANOVIC, “State Responsibility for Genocide”, see supra n. 9, 583; A. CASSESE, “The Nicaragua and Tadic Tests Revisited”, see supra n. 269, 663-664.} Indeed, the Commentary stresses that the Nicaragua case and Tadic case aren’t comparable. Moreover, it is argued that the mandate of the ICTY is limited to questions of individual criminal responsibility. Therefore, questions of

\footnote{ICTY, Tadic 1999, see supra n. 302, para. 137.}
state responsibility logically do not fall under the scope of this mandate. Furthermore, the question brought before the ICTY was related to the applicable rules of international humanitarian law, not general rules of state responsibility.\textsuperscript{426} On the other hand, the Commentary didn’t want to take an unambiguous position by formulating an important \textit{“Solomonic”} statement:\textsuperscript{427}

\begin{quote}
\textit{“In any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it.”}
\end{quote}

The Commentary thus formulates a very vague preference for the ‘effective control’ test without however raising it to an absolute rule. Every case needs indeed to be appreciated according to its specific characteristics. In sum, the Commentary to art. 8 ILC Draft Articles does not provide any overwhelming evidence in favor of the ‘effective control’ threshold, nor of the ‘overall control’ threshold. The ICJ on the other hand, took a firm stand in its \textit{Genocide} judgment of 2007.

\textbf{6. The ICJ Genocide Case of 2007}

In the case concerning application of the convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Serbia and Montenegro) of 2007 (hereafter: \textit{Genocide} case), the question brought before the ICJ concerned the discussion whether the acts of genocide (\textit{i.e.} the Srebrenica massacre) carried out by the Bosnian Serb army (\textit{i.e.} VRS: Army of the Republika Srpska) can be attributed to the Federal Republic of Yugoslavia.\textsuperscript{428} It is very important to note that the Court applied the ‘effective control’ threshold to answer this question which resulted in a negative conclusion. Moreover, the Court completely rejected on \textit{two} grounds the ‘overall control’ test as elaborated by the ICTY in the \textit{Tadic} case.\textsuperscript{429} By doing so, the Court clearly confirmed the ‘effective control’ test of its previous \textit{Nicaragua} judgment.\textsuperscript{430} In addition, after a long time of persistent confusion, the Court distinguished

\begin{itemize}
\item \textsuperscript{426} J. CRAWFORD, \textit{The International Law Commission’s Articles on State Responsibility}, see supra n. 99, 112.
\item \textsuperscript{427} A. CASSESE, “The Nicaragua and Tadic Tests Revisited”, see supra n. 269, 664; J. CRAWFORD, \textit{The International Law Commission’s Articles on State Responsibility}, see supra n. 99, 112.
\item \textsuperscript{428} ICJ, \textit{Genocide Case}, see supra n. 189, para. 379; B. MICHAEL, “Responding to Attacks by Non-State Actors: The Attribution Requirement of Self-Defence”, see supra n. 247, 144; A. CASSESE, “The Nicaragua and Tadic Tests Revisited”, see supra n. 269, 649-650.
\item \textsuperscript{429} A. CASSESE, “The Nicaragua and Tadic Tests Revisited”, see supra n. 269, 649.
\item \textsuperscript{430} B. MICHAEL, “Responding to Attacks by Non-State Actors: The Attribution Requirement of Self-Defence”, see supra n. 247, 144.
\end{itemize}
clearly between the ‘complete dependence’ test and ‘effective control’ test as initially formulated in the Nicaragua case.431

6.1 Distinction ‘Complete Dependence’ and ‘Effective Control’ Confirmed

In contrast to the Tadic judgment, the Court clearly distinguished between these two important concepts. It clearly made a twofold analysis by asking firstly whether the VRS was a de facto organ of the Federal Republic of Serbia (i.e. the ‘complete dependence’ test). Subsequently, if this wasn’t the case, the question then rose whether the acts of genocide could nevertheless be imputed to the Republic of Serbia on the basis of the control it exercised over persons who however didn’t qualify as state organs (i.e. the ‘effective control’ test):

“(...) This question has in fact two aspects, which the Court must consider separately. First, it should be ascertained whether the acts committed at Srebrenica were perpetrated by organs of the Respondent, i.e., by persons or entities whose conduct is necessarily attributable to it, because they are in fact the instruments of its action. Next, if the preceding question is answered in the negative, it should be ascertained whether the acts in question were committed by persons who, while not organs of the Respondent, did nevertheless act on the instructions of, or under the direction or control of, the Respondent. (...)”432

With regard to the ‘complete dependence’ the Court stated the following:

“(...) according to the Court’s jurisprudence, persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in “complete dependence” on the State, of which they are ultimately merely the instrument. (...)”433

“(…) However, so to equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a particularly great degree of State control over them, a relationship which the Court’s Judgment quoted above expressly described as “complete dependence” (…)”.434

431 K. Kirss, “Role of the International Court of Justice”, see supra n. 300, 80.
432 ICJ, Genocide Case, see supra n. 189, para. 384.
433 ICJ, Genocide Case, see supra n. 189, para. 392.
434 ICJ, Genocide Case, see supra n. 189, para. 393.
One may not forget that according to the Court *de facto* state organs fall under the scope of art. 4 ILC Draft Articles. If the first test didn’t result in a positive answer, the Court had to apply the second test. That’s when the ‘effective control’ test came again into play. Could Serbia be responsible of genocide due to the control it exercised over the VRS? It is important to note that the Court hereby stressed explicitly that it was now discussing “a completely separate issue”.

“(…) Having answered that question in the negative, the Court now addresses a completely separate issue: whether, in the specific circumstances surrounding the events at Srebrenica the perpetrators of genocide were acting on the Respondent’s instructions, or under its direction or control. An affirmative answer to this question would in no way imply that the perpetrators should be characterized as organs of the FRY, or equated with such organs. It would merely mean that the FRY’s international responsibility would be incurred owing to the conduct of those of its own organs which gave the instructions or exercised the control resulting in the commission of acts in breach of its international obligations. In other words, it is no longer a question of ascertaining whether the persons who directly committed the genocide were acting as organs of the FRY, or could be equated with those organs — this question having already been answered in the negative. What must be determined is whether FRY organs — incontestably having that status under the FRY’s internal law — originated the genocide by issuing instructions to the perpetrators or exercising direction or control, and whether, as a result, the conduct of organs of the Respondent, having been the cause of the commission of acts in breach of its international obligations, constituted a violation of those obligations”

6.2 Confirmation of the ‘Effective Control’ Test

It is important to note that according to the Court, art. 8 ILC Draft Articles reflects international customary law. The Court further stated explicitly that art. 8 ILC Draft Articles needs to be understood in the light of its previous *Nicaragua* judgment, which

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435 See supra Chapter 2.2 of Part III, n. 304; However, this reasoning of the Court has been contested by DE FROUVILLE who argues that *de facto* organs should rather fall under the scope of art. 8 ILC Draft Articles. He argues that Art. 8 is based on factual links, art. 4 on the other hand is based on legal or institutional links. According to DE FROUVILLE, the Court is mixing two separate cases of attribution by considering *de facto* organs as falling under the scope of art. 4 ILC Draft Articles, see O. DE FROUVILLE, “Attribution of Conduct to the State: Private Individuals”, see supra n. 99, 269; As previously mentioned argues CAHN in the same line while stating that the notion of “*de facto* organs” is embodied in art. 8 ILC Draft Articles and not in art. 4. He thus also rejects the reasoning of the ICJ in the Genocide case, see supra n. 295.

436 ICJ, Genocide Case, see supra n. 189, para. 394.

437 ICJ, Genocide Case, see supra n. 189, para. 397.

438 ICJ, Genocide Case, see supra n. 189, para. 398.
proclaimed the ‘effective control’ test. It then clarified why it finds the “overall control” test to be unpersuasive.

The Court highlighted the fact that the jurisdiction of the ICTY is limited to criminal individual responsibility. Indeed, Art. 6 of the ICTY Statute states that the Tribunal “shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.” This implies logically that states cannot be prosecuted by the ICTY. On the other hand, art. 34.1 of the Statute of the ICJ states that “only States may be parties in cases before the Court.” The ICTY is thereby not the competent tribunal to rule on questions of general international law, including questions of state responsibility. The Court argued therefore that it was free not to take into account rulings of the ICTY related to 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.” This reasoning is reminiscent of the preliminary objection of the Prosecution in the Tadic case.

In addition, the Court considered the threshold of control according to which one can distinguish between national and international armed conflicts to be unpersuasive when used for establishing state responsibility for actors acting on behalf of a state. This finding is underpinned on two main grounds. First of all, it is argued that the degree and nature of the required state control on another state’s territory to qualify an armed conflict as international is a completely different matter than the degree and nature of the required state control over non-state actors according to which a state can incur international responsibility for their actions. These two legal questions therefore cannot be assimilated. Differences between these two thresholds would be very well possible without causing any logical inconsistency. Secondly, the Court argues that the acceptance of the ‘overall control’ test

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439 ICJ, Genocide Case, see supra n. 189, para. 399.
440 B. Michael, “Responding to Attacks by Non-State Actors: The Attribution Requirement of Self-Defence”, see supra n. 247, 144.
442 ICJ Statute, Annex to UN Charter, see supra n. 70.
443 ICJ, Genocide Case, see supra n. 189, para. 403; A. Casse, “The Nicaragua and Tadic Tests Revisited”, see supra n. 269, 650.
444 ICTY, Tadic 1999, see supra n. 302, para. 103; See supra Chapter 5.2
445 ICJ, Genocide Case, see supra n. 189, para. 404-405; A. Casse, “The Nicaragua and Tadic Tests Revisited”, see supra n. 269, 651.
446 ICJ, Genocide Case, see supra n. 189, para. 405.
447 ICJ, Genocide Case, see supra n. 189, para. 405; A. Casse, “The Nicaragua and Tadic Tests Revisited”, see supra n. 269, 51.
would broaden 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.” In other words, according to the Court, the ‘overall control’ test is inappropriate because it goes way beyond the three standards formulated in art. 8 ILC Draft Articles. Finally, the Court confirms that it will read art. 8 ILC Draft Articles according to its settled case law to discuss the question at stake. Serbia has thus not been found to be responsible for the Srebrenica massacre through the conduct of its organs or persons which can trigger the responsibility of Serbia according to customary international law.

6.3 Conclusion

The Court clearly confirmed the distinction between the ‘complete dependence’ and ‘effective control’ test. The Court furthermore firmly confirmed its ‘effective control’ test and rejected on two grounds the ‘overall control’ test of the ICTY. Firstly, the ICTY does not have any jurisdiction on matters of general international law. Secondly, the ‘overall control’ test is not convincing when applied within the context of the law of state responsibility. The threshold of state control for qualifying a conflict as an international armed conflict and the threshold required to establish a link of attribution between a state and de facto organs which are acting on its behalf are two non-comparable legal questions. Moreover, the application of the ‘overall control’ test would expand the scope of state responsibility in an unacceptable way. The question whether the ‘overall control’ test has replaced the ‘effective control’ test, and thus softened the attribution threshold, seems at first sight to be answered negatively. The ICJ seems to have obviously settled this question in favor of the ‘effective control’ test. However, one should nevertheless briefly reflect from a broader perspective upon this important conclusion.

448 ICJ, Genocide Case, see supra n. 189, para. 406; B. Michael, “Responding to Attacks by Non-State Actors: The Attribution Requirement of Self-Defence”, see supra n. 247, 144.
449 A. CasseSse, “The Nicaragua and Tadic Tests Revisited”, see supra n. 269, 651.
450 ICJ, Genocide Case, see supra n. 189, para. 407.
451 ICJ, Genocide Case, see supra n. 189, para. 413, 471 (2); However, as previously mentioned in Chapter 2.3 of Part II, Serbia did fail to comply to its autonomous and positive obligations to prevent and punish acts of genocide, see supra n. 189.
7. **Nicaragua vs Tadic, which one prevails?**

7.1 **Background**

The conflicting ‘effective control’ and ‘overall control’ positions of the ICJ and the ICTY are seen as the classical example of the so-called *fragmentation* of international law and the ensuing multiplication of international courts and tribunals. As any other system of law, international law is divided into different legal branches (e.g. international human rights, environmental law, humanitarian law, maritime law etc.) This division into several legal branches is completely normal. However this fragmentation has also entailed the presence of specific dispute settlement bodies. One may not forget that the international legal order has a *horizontal* character, without any central legislative, executive or judicial authority. The decisions of dispute settlement bodies have in such a system a much greater value. In sum, since there is no hierarchy in the international legal order which, this entails a strong incentive for international courts and tribunals to contribute to international law by their *own* decisions. The so-called ‘judicial law-making’ is thus very important in international law. The question then rises how these different courts and tribunals apply international law?

Logically, international tribunals and courts tend to apply international law from their *own* perspective. As international courts and tribunals are more inclined to contribute to international law by ‘judicial law-making’, this certainly increases the risk for conflicting decisions. This phenomenon has also been described as the so-called “*jurisdictionalization of international law*”. Due to the horizontal character of the international legal order, all international courts and tribunals and their decisions are *equally* important. This naturally doesn’t discourage them to discuss questions which don’t fall under the scope of their specific expertise. The horizontal character of the international legal order also explains the absence of a universal judicial authority which could guarantee a certain homogeneity and consistency in international case law by correcting the legal ‘misunderstandings’. It is clear that the international legal order is characterized by an *inherent* tendency to create

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452. K. KIRSS, “Role of the International Court of Justice”, see *supra* n. 300, 143.
453. K. KIRSS, “Role of the International Court of Justice”, see *supra* n. 300, 144, 148.
454. K. KIRSS, “Role of the International Court of Justice”, see *supra* n. 300, 148.
455. K. KIRSS, “Role of the International Court of Justice”, see *supra* n. 300, 149.
457. K. KIRSS, “Role of the International Court of Justice”, see *supra* n. 300, 150.
458. K. KIRSS, “Role of the International Court of Justice”, see *supra* n. 300, 149.
contradictory decisions, which jeopardizes the coherence of international law in general. The coexistence of conflicting judicial decisions in international law goes far beyond the scope of this research. It is however within this particular background that one needs to situate the discrepancy between the *Nicaragua* and *Tadic* judgment.\footnote{K. Kirss, “Role of the International Court of Justice”, see supra n. 300, 149-150.}

### 7.2 Critical Analysis

One could call both the ‘effective control’ and ‘overall control’ test into question. There are convincing *pro*- as well as *contra* arguments for both positions. First of all, it is highly remarkable that the ICJ did not mention any of the grounds on which its ‘effective control’ test was based. As Cassese has stated firmly:

> “The ‘effective control’ test may or may not be persuasive. What matters, however, is to establish whether it is based on either customary law (resulting from state practice, case law and opinio juris) or, absent any specific rule of customary law, on general principles on state responsibility or even general principles of international law.”\footnote{A. Cassese, “The Nicaragua and Tadic Tests Revisited”, see supra n. 269, 653.}

Moreover, as previously mentioned, according to the ICTY, the ‘effective control’ doesn’t seem to be endorsed by any judicial or state practice. Cassese argues moreover in this respect that the distinction between private individuals and organized groups seems to have been maintained subsequent to the *Tadic* case by international courts and UN bodies.\footnote{A. Cassese, “The Nicaragua and Tadic Tests Revisited”, see supra n. 269, 658-661.} In other words, subsequent state practice seems to have endorsed the ‘overall control’ threshold. Furthermore, the ‘effective control’ test seems not be in conformity with the well-established basic principle of state responsibility, namely the *ultra vires* principle, as defended by the ICTY.\footnote{See supra Chapter 5.3.1} The ‘effective control’ test, when incorrectly applied to organized and armed groups - for which an ‘overall control’ should suffice according to the ICTY - compromises the *ultra vires* principle. From a policy perspective the ‘effective control’ test has also been put into question. Maintaining an ‘effective control’ test nowadays is said to be rather unrealistic, and insufficient to oppose international terrorism.\footnote{R. Vark, “State Responsibility for Private Armed Groups in the Context of Terrorism”, see supra n. 93, 189.}

On the other hand, it has been contended by Milanovic that the case law on which the ICTY’s judgment is based and according to which the ‘effective control’ wouldn’t be in
accordance with state practice, does not support at all the emergence of the ‘overall control’ threshold.\textsuperscript{464} This proposition has however again been put into question by CASSESE who strongly supports the ICTY’s point of view.\textsuperscript{465} It has also been argued that the ICTY’s analysis of the law of state responsibility is completely erroneous from the very beginning, because it ignored the existence of the twofold test (\textit{i.e.} ‘complete dependence’ and ‘effective control’) of the Nicaragua case.\textsuperscript{466} The Tadic case has furthermore been criticized for blurring the primary and secondary rules of international law by mixing the concepts of state responsibility with those of the primary rules of international humanitarian and human rights law. The ICTY’s reference to the international law of state responsibility to determine whether the conflict at stake had a national or an international character has been considered as a very odd reasoning in this respect. The basic idea on which this critique is founded is that the law of state responsibility cannot answer the question whether a \textit{prima facie} internal armed conflict has become international.\textsuperscript{467} However, from a policy perspective, it has been contended that the ICTY established a proper attribution threshold while at the same time having completely misread the Nicaragua judgment.\textsuperscript{468}

In sum, one could cautiously conclude - without however having elaborated exhaustively all the possible objections to the two thresholds in order not to absent oneself from the initial research question - that both the ‘effective control’ as ‘overall control’ judgments have been the object of a seemingly never-ending academic debate in legal literature. The ICJ seems however to have developed an \textit{objective} test according to which one could – at least for the purpose of this research – settle the question at stake; which test needs to be preferred?

\subsection*{7.3 The ‘Specific Purview’ Test}

The ICJ clearly confirmed the priority of the ‘effective control’ test over the ‘overall control’ test. However, how can one reconcile the priority of the ‘effective control’ test in the horizontal structure of the international legal order in which all the judgment of international courts and tribunals are equally important?

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{464} M. MILANOVIC, “State Responsibility for Genocide”, see supra n. 9, 586-587.
\item \textsuperscript{465} A. CASSESE, “The Nicaragua and Tadic Tests Revisited”, see supra n. 269, 658.
\item \textsuperscript{466} M. MILANOVIC, “State Responsibility for Genocide”, see supra n. 9, 579.
\item \textsuperscript{467} M. MILANOVIC, “State Responsibility for Genocide”, see supra n. 9, 583-585.
\item \textsuperscript{468} M. MILANOVIC, “State Responsibility for Genocide”, see supra n. 9, 581.
\end{itemize}
\end{footnotesize}
The ICJ seized the opportunity in the *Genocide* case, not only to confirm its previous ‘effective control’ test but also to explain its relationship with other international courts in the international legal order.\(^{469}\) The Court applied an ‘institutional test’, the so-called ‘specific purview’ test to justify why it had used some, but not all of the findings of the ICTY. As already mentioned, the Court therefore took the factual and legal findings of the ICTY related to the criminal liability of the accused into account, whereas the Court refused to recognize the ICTY’s reasoning related to the law of state responsibility.\(^{470}\)

“(...) The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction (...)”\(^{471}\)

This finding allows in cases of conflicting views due to judicial overlapping to determine the preferable interpretation on objective grounds. Only the finding elaborated by the ‘competent organ’ shall be granted authority.\(^{472}\) This ‘specific purview’ test has two major consequences. Firstly, it stresses the value of international judicial decisions of specialized bodies, made within their specific legal discipline. Secondly, the ICJ (re)claims its position as the highest judicial authority on issues of general international law. This reasoning could thus be very useful in future cases to avoid differing interpretations.\(^{473}\) Of course, this technique to resolve conflicting judicial decisions could also be questioned critically.\(^{474}\) However, for the purpose of this research, it is very useful to underpin the priority of the ‘effective control’ test not purely on the authority of the ICJ as such.

### 7.4 Conclusion

One can conclude that - in principle - the ‘effective control’ test prevails over the ‘overall control’ test. The ‘effective control’ threshold is thus the extant law. However, it is important to note that on the one hand, the Commentary to art. 8 ILC Draft Articles has highlighted - as previously mentioned - that one may not forget to appreciate each case separately. On the other hand, one may not forget that this Commentary dates back to 2001, *before* the ICJ

\(^{469}\) K. KIRSS, “Role of the International Court of Justice”, see *supra* n. 300, 156.

\(^{470}\) K. KIRSS, “Role of the International Court of Justice”, see *supra* n. 300, 159.

\(^{471}\) ICJ, *Genocide Case*, see *supra* n. 189, para. 403.


\(^{473}\) K. KIRSS, “Role of the International Court of Justice”, see *supra* n. 300, 160.

\(^{474}\) As CANNIZARO does, see E. CANNIZARO, “Interconnecting International Jurisdictions”, see supra 472, 4.
firmly confirmed the ‘effective control’ threshold in the *Genocide* case of 2007. Parallel to the latter finding, one may also not forget that in 2001 - when the ILC Draft Articles have emerged and the events of 9/11 occurred - the ‘specific purview’ test of the *Genocide* was still non-existent. The debate was still heavily raging at that time.

In any event, for the purpose of this research the ‘effective control’ will be considered retroactively as the prevailing and thus the only correct attribution threshold. Despite the fact that this conclusion implies to a certain extent a form of ‘hineininterpretierung’, there doesn’t seem to be a lot of added value in assessing every future legal question in this research from both an ‘effective control’ and ‘overall control’ perspective. Knowing that the latter threshold needs anyway to be disregarded makes this dual perspective redundant. The next Chapter will briefly explain the meaning of art. 11 ILC Draft Articles before proceeding to the final Part.

**8. Art. 11 ILC Draft Articles**

Before proceeding to the final Part, one may not forget to at least mention art. 11 ILC Draft Articles. Even though this article isn’t of utmost importance for the issue discussed in this research, one cannot simply ignore its meaning and background in a terrorism context. Art. 11 states the following:

“*Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own***

As already mentioned in Part I, according to the inter-state approach towards art. 51 UN Charter, which is also the starting point of this research, a determination of direct state responsibility is an absolute *conditio sine qua non* to justify a lawful use of force in self-defence.\(^{475}\) It has also been pointed out that all acts of private persons who don’t act on behalf of a state cannot be attributed to a state, unless these persons act as *de facto* actors or organs.\(^{476}\) Art. 11 is interesting in that sense that it allows for an act which has been entirely carried out by a *third* party (*i.e.* thus no *de facto* agent of organ), to be nevertheless attributed to a state through its *approval*.\(^{477}\) In other words, this article relates to conduct that at the time

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\(^{475}\) See *supra* Chapter 2 of Part I, n. 101.

\(^{476}\) See *supra* Chapter 1.

\(^{477}\) O. DE FROUVILLE, “Attribution of Conduct to the State: Private Individuals”, *see supra* n. 99, 274.
of commission could not be attributed to a state. However, a state can be held responsible for this conduct when this conduct has been acknowledged and adopted by a state as its own, i.e. a so-called \textit{ex post facto} attribution.\footnote{478} The ILC has relied upon the ICJ Tehran hostages case which provides the classic example of an \textit{ex post facto} attribution.\footnote{479}

“The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State.”\footnote{480}

One needs to stress in this respect that the wording of art. 11; “\textit{acknowledges and adopts the conduct in question as its own}” clearly wants to make clear that mere support or endorsement does \textit{not} suffice in this respect. It is important to note that art. 11 only produces legal consequences when a state \textit{explicitly} acknowledges a certain conduct as its own. The formulation “\textit{acknowledges and adopts}” implies \textit{more} than a mere acknowledgment of a factual situation and thus presupposes that a state identifies the conduct and makes it its own.\footnote{481}

In addition, an \textit{ex post factum} attribution (\textit{i.e.} an attribution by endorsement) is not the same as a situation of negligence (\textit{i.e.} violation of the general obligation of prevention). In both cases the state does not participate in the execution of the action concerned. However, whereas in a case of negligence state responsibility is founded on the state’s \textit{inaction} in breach of international obligations towards that action, art. 11 is holding a state responsible


\footnote{479} L. CONDORELLI and C. KRESS, “The Rules of Attribution: General Considerations”, see supra n. 18, 231-232; T. BECKER, \textit{Terrorism and the State}, see supra n. 94, 73; J. CRAWFORD, \textit{The International Law Commission’s Articles on State Responsibility}, see supra n. 99, 121-124.

\footnote{480} ICJ Tehran Hostages Case, see supra 174, para. 74.

\footnote{481} J. CRAWFORD, \textit{The International Law Commission’s Articles on State Responsibility}, see supra n. 99, 121-124.
due to its own act towards that action, namely an approval.\textsuperscript{482} A further analysis of this article goes beyond the scope of this research.

Up to now, this research has relied on an inter-state reading of art. 51 UN Charter (\textit{i.e.} an attribution-based approach of “armed attack”), while having maintained the ‘effective control’ threshold as the extant attribution standard for the actions of non-state actors within the agency-based paradigm of the law of state responsibility (art. 8 ILC Draft Articles). In addition, one may not forget the possible existence of a \textit{de facto} organ (art. 4.2 ILC Draft Articles) and an \textit{ex post facto} attribution (art. 11 ILC Draft Articles) which also allow for the attribution of conduct of private actors to a state.

In sum, after having discussed the prohibition of international terrorism from a \textit{Jus ad Bellum} perspective and having discussed the extant law of state responsibility, one can finally proceed to the next and final Part. Part IV will address the crucial question whether or not the ‘effective control’ has been changed in the aftermath of 9/11.

\textsuperscript{482} O. DE FROUVILLE, “Attribution of Conduct to the State: Private Individuals”, see \textit{supra} n. 99, 274.
PART IV: Has the Law of State Responsibility been Affected?

1. Introduction

Before 9/11 the abovementioned inter-state approach (see Part II) was the undisputable prevailing view. However, this proposition needs to be somewhat nuanced. Even before 9/11 states as Israel and the United States proclaimed a kind of self-defence that allowed them to use force against terrorist groups abroad on the basis that the host countries were ‘accomplices’ to these terrorist acts (i.e. acts of indirect aggression). This doctrine has also been described as the so-called ‘Shultz doctrine’ (named after former US Secretary of State Shultz).\(^{483}\) However, this point of view wasn’t shared, nor approved by the majority of the world community.\(^{484}\) In other words, this legal mindset wasn’t clear enough to be able to establish new norms of customary international law.\(^{485}\)

For instance, Israel claimed to have acted in self-defence when it attacked the PLO headquarters in Tunisia in 1985. Its action was however strongly condemned by the UNSC.\(^{486}\) In addition, a terrorist bomb exploded in a Berlin nightclub in 1986, which killed several American soldiers. The U.S. decided therefore to bomb Tripoli in self-defence. This action was condemned by the UNGA.\(^{487}\) A UNSC resolution failed due to the negative votes of three of the permanent members; France, The United Kingdom and the United States.\(^{488}\) Furthermore, after the American embassies in Kenya and Tanzania had been bombed, the U.S. attacked in self-defence terrorist targets in Sudan and Afghanistan in 1998 (i.e. training camps in Afghanistan and a pharmaceutical plant in Sudan).\(^{489}\) A number of governments expressed their concern that the territorial integrity of these states was violated by targeting

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\(^{483}\) T. RUYS, ‘Armed Attack’ and Article 51 of the UN Charter, see supra n. 15, 422.

\(^{484}\) A. CASSESE, “Terrorism is Also Disrupting Some Crucial Legal Categories of International Law”, see supra n. 4, 996.

\(^{485}\) M. BYERS, “Terrorism, the Use of Force and International Law after 11 September”, 16 International Relations 2002, 159 (hereafter: M. BYERS, “Terrorism, the Use of Force and International Law after 11 September”).


\(^{489}\) K. N. TRAPP, State Responsibility for International Terrorism, see supra n. 6, 51.
these terrorist targets which were on their territory. Indeed, the states as such weren’t the target of the attacks since they weren’t held directly responsible for the initial terrorist attacks. However, even in situations where the state was ‘directly’ involved in acts of terrorism, the international community responded at best with mixed reactions with regard to the use of force against states which support terrorism.\textsuperscript{490}

One can thus generally conclude that before 9/11 there was a general reluctance to explicitly consider host states as those legally responsible for private terrorist attacks carried out from their territory.\textsuperscript{491} The aftermath of the tragic events of 9/11 disturbed drastically this \textit{status quo}. One should verify if, and to what extent the events of 9/11 have been able to change international law. This Part will try to provide an answer to the question whether the fundamental agency paradigm of the law of state responsibility and the accompanying ‘effective control’ threshold have been abandoned for a much less demanding attribution test.

\section*{2. The Aftermath of 9/11}

After 9/11, the Bush Administration adopted an approach according to which the terrorists themselves and the regime(s) supporting them became \textit{indistinguishable}.\textsuperscript{492} Harboring or supporting terrorists is in this reasoning equated to the terrorist acts themselves (i.e. the so-called ‘harboring theory’). The U.S. subsequently considered that a state which has been the victim of terrorist attacks has the right to act in self-defense against any state ‘harboring’ these terrorists.\textsuperscript{493} On September 11, after the attacks President Bush stated in an address to the Nation the following notorious statement.

\begin{quote}
"We will make no distinction between the terrorists who committed these acts and those who harbor them”\textsuperscript{494}
\end{quote}

\textsuperscript{490} M. BYERS, “Terrorism, the Use of Force and International Law after 11 September”, see supra n. 485, 159-160.
\textsuperscript{491} T. BECKER, \textit{Terrorism and the State}, see supra n. 94, 207.
\textsuperscript{492} E. NIELSEN, “State Responsibility for Terrorist Groups”, see supra n. 179, 175: "For every regime that sponsors terror, there is a price to be paid, and it will be paid. The allies of terror are equally guilty of murder and equally accountable to justice. The Taliban are now learning this lesson. That regime and the terrorists who support it are now virtually indistinguishable.”, President Bush speaks to the United Nations, 10 November 2001, \url{http://edition.cnn.com/2001/US/11/10/ret.bush.un.transcript/index.html?_s=PM:US}, (consulted on 12/04/2013).
\textsuperscript{494} S. R. RATNER, “\textit{Jus ad Bellum} and \textit{Jus in Bello} after September 11”, see supra n. 493, 906.
Inter alia, the ‘harboring theory’ is reminiscent of art. 3 (f) of the UNGA Resolution 3314 on the definition of aggression:495

“(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;”

It is plain that art. 3 (f) falls under the scope of the obligation to prevent and abstain. Moreover, it also seems to share some resemblance with the law of neutrality:496

“Belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral Power.

Corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents.”497

Furthermore, the ‘harboring theory’ presupposes not only a material element (actus reus) but also a subjective element (mens rea). The state must have willingly allowed its territory to be used by armed groups who carry out or plan to carry out armed attacks abroad.498 In addition, the notorious US National Security Strategy (NSS) that was promulgated in September 2002 could be considered as a sort of a codification of the ‘harboring theory’ by stating once more that “We make no distinction between terrorists and those who knowingly harbor or provide aid to them.”499 These findings aside, on September 12, the UNSC passed Resolution 1386. This Resolution recognized in the preamble “the inherent right of individual and collective self-defence in accordance with the Charter” and included furthermore an interesting paragraph in this respect:

“Calls 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.”500

495 T. Ruyts, ‘Armed Attack’ and Article 51 of the UN Charter, see supra n. 15, 503.
496 T. Ruyts, ‘Armed Attack’ and Article 51 of the UN Charter, see supra n. 15, 503.
498 T. Ruyts, ‘Armed Attack’ and Article 51 of the UN Charter, see supra n. 15, 503.
499 T. Ruyts, ‘Armed Attack’ and Article 51 of the UN Charter, see supra n. 15, 444; National Security Strategy, see supra n. 62, 5.
On 14 September 2001, the US Congress adopted a resolution which authorized the use of 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”. On September 28, the UNSC passed Resolution 1373. The following paragraphs are worth mentioning:

“2. Decides also that all States shall:
(a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;
(b) (...)
(c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;
(d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens,”.

The meaning and importance of these (and other) UNSC Resolutions will be discussed more extensively in the following Chapter 4.3. On 7 October 2001, the U.S. launched ‘Operation Enduring Freedom’, i.e. a military operation against Al Qaeda and Taliban targets on the territory of Afghanistan. It is important to highlight in this respect that the US invocation of its right of self-defence wasn’t limited to mere Al Qaeda units, but thus also included Afghanistan as such. Indeed, the US considered the 9/11 attacks as an “armed attack” in the meaning of art. 51 of the UN Charter. In a letter of that same day from the Permanent Representative of the United States of America to the United Nations addressed to the President of the UNSC, the US reported to the UNSC that they had initiated actions in the exercise of their inherent right of individual and collective self-defence and explained their motives in the following manner:

502 Art. 2 S/Res/1373.
503 T. BECKER, Terrorism and the State, see supra n. 94, 212; it is moreover interesting to note in this respect that terrorist attacks committed by non-state actors as such are not a new phenomenon, but a military response against them is however a rather new development in counter-terrorism policy, D. POKEMPNER, “The ‘New’ Non-State Actors in International Humanitarian Law”, 38 The George Washington International Law Review 2006, 553; RUYS notes moreover that in retrospect one could consider the US military response to the bombings of the American embassies in Kenya and Tanzania in 1998 as an important step in the change of view with regard to counter terrorism policy. Whereas in the past law enforcement mechanisms were considered as the correct response, nowadays the use of military force can be exceptionally accepted, T. RUYS, ‘Armed Attack’ and Article 51 of the UN Charter, see supra n. 15, 427-428.
"The attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation. Despite every effort by the United States and the international community, the Taliban regime has refused to change its policy. From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad."506

The letter from the United Kingdom contained a very similar explanation.507 STAHN distinguishes a “tripartite chain of responsibility” in this statement. The responsibility of Afghanistan as a state is triggered through Al Qaeda’s involvement in the 9/11 attacks and the position of the Taliban regime which controlled the territory of Afghanistan (actus reus) and was aware of the terrorist activities of Al Qaeda (mens rea).508 However, it hasn’t been clarified by the US and the United Kingdom what precise degree of state involvement, if any, by Afghanistan was required in order to justify the use of force in self-defence against it.509

The first reactions of the Taliban regime to these events was a request to the U.S not to attack them while denying any involvement with Bin Laden. The regime furthermore demanded evidence of Al Qaeda’s responsibility. After some diplomatic interventions, the Taliban even agreed to extradite Bin Laden on the condition that the evidence against him was brought before an Afghan court. A council of Islamic clerics later stated that Islamic law did not allow the Taliban to force Bin Laden to leave the country, while they could however try to persuade him to do so. The Taliban also proposed several times to extradite Bin Laden to a third state. The U.S. firmly rejected each of these dubious possibilities, stressing that the Taliban’s conditions were non-negotiable.510

At first glance, it seems that in the wake of 9/11 something fundamental has happened to international law. Indeed, it is very important to note in this respect that the Taliban government of Afghanistan was thus held directly responsible for the terrorist attacks of 9/11 because it merely allowed Al Qaeda to operate on its territory (i.e. an application of the so-

507 T. Ruys, ‘Armed Attack’ and Article 51 of the UN Charter, see supra n. 15, 436.
509 C. GRAY, International Law and the Use of Force, see supra n. 93, 201.
510 T. BECKER, Terrorism and the State, see supra n. 94, 213.
called ‘harboring theory’).\textsuperscript{511} Afghanistan’s responsibility was thus not based on the determination that it had \emph{controlled or directed} (\textit{i.e.} the wording of art. 8 ILC Draft Articles) Al Qaeda units which carried out the 9/11 attacks.\textsuperscript{512} The US didn’t even try to prove a possible agency relationship between Al Qaeda and the Taliban government.\textsuperscript{513}

In sum, this point of view meant a \textit{radical departure} from the agency-based structure of the law of international state responsibility. In addition, this approach seemed to be surprisingly endorsed by an overwhelming majority of the international community.\textsuperscript{514} The launching of ‘Operation Enduring Freedom’ was not only quasi - unanimously approved, it also received - to then unseen - offers of airspace and landing rights.\textsuperscript{515} On September 12, the North Atlantic Council (NATO) invoked art. 5 (\textit{i.e.} the collective self-defense provision) of the Washington Treaty, which states that an armed attack on one or more of the Allies in Europe or North America shall be considered an attack against them all.\textsuperscript{516} On September 14, Australia did the same under the Anzus Treaty.\textsuperscript{517} Furthermore, on September 21, the Organization of American States (OAS) also invoked the collective self-defence provision under the Inter-America Treaty of Reciprocal Assistance.\textsuperscript{518} On the same date, the European Council made a very clear statement in this respect. It followed the international trend by making the following declaration:

\begin{quote}
\textit{On the basis of Security Council Resolution 1368, a riposte by the US is legitimate. The Member States of the Union are prepared to undertake such actions, each according to its means. The actions must be targeted and may also be directed against}
\end{quote}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{511} E. NIELSEN, \textquote{State Responsibility for Terrorist Groups}, see supra n. 179, 174; T. RUYS, \textquote{Armed Attack} and \textquote{Article 51 of the UN Charter}, see supra n. 15, 440.
\item \textsuperscript{512} T. BECKER, \textquote{Terrorism and the State}, see supra n. 94, 33.
\item \textsuperscript{513} D. JINKS, \textquote{State Responsibility for the Acts of Private Armed Groups}, see supra n. 504, 89.
\item \textsuperscript{514} E. NIELSEN, \textquote{State Responsibility for Terrorist Groups}, see supra n. 179, 175; T. RUYS, \textquote{Armed Attack} and \textquote{Article 51 of the UN Charter}, see supra n. 15, 436; T. BECKER, \textquote{Terrorism and the State}, see supra n. 94, 208.
\item \textsuperscript{515} T. RUYS, \textquote{Armed Attack} and \textquote{Article 51 of the UN Charter}, see supra n. 15, 436.
\item \textsuperscript{516} Art. 5 The North Atlantic Treaty, 4 April 1949, \url{http://www.nato.int/cps/en/natolive/official_texts_17120.htm}, (consulted 1 May 2013); T. BECKER, \textquote{Terrorism and the State}, see supra n. 94, 214; M. G. KOHEN, \textquote{The use of force by the United States after the end of the Cold War, and its impact on international law} in M. BYERS, G. NOLTE, \textquote{United States Hegemony and the Foundations of International Law}, Cambridge, Cambridge University Press, 2003, 222. (hereafter: M. G. KOHEN, \textquote{The use of force by the United States after the end of the Cold War}).
\item \textsuperscript{517} Art. 4 Security Treaty between Australia, New Zealand and the United States of America (ANZUS), 1 September 1951, \textquote{Australian Treaty Series} 1952, 2; T. BECKER, \textquote{Terrorism and the State}, see supra n. 94, 214.
\item \textsuperscript{518} Art. 3 Inter-American Treaty of Reciprocal Assistance, 2 September 1947, \url{http://www.oas.org/juridico/english/treaties/b-29.html}, (consulted 1 May 2013); T. BECKER, \textquote{Terrorism and the State}, see supra n. 94, 214; M. G. KOHEN, \textquote{The use of force by the United States after the end of the Cold War}, see supra n. 516, 223.
\end{enumerate}
\end{footnotesize}
States abetting, supporting or harbouring terrorists. They will require close cooperation with all the Member States of the European Union."

In sum, the NATO, European Union and Rio Treaty States (as well as Australia) clearly endorsed the American approach towards self-defence against terrorism. Moreover, even non-NATO allies supported the US by providing them *inter alia* military, logistical and technical assistance. Egypt, China and Russia also supported ‘Operation Enduring Freedom’ once it had started. In addition, the fifty-six member states of the Organization of the Islamic Conference (OIC) even refrained from criticizing openly the military campaign while only calling for the military operations not to exceed beyond Afghan territory. The organization of African Unity and the Association of Southeast Asian Nations also abstained from expressing any criticism towards the American use of force, despite the many opportunities they had to do so. Notwithstanding the overwhelming endorsement of the international community, one may not forget that the governments of Iraq, Sudan, North-Korea, Cuba, Malaysia and Iran condemned the U.S. military operations.

The question now rises whether ‘Operation Enduring Freedom’ - which implied a radical departure from the prevailing views on the law of state responsibility - was in accordance with international law. In addition, one should verify if and to what extent the international endorsement and acquiescence surrounding the American use of force in Afghanistan, the subsequent UNSC Resolutions, state practice and case law have had any influence on the law of state responsibility, more precisely, the law of attribution.

3. The Illegality of ‘Operation Enduring Freedom’

Can the military response to the 9/11 attacks and its international endorsement be reconciled with the existing views on state responsibility which have been elaborated in the previous Parts? Up to now, this research has relied on an inter-state reading of art. 51 of the UN


520 M. G. KOHEN, “The use of force by the United States after the end of the Cold War”, see supra n. 516, 223; S. R. RATNER, “*Jus ad Bellum* and *Jus in Bello* after September 11”, see supra n. 493, 909.

521 Albania, Armenia, Azerbaijan, Ethiopia, Georgia, Japan, Jordan, Oman, Pakistan, Qatar, Saudi-Arabia, South-Korea, Turkey and Uzbekistan, T. BECKER, *Terrorism and the State*, see supra n. 94, 215.

522 T. BECKER, *Terrorism and the State*, see supra n. 94, 216; S. D. MURPHY, “Terrorism and the Concept of ‘Armed Attack’”, see supra n. 488, 49.

523 S. R. RATNER, “*Jus ad Bellum* and *Jus in Bello* after September 11”, see supra n. 493, 910.

524 S. R. RATNER, “*Jus ad Bellum* and *Jus in Bello* after September 11”, see supra n. 493, 909-910.
Charter (i.e. an attribution-based approach of “armed attack”), while having maintained the ‘effective control’ threshold as the current attribution standard for the actions of non-state actors within the agency-based paradigm of the law of state responsibility (art. 8 ILC Draft Articles). In addition, one has repeatedly underlined the distinction between direct and indirect responsibility. Whereas direct responsibility allows for the attribution of armed attacks committed by non-state actors (i.e. terrorist groups), indirect responsibility for failing to respect the obligation to prevent and abstain does not. As a matter of fact, the ‘harboring theory’ comes actually down to an inverse reasoning. Under this perspective, a mere indirect responsibility allows for the direct attribution of the acts carried out by non-state actors.

As already has been suggested, it is plain that this approach cannot be easily reconciled with the prevailing principles of the law of state responsibility. The view that a failure to prevent terrorist attacks or toleration for them implies direct state responsibility for the attacks themselves has always been widely rejected. Moreover, never has an argument to justify the use of force in self-defence for the simple assistance to irregulars causing an alleged indirect armed attack been upheld by an organ of the United Nations. Only when on could eventually establish the existence of an agency relationship between Al Qaeda and the Taliban government under the general rules of state responsibility (i.e. the ILC Draft Articles), the Taliban government could be possibly held directly responsibility. Subsequently, the use of force in self-defence against them could be legally justified.

The legality of ‘Operation Enduring Freedom’ has been therefore often put seriously into question. In general, it is assumed that the Taliban did not direct or control the Al Qaeda attacks on the United States on September 11. One can only derive from the publicly available evidence both before and after the attacks, that the Taliban provided a mere shelter to Al Qaeda. There isn’t thus any reasonable ground to assume that the Taliban directed or controlled Al Qaeda activities. Neither a substantial involvement can be derived in this respect. This point of view is moreover being substantiated by several UNSC Resolutions which qualified the relationship between Al Qaeda and the Taliban only as a shelter for the

525 T. BECKER, Terrorism and the State, see supra n. 94, 219.
527 T. BECKER, Terrorism and the State, see supra n. 94, 219.
528 J. PAUST, “Use of Armed Force against Terrorists in Afghanistan, Iraq and Beyond”, see supra n. 200, 542.
529 T. BECKER, Terrorism and the State, see supra n. 94, 217.
planning and training of future terrorist attacks.\textsuperscript{530} The U.S attacks against Afghanistan are thus from a legal perspective at the very least \textit{“highly problematic”}.\textsuperscript{531} As PAUST has clearly put it:

\begin{quote}
\textit{“The Taliban's provision of safe haven to bin Laden and toleration of his terrorist training camps in areas generally controlled by the Taliban, the receipt of monies and military support from bin Laden for the Taliban's war against the Northern Alliance, and even knowledge of past and continuing al Qaeda terroristic attacks would not constitute Taliban control of, or direct participation in, future al Qaeda attacks like the September 11th attack on the United States so as to justify the use of military force against the Taliban, especially in view of the International Court of Justice's Nicaragua decision.”}\textsuperscript{532}
\end{quote}

CORTEN and DUBUISSON argue in the same line by concluding that the U.S. justification to use force in self-defence against Afghanistan isn’t reconcilable neither with the \textit{lex specialis} attribution thresholds with regard to the definition of aggression, nor with the general rules of attribution as provided by art. 8 ILC Draft Articles (\textit{i.e.} the ‘effective control’ threshold that has been introduced by the ICJ in its \textit{Nicaragua} case). They argue that in both cases \textit{substantial} state involvement is required into the unlawful conduct for attribution to occur.\textsuperscript{533} This obviously isn’t the case. As already elaborated in Chapter 3 of Part I, CORTEN and DUBUISSON consider “substantial involvement” as a \textit{lex specialis} attribution threshold. According to their point of view “substantial involvement” presupposes that a state is informed about a future commission of an act of aggression and its participation therein. The state’s involvement needs to be substantial in this respect, which excludes a mere incidental or accessory involvement. \textit{A Contrario}, tolerating or harboring terrorists on its territory does clearly not suffice for directly attributing acts of terrorism to a state.\textsuperscript{534}

Moreover, also the so-called constructive approach which has also been previously elaborated in Chapter 3 of Part I considers the definition of aggression (\textit{i.e.} art. 3 (g) of UNGA Resolution 3314) as an \textit{autonomous} assessment of state conduct which could constructively be equated to an armed attack does not provide a satisfactory explanation for the justification


\textsuperscript{531} J. PAUST, “Use of Armed Force against Terrorists in Afghanistan, Iraq and Beyond”, see supra n. 200, 542.

\textsuperscript{532} J. PAUST, “Use of Armed Force against Terrorists in Afghanistan, Iraq and Beyond”, see supra n. 200, 542-543.

\textsuperscript{533} O. CORTEN, F. DUBUISSON, “Operation ‘Liberté Immuable’”, see supra n. 114, 56.

\textsuperscript{534} \textit{Ibid.}
of ‘Operation Enduring Freedom’. As BECKER has noted “According to the available evidence, the Taliban neither ‘sent’ Al-Qaeda to perpetrate the attacks nor was ‘substantially involved’ in them, in the way prescribed in Article 3(g) of the Definition of Aggression or applied in Nicaragua”.

In addition, RATNER concludes that the ‘harboring theory’ is neither supported by the ‘effective control’ test, nor by the ICTY ‘overall control’ threshold. Indeed, these two authoritative thresholds presuppose that one would not consider a state responsible for the acts of non-state actors on its territory unless there is a proof of a relation that goes much further than the mere harboring of those non-state actors. A fortiori the use of force in self-defense against that harboring state couldn’t be justified in this respect. RATNER however makes a subtle but crucial distinction. He does not ignore the undisputable and strong link between Al Qaeda and the Taliban government. He acknowledges that the toleration of the government could have implied an active protection of Al Qaeda members by the Taliban government of Afghanistan, even entailing the ratification of Al Qaeda conduct by the Taliban government. However, he makes a fundamental distinction between complicity and the imputation of direct responsibility. The fact that the Afghan government could hypothetically be considered as an accomplice for the illegal acts of Al Qaeda does not ipso facto imply that the direct responsibility of these acts should be imputed to the Afghan government. RATNER thus rightly acknowledges the distinction between direct and indirect responsibility.

With regard to the ratification of Al Qaeda conduct by the Afghan government, one can briefly mention that there are authors (such as inter alia DINSTEIN) who – wrongly - consider art. 11 ILC Draft Articles to allow for the attribution of the 9/11 attacks to the Afghan government and hereby justifying the use of force in self-defence against Afghanistan. Firstly, it is very unclear to what extent the Taliban regime has openly endorsed the 9/11 attacks. Next to the uncertainty about the facts, one may not forget that mere congratulations or approval do not suffice for attribution to occur under art. 11 ILC Draft

535 T. BECKER, Terrorism and the State, see supra n. 94, 228-229.
536 S. R. RATNER, “Jus ad Bellum and Jus in Bello after September 11”, see supra n. 493, 908-909.
537 Ibid.
538 At the time RATNER wrote his article, most of the evidence with regard to the Al Qaeda-Taliban relationship was not yet revealed publicly,
539 S. R. RATNER, “Jus ad Bellum and Jus in Bello after September 11”, see supra n. 493, 908.
540 T. BECKER, Terrorism and the State, see supra n. 94, 225.
541 T. BECKER, Terrorism and the State, see supra n. 94, 226; O. CORTEN, F. DUBUISSON, “Operation ‘Liberté Immuable’”, see supra n. 114, 68.
Articles. In sum, an *explicit* endorsement in the form of an unequivocal acknowledgment of the private conduct as its *own* is required. The initial attempts of the Taliban Regime to distance themselves from the 9/11 attacks and their subsequent offers to extradite Bin Laden under certain conditions contrast sharply with the very demanding conditions of art. 11 ILC Draft Articles. Nevertheless, it is important to acknowledge that if indeed attribution occurred under art. 11 ILC Draft Articles this would allow the American response to be in accordance with the prevailing views of the law of state responsibility. Even CASSESE acknowledged in this respect that force against Afghanistan may not be used unless “*the Afghan central authorities show by words or deeds that they approve and endorse the action of terrorist organizations.*” However, as previously set out, the facts do not allow for such a conclusion.

Finally, one can conclude that - quite obviously - there wasn’t any agency relationship between Al Qaeda and the Taliban government of Afghanistan. Therefore, according to the law of state responsibility, the state of Afghanistan shouldn’t have borne any responsibility for the actions of Al Qaeda who perpetrated the 9/11 attacks. ‘Operation Enduring Freedom’ thus doesn’t seem to be in accordance with the law of state responsibility. However, this clear conclusion does not explain the overwhelming acquiescence and endorsement of this apparently illegal military response. Subsequently the question rises what the legal value is of this international acquiescence?

KOHEN for instance minimizes the legal value of this international endorsement. He argues that it was mainly *politically* motivated. He mentions the difficult dilemma faced by a lot of countries. The American diplomatic pressure on a lot of states to support their view did impair the voluntariness and credibility of their supportive statements. One didn’t want not to support the U.S. at this critical moment, but at the same time one was hereby forced to consider the U.S. policy to be in conformity within the existing legal framework of international law. The sensitive political context did therefore affect the value of the ‘acquiescence’ of the world community. KOHEN thus argues that the decisive reasons for

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542 See *supra* Chapter 8 of Part III, n. 481.
543 T. BECKER, *Terrorism and the State*, see *supra* n. 94, 226; C. STAHN, “International Law at Crossroads? The Impact of September 11”, see *supra* n. 294, 220-221.
544 A. CASSESE, “Terrorism is Also Disrupting Some Crucial Legal Categories of International Law”, see *supra* n. 4, 999.
545 T. RUYS, ‘*Armed Attack*’ and Article 51 of the UN Charter, see *supra* n. 15, 440.
546 M. G. KOHEN, “The use of force by the United States after the end of the Cold War”, see *supra* n. 516, 226.
547 M. G. KOHEN, “The use of force by the United States after the end of the Cold War”, see *supra* n. 516, 224.
states to support the Bush Administration are many, but not a priori of a legal nature.\footnote{M. G. KOHEN, “The use of force by the United States after the end of the Cold War”, see supra n. 516, 225.} RATNER on the contrary strongly disagrees with KOHEN on this point. He argues that the artificial distinction as provided by KOHEN between legal and non-legal factors at the end comes down to the fundamental difference between protest and non-protest. He made the following interesting argument in this respect:

“If state B protests A’s action, it might object to that conduct as either a legal or a policy (ie., a nonlegal) matter; but the absence of protest – where state A’s act is of a major, even constitutive nature, affecting all states – would strongly suggest that B endorsed, or at least did not object to, both the legal and the nonlegal bases for A’s actions.”

It is obvious that one cannot simply ignore the international endorsement purely because also political motives have possibly played a role in assessing the decision to endorse the American position. It is beyond any doubt that the political atmosphere could explain the international endorsement.\footnote{S. R. RATNER, “Jus ad Bellum and Jus in Bello after September 11”, see supra n. 493, 910.} However, this does not a priori exempt the international endorsement as such from any legal value. The international endorsement is therefore at the very least to be considered as “highly significant” and requires therefore special attention.\footnote{R.L. JOHNSTONE, “State Responsibility: A Concerto for Court, Council and Committee”, see supra n. 168, 91.} Can one consider this widely acceptance of the U.S. ‘harboring theory’ to be the prelude of a new attribution rule?

4. The Emergence of a New Rule?

There are several authors who contend that the secondary rules of the law of state responsibility have not remained unchanged after 9/11. These considerations are as said based on the apparent opinio juris surrounding the American justification to use force in and against Afghanistan.\footnote{M. MILANOVIC, “State Responsibility for Genocide”, see supra n. 9, 584; S. R. RATNER, “Jus ad Bellum and Jus in Bello after September 11”, see supra n. 493, 910.} As JINKS for instance has argued; “The legal response to the terrorist attacks (and other recent developments) strongly suggests that the scope of state liability for private conduct has expanded”.\footnote{E. NIELSEN, “State Responsibility for Terrorist Groups”, see supra n. 179, 183.} STAHN’S point of view is also worth mentioning in this respect; “The more or less instant qualification of the acts of September 11 as armed attacks by NATO

\footnote{D. JINKS, “State Responsibility for the Acts of Private Armed Groups”, see supra n. 504, 83.}
and the OAS, without further inquiry about the specific role of the Taliban, indicates a departure from the principles of Nicaragua”.  

However, the value of these considerations needs to be assessed in light of the important United Nations UNSC Resolutions which have been passed in the aftermath of 9/11 and state practice subsequent to the events of 9/11. In addition, subsequent case law of the ICJ can also be of value when assessing the legal consistency of an apparent emergence of a change in international law. By critically analyzing the doctrinal considerations about a possible emergence of a new rule in light of the abovementioned legal background, one will be able to answer the challenging question whether or not 9/11 has effectively entailed a change in the law.

4.1 An ‘Aiding and Abetting’ Test?

Of the many scholarly publications with regard to the establishment of a lower attribution threshold, the disquisition of RUYS and VERHOEVEN has proven to be one of the most contributing to the legal debate at stake. They introduce an ‘aiding and abetting’ test as a new attribution threshold that would be able to cope with the challenges of international state-sponsored terrorism. As a matter of fact, they argue that state practice supports their ‘aiding and abetting’ threshold which is based on a flexible reinterpretation of the legal notion of “substantial development”. Their ‘aiding and abetting’ threshold is thus a lex specialis attribution test based on a primary rule. One needs to remember in this respect that the ICJ advocated a restrictive meaning towards the notion of ‘substantial involvement’. The Court argued in the Nicaragua case of 1986 that assistance to rebels by the provision of weapons or logistical support isn’t enough to amount to an “armed attack”. A fortiori it hereby implicitly excluded the toleration or harboring of private armed groups on one state’s territory from the scope of “armed attack”. By promulgating an ‘aiding and abetting’ test, RUYS and


555 The ‘aiding and abetting’ threshold is not introduced for the very first time in legal literature by RUYS and VERHOEVEN. However, their pleading for this threshold provides a good synthesis of the several points of view with regard to the relationship between the law of self-defence and the law of state responsibility. Their proposition therefore is a point of reference to assess the opinio juris after 9/11. In addition, a lot of authors (e.g. NOLLKAEMPER, RANDZELHOFER & NOLTE, TAMS) refer to their article.


557 See supra Chapter 3 of Part I, n. 133.
VERHOEVEN clearly distance themselves from the Court’s analysis, which has moreover been the object of severe criticism in legal literature for being too rigid.\textsuperscript{558}

To fully understand the meaning of ‘aiding and abetting’, it is important to note in this respect that the legal foundations of the ‘aiding and abetting’ concept are laid in international criminal law.\textsuperscript{559} ‘Aiding and abetting’ constitutes one of two possible categories of responsibility for criminal participation in international law.\textsuperscript{560} It consists – just as the ‘harboring theory’ - of two cumulative elements; a material element (\textit{i.e.} \textit{actus reus}) and a subjective element (\textit{i.e.} \textit{mens rea}). The material element implies that there must have been practical aid (\textit{i.e.} the provision of arms, encouragement and moral support) to the perpetrator of a certain crime whereas the subjective element implies that the abettor knows that his aid assists and supports this crime. It is important to note that the assistance needs to contribute \textit{substantially} to the perpetration of the crime. However, one cannot simply extrapolate legal concepts of international criminal law into public international law since both branches of law are of a completely different nature and pursue different aims. For this reason, the moral support for crimes which fall under the scope of ‘aiding and abetting’ under a criminal perspective, cannot be upheld in a self-defence context. Allowing the lawful use of force against states which have sympathy with committed terrorist attacks would indeed open Pandora’s box.\textsuperscript{561} Furthermore, a criminal reading towards the concept of ‘aiding and abetting’ does not seem to provide the necessary legal instruments to handle the notorious act of harboring private armed bands, which is at stake in this research. The authors argue in this respect the following:

\begin{quote}
\textit{“the harbouring of private actors committing attacks abroad would give rise to measures of self-defence under the cumulative condition that by giving shelter the state substantially contributes to the commission of private attacks and that the state is aware of this.”}\textsuperscript{562}
\end{quote}

In sum, RUYS and VERHOEVEN argue that the concept of ‘aiding and abetting’ could be a “useful yardstick” for the use of force in self-defence in cases of so-called ‘indirect military

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\textsuperscript{558} T. RUYS, S. VERHOEVEN, “Attacks by Private Actors and The Right of Self-Defence”, see supra n. 128, 314.  
\textsuperscript{559} T. RUYS, S. VERHOEVEN, “Attacks by Private Actors and The Right of Self-Defence”, see supra n. 128, 315.  
\textsuperscript{561} T. RUYS, S. VERHOEVEN, “Attacks by Private Actors and The Right of Self-Defence”, see supra n. 128, 316.  
\textsuperscript{562} T. RUYS, S. VERHOEVEN, “Attacks by Private Actors and The Right of Self-Defence”, see supra n. 128, 316-317. 
\end{flushleft}
aggression’. It is based on a more extensive reinterpretation of the “substantial involvement” criterion of art. 3 (g) of UNGA Resolution 3314. Indeed, since it is a much more lower threshold, it would enclose a much broader range of activities than the very stringent Nicaragua test. In addition, it also takes the intention of states into account. In other words, state support to armed bands will not function as an attribution threshold when the supporting state isn’t aware of the fact that its support is being used to carry out armed activities abroad. There are thus two important elements, i.e. substantial practical aid (actus reus) and the awareness of the state that its aid is used for armed activities abroad (mens rea).

If one compares RUYS and VERHOEVEN’S approach towards the meaning of ‘substantial involvement’ with CORTEN and DUBUISSON’S point of view, one could cautiously ascertain – in contrast to what one might have thought initially - that the first mentioned authors do not differ significantly from the position of the latter. One needs to recall in this respect that according to CORTEN and DUBUISSON ‘substantial involvement’ presupposes that a state is informed about a future commission of an act of aggression and its substantial participation therein. The actus reus and mens rea elements seem thus to be already incorporated in their approach. Subsequently, their approach excludes a mere incidental or accessory involvement. A fortiori and a contrario, the mere toleration of armed groups on one state’s territory – which nevertheless constitutes illegal state conduct and possibly entails state responsibility – does not suffice in this respect. In addition, RUYS and VERHOEVEN seem to confirm to some extent CORTEN and DUBUISSON’S reasoning by logically arguing that the toleration of armed groups can be considered as an armed attack (which would give rise to self-defence measures) when the mere act of harboring them can be equated to a substantial participation in the commission of the attack of the private actors (actus reus) and the state is aware of this situation (mens rea). In other words, the subtle difference between RUYS and VERHOEVEN and CORTEN and DUBUISSON, lies in the fact that RUYS and VERHOEVEN already seem to consider the conscious tolerating of armed bands as such as a possible substantial state involvement in the commission of the attack, whereas CORTEN and DUBUISSON don’t seem to merge these two concepts in their definition. They still consider the act of toleration

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563 T. RUYS, S. VERHOEVEN, “Attacks by Private Actors and The Right of Self-Defence”, see supra n. 128, 316. However, as already mentioned in Part I, one must bear in mind that there exists a lot of discussion whether and to what extent indirect aggression falls under the scope of the definition of aggression, see supra Chapter 3 of Part I, n. 116.

564 See supra Part I and II.


567 See supra Chapter 3 of Part I, n. 133.
to be *ipso facto* incidental or accessory. However, RUYS and VERHOEVEN firmly focus on the *substantial* effects it could have on the commission of private attacks abroad.

### 4.2 Complicity?

TAMS on the other hand, provides a different angle towards the ‘aiding and abetting’ criterion as promulgated by RUYS and VERHOEVEN to which he completely adheres. He tries to situate the notion of ‘aiding and abetting’ in a broader legal framework. First of all, he mentions the notorious statement of the ICJ in the *Armed Activities* case of 2005 in which the Court left open the question to what extent international law allows for self-defence against non-state actors.\(^568\)

> “For all these reasons, the Court finds that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present. Accordingly, the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces.”\(^569\)

This curious statement sharply contrasts with previous ICJ judgments in which the Court firmly adhered to the inter-state reading. One may recall for instance the *Wall Opinion* of 2004 in which the Court stated that “*Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State*.”\(^570\) TAMS thus argues in this respect that the Court’s uncertainty is another proof of a possible change in the law. He even considers the view that the law indeed has changed to be the “*prevailing understanding*”.\(^571\) Subsequently, TAMS seeks to accommodate this apparent change in the law within the existing framework of international law. While still adhering to the traditional inter-state reading of art. 51 UN Charter he recognizes the existence of a *special* (*i.e.* *lex specialis*) rule of attribution (art. 55 ILC Draft Articles) within a context of terrorism.\(^572\)

> “In short, pursuant to this more moderate re-reading, modern practice points towards a special standard of imputability in relations between terrorist groups and host states,”

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568 C.J. TAMS, “The Use of Force against Terrorists”, see *supra* n. 71, 384.
569 ICJ *Armed Activities Case*, see *supra* n. 85, para. 147.
570 ICJ *Wall Opinion*, see *supra* n. 83, para. 139, See *supra* Part I
571 C.J. TAMS, “The Use of Force against Terrorists”, see *supra* n. 71, 384-385.
572 C.J. TAMS, “The Use of Force against Terrorists”, see *supra* n. 71, 385.
arguable most closely resembling international rules against ‘aiding and abetting’ illegal conduct.”

It is plain that the special ‘aiding and abetting’ threshold implies a departure from the general Nicaragua ‘effective control’ threshold which is solidly enshrined in the ILC Draft Articles and the ICJ’s case law. However, as TAMS points out, one should not overstate this new development. The law of attribution is not “set in stone”. The ‘effective control’ may indeed be the generally accepted attribution criterion. However, one may not forget that it was a judicial creation of the ICJ, not “God-Given”. Therefore, one should rather consider this development as a smooth process of reform and not per se as revolutionary. TAMS also argues in this respect that the international community seems to have accepted the idea to allow the use of force in self-defence against armed attacks which aren’t attributable to a state. He notes that the emphasis in the legal debate has shifted towards the legal notions of necessity and proportionality. This evolution in state practice will be discussed more extensively in Chapter 4.4. Furthermore, it is very important to acknowledge in this respect that according to TAMS, the ‘aiding and abetting’ threshold encloses to some extent the notion of ‘complicity’. ‘Complicity’ is considered as wrongful state conduct. Art. 16 ILC Draft Articles deals with complicity and reads as following:

“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.”

At first glance, the wording of art. 16 ILC Draft Articles makes clear that it deals with complicity between states. Art. 16 is moreover situated under Chapter V of the ILC Draft Articles which deals with “Responsibility of a State in connection with the Act of another State”. Art. 16 thus does not form part of Chapter II “Attribution of Conduct to a State”, which is the relevant chapter for the purpose of this research. However, the ICJ made in this respect a very important consideration in the Genocide case of 2007. It not only considered art. 16 to reflect international customary law, but argued moreover that the general rules of

573 Ibid.
574 C.J. TAMS, “The Use of Force against Terrorists”, see supra n. 71, 386.
575 Ibid.
576 C.J. TAMS, “The Use of Force against Terrorists”, see supra n. 71, 381.
577 C.J. TAMS, “The Use of Force against Terrorists”, see supra n. 71, 386-387.
state responsibility can be applied in situations of prohibited state assistance to non-state actors.\textsuperscript{578}

“Although this provision, because it concerns a situation characterized by a relationship between two States, is not directly relevant to the present case, it nevertheless merits consideration. The Court sees no reason to make any distinction of substance between “complicity in genocide”, within the meaning of Article III, paragraph (e), of the Convention, and the “aid or assistance” of a State in the commission of a wrongful act by another State within the meaning of the aforementioned Article 16 — setting aside the hypothesis of the issue of instructions or directions or the exercise of effective control, the effects of which, in the law of international responsibility, extend beyond complicity. In other words, to ascertain whether the Respondent is responsible for “complicity in genocide” within the meaning of Article III, paragraph (e), which is what the Court now has to do, it must examine whether organs of the respondent State, or persons acting on its instructions or under its direction or effective control, furnished “aid or assistance” in the commission of the genocide in Srebrenica, in a sense not significantly different from that of those concepts in the general law of international responsibility.”\textsuperscript{579}

In other words, the general rules of state responsibility, \textit{i.e.} the direction and control thresholds can be used to ascertain whether a state is guilty for ‘complicity in genocide’ which is a breach of the \textit{separate} obligation not to be complicit in acts of genocide. The Court thus correctly distinguished between direct and indirect responsibility. However, since in TAMS’ opinion, the ‘aiding and abetting’ attribution threshold encloses the notion of ‘complicity’, he hereby implicitly acknowledges that when a state breaches its primary obligation to prevent and abstain by assisting non-state actors (\textit{i.e.} complicity), it could be subsequently held responsible for the actions of these non-state actors.\textsuperscript{580} TAMS uses this paragraph of the ICJ \textit{Genocide} case to substantiate its finding that the ‘aiding and abetting’ attribution standard is based on a form of state involvement, \textit{i.e.} complicity which – as an autonomous breach of an international obligation - is wrongful. In sum, the ‘aiding and abetting’ threshold allows for the establishment of a link of attribution between a state and actions carried out by non-state actors when a state has violated its primary obligation to prevent and abstain.

One can therefore conclude that the ‘aiding and abetting’ threshold is a \textit{lex specialis} attribution threshold, based on the wrongful act of complicity. As a matter of fact, one can moreover deduce from the previous that the ‘aiding and abetting’ threshold perfectly fits

\textsuperscript{578} C.J. TAMS, “The Use of Force against Terrorists”, see \textit{supra} n. 71, 387.

\textsuperscript{579} ICJ, \textit{Genocide Case}, see \textit{supra} n. 189, para. 420.

\textsuperscript{580} C.J. TAMS, “The Use of Force against Terrorists”, see \textit{supra} n. 71, 386-387; This is a clear expression of Judge JENNINGS’ point of view.
within the theoretical framework of the ‘harboring theory’. Indeed, both concepts consider a violation of a primary rule (i.e. violating the obligation to prevent and abstain which results in complicity) as a constitutive element of the attribution process. The ‘aiding and abetting’ threshold is thus to some extent a corollary of the ‘harboring theory’ in this respect. However, this point of view is not uncontested.581

Finally, it may be noticed that the ‘aiding and abetting’ test seems to some extent to be reminiscent of the dissenting opinion of Judge JENNINGS.582 His well-known objection to the Nicaragua test according to which it is incomprehensible that the provision of arms, combined with some kind of logistical or other support does not amount to an armed attack seems at the very least to be softened by this apparent change in the law.583 Indeed, the previously elaborated “gap” between the use of force and armed attack is hereby bridged.584 The ‘aiding and abetting’ test would put the prohibition of the “use of force” at the same level of “armed attack”. This equalization would avoid the previously mentioned ‘paradoxical’ situation in which state support to non-state actors only amounts to a violation of the prohibition to use force but not to an ‘armed attack’ in the meaning of art. 51 UN Charter. At the same time – as discussed in Chapter 4.2 of Part II - one may not forget that the so-called “gap” between these two legal concepts seems to be in line with the definition of aggression and the basic concept of the law of state responsibility. Moreover, this distinction is endorsed by a large majority of legal scholars.585 This finding puts the soundness of the ‘aiding and abetting’ threshold into question. However, the question now rises if and to what extent the ‘harboring theory’ and the corresponding ‘aiding and abetting’ threshold has been accepted in international law.

4.3 Security Council Resolutions

Since it would be very imprudent to rely solely on an apparent opinio juris emerging in the aftermath of 9/11 to assess whether the law of attribution has changed, UNSC Resolutions

581 Some critical objections against this conflation of primary and secondary rules will be formulated in Chapters 4.3.2 and 4.4.
582 Mutatis Mutandis, The points of view of KOWALSKI and MICHAEL - which have been elaborated in Chapter 4.1 of Part II – also need to be mentioned in this respect, as they are largely based upon JENNINGS’ original point of view.
583 Dissenting Opinion Judge JENNINGS, ICJ, Nicaragua Case, 543; T. RUYS, ‘Armed Attack’ and Article 51 of the UN Charter, see supra n. 15, 415. see supra Part II, Chapter 4.1.
584 See supra Part II, Chapter 4.1, n. 238.
585 See supra Part II, Chapter 4.2 n. 252.
need particular attention.\textsuperscript{586} In the aftermath of 9/11, a couple of very important, but ambiguous UNSC Resolutions have been passed. The crucial question with regard to these Resolutions is whether or not they support the harboring theory. First of all, it must be acknowledged that the UNSC’s position is much less clear-cut than the doctrinal considerations and the American position which firmly defend the ‘harboring theory’.\textsuperscript{587} At first glance, the Resolutions don’t seem to exclude the legal emergence of the ‘harboring theory’. However, this is not \textit{a priori} the only possible conclusion which can be drawn from these Resolutions.\textsuperscript{588} The next Chapters will examine if and to what extent the Resolutions did effectively change international law. A distinction is made between the primary and secondary rules.

\textbf{4.3.1 A Change in the Primary Rules of International Law}

Firstly, one needs to recall the \textit{positive due diligence} obligation to prevent international terrorism which was elaborated in Chapter 2.1 of Part II.\textsuperscript{589} Responsibility for breaching positive obligations is \textit{not} fault-based but is characterized by an \textit{objective} standard.\textsuperscript{590} There is therefore no need to attribute specific attributable faults to a particular state organ for state responsibility to take place. Compliance with this positive obligation needs moreover to be assessed through a \textit{due diligence} standard of conduct. It has also been contended in this respect that the obligation of prevention therefore implies a \textit{relative} and \textit{flexible} test which is very dependent on the specific factual circumstances of each case.\textsuperscript{591} The question now rises whether the aftermath of 9/11 has had any influence on this flexible due diligence obligation? In other words, did the aftermath of 9/11 create specific factual circumstances according to which the relative due diligence standard of conduct has been sharpened?

As already partially mentioned in Part II, UNSC Resolution 1373 of September 28 2001, Resolution 1540 of April 28 2004 and Resolution 1566 of October 8 2004 are rather unique because it is the very first time that the UNSC used its powers under Chapter VII of the UN

\textsuperscript{586} E. NIELSEN, “State Responsibility for Terrorist Groups”, see \textit{supra} n. 179, 184; R.L. JOHNSTONE, “State Responsibility: A Concerto for Court, Council and Committee”, see \textit{supra} n. 168, 91.
\textsuperscript{587} R.L. JOHNSTONE, “State Responsibility: A Concerto for Court, Council and Committee”, see \textit{supra} n. 168, 90.
\textsuperscript{588} R.L. JOHNSTONE, “State Responsibility: A Concerto for Court, Council and Committee”, see \textit{supra} n. 168, 91.
\textsuperscript{589} K. N. TRAPP, \textit{State Responsibility for International Terrorism}, see \textit{supra} n. 6, 80; T. BECKER, \textit{Terrorism and the State}, see \textit{supra} n. 94, 132; see \textit{supra} part II, Chapter 2.1.
\textsuperscript{590} R.L. JOHNSTONE, “State Responsibility: A Concerto for Court, Council and Committee”, see \textit{supra} n. 168, 74.
\textsuperscript{591} K. N. TRAPP, \textit{State Responsibility for International Terrorism}, see \textit{supra} n. 6, 65-66; T. BECKER, \textit{Terrorism and the State}, see \textit{supra} n. 94, 141-142.
Charter to create universally binding obligations. In other words, these resolutions are addressing a specific issue of international peace and security in a quasi-legislative way towards the whole international community without any temporal or geographical limitations, i.e. erga omnes. The important Resolution 1373 stated inter alia the following:

“Acting under Chapter VII of the Charter of the United Nations,
(...)
2. Decides also that all States shall:
(a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;
(b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;
(c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;
(d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;
(e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;
(f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;
(g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents.”

This resolution provides in a general way obligations of conduct (i.e. no obligations of result). States are subsequently obliged to undertake several specific measures in this respect. If a state does fail to fulfill its obligations under this resolution, the UNSC has expressed “its determination to take all necessary steps in order to ensure the full implementation of this resolution, in accordance with its responsibilities under the Charter”. In addition, UNSC Resolution 1540 of April 28 2004 stated inter alia the following:

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592 T. BECKER, Terrorism and the State, see supra n. 94, 122.
593 See supra Chapter 2.1 of Part. II, n. 179.
594 Art. 2, 3 S/Res/1373.
596 Art. 8 S/Res/1373.
“Acting under Chapter VII of the Charter of the United Nations,
1. Decides that all States shall refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery;
2. Decides also that all States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them;
3. Decides also that all States shall take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery, including by establishing appropriate controls over related materials and to this end shall:
   (a) Develop and maintain appropriate effective measures to account for and secure such items in production, use, storage or transport;
   (b) Develop and maintain appropriate effective physical protection measures;
   (c) Develop and maintain appropriate effective border controls and law enforcement efforts to detect, deter, prevent and combat, including through international cooperation when necessary, the illicit trafficking and brokering in such items in accordance with their national legal authorities and legislation and consistent with international law;
   (d) Establish, develop, review and maintain appropriate effective national export and trans-shipment controls over such items, including appropriate laws and regulations to control export, transit, trans-shipment and re-export and controls on providing funds and services related to such export and trans-shipment such as financing, and transporting that would contribute to proliferation, as well as establishing end-user controls; and establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations;”

UNSC Resolution 1566 is also worth mentioning. It stated inter alia:

“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;”

It is very important to acknowledge that before 9/11 the UNSC’s condemnation of manifestations of state-sponsored international terrorism was rather succinctly enclosed in the following traditional wording:

“(…) every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when such acts involve a threat or use of force.”

This formulation is a nearly similar reformulation of the abovementioned First Principle of the UNGA Resolution 2625 of 1970 on Friendly Relations. The very demanding material contents of these Resolutions passed in the aftermath of 9/11 haven’t left the substantive law of self-defence untouched. It has been contended that these Resolutions have sharpened the due diligence standard of conduct. One could therefore state in this respect that UNSC Resolutions 1373, 1540 and 1566 have entailed a change in the primary rules of international law. However, it has also been argued that one could also characterize this evolution as a rather clarification and intensification of the obligation to prevent, without entailing any fundamental change as such of the obligation to prevent (i.e. primary rule). In any event, one can conclude that the obligation to prevent international terrorism is nowadays assessed through a much more stringent due diligence standard of conduct than before 9/11. Since responsibility for breaching positive obligations is not fault-based, the objective standard is based upon a general assessment of the state actions and omissions as a whole. When there is a positive obligation that has not been respected, the state which had to act but failed to do so bears ipso facto state responsibility in this respect.

In other words, the threshold to assess whether or not a state ought to have acted has been sharpened in the aftermath of 9/11. A state will nowadays violate its obligation to prevent much more easily than before 9/11. However, one may not forget that when a state fails to respect these sharpened due diligence criteria, it is committing a separate breach of international law for which it bears international state responsibility. The international responsibility is based on the failure to prevent and not on the terrorist attack itself. Indeed, a state does not bear any direct responsibility in this respect for the actions of non-state actors as such. Consequently, this is in accordance with the – already often mentioned - basic concept of the law of state responsibility (i.e. a state can only bear responsibility for its own

600 See supra Chapter 3.2.1 of Part II.
602 T. BECKER, Terrorism and the State, see supra n. 94, 130.
603 See supra Chapter 3.2.1 of Part II, n. 168.
actions). In sum, the fact that the obligation of prevention needs to be assessed through more stringent due diligence criteria does not change fundamentally the existing views which have been elaborated so far. *Nihil novi sub sole.*

One can therefore cautiously conclude that the primary rules of international law seem to have been modified to some extent by UNSC Resolutions in the aftermath of 9/11. However, this finding is not of great added value, as it doesn’t entail any fundamental consequences. Nevertheless, it is an important conclusion that will certainly contribute to resolve the research question at stake; whether or not the law of state responsibility has been modified? Has the ‘harboring theory’ been confirmed by these Resolutions? In addition, the question rises whether one could *a priori* conclude from the abovementioned finding that the secondary rules have *also* been modified to some extent?605

### 4.3.2 A Change in the Secondary Rules of State Responsibility?

If one would conclude that the secondary rules have also changed, this would consequently imply that the abovementioned basic concept of the law of state responsibility seems to have been superseded. Indeed, if a state can bear responsibility for actions carried out by non-state actors in the absence of any agency relationship (*i.e.* the ‘harboring theory’), this would mean a radical departure from the prevailing views on the law of state responsibility. It has been often contended that the Resolutions could be interpreted in a way that confirms the harboring theory. However, the preferred interpretation is that they do *not*.606 First of all, in the preamble to UNSC Resolution 1368 the Security Council recognized the “*inherent right of individual or collective self-defence in accordance with the Charter*.”607 Moreover, the Security Council 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.”608

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607 Preamble S/Res/1368.
608 Art. 3 S/Res/1368.
Indeed, this paragraph could certainly be considered as a kind of confirmation of the ‘harboring theory’, which would allow the use of force in self-defence against the ‘harboring’ state. However, it must be acknowledged that the Resolution does not specify whether the responsibility of “those responsible (...) for harbouring the perpetrators” is incurred for the mere breaching of the separate obligation to prevent and abstain which – as elaborated in the previous chapter - is being assessed through a sharpened due diligence standard of conduct, or for the resulting terrorist attacks themselves.\(^609\) One should moreover note the tautology in this paragraph; “those responsible (...) will be held accountable”.\(^610\) In other words, it isn’t clear whether the responsibility to which reference is made relates to direct or to indirect state responsibility.

In UNSC Resolution 1373, the Council reaffirmed in its preamble the traditional First Principle of UNGA Resolution 2625 of 1970 on Friendly Relations according to which “every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts”.\(^611\) In the second paragraph of this Resolution, the Council further elaborated upon this Principle (i.e. obligation to prevent and abstain). As already set out in the previous Chapter, it decided inter alia to

> “Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;”

> “Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens”

> “Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens,”\(^612\)

However, one cannot deduce from this wording any direct responsibility for the consequences of the failure to implement these practical implementations of the separate obligation to prevent and abstain.\(^613\) Furthermore, in the third paragraph, the Council called upon all states

\(^610\) E. NIELSEN, “State Responsibility for Terrorist Groups”, see supra n. 179, 176; R.L. JOHNSTONE, “State Responsibility: A Concerto for Court, Council and Committee”, see supra n. 168, 81, 91;
\(^611\) Preamble S/Res/1373.
\(^612\) Art. 2 a, c, d S/Res/1373.
to “Cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts.” 614 Indeed, at first glance, one could again consider these statements as a confirmation of the ‘harboring theory’. However, the Resolution solely mentioned the vague “perpetrators of such acts” without any further specification. What acts are referred to? The “terrorist attacks” themselves, or the acts of failing to respect the obligation “to prevent and suppress terrorist attacks”? Mutatis mutandis, which perpetrators are referred to? The perpetrators of the terrorist attacks themselves or the state which doesn’t respect its obligation to prevent and abstain? Therefore, one must conclude again that the Council’s wording does not allow to deduce direct state responsibility for the consequences of violating the obligation to prevent and abstain. 615 In sum, the Resolution never clearly focused on direct state responsibility which would allow measures to be taken against states that fail to respect the abovementioned obligations (i.e. further implementations of the obligation to prevent and abstain). Finally, the Council’s determination in the eighth paragraph “to take all necessary measures in order to ensure the full implementation (…)” does not require a preliminary violation of international law and subsequent state responsibility, since the Council’s powers to take measures to ensure international peace and security aren’t dependent on any preliminary breach of international law. 616 Therefore, one cannot deduce direct responsibility for violating these obligations (in contrast to what the ‘harboring theory’ would imply) from the wording of the Resolution.

Furthermore, one can mutatis mutandis conclude the same about the content of UNSC Resolutions 1540 and 1566. These Resolutions focus on the further implementation of the obligation to prevent and abstain. 617 Consequently, the emergence of direct responsibility for failing to do so cannot again be established in this respect. 618 However, even on the assumption that the Security Council has authorized to use force against ‘harboring’ states, this does not a priori imply a change in the rules of state responsibility. It could be argued that the right of self-defence of the victim state is triggered due to the mere breach of the duty to prevent and abstain. 619 In sum, on can conclude that the ambiguous wording of the UNSC

614 Art. 3 c S/Res/1373.
615 J. PAUST, “Use of Armed Force against Terrorists in Afghanistan, Iraq and Beyond”, see supra n. 200, 544-545.
617 Art. 3 S/Res/1540.
619 E. NIELSEN, “State Responsibility for Terrorist Groups”, see supra n. 179, 185; This obviously implies a departure from the inter-state approach. See infra Chapter 4.4 for a further elaboration of this point of view.
Resolutions don’t seem to clearly distinguish between direct and indirect responsibility, which it makes impossible to clearly discern direct state responsibility for actions carried out by non-state actors.

Whereas the primary rules seem to have been modified, there are no compelling grounds to conclude the same about the secondary rules. The abovementioned Resolutions undoubtedly reflect the UNSC’s engagement to combat international terrorism, but they don’t seem to entail a shift in the secondary rules of state responsibility. Nevertheless, concluding the contrary is not an impossible point of view. However, as it is very unclear whether state responsibility is incurred for breaching the autonomous obligation to prevent and abstain, or for the terrorist attacks themselves, rejecting an alleged change in the law is the preferred conclusion.620

From a conceptual point of view, one must pay particular attention not to conflate the apparent endorsement of ‘Operation Enduring Freedom’ by the UNSC Resolutions with Afghanistan’s state responsibility for the 9/11 attacks themselves.621 In other words, the distinction between a primary rule of international law (i.e. the obligation to prevent and abstain) and a secondary rule of international law (i.e. the agency paradigm) may not be neglected. Indeed, the essence of the harboring theory consists of using the violation of the primary rule to prevent and abstain as an attribution threshold in order to impute the resulting actions of non-state actors to a state.622 As discussed in Chapter 4.2 of this Part, the ‘aiding and abetting’ threshold is based upon the concept of complicity, which implies a violation of a primary rule, i.e. the obligation to prevent and abstain. MILANOVIC aptly formulated this important finding:

“A state may well harbor 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


621 E. NIELSEN, “State Responsibility for Terrorist Groups”, see supra n. 179, 185.

One may therefore conclude that a change in the primary rules (i.e. the abovementioned sharpening of the due diligence criteria) does not necessarily indicate a simultaneous shift in the secondary rules of state responsibility. The primary rules of international law with regard to the prohibition of international terrorism - as elaborated in Part II - can thus evolve autonomously of the secondary rules of state responsibility. Therefore, the scholarly proposition that a so-called ‘aiding and abetting’ threshold has emerged to replace the traditional ‘effective control’ threshold, cannot be confirmed by UNSC Resolutions 1368, 1373, 1540 and 1566 whereof the latter three have a ‘quasi - legislative’ character. Finally, one must verify to what extent the harboring theory and the corresponding ‘aiding and abetting’ threshold has been accepted by international state practice and case law of the ICJ subsequent to the events of 9/11.

4.4 State Practice and Case Law of the ICJ subsequent to 9/11

This Chapter will try to clarify to what extent subsequent state practice and case law of the ICJ reflects a change in the law of state responsibility. First of all, it needs to be acknowledged in this respect that it is highly remarkable that ‘Operation Enduring Freedom’ is the one and only case in which the international community has ever accepted the use of force in self-defence against both the terrorists (i.e. non-state actors) and the state, when the initial terrorist attack wasn’t attributable to the state from which these terrorists groups operated. After ‘Operation Enduring Freedom’ no similar use of force in self-defence has occurred.

State practice seems to suggest that the law of self-defence seems to have abandoned to some extent the inter-state reading of art. 51 UN Charter by distinguishing between two possible scenarios of the exercise of the right of self-defence. Therefore, one needs to distinguish between the use of force in self-defence against a state (the inter-state approach remains

623 M. MILANOVIĆ, “State Responsibility for Genocide”, see supra n. 9, 584.
625 K. N. TRAPP, State Responsibility for International Terrorism, see supra n. 6, 54; T. RUY, ‘Armed Attack’ and Article 51 of the UN Charter, see supra n. 15, 495; C. GRAY, International Law and the Use of Force, see supra n. 93, 201.
unharmed in this situation) and within a state (i.e. a so-called right of self-defence against non-state actors which doesn’t require anymore the imputation of the armed attach to the host state). As TAMS and NOLLKAEMPER have stated, in practice the emphasis in the current legal debate seems nowadays to have shifted towards the legal notions of necessity and proportionality whereas in the past attribution played a crucial role in the law of self-defence. Moreover, it has been contended in this respect that the case law of the ICJ has always insisted on the direct attributability of the armed attack because in all cases brought before the Court, the use of force was also directed against the state in which non-state actors operated. Accordingly, the distinction between the use of force in self-defence against a state and within a state would be in accordance with the case law of the ICJ.

All invocations of the right to use of force in self-defence in the aftermath of 9/11 have been directed against terrorists groups (i.e. non-state actors) which have carried out attacks. In addition, the states which ‘harbored’ these terrorist groups have been accused of ‘complicity’ in the attacks, i.e. having failed to respect their obligation to prevent and abstain by e.g. actively supporting these terrorist groups. However – with the exception of ‘Operation Enduring Freedom’ - the victim states have never claimed a right to use force in self-defence directly against the ‘harboring’ state as such. Indeed, their claims to use force in self-defence have always been precisely limited against the non-state terrorist groups within the territory of these ‘harboring’ states. The war between Israel and Lebanon of 2006 (i.e. the so-called ‘Second Lebanon War’) and the conflict between Turkey and the PKK are inter alia illustrative examples of this new tendency.

In the summer of 2006, Hezbollah started firing rockets at Israeli cities after having abducted two Israeli soldiers. These actions couldn’t possibly be attributed to Lebanon under the law of state responsibility (i.e. the ILC Draft Articles). Israel responded to these attacks with an extensive military campaign against Hezbollah within the territory of Lebanon. Israel has

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626 T. RUYS, ‘Armed Attack’ and Article 51 of the UN Charter, see supra n. 15, 493,531; C.J. TAMS, ‘The Use of Force against Terrorists’, see supra n. 71, 381; A. NOLLKAEMPER, “Attribution of Forcible Acts to States”, see supra n. 14, 135; One may not forget that the controversial debate whether or not there exists a so-called right of self-defence against non-state actors has not emerged for the very first time in the aftermath of 9/11. However, the events of 9/11 were a new impetus to this proposition.  
627 C.J. TAMS, ‘The Use of Force against Terrorists”, see supra n. 71, 381; A. NOLLKAEMPER, “Attribution of Forcible Acts to States”, see supra n. 14, 146.  
628 K. N. TRAPP, State Responsibility for International Terrorism, see supra n. 6, 48.  
629 K. N. TRAPP, State Responsibility for International Terrorism, see supra n. 6, 54, 58.  
630 K. N. TRAPP, State Responsibility for International Terrorism, see supra n. 6, 58.  
631 T. RUYS, ‘Armed Attack’ and Article 51 of the UN Charter, see supra n. 15, 453.
consistently declared in this respect that it was acting against the terrorists of Hezbollah and not against Lebanon as such. Israel’s right of self-defence was largely supported by the international community and a majority of the members of the UNSC. As Lebanon couldn’t be held responsible for the initial Hezbollah attacks, it was rather its failure to prevent these terrorist that has triggered Israel’s right of self-defence.

The conflict between Turkey and Iraq of 2007-2008 also needs to be mentioned in this respect. Despite the fact that the cross-border attacks of the PKK fighters (i.e. Kurdistan Workers’ Party), couldn’t be attributed to Iraq, the international community has accepted Turkey’s right to use force in self-defence against PKK bases. As Israel in the previous case, Turkey consistently maintained it was solely targeting terrorist bases of the PKK and did not claim the use of force against Iraq itself.

In sum, post 9/11 state practice seems to reflect a tendency according to which the use of force against non-state actors within the territory of the ‘harboring’ isn’t anymore a priori excluded. In other words, when a state becomes the victim of terrorist attacks which aren’t attributable to the ‘harboring’ state, the use of force against that ‘harboring’ state could be in accordance with art. 51 UN Charter when that state violates its obligation to prevent and abstain. The attribution-based approach towards “armed attack” seems to have been abandoned. The violation of the primary obligation to prevent and abstain (or the inability to do so) is under this approach a yardstick to assess the necessity of the use of force in self-defence. Subsequently, if deemed necessary to use force against these non-state actors, this would justify the violation of the territorial integrity of the ‘harboring’ state. The justification of the violation of the territorial integrity of the ‘harboring’ state is thus based on a violation of its own obligation to prevent and abstain, and not on the direct imputation of the committed terrorist attacks themselves. The abovementioned characteristic according to which responsibility for violations of positive obligations (i.e. the obligation to prevent and

632 K. N. TRAPP, State Responsibility for International Terrorism, see supra n. 6, 55; T. RUYS, ‘Armed Attack’ and Article 51 of the UN Charter, see supra n. 15, 451-453.
633 T. RUYS, ‘Armed Attack’ and Article 51 of the UN Charter, see supra n. 15, 454.
634 K. N. TRAPP, State Responsibility for International Terrorism, see supra n. 6, 56-57; T. RUYS, ‘Armed Attack’ and Article 51 of the UN Charter, see supra n. 15, 457-462.
635 K. N. TRAPP, State Responsibility for International Terrorism, see supra n. 6, 59-60.
636 K. N. TRAPP, State Responsibility for International Terrorism, see supra n. 6, 59.
abstain) isn’t fault-based but based on an objective standard is clearly expressed under this point of view.638

One can therefore conclude that recent state practice doesn’t seem to have confirmed the harboring theory. Nevertheless, the law of self-defence seems to have witnessed an evolution which clearly departs from the traditional inter-state reading. The use of force in self-defence, when precisely limited against the non-state actors responsible for terrorist attacks seems to have been endorsed to some extent. Under this approach, the ‘harboring’ state doesn’t bear any responsibility for the actions of non-state actors as such, but it is its own failure or inability to prevent or abstain from these actions which makes the use of force necessary, justifying subsequently the violation of its territorial integrity. However, whether this tendency has been accepted in international law is very uncertain. Persistent legal uncertainty dominates the legal debate at stake.639 As previously mentioned in Chapter 4.2, the ICJ left open the question to what extent international law allows the use of force in self-defence against non-state actors.640 The legal status of this new tendency is at the very least to be considered as ‘not unambiguously illegal’.641 Since the purpose of this research is not to verify to what extent international law has accepted the use of force in self-defence against non-state actors, one must examine if and to what extent this apparent evolution has influenced the law of state responsibility?

Again, one must acknowledge that the apparent evolution of the law of self-defence is situated within the primary rules of international law.642 A ‘harboring’ state that doesn’t respect its own obligation to prevent and abstain is the trigger to allow the use of force in self-defence against the non-state actors on its territory. Subsequently, there’s no need the law of state responsibility to come into play at all (with the exception of the initial conclusion that the actions of the non-state actors aren’t attributable to the state according to the general rules of state responsibility).643 One can therefore conclude that state practice subsequent to the events of 9/11 seems to reflect an apparent change in the substantive (i.e. primary rules) and not in

638 See supra Chapter 2.1 of Part II, n. 168.
639 C. GRAY, International Law and the Use of Force, see supra n. 93, 201.
640 ICJ Armed Activities Case, see supra n. 85, para. 147; C.J. TAMS, ‘The Use of Force against Terrorists’, see supra n. 71, 384.
641 T. RUYS, ‘Armed Attack’ and Article 51 of the UN Charter, see supra n. 15, 531.
642 T. RUYS, ‘Armed Attack’ and Article 51 of the UN Charter, see supra n. 15, 493.
the secondary rules of state responsibility. Finally, one should briefly refer to some interesting case law of the ICJ before coming to a final conclusion.

In the *Armed Activities* case of 2005, the ICJ made a remarkable statement with regard to the relationship between the law of self-defence and the law of state responsibility. The Court has relied in this case on the *general* rules of the law of state responsibility – and thus not on a softer *lex specialis* attribution threshold - with regard to the process of attribution of conduct of private armed groups to a state in the sense of art. 51 UN Charter.\(^{644}\) The Court stated the following in this respect:

“The Court concludes that there is no credible evidence to suggest that Uganda created the MLC. Uganda has acknowledged giving training and military support and there is evidence to that effect. The Court has not received probative evidence that Uganda controlled, or could control, the manner in which Mr. Bemba put such assistance to use. In the view of the Court, the conduct of the MLC was not that of “an organ” of Uganda (Article 4, International Law Commission Draft Articles on Responsibility of States for internationally wrongful acts, 2001), nor that of an entity exercising elements of governmental authority on its behalf (Art. 5). The Court has considered whether the MLC’s conduct was “on the instructions of, or under the direction or control of” Uganda (Art. 8) and finds that there is no probative evidence by reference to which it has been persuaded that this was the case. Accordingly, no issue arises in the present case as to whether the requisite tests are met for sufficiency of control of paramilitaries (see Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, pp. 62-65, paras. 109-115).”\(^{645}\)

In addition, the *Genocide* case of 2007 also contained a very interesting provision with regard to the law of state responsibility:

“The 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*.”\(^{646}\)

A classic example of a clearly expressed *lex specialis* rule of attribution is art. 91 of Additional Protocol I of 1977 to the Geneva Conventions of 1949.\(^{647}\) Art. 91 states the following:

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\(^{645}\) ICJ *Armed Activities Case*, see supra n. 85, para. 160.

\(^{646}\) ICJ, *Genocide Case*, see supra n. 189, para. 401; T. RUYS, ‘*Armed Attack* and Article 51 of the UN Charter’, see supra n. 15, 491.
“A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”

The ICJ confirmed moreover the customary character of this provision in the *Armed Activities* case. In other words, when an individual is a member of the armed forces of a belligerent party, he will be responsible for all his actions, even when he acted in a purely private capacity. The ambiguous wording of the definition of aggression, *i.e.* art. 3 (g), the consequent co-existence of numerous conflicting point of views towards the meaning and scope of this definition – which results in different attribution regimes; the general rules of state responsibility, the constructive approach and the *lex specialis* thresholds with its variations such as the ‘aiding and abetting’ test - and the ensuing persistent legal uncertainty in this respect does not allow to deduce the existence of a “*clearly expressed lex specialis*.”

Subsequently, since there isn’t any *lex specialis* attribution rule to be applied in this respect, the general rules of state responsibility which have a *residual* character (*i.e.* the ‘effective control’ test) remain the only applicable attribution rule.

In addition, as previously mentioned in Chapter 4.2, the ICJ clearly rejected - in sharp contrast to Tams’ use of this judgment to substantiate the legal foundation of the ‘aiding and abetting’ threshold - the existence of complicity as an attribution threshold in the *Genocide* case of 2007. The Court clearly considered complicity as a separate offence under the Genocide Convention, and subsequently distinguished it from the rules of attribution.

“Although this provision, because it concerns a situation characterized by a relationship between two States, is not directly relevant to the present case, it nevertheless merits consideration. The Court sees no reason to make any distinction of substance between “complicity in genocide”, within the meaning of Article III, paragraph (e), of the Convention, and the “aid or assistance” of a State in the commission of a wrongful act by another State within the meaning of the aforementioned Article 16 — setting aside the hypothesis of the issue of instructions or directions or the exercise of effective control, the effects of which, in the law of international responsibility, extend beyond complicity. (...)”

647 Art. 91 Additional Protocol I, see *supra* n. 10; The ICTY has confirmed this in footnote 117 of ICTY, *Tadic* 1999, see *supra* n. 302, para. 98.
648 ICJ *Armed Activities Case*, see *supra* n. 85, para. 214.
649 See *supra* Chapter 3 of Part I.
651 ICJ, *Genocide Case*, see *supra* n. 189, para. 420.
One can therefore conclude that the *Armed Activities* case and the *Genocide* case don’t seem to reflect any endorsement of a lower *lex specialis* threshold in the form of an ‘aiding and abetting’ test. To the contrary, the general rules of state responsibility seem to have been reconfirmed. As a matter of fact, one could moreover state that the subsequent ICJ case law is a kind of reflection of the subsequent state practice, which – as previously discussed - hasn’t influenced the law of state responsibility as such. Subsequent state practice and case law of the ICJ thus do not allow to establish a change in the law of state responsibility in the form of a lower attribution threshold which derogates from the ‘effective control’ threshold as initially formulated in the *Nicaragua* case. *Mutatis mutandis*, neither the ‘harboring theory’ has been accepted.

From a conceptual point of view, one must moreover acknowledge that concluding the contrary (i.e. stating that an ‘aiding and abetting’ threshold within the theoretical framework of the ‘harboring theory’ which is based on the concept of complicity as formulated by RUYS, VERHOEVEN and TAMS has emerged in international law), would imply a “mischief to the rules of attribution” as TRAPP has argued. Indeed – as already partially elaborated in Chapter 4.3.2 - considering complicity as an attribution threshold would conflate the distinction between the substantive rules of international law and the secondary rules of state responsibility. State complicity in acts of international terrorism is a clear breach of the state’s own and autonomous obligation to prevent and abstain from acts of international terrorism. In other words, recognizing an ‘aiding and abetting’ attribution threshold which is based on the violation of this autonomous obligation to prevent and abstain would collapse the substantive obligation to prevent and abstain into a secondary attribution rule.652 TRAPP has made a remarkable statement in this respect:

“An argument that states should be held directly responsible for positive conduct (the commission of a terrorist act) on the basis of attributability, when all they may be ‘guilty’ of is an omission (a however deliberate failure to prevent) renders many of the primary rules of international law in the terrorism context redundant – and is difficult to distinguish from that (infamous) Bush-ism, ‘we will make no distinction between the terrorists who committed these acts and those who harbor them’.”653

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Finally, one can therefore conclude that also subsequent state practice and case law do not seem to reflect any endorsement of a change in the law of state responsibility.

5. Conclusion

The UNSC Resolutions, state practice and case law don’t seem to reflect any change in the law of state responsibility which would consider the ‘aiding and abetting’ as a new attribution threshold. The ‘effective control’ test remains therefore the prevailing threshold with regard to conduct of non-state actors which have a relationship of sufficient direction and control as promulgated by art. 8 ILC Draft Articles. Consequently, the general rules of state responsibility as formulated in the ILC Draft Articles are thus also applicable in a terrorism context. Nicaragua hasn’t been left aside. In contrast to what one may have initially thought, the law of state responsibility hasn’t been modified in the aftermath of 9/11. Subsequently, international law does not recognize the so-called ‘harboring theory’ and the corresponding ‘aiding and abetting’ threshold. However, concluding that international law has been left untouched by the events of 9/11 would go way too far. It is plain that the aftermath of 9/11 has clearly influenced international law. The difficulty of the state-centered structure of international law to deal with non-state actors which disturb international peace and security has again been exposed in this respect.

It is beyond any doubt that the changes in the law and the subsequent legal uncertainty need to be situated within the primary legal framework of the Jus ad Bellum, and not a priori in the law of state responsibility. Acknowledging the distinction between every state’s obligation to prevent and abstain from international terrorism and the prohibition of international terrorism sensu stricto (and thus not conflating them) is very important from a conceptual point of view. The due diligence standard of conduct that is used to assess the separate obligation to prevent international terrorism has been sharpened. In addition, there is to some extent a tendency discernible which distinguishes between the use of force in self-defence against a state and within a state. However, legal uncertainty still persists with regard to this apparent evolution.

The combination of the sharpened due diligence standard and the aforementioned tendency seems to allow the use of force in self-defence within a state against terrorist groups without any requirement of ‘effective control’. It is the violation of the substantive and positive
obligation to prevent and abstain by the state *as such* that triggers the right of self-defence of the victim state. Since state responsibility for violating a positive obligation isn’t fault-based, attribution doesn’t come into play at all. Violating the obligation to prevent and abstain is subsequently considered as a *yardstick* in order to properly assess the *necessity* to violate the territorial integrity of the state at stake. The state isn’t thus – in contrast to the ‘harboring theory’ - held *directly* responsible for the committed terrorist attacks under this approach.

In sum, a mere *indirect* responsibility seems to suffice to trigger a right of self-defence, *without* however handling this indirect responsibility as an attribution threshold. The inter-state approach and its corresponding attribution-based approach towards “armed attack” needs thus to be adjusted in this respect. However, the law of state responsibility remains unchanged. Therefore one must not try to disturb the conceptual balance between the substantive and autonomous obligations of every state and the secondary law of state responsibility. Nevertheless, a lot of legal uncertainty persists. Let us hope that the future will provide more clarity.
Dutch Summary

Rechtsvraag

Deze thesis richt zich op de vraag in welke mate het staatsaansprakelijkheidsrecht al dan niet beïnvloed is door de strijd tegen het internationaal terrorisme, die na de gebeurtenissen van 11 september een internationale prioriteit is geworden. De zogenaamde ‘Harboring Theory’ van de Bush Administratie impliceerde dat Afghanistan als staat (mede)verantwoordelijk werd geacht voor de aanslagen van 11 september omwille van het *louter* toestaan van Al-Qaeda groeperingen op Afghaans grondgebied. Dit controversieel standpunt was bovendien de verantwoording voor de Amerikaanse militaire campagne ter zelfverdediging tegen Afghanistan, *i.e.* ‘Operation Enduring Freedom’.

Deze visie strookt echter niet met het staatsaansprakelijkheidsrecht dat een strenge ‘effectieve controle’ vereist van de staat t.a.v. niet statelijke actoren opdat de handelingen van deze laatste aan de staat kunnen worden toegerekend. De vereiste van ‘effectieve controle’ werd door het Internationaal Gerechtshof in de *Nicaragua* zaak van 1986 vastgelegd. Daarnaast stelt het basisprincipe van het staatsaansprakelijkheidsrecht dat een staat enkel kan aansprakelijk worden gesteld voor handelingen die haar kunnen worden toegerekend (*i.e.* *eigen* handelingen). Het staat vast dat de verhouding tussen de Taliban regering van Afghanistan en Al Qaeda niet gekenmerkt was door een verhouding van ‘effectieve controle’. De juridische motivering van de militaire zelfverdedigingscampagne tegen Afghanistan strookte bijgevolg niet met het internationaal recht. De militaire interventie in Afghanistan werd echter wel op een verrassende wijze quasi-unaniem gesteund door de internationale gemeenschap. De vraag rijst bijgevolg of door deze internationale berusting in de ‘Harboring Theory’ het staatsaansprakelijkheidsrecht gewijzigd is. Is het staatsaansprakelijkheidsrecht ‘verzacht’ zoals door sommigen wordt vooropgesteld? Werd de strenge ‘effectieve controle’ vervangen door een veel lager ‘*aiding and abetting*’ toerekeningscriterium? *M.a.w.*, Is de *Nicaragua* test opzijgezet?
Corpus

Van crucial belang voor de inhoud en structuur van deze thesis is het conceptueel onderscheid tussen enerzijds het primaire (i.e. substantieve) internationaal recht en anderzijds het secundaire staatsaansprakelijkheidsrecht. Deze laatste beheerst de gevolgen van een schending van een substantieve regel en hebben een residuair karakter.

Deel I zal een tussenstatelijke opvatting van art. 51 van het VN Handvest vooropstellen, wat het uitgangspunt is van deze thesis. Deze visie houdt in dat het recht op zelfverdediging enkel geldt tussen staten. Enkel wanneer een gewapende aanval direct kan worden toegerekend aan een staat, kan op een legitieme manier militaire actie ter zelfverdediging genomen worden tegen deze staat. Het is belangrijk om op te merken dat directe aansprakelijkheid vereist is, en niet louter een indirecte aansprakelijkheid. Dit deel zal bovendien ook uitleggen hoe deze interstatelijke visie geïncorporeerd wordt in een context van internationaal terrorisme. Ten slotte zal dit deel ook de complexe verhouding proberen toe te lichten tussen de definitie van ‘gewapende aanval’ en de toerekeningscriteria van het staatsaansprakelijkheidsrecht.

Deel II zal het Jus ad Bellum belichten vanuit een staatsaansprakelijkheidsperspectief. Het belangrijk onderscheid tussen enerzijds de autonome verplichting van elke staat daden van internationaal terrorisme te voorkomen en zich niet in te mengen in zulke daden en anderzijds het verbod op daden van internationaal terrorisme sensu stricto wordt in dit deel toegelicht. De verplichting tot preventie en niet-inmenging bestaat uit enerzijds de positieve verplichting tot preventie en anderzijds de negatieve verplichting tot niet-inmenging. De positieve verplichting is een inspanningsverbintenis en wordt beoordeeld in functie van een relatieve due diligence standaard. De negatieve verplichting is een resultaatverplichting die logischerwijze niet in functie van een due diligence standaard wordt beoordeeld. Het schenden van de autonome verplichting tot preventie en niet-inmenging impliceert een louter indirecte staatsaansprakelijkheid, die principieel niet volstaat om gewapend geweld in zelfverdediging te rechtvaardigen. Het verbod op daden van internationaal terrorisme sensu stricto heeft betrekking op de betekenis en omvang van art. 51 en art. 2 (4) van het VN Handvest. Het schenden van het verbod op internationaal terrorisme sensu strico impliceert directe staatsaansprakelijkheid. De dualiteit tussen de juridische begrippen ‘gewapende aanval’ en ‘gebruik van geweld’ zoals respectievelijk geformuleerd door de bovenvermelde artikels wordt uitvoerig besproken. Daarnaast zal ook het principe van non-interventie in dit
verband worden besproken. Ten slotte wordt de huidige stand van het *Jus ad Bellum* kritisch onder de loep genomen.


Deel IV zal tenslotte de vraag beantwoorden of het staatsaansprakelijkheidsrecht al dan niet gewijzigd is door de gebeurtenissen na 9/11. De stelling dat de veeleisende ‘effectieve controle’ test verlaten is ten voordele van een lagere ‘aiding and abetting’ toerekeningscriterium wordt kritisch benaderd. Deze stelling wordt geanalyseerd in het licht van de quasi-legifererende resoluties van de VN Veiligheidsraad die kort na de gebeurtenissen van 9/11 zijn genomen. Daarnaast wordt deze stelling ook getoetst aan de navolgende statenpraktijk en rechtspraak van het Internationaal Gerechtshof. Uit deze analyse blijkt dat de relevantie resoluties van de VN Veiligheidsraad een verscherping van de *due diligence* standaard impliceren ter beoordeling van de positieve verplichting tot preventie van internationaal terrorisme. Uit deze resoluties kan men echter geen bevestiging van de ‘Harboring Theory’ terugvinden wat een verwerping van *Nicaragua* met zich zou meebrengen. Daarnaast is ‘Operation Enduring Freedom’ het enigste geval waarbij een staat ook aansprakelijk wordt gesteld voor de handelingen van niet-statale actoren die niet toerekenbaar zijn aan een staat o.g.v. het staatsaansprakelijkheidsrecht. Alle andere gevallen van het gebruik van gewapend geweld in zelfverdediging na 9/11 richten zich exclusief tot niet-statale terroristische groeperingen, zonder evenwel de staat waarop deze groeperingen zich bevinden te viseren. Ondanks de grote rechtsonzekerheid die in dit verband heerst,
impliceert dit toch een afwijking van de interstatelijke benadering die het uitgangspunt van deze thesis is.

**Conclusie**

Men komt tot de conclusie dat *Nicaragua niet* opzij is gezet door de ontwikkelingen na 9/11. Het internationaal recht heeft ongetwijfeld veranderingen ondergaan, maar deze situeren zich veeleer in het substantieve *Jus ad Bellum* en niet in het secundaire staatsaansprakelijkheidsrecht als dusdanig. Enerzijds is de *due diligence* norm ter beoordeling van de positieve verplichting tot preventie verstrengd. Anderzijds kan men uit de statenpraktijk een evolutie distilleren die afwijk van de interstatelijke benadering op het recht van zelfverdediging. Het toestaan van terroristische organisaties op het grondgebied van een staat is en blijft nog steeds een schending van de autonome verplichting tot preventie en niet-inmenging. Deze schending lijkt echter een maatstaf te zijn om via het primaire recht te beoordelen of gerichte militaire acties tegen niet-statelijke actoren noodzakelijk zijn. Deze schending kan echter niet fungeren als een toerekeningscriterium. Dit is echter wat de ‘Harboring Theory’ net wel doet. Op grond van deze opvatting wordt een indirecte aansprakelijkheid gehanteerd als een toerekeningscriterium om directe staatsaansprakelijkheid te bekomen. Deze juridische redenering is verkeerd. Het louter toestaan van terroristische groepen op het grondgebied van een staat is geen toerekeningscriterium, maar een *autonome* schending van het internationaal recht. Anders oordeelen zou immers het conceptueel onderscheid tussen het substantief recht en aansprakelijkheidsrecht ondermijnen, waarbij een schending van een substantieve regel tegelijkertijd zou fungeren als toerekeningscriterium.
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