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International responsibility, terrorism and counter-terrorism

The question of responsibility for acts of international terrorism, or in response to international terrorism, has permeated discussion since 9/11. Was a state responsible for the September 11 attacks, or for acts of international terrorism since then, and what are the implications? To what extent do the permissible responses, including the resort to armed force, depend on responsibility? Questions regarding state responsibility for terrorism have arisen to similar effect in many other contexts, before and after 9/11, such as in relation to the killing of former Lebanese Prime Minister Harari, the Lockerbie bombing or more recently in the context of allegations of Iranian involvement in attempts on US territory and beyond.

In addition to questions of state responsibility for terrorism itself are others concerning acts carried out in the ‘global war on terror’ in what circumstances are states responsible in connection with wrongs by other states, or by private security companies carrying out security or counter-terrorism measures for example? While the focus is on state responsibility, fundamental questions also arise regarding those individuals and entities accused of being engaged in terrorism: to what extent can al-Qaeda, or associated entities or individuals, be considered responsible under international law?

The international responsibility of a state arises from the commission of an internationally wrongful act, consisting of conduct that (a) is attributable to a state under international law and (b) constitutes a breach of an international obligation of the state. States may also be responsible in connection

with wrongs by other states. Subsequent chapters will address the international obligations of the state (sometimes referred to as ‘primary rules’ of international law) – including in relation to criminal law, force, human rights and humanitarian law. This chapter deals with the ‘secondary’ rules that determine when a state will be responsible for those wrongs.

As will be apparent from the chapters that follow, questions of responsibility are of cross-cutting relevance to the areas of law and practice discussed in this book. Their relevance has always been more apparent in relation to some aspects of the framework of responses to terrorism than others. For example, state responsibility is not generally required for crimes under international criminal law engaging individual responsibility to arise. However, even there are connections; for example in certain circumstances state responsibility may be relevant to whether terrorist attacks amount to specific crimes (notably war crimes and the crime of aggression). By contrast, the question of state responsibility has traditionally been considered closely interlinked with the lawfulness of the use of force, as will be explored in Chapter 5; while doubt is increasingly cast on the view that state responsibility for an armed attack is a prerequisite to self-defence, the extent of the state’s responsibility may remain relevant to an assessment of the lawfulness (i.e., the necessity and proportionality) of attacking particular state targets. On these and other issues arising in practice, explored in each subsequent chapter of this book and in particular in the case studies, the ‘secondary’ rules of responsibility set out in this chapter must be considered alongside the ‘primary’ obligations under international law discussed in others.

As we will see, some of the rules on state responsibility in respect of terrorism and counter-terrorism have proved legally controversial, and this


5 Chapter IV, Articles 16–19, ILC Articles ibid.


7 Chapter 4A1.1 on the elements of war crimes and aggression and controversies around a policy element for crimes against humanity ‘on the interconnections, and the consequences of the individualisation of international responsibility’ for state responsibility, see A. Nolkaemper, Concurrence between Individual Responsibility and State Responsibility in International Law. International and Comparative Law Quarterly 2003, 52, pp. 615-640.

8 See discussion of self-defence in Chapter 5A.2.1.

9 As discussed at Chapter 5, the view that self-defence under Article 51 of the UN Charter only arises in response to attacks by states is increasingly doubtful. Measures involving the use of force in self-defence must though be ‘necessary’ to avert an attack, suggesting that for such measures to be directed against the organs of a state, that state must exercise a degree of control over the attack in question.

10 Responsibility is addressed first on account of its cross-cutting relevance to the issues of practice discussed in subsequent chapters (Part B of Chapters 4–7, and Chapters 8 and 10 in particular). See Chapter 2.3 and Part A of Chapters 4–10 for the primary obligations.
is an area of law which some claim has shifted, or may be in particular flux, influenced in part by state practice since 2001. What is clear is that if issues of responsibility in international law were once perhaps considered principally of academic interest, they have assumed greater prominence in legal and political discourse, the practice of states and the jurisprudence of courts and adjudicatory bodies in this field in recent years. State responsibility for acts of terrorism or counter-terrorism carries a range of implications, both legal and political. Understanding this area of law is critical to assessing the responsibility of the multiplicity of state and non-state actors currently engaged in or associated with international terrorism or the ‘war on terror’, and to ensuring accountability, reparation and effective prevention in the long-term.

Part 1 of this chapter assesses the responsibility of states for international terrorism in the light of the rules on international responsibility. It considers the basis on which acts of international terrorism, perpetrated by private individuals or organisations, may be attributed to a state such that the state incurs legal responsibility for those acts, and the consequences of such responsibility. Part 2 considers the extent to which so-called ‘non-state actors’ – private individuals, organisations or entities, such as al-Qaeda or other terrorist groups or entities – may themselves incur ‘responsibility’ under international law. The relevance of the law of ‘state responsibility’ to assessing the unfolding responses to international terrorism is then addressed at Part 3. In recent years, the multi-acted, transnational complexity of the ‘war on terror’ has sharpened focus on the significance of understanding the nature of a state’s responsibility where it acts through or in cooperation with other states, or where violations arise at the hand of private contractors, addressed at sections 3.1 and 3.2 respectively. The ‘war on terror’ has also raised questions concerning the right, or in exceptional circumstances the obligation of other states to take measures to end serious international wrongs addressed at section 3.3.

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11 See, e.g., rendition in Chapter 10, and judicial practice in Chapters 4, 7 and 11.
12 For a fuller discussion of the implications of determining whether a state is responsible for terrorism as such, rather than the ‘separate delict’ of failing to meet other obligations in respect of terrorism, see T. Becker, Terrorism and the State: Rethinking the Rules of State Responsibility (Portland: Hart Publishing, 2006), p. 156 et seq.
13 See, e.g., Chapter 10 on the responsibility of multiple states for the extraordinary rendition programme.
14 The obligations owed to the international community as a whole, and the obligation to cooperate in order to end serious breaches of jus cogens norms are discussed below.
3.1 STATE RESPONSIBILITY IN INTERNATIONAL LAW

3.1.1 State Responsibility for Terrorism: Legal Standards of Attribution?

As a starting point, a state on whose territory crimes are orchestrated is not automatically responsible for them.\(^{15}\) As the ICJ noted in 1949 in the *Corfu Channel* case, it is impossible to conclude ‘from the mere fact of the control exercised by a state over its territory and waters that that State necessarily knew or ought to have known of any unlawful act perpetrated therein nor that it should have known the authors’.\(^{16}\) It would be anomalous to suggest a strict liability test in the context of international terrorism, potentially implicating the responsibility of the US, Germany or others in respect of those who trained and organised the 9/11 attacks from their territories.\(^{17}\)

Instead, as noted above, the international responsibility of a state arises where a breach of an internationally wrongful act is ‘attributable’ to it under international law.\(^{18}\) As regards acts committed by individuals or groups not formally linked to the state, the question of the standard for attribution of conduct to the state, and whether it has been met on the facts, is critical.\(^{19}\) This question of attribution, whereby the state becomes responsible for the acts themselves, must be distinguished from the question whether the state has breached any obligations in respect of the prevention of or response to international terrorism.\(^{20,21}\)

The question of state responsibility is relatively straightforward where conduct occurs at the hand of state officials or organs of the state.\(^{22}\) States are directly responsible for the conduct of organs of the state, which amounts to an ‘act of state’\(^{23}\) even if the official exceeded or acted outside his or her authority.\(^{24}\) Likewise, where individuals or entities exercise elements of ‘governmental authority,’ in accordance with national law, these are also deemed acts of state for which the state has responsibility, even where the

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16 *Corfu Channel (United Kingdom v. Albania), Merits, ICJ Reports* 1949, p. 4.
17 Likewise, simple knowledge of suspected terrorist activities could potentially implicate many states, and would clearly not itself be enough.
18 ILC Articles, supra note 4 at Article 2.
19 If the events of September 11 could be attributable to the state, this second prong of the test would clearly be satisfied as violence against another state would violate the rules on the use of force, set out at Chapter 5.
20 For obligations of ‘due diligence’ to prevent, see below and Chapters 2 and 7. See, e.g., Becker, supra note 12, suggesting that this distinction is valid but not rigid.
21 Controversies are explored further below.
22 ILC Articles, supra note 4 at Article 4, p. 94 et seq.
23 Ibid.
24 Ibid. at Article 7 and Commentaries, p. 106 et seq.
actors go beyond the scope of their authority.\textsuperscript{25} Although these rules will rarely be relevant to terrorist organisations, it is at least remotely conceivable that in a ‘failed’ or ‘failing’ state, where state authorities are absent, an organisation could assume elements of governmental responsibility, rendering the acts of the organisation (carried out pursuant to this exercise of governmental authority) to acts of state.\textsuperscript{26} Generally speaking, however, the relevant and controversial question is the standard for attribution where those directly responsible for conduct are private individuals or groups with no formal or legal relationship with the state.

States are responsible for private actors’ conduct which they directed or over which they exercised effective control.\textsuperscript{27} Controversy and uncertainty arises (heightened in recent years) as to the meaning of such ‘effective control,’ and whether lesser forms of involvement, such as supporting, ‘harbouring’, encouraging or even passively acquiescing in wrongs, or some other causal relationship short of ‘control’ is sufficient to render acts of terrorism attributable to the state. Controversy as to the applicable legal standards is coupled with challenges in evidentiary terms as ‘a transparent relationship between terrorist actors and the state is predictably uncommon’.\textsuperscript{28}

3.1.1.1 Effective or overall control?

International jurisprudence and the work of the International Law Commission support the view that the acts of private individuals may be attributed to a state which exercises sufficient control over the conduct in question. According to the International Court of Justice in the Nicaragua case, the test is whether the state or states in question exercised ‘effective control.’\textsuperscript{29} Although the Court found the US to have helped finance, organise, equip, and train the Nicaraguan Contras, this was not deemed sufficient to render the Contras’ activities attributable to the US. Such a level of support and assistance did not ‘warrant the conclusion that these forces [were] subject to the United States to such an extent that any acts they have committed are imputable to that

\textsuperscript{25} Ibid. at Article 5, p. 100 et seq. See more complex discussion on the application of this rule to private contractors in Part 3 below.

\textsuperscript{26} Ibid. at Article 9, on “Conduct carried out in the absence or default of the official authorities” and Commentaries, p. 100 et seq. On the law governing failing states, see, e.g., Advisory Council on International Affairs, Failing States: A Global Responsibility, Advisory Report No. 35, May 2004, p. 59 (hereinafter Dutch AIV Report 2004) and Chapter 5.

\textsuperscript{27} Oppenheim’s International Law, supra note 15 at p. 501; ILC Articles, supra note 4 at Article 8.


\textsuperscript{29} Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, ICJ Reports 1986, p. 14 (hereinafter ‘Nicaragua case’), paras. 86-93.
Despite years of outspoken criticism of this decision, generated by those who consider it to impose too rigorous a threshold for establishing responsibility, the Nicaragua ‘effective control’ test was approved by the ICJ in the 2007 Genocide case, and remains the authoritative legal standard. It demonstrates that attribution must then be established vis-à-vis particular conduct (rather than over the group’s actions more generally), and that the threshold for attribution is high.  

The ILC’s Articles in turn confirm the high threshold for attributing acts of private individuals to the state, providing that such acts may be attributed to the state if the person is acting on ‘instructions’ of the state, or under the state’s ‘direction or control’. This standard has been described by the ICJ as ‘substantially coinciding’ with the effective control test endorsed by the Court.

The jurisprudence of the ICTY has developed in a slightly different direction. Reflecting Nicaragua, the Trial Chamber in the Tadić case noted that the relationship between the groups and the state must be more than one of ‘great dependency’, amounting instead to ‘a relationship of control’. The Appeals Chamber, while endorsing this, found that different tests applied in respect of private individuals who are not militarily organised and paramilitary or similar groups. In respect of the latter the test was whether the state

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30 Ibid. The United States was found liable for specific activities, which were the result of direct action on the part of its military or foreign nationals in its pay.  
32 See ILC’s Commentary to Article 8(3), supra note 4, confirming that state responsibility under the ILC’s Articles was considered to arise in relation to particular conduct.  
33 See Nicaragua case, supra note 29, paras. 86-93. Nicaragua demonstrated also the evidentiary difficulty of proving state responsibility for acts of non-state actors.  
34 ILC Articles, supra note 4 at Article 8 and Commentary.  
36 See Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999 (hereinafter ‘Tadić Appeal Judgment’). The question was whether the acts of the VRS (Bosnian Serb forces) could be imputed to the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro), such that an international conflict had arisen between that state and Bosnia-Herzegovina. Note that the question arose for the purpose of determining individual responsibility for IHL violations, whereas Nicaragua addressed state responsibility directly.  
37 Ibid.  
38 Acts of individuals to be attributed to the state generally requires ‘specific instructions’, or they may be ‘publicly endorsed or approved ex post facto by the State at issue’. See ibid. at para. 137.
exercised ‘overall control’ over the activities of the group, rather than effective control of particular conduct. The Tribunal reflected the *Nicaragua* judgment by emphasising that the ‘mere provision of financial assistance or military equipment or training’ was insufficient, requiring instead that the state have ‘a role in organising, coordinating or planning the military actions’.\(^{39}\) Moreover, the ICTY noted that where the ‘controlling State’ is not the state where the armed clashes occur, ‘more extensive and compelling evidence is required to show that the state is genuinely in control of the units or groups, not merely by financing and equipping them, but also by generally directing or helping plan their actions’.\(^{40}\)

The ICTY thus suggested a more ‘flexible’ standard for attribution, based on the ongoing relationship with the armed groups rather than control over particular conduct, that has been favoured by some as a more realistic vehicle for holding states accountable for violations by private actors through state support.\(^{41}\) However, despite sometimes persuasive arguments as to the merits of this standard or why it may lead in some circumstances to preferred results, as a statement of the current law on state responsibility in international law, it is doubtful.\(^{42}\) The ILC Commentaries suggest that while the ICTY standard may be relevant in the context of international criminal law, and to determining the threshold of international armed conflict for IHL purposes, the ‘effective control’ of conduct test remains the relevant one for state responsibility.\(^{43}\) This is supported by the reassertion by the ICJ of the effective control test in the *Genocide* case, as noted above.

### 3.1.1.2 Ex post facto assumption of responsibility

Where the state does not exercise the necessary control at the time of the conduct in question, it may nonetheless assume responsibility for the wrong *ex post facto*, where it subsequently ‘acknowledges or accepts’ the conduct as its own.

In the *Tehran Hostages* case, the ICJ held that while the ‘direct’ responsibility of Iran for the original takeover of the US Embassy in Tehran in 1979 was not

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\(^{39}\) Ibid. at para. 138.

\(^{40}\) See, e.g., 3.3.2 Privatising Counter-terrorism and Responsibility where the overall control test would also fit more readily with the sort of ongoing relationship between the state and the groups with whom it contracts.

\(^{41}\) See also ICJ Genocide case, supra note 35.

proved, subsequent statements in the face of incidents involving hostage taking by students created liability on the part of the state. To the extent that the judgment indicates that the Iranian State was considered capable of putting a stop to an ongoing situation and instead chose to endorse and to ‘perpetuate’ it, the Court’s finding against Iran is consistent with the application of the ‘effective control’ test. But the judgment also makes clear that even if such a test were not met, the state may become responsible through its subsequent ‘approval’ or ‘endorsement’ of wrongful acts. This approach has been followed by the ICTY and, as noted above, the ILC’s Articles.

One commentator has sought to rely on this test as a basis for finding Afghanistan responsible for 9/11, in light of the Taleban ‘blatantly and adamantly refusing to take any action against al Qaeda and Bin Laden, and in offering them sanctuary’, by virtue of which it was suggested that the government ‘espoused the armed attack against the US’. There is little authority, however, for treating refusal to react itself as sufficient for the purposes of ex post facto assumption of responsibility. Rather, what is required goes beyond mere approval of the conduct of others, to a degree of endorsement whereby the state can be said to have identified the conduct ‘as its own’.

3.1.1.3 A grey area? ‘Harbouring’, ‘supporting’ or ‘causing’ terrorism (and the case of Afghanistan) post-9/11

States are not then strictly responsible for international wrongs emanating from their territory, but they are responsible for acts of individuals or groups over whom they exercise ‘effective control’, or where they subsequently endorse the conduct as their own. Before September 11, it had been suggested that there was also a difficult ‘grey area’, wherein ‘the issue becomes more difficult

44 See United States Diplomatic and Consular Staff in Teheran (United States v. Iran), ICJ Reports 1980, p. 3 (hereinafter ‘Teheran Hostages’ case). During the first phase of the occupation of the American Embassy, the international responsibility of Iran arose from a breach of the different primary obligations of due diligence. See ibid. at pp. 31-33, paras. 63-68 and below chapter 3 1.2.
46 Tadić Appeal Judgment, supra note 36, para. 137.
47 ILC Articles, supra note 4 at Article 11.
49 It would however breach other obligations required in response to serious criminal acts. See para. 3.2 below.
50 ‘[A]s a general matter, conduct will not be attributable to a State under Article 11 where a State merely acknowledges or expresses its verbal approval of it’. ILC’s Commentary to Article 11, supra note 4.
51 See A. Cassese, ‘The International Community’s “Legal” Response to Terrorism’, 38 (1989) ICLQ 589 at 599. Cassese sets out six levels of involvement that a state may have in terrorist activity. The three grey areas in the middle involve the supply of financial aid or weapons, logistical or other support and acquiescence, respectively.
when a state, which has the ability to control terrorist activity, nonetheless tolerates, and even encourages it.\textsuperscript{52} Since September 11, this grey area has become both increasingly significant and increasingly murky.

In part, this reflects perceptions concerning the shifting nature of terrorist organisations’ capacities, and in particular the evolution in their inter-relationship with states. Changing realities whereby organisations may be as powerful as states, influenced by the growing number of failed and failing states, frequently challenge traditional assumptions regarding this relationship. The controversy is also fed however by state practice post-9/11, and specifically the Afghanistan intervention and the nature of the international reaction to it.

Immediately following the events of September 11, then US President Bush asserted that in the search for those ‘responsible’, no distinction would be made ‘between the terrorists ... and those who harbor them’.\textsuperscript{53} The harbouring and support language has reappeared elsewhere, including in international statements and national laws.\textsuperscript{54} The case against Afghanistan, so far as made out by the US, amounted to the September 11 attacks having been ‘made possible by the decision of the Taleban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation’.\textsuperscript{55} Alternative formulations as to the link between the Taleban and al-Qaeda at the time included allegations that the Taleban ‘protected’ the al-Qaeda network,\textsuperscript{56} while

\begin{itemize}
  \item \textsuperscript{52} Travalio, ‘Terrorism’, supra note 31 at p. 154.
  \item \textsuperscript{53} ‘We will make no distinction between the terrorists who committed these acts and those who harbor them.’ ‘Statement by the President in his Address to the Nation’, 11 September 2001, available at: \url{http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html} last visited 12 November 2012.
  \item \textsuperscript{55} ‘Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council’, 7 October 2001, UN Doc. S/2001/946. See further below and Chapter 5B.1.1.1 on the failure to make out a case of legal responsibility of Afghanistan for 9/11.
  \item \textsuperscript{56} ‘We know that the individuals who carried out these attacks were part of the worldwide terrorist network of Al-Qaeda, headed by Osama bin Laden and his key lieutenants and protected by the Taleban.’ Statement by NATO Secretary-General Lord Robertson, 2 October 2001, available at: \url{http://www.nato.int/docu/speech/2001/s011002a.htm} last visited on 5 May 2013 (emphasis added).
\end{itemize}
broader statements have been made as to the need for accountability of those nations ‘compromised by terror,’\textsuperscript{57} or ‘allies of terror.’\textsuperscript{58}

On 7 October 2001, the US and its allies launched military operations against Afghanistan in response to the events of 9/11, triggering questions on the compatibility with, or impact on, the law of state responsibility. The first question is whether the legal standard was met for attributing the conduct of private ‘terrorist’ organisations to the state in relation to Afghanistan and the 9/11 attacks. Did the relationship between the Taleban and al-Qaeda surpass association or inter-dependency and reach the requisite control by the former over the conduct of the latter?\textsuperscript{59}

Whether the Taleban exercised effective control over the conduct of al-Qaeda (or indeed – if one were to accept the ICTY test – overall control of the entity itself), to be responsible for the attacks was the subject of doubtful speculation at the time.\textsuperscript{60} Information emerging in the years following 9/11 – including from an official commission conducted in the United States – casts far greater doubt on the proposition.\textsuperscript{61} There is evidence of a close and mutually beneficial association between the two, with al Qaeda providing troops, weapons and resources to the Taleban (not \textit{vice versa}) and the Taleban providing ‘sanctuary’ in return.\textsuperscript{62} Notably, states involved in the military operations, while making numerous allegations of support for terrorists, did


\textsuperscript{59} The test is effective control over specific conduct, or overall control over activities of the group, if it is militarily organised. See Tadić Appeal Judgment, supra note 36.

\textsuperscript{60} Many commentators denied the legal responsibility of Afghanistan for the September 11 attacks. See, e.g., Jinks, ‘State Responsibility’, supra note 58, p. 83, 93-99; and M. Sassòli, ‘State Responsibility for Violations of International Humanitarian Law’, 84 (2002) IRRC 01. Y. Dinstein, War, Aggression and Self-Defence (Cambridge: Cambridge University Press, 2011), p. 261 suggests: ‘The original outrage of 9/11 could not be imputed to Afghanistan ex post facto. But, even though the Taliban were not accomplices to the 9/11 events before and during the act, they became accessories after-the-fact. By brazenly refusing to take any measures against Al-Qaeda and Bin Laden – and continuing to offer them shelter within its territory – Afghanistan endorsed the armed attack against the United States.’ On ex post facto assumption of responsibility, see section 3.1.1.

\textsuperscript{61} The findings of the National Commission on Terrorist Attacks Upon the United States released on 22 July 2004 (the ‘9/11 Commission Report’), cast renewed doubt on the degree of control exercised by the Taleban over al-Qaeda, including the opposition of senior government officials to 9/11. Less surprisingly, the report rejects any suggestion of a link between the September 11 attacks and Iraq. See ‘-Qaeda had targeted Congress and CIA, panel finds’, International Herald Tribune, 17 June 2004. The reports of the Commission are available at: http://govinfo.library.unt.edu/911/report/911Report.pdf. See also Becker, supra note 12 at p. 217.

\textsuperscript{62} 9/11 Commission Report, supra note 61, p. 66. See also Chapter 6 on the evolving nature of ‘al Qaeda and associates’.
not seek to make the case as to the exercise of effective or overall control by the Taleban.\textsuperscript{63} Legal responsibility of Afghanistan was not asserted in terms by the states driving the Afghan prong of the ‘war on terror’, and was therefore not subject to the full debate and analysis that one might expect, given the severity of impending consequences for Afghanistan. It would certainly have been a difficult case to make on the facts and in accordance with all applicable legal standards.\textsuperscript{64}

The second question that follows is whether, as some have suggested, the standard for the attribution of acts of private actors to states has changed as a result of the Afghan intervention and the overwhelming state support for the Afghan intervention, despite the effective control test not having been met.\textsuperscript{65} For some, this suggests that ‘harboring and supporting’ terrorist groups may now be sufficient for state responsibility, reflecting the language of the Bush Administration and official documents prior to the intervention.\textsuperscript{66} Another approach suggests that the response demonstrates an appetite for a new ‘causation based’ approach by which conduct is attributed to a state if the state fails in its legal obligations (e.g., due diligence to prevent\textsuperscript{67}) and this ‘causes’ a terrorist act.\textsuperscript{68}

The view that the Afghanistan intervention reveals a shift in state practice or opinion appears to be based on the assumption that the decision to attack Afghanistan was premised on the attribution of al-Qaeda’s actions to Afghanistan (according to a lower threshold than accepted previously).\textsuperscript{69} However, this is unclear for various reasons. First, it is unclear to what extent the allegations levelled against the Taleban of harbouring and supporting terrorists were


\textsuperscript{64} According to Tal Becker, there is ‘simply no evidence’ of a relationship of control by the Taleban over al Qaeda. See Becker, supra note 12 at p. 217.

\textsuperscript{65} The extent of international support for the intervention is discussed in Chapter 5B.1. Becker, supra note 12, considers the state response to the Afghan intervention as evidence that states did not accept the classic agency test for attribution set out above. This is been questioned; see below and Lehto, supra note 54, Chapter 9.

\textsuperscript{66} See, e.g., Jinks, ‘State Responsibility’, supra note 58 at p. 91. This language is not endorsed by a wide number of commentators despite its use by the allied forces to justify intervening in Afghanistan.

\textsuperscript{67} See the following section for more details.

\textsuperscript{68} Becker’s theory seeks to hold the state responsible for harm it causes through wrongful activity (such as failing in its due diligence obligations) even where it does not ‘control’ acts of powerful networks such as al Qaeda.

legal (as opposed to political) claims at all. To the extent that they were, it is unclear whether the claim is that 9/11 was attributable to the state, or rather that providing support for terrorists in itself constitutes another internationally wrongful act. It may well be, in addition, that such attribution was not considered a prerequisite to the lawfulness of the use of force in self-defence (or indeed that in certain quarters lawfulness was not considered an essential prerequisite for military action to proceed), rather than that the standards of attribution were considered to have been met. Growing recognition of the possibility of lawful self-defence absent state responsibility (discussed in Chapter 5) is consistent with the possibility that, to the extent that practice reveals a shift in the law, the shift relates to the primary rules on the use of force rather than to the secondary rules on state responsibility.

The failure of states to articulate their approach to state responsibility makes it difficult to identify whether they were acting out of an assessment that the Taleban was legally responsible and, if so, what the parameters might be for any accepted new standard.

There may however be growing concern about the appropriateness of the ‘effective control’ standard, which, compounded by evidentiary obstacles, has been described as making attribution in terrorist cases only a ‘theoretical possibility.’ However, despite disquiet and a myriad of apparent ‘standards’ being referred to or proposed by commentators, states and international institutions, it is doubtful whether any other standard lays reasonable claim to reflect the law as it currently stands. While likely to stimulate further debate on the need for legal development in the future, and the law may well shift over time, it is highly doubtful whether a new standard for attribution has emerged and acquired sufficient support to displace the established rules on attribution in international law. Despite the post-9/11 muddying of legal waters, it appears likely that the high threshold of requiring that the state ‘directs’ or exercises ‘effective control’ over the conduct in question, and ‘the traditional view ... that state toleration or encouragement is an insufficient state connection’ for attribution of responsibility, remain valid statements of the law.

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70 See, e.g., statements regarding the accountability of the ‘allies of terror’ and ‘nations compromised by terror’ above.
71 See Chapter 5, para. 5B.2.1.1.
72 See statements to the Security Council by the US and UK, supra note 63.
73 Becker, supra note 12 at p. 7. As noted above, factual assumptions of a model in which a powerful state controlling a dependent non-state actor rather than an equal or inverted power relationship are now being questioned.
74 Becker’s approach may constitute a proposal as to how the law might develop rather than an assessment of where it stands currently. As regards harbouring, it remains doubtful that there is sufficient clarity around the term to provide the quality and certainty required of law at this stage.
In conclusion, while formulae vary slightly, it remains the case that state responsibility for terrorism ultimately depends on ‘effective control’ of conduct. The evaluations of whether the test of responsibility of any state for al Qaeda affiliates at any point in time, or for the many other ‘allies’ and ‘associates’ of al Qaeda worldwide against whom the US claims to be in armed conflict, have to be made against this test. It is a question of degree (and an issue of fact to be established by those alleging responsibility) ‘whether the individuals concerned were sufficiently closely associated with the state for their acts to be regarded as acts of the state rather than as acts of private individuals’. The various standards advocated before and especially after 9/11 make a useful contribution to the debate as to lex ferenda, but have not reached the point where one could confidently identify a change in international legal standards. The debate does however remind us that existing rules need to be interpreted with sufficient flexibility, and mindful of realities, to be capable of practical application.

3.1.2 Responsibility for failure to prevent and protect against terrorism

It should be emphasised that the fact that the acts of al-Qaeda may not have been attributable to Afghanistan (and the Taleban as de facto government thereof) does not, however, mean that the latter did not breach international obligations and incur international responsibility in respect of its relationship with the al-Qaeda network.

States have obligations to take a range of measures in respect of terrorism, which existed before 9/11 but have been supplemented and strengthened since. At the very heart of the international legal order is the long-standing obligation that a state must not allow its territory to be used to commit harmful acts against other states, which plainly includes the obligation not to allow international terrorist groups to operate out of its territory. With respect to international terrorism specifically, numerous conventions on particular forms of terrorism enshrine various specific duties directed at ensuring that states

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76 See Chapter 6 B11 on the changing form and capabilities of al Qaeda since 9/11, with the ‘franchise’ model and role of random individuals making state responsibility more challenging.

77 See, e.g., the 2010 US National Security Strategy: ‘Al Qa’ida’s core in Pakistan remains the most dangerous component of the larger network, but we also face a growing threat from the group’s allies worldwide.’ Available at: http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf

78 Oppenheim’s International Law, supra note 15, p. 550.

79 See ‘Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations’, GA Res. 2625 (XXV), adopted by consensus on 24 October 1970, UN Doc. A/Res/25/2625, Principle 1, para. 9; see also Chapter 2.2.2; Corfu Channel Case, supra note 16; SS Lotus (France v. Turkey), 127 PCIJ, (ser A) no. 10.
abstain from and take measures to prevent acts of terrorism emanating from the state’s territory, as reflected in several Security Council and General Assembly resolutions before 2001. After 9/11, these obligations were reiterated and expanded by the Security Council obliging all states, inter alia, to ‘refrain from providing support, active or passive’, ‘deny safe haven’ to persons involved in terrorism, ‘freeze without delay terrorist assets’, criminalise terrorism and cooperate fully with other states in criminal matters, while stressing that ‘those responsible for aiding, supporting or harbouring the perpetrators, organisers and sponsors of these acts will be held accountable’. Additional resolutions reflect specific obligations such as not providing arms or resources to al Qaeda. Reflecting existing legal obligations, these resolutions have been described as ‘redefining and enlarging the requirements of due diligence to suppress and punish terrorism’.

If it can be established that a state has ‘harboured or supported’ terrorist groups, this may well represent a breach of a range of the obligations of the state. A critical distinction exists, however, between a state being responsible for failing to meet its obligations vis-à-vis terrorism on its territory, and the acts of terrorists being ‘attributable’ or ‘imputable’ to the state, such that the state itself becomes responsible for the terrorists’ wrongs. Not only is the latter a very different international wrong, it may have very different consequences in legal and political terms.

As noted above, to establish state responsibility for acts of terrorism the critical issue is often not whether a wrong has occurred but whether the test for attribution has been satisfied. By contrast, for breach of certain other obligations incumbent on a state relating to terrorism (for instance the obligation not to allow terrorists to operate from a state’s territory or to freeze funds of terrorist organisations), the problem may rather be one of proving that a breach has occurred.

In part, this is because these obligations do not give rise to strict liability but rather tend to embody a ‘due diligence’ test requiring reasonable measures.

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80 See SC Res. 1373, supra note 54 at para. 2 and Chapter 2. See also SC Res. 1624 (2005), UN. Doc. S/Res/1624, which also focuses on preventative measures.
83 Lehto, supra note 54, p. 383
84 Similarly, in Nicaragua for example, whilst the ICJ determined that the acts of Contras were not attributable to the United States this did not ‘suffice to resolve the entire question of the responsibility incurred by the United States through its assistance to the contras’. Nicaragua case, supra note 29, paras. 110 and 115.
85 See para. 3.1.3 below.
of prevention. If, for instance, the state did not know, and took the reasonable steps to ascertain whether terrorists were operating out of its territory, or whether an apparently innocent bank account held in its territory was in fact being used for money laundering by a terrorist group, there may be no breach of its obligations. Our understanding of the ‘due diligence’ obligation on states to prevent acts of international terrorism can be informed by various other areas of international law, notably the human rights field, where the notion of the state’s positive obligations to exercise due diligence to prevent violations by private actors (in contexts ranging from public riots to domestic violence) is well-established and reflected in abundant jurisprudence.

As noted in Chapter 2, a series of resolutions adopted by the Security Council after 9/11 have contributed to clarifying the content of the obligations to prevent, protect against and respond to terrorism; these supplement the extensive provisions of treaties dedicated to particular forms of terrorism. The lack of clarity as to the nature and limits of ‘terrorism’ to which these obligations are directed has been discussed in that chapter. Confusion regarding the definition is compounded by the lack of clarity surrounding standards of attribution, and the meaning and relevance of terms such as ‘harbouring and supporting’ terrorism. Such ambiguity runs the risk of creating increased vulnerability for states, while seriously undermining the force of any such obligations. The suggestion that there is no legal difference between responsibility for acts of terrorism and for failure to meet all obligations in respect of preventing and combatting terrorism, may further contribute to uncertainty around the nature, and the implications, of state responsibility for international wrongs in this field.

3.1.3 Consequences of international responsibility for terrorism or breach of obligations relating to the prevention of terrorism

Legal consequences flow from state responsibility for an internationally wrongful act. The extent to which practical consequences also ensue depends, at least in considerable degree, on the question of enforcement, the Achilles heel of the international legal system. A state that is responsible for an international-

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86 Under a ‘due diligence’ standard, it is the act or omission on the part of the state, not the injurious act by the private actor, which constitutes the internationally wrongful act for which the state may be responsible.
87 See Chapter 7, Parts A.2 and A.4. Although some caution is due as the standards and contexts are not identical, e.g., international terrorism takes effect abroad, and different questions of fact and proof, and different expectations as to the state’s knowledge of this activity, may arise.
88 For a discussion of the regional and global conventions dealing with international terrorism, see Chapter 2, para. 2.1 above.
89 See generally, Part II, ILC Articles, supra note 4.
A wrongful act is obliged to cease the act (if it is ongoing), offer assurances of non-repetition and make full reparation for material or moral injury suffered.\footnote{Ibid. at Articles 30 and 31.} If the state denies cessation of the wrongful act or refuses to comply with its secondary obligation to make full reparation, the injured state for its part may take ‘countermeasures’ against the responsible state to induce it to comply with these obligations.\footnote{Ibid. at Article 49.}

In practice, the breach of an international obligation by a state may trigger various responses. States will often resort to diplomacy to persuade states to desist from or cease internationally wrongful conducts. In addition, they may take lawful but ‘unfriendly’ acts, which may include, for example the breaking of diplomatic relations, limitations on trade with the wrongdoing state or the withdrawal of voluntary aid programmes. Resort to the International Court of Justice\footnote{See generally, C. Gray, Judicial Remedies in International Law (Oxford: Clarendon Press, 1987).} or to the organs of the United Nations to determine breaches or enforce obligations,\footnote{In practice, the General Assembly or Security Council may determine a breach, although the Council has a unique role in determining the existence of acts of aggression under the Charter, and is uniquely empowered to authorise the use of force in response to a threat to international peace and security; see Chapter 5.2.2.} is another means to seek to induce the responsible state to comply with the obligations arising from the breach.

Such measures, which are clearly permissible, are distinct from countermeasures, however, which are measures that would normally be unlawful, but for the fact that they are taken in response to an internationally wrongful act.\footnote{See ILC Articles, supra note 4 at Introductory Commentary to Part Three, Chapter II, para. 1.} Countermeasures may consist, for example, in the suspension of the performance of trade agreements in force between the injured state and the offending state,\footnote{See, e.g., the collective measures adopted in 1982 by EC states, New Zealand, Australia and Canada against Argentina during the Falklands war. Those measures consisted, inter alia, of a temporary prohibition on all imports of Argentine goods (a course of conduct prohibited under Article XII(1) of the General Agreement on Tariffs and Trade).} in the suspension of air services agreements or in the freezing of the assets of the offending state or its nationals by the injured state.

Countermeasures are however subject to limits: they must, as far as possible, be reversible, they can only target the responsible state,\footnote{ILC Articles, supra note 4 at Article 49, paras. 2 and 3.} they must not be disproportionate to the injury caused by the internationally wrongful act,\footnote{Ibid. at Article 51.} and they cannot involve the violation of fundamental human rights, humanitarian law or peremptory norms of international law.\footnote{Ibid. at Article 50.} Given these limits, the lawfulness of certain countermeasures commonly resorted to by
states, such as economic sanctions, is controversial.99 While some would argue that economic sanctions constitute lawful countermeasures, others would question their compatibility with ‘obligations for the protection of fundamental human rights’.100

Notably, the use of force is not a permissible countermeasure.101 The ILC’s Articles do not, however, affect the right of every state to act in self-defence, nor to take measures authorised pursuant to a Security Council resolution under Chapter VII of the Charter.102 Questions that are often raised in this context, relating to whether self-defence requires state responsibility for an ‘armed attack,’ are not questions related to the rules of state responsibility themselves but to the law on the use of force. Lawfulness of the use of force in self-defence will therefore depend principally on the primary rules on the use of force discussed in the next chapter.

In general, it is the state which is directly injured by an internationally wrongful act that may invoke the responsibility of the wrongdoing state, although it is important to note that in certain circumstances other states may, or must, respond to the wrongful act. This arises in cases where ‘the obligation breached is owed to a group of States ... and is established for the protection of a collective interest of the group’ or where ‘the obligation breached is owed to the international community as a whole’.103 At a minimum, non-directly injured states can ask for cessation of the wrongful conduct, for assurances of non-repetition and for performance of the obligation of reparation (in the


100 Sanctions should, at a minimum, be conceived and enforced so as to ‘take full account of the provisions of the International Covenant on Economic Social and Cultural Rights’, Committee on Economic, Social and Cultural Rights, General Comment No. 8, 5 December 1997, UN Doc. E/C.12/1997/8, para. 1. See also ILC’s Commentary to Article 50, supra note 4 at para. 7.

101 The ILC’s Articles on State Responsibility specify that countermeasures shall not affect the ‘obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations’. ILC Articles, supra note 4 at Article 50, para. 1(a).

102 Ibid. Article 59 of the ILC’s Articles on State Responsibility recognises that the law of the UN Charter constitutes a lex specialis as regards the general rules set out in the Articles. Article 21 expressly states that ‘[i]f the wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations’.

103 The powers of the ‘non-directly injured States’ are more limited than those of the states directly injured by the breach.
interest of the injured state or of the beneficiaries of the obligation breached).  

Moreover, the ILC Articles make clear that if the internationally wrongful act amounts to a gross or systematic breach of obligations under peremptory norms – such as serious violations of human rights or of basic rules of IHL or the unlawful use of force – states are not only entitled, but may be obliged, not to recognise the situation of unlawfulness and to act together to end it.  

This was confirmed by the ICJ in the Namibia advisory opinion concerning the implications for other states of South Africa’s presence in Namibia notwithstanding a Security Council resolution deciding that the situation was illegal, and more recently in the The Wall advisory opinion concerning the Israeli construction of the so-called ‘security fence’ that was found by the Court to be unlawful. States’ obligations to respond in the face of a breach by another state of ‘erga omnes’ obligations – such as respecting the right to self-determination and certain core aspects of international humanitarian law – was described in the following terms:

Given the character and the importance of the rights and obligations involved, the Court is of the view that all states are under an obligation not to recognise the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all states, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end.

This notion of collective responsibility to act in face of egregious violations, which was described by the ILC in 2001 as representing the ‘progressive development of the law’, has gained ground since then. This may be reflected, albeit indirectly, in the political doctrine concerning ‘responsibility to protect’ from 

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104 ILC Articles, supra note 4 at Article 48(2)(a) and (b).
105 Ibid. at Articles 40 and 41. The ILC’s Commentary to Article 41 recognises that Article 41(1) ‘may reflect the progressive development of international law’ (para. 3). The ILC Articles also specify that states must not recognise or facilitate the situation that has given rise to the wrong.
107 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004.
109 The Wall Advisory Opinion, supra note 107, para. 159.
serious violations of their rights. Serious breaches may therefore in principle incur serious consequences for states, from a range of states or from the international community more broadly.

### 3.2 RESPONSIBILITY OF NON-STATE ACTORS IN INTERNATIONAL LAW

This chapter has thus far focused on state responsibility for terrorism, but does international law also recognise the responsibility of those individuals and organisations believed to have been directly responsible for 9/11 or other acts of terrorism? This raises the troublesome issue of the responsibility of ‘non-state actors’ in international law.

International law is state-centric, with the traditional rule that it is made by states for states. As a basic governing principle, while states are the subjects of international law, ‘non-state actors’ are governed instead by national law. In respect of ‘terrorists’ and ‘terrorist organisations,’ the principal source of applicable law is national law. International law for its part focuses on ensuring that the state meets its obligation to provide a national legal system that effectively prevents, represses and punishes acts of terrorism, within the framework of the rule of law.

The sharpness of this dichotomy between states and non-state actors has been somewhat eroded through developments in international law. The following text highlights ways in which international law currently provides for the responsibility of non-state actors, including potentially those engaged in international terrorism, and signals the prospect of future legal development in this area.

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110 The responsibility to protect is enshrined in several UN documents including, the Report of the High Level UN Panel, UN Doc. A/59/565, available at: http://www.un.org/secureworld/report.pdf. The Resolutions and statements adopted at the time of the Libyan intervention in early 2011 were cited as providing significant weight behind this concept (see SC Res.1973 (2011), UN Doc. S/RES/1973), yet this has not been apparent in the Syrian context in 2012/13.

111 See Chapter 7A4 and on terrorism obligations specifically in e.g. Security Council resolutions para. 3.1 above and Chapter 2.

112 This discussion is relevant to the responsibility of non-state actors engaged in counter-terrorism also. See 5.2 below.
3.2.1 The ‘individualisation’ of International Law

The Nuremberg judgment famously reminded us that as crimes are committed by human beings not by ‘abstract entities’, only by holding individuals to account could crimes be prevented. Since Nuremberg, it has become well established that non-state actors may be criminally responsible not only under national but also international law, as discussed at Chapter 4.

The responsibility of individuals for established crimes under international law – such as genocide, crimes against humanity and war crimes – arises irrespective of whether the perpetrator was a state official or a non-state actor. This is true of all crimes within the jurisdiction of the International Criminal Court for example, and is made explicit in the definition of crimes against humanity, which must be committed pursuant to a ‘state or organisational plan or policy’. By contrast, aggression requires state involvement, though the individual accused may or may not be a state official. As discussed, specific terrorism treaties generally cover only acts committed by non-state actors. However, these treaties do not themselves impose responsibility directly on individuals, but on states, and the ability to hold the individual to account under them depends on incorporation into domestic law. It remains highly doubtful that terrorism constitutes a crime under international criminal law, as explored in Chapter 2, but it is beyond reasonable dispute that certain serious terrorist attacks may constitute core crimes under international law, such as war crimes or crimes against humanity.

While criminal law usually focuses on the individual responsibility of natural persons, Nuremberg also provides a precedent for holding legal persons – such as corporations, political parties or government departments – criminally liable. A similar proposal contemplated in the context of the ICC Statute was rejected, albeit for practical reasons related to the functioning of

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113 L. van den Herik and N. Schrijver (eds.), Counterterrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges (Cambridge: Cambridge University Press, 2013), at Ch. 1.
115 For example, genocide requires no link whatsoever to a state or organisation, and war crimes must be committed in association with a non-international armed conflict between rebel groups.
116 ICC, Finalised draft text of the Elements of Crimes, PCNICC/2000/1/Add.2 and Chapter 4A.1.1.3.
117 See Chapter 4A.1.1.3.
118 See Chapter 2, parts 2.1.3 and 2.1.5.
119 Ibid.
120 Ibid. Chapter 4A.1.1.3.
International responsibility, terrorism and counter-terrorism

that court, rather than on principled legal grounds.\textsuperscript{121} While it is conceivable that a criminal process could be launched against legal persons such as political parties or corporations involved in terrorism, this is unlikely to be true of loose networks such as al-Qaeda which would presumably lack legal personality in any legal system, national or international. Persons forming even loose networks for a criminal purpose may, however, be individually criminally responsible under forms of liability such as ‘conspiracy’, ‘acting in common purpose’, or ‘joint criminal enterprise’.

In the terrorism context specifically, targeted sanctions raise the question of the role of the individual or organisation under international law. A growing feature of counter-terrorism practice post-9/11 has been the imposition of sanctions, by for example Security Council in Resolution 1267, with the effect of freezing assets and imposing travel bans and other restrictions on individuals designated by the UN Sanctions Committee as linked to al-Qaeda (or formerly the Taleban).\textsuperscript{123} Making individuals directly subject to international legal regulation in this very direct way upsets traditional assumptions about the subjects of international law, as well as about the relationship between the state and the individual. The implications of, and challenges to, these sanctions lists are discussed in later chapters,\textsuperscript{124} but their existence marks a further step in the journey towards the individualisation of international law.

3.2.2 International humanitarian law

International humanitarian law, perhaps more than any other area of international law, has long been familiar with applying legal rules to non-state
Chapter 3

entities. Since 1949, specific rules have been in place governing the conduct of non-international armed conflicts, binding on both the state party to the conflict and armed groups.

As discussed in Chapter 6, IHL applies only where the ‘armed conflict’ threshold is met, as opposed to in ‘situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature’. Most acts commonly referred to as ‘terrorist’ are precisely those that delegates sought to exclude from the definition of armed conflict. Moreover, as discussed at Chapter 6, section B, it is highly doubtful whether an entity such as al-Qaeda could constitute a party to a non-international armed conflict. If however the conduct of a non-state entity, properly understood, is conduct carried out as a party to a non-international armed conflict, that party will be bound by the body of IHL applicable to such conflicts. Among the prohibitions of IHL, as noted in Chapter 6, is a specific prohibition on spreading terror among the civilian population, although numerous acts commonly referred to as terrorism will fall within other categories of IHL violation for which the armed group may be responsible as a matter of international humanitarian law.

One of the weaknesses in the current system of IHL is however the lack of effective mechanisms for enforcing responsibility. As regards the state, human rights bodies provide one mechanism for reviewing IHL compliance, albeit indirectly, and diplomatic channels may prove particularly effective. For the non-state party diplomatic avenues are less readily available or effective and there is no meaningful mechanism for holding it to account as a party, except so far as serious violations of IHL amount to war crimes and international criminal law provides such mechanisms in respect of the individuals who comprise the group.

126 See Chapter 6.
128 On these requirements, which relate principally to the definition or identification, and level of organisation, of the entity, see Chapter 6.
130 See Chapter 6 and Chapter 7B3
131 Chapter 7A.3.4 on interplay and 7B3 on interplay in practice post-9/11.
3.2.3 International human rights law?

The development of human rights law in the aftermath of the Second World War revolutionised international law by establishing the prime exception to the rule that states are the subjects of international law. However, at least as originally conceptualised, while individuals could possess rights, only states bore obligations under human rights law. Several developments in human rights law have sought to ensure that the general rule against non-state actor responsibility under human rights law does not represent a legal void, whereby rights can be violated with impunity.

Human rights bodies have adopted a progressive approach to the obligations of states to ‘respect and ensure’ the rights within the human rights conventions, interpreting them as enshrining ‘due diligence’ obligations to take measures to prevent violations and to provide redress for them – whether committed by state entities or non-state actors. Therefore, the conduct of non-state actors is regulated by human rights law indirectly, in that where ‘private persons [violate rights] freely and with impunity’ the state itself becomes responsible under human rights law.

Moreover, the lack of direct responsibility of non-state actors under international law is increasingly open to question, particularly as entities such as transnational corporations, armed groups or indeed arguably terrorist organisations, assume powers and exercise authority traditionally within the exclusive sphere of state control, through which they do, in practice, violate human rights. Arguably, support in principle for recognising the responsibility of non-state actors in human rights law can be found even in early human rights instruments. One commentator has noted for example that the long established Universal Declaration of Human Rights, covers:

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\text{[e]very individual includ[ing] juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all.}
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Subsequent regional developments in Africa and the Americas, unlike the traditional Western-European approach to human rights, reflect the notion of individuals and entities as not only holders of rights but bearers of respons-

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132 See e.g., Velasquez Rodriguez v. Honduras, Merits, Judgment of 29 July 1988, IACtHR, Series C, No. 4, or the ‘due diligence’ test set down by the Human Rights Committee, General Comment No. 31: [2004], UN Doc. CCPR/C/74/CRP.4/Rev.6, para. 8. See Chapter 7A.4.2.
133 Velasquez Rodriguez, ibid. at para. 176.
134 They commit acts which, if carried out by the state, would amount to rights violations.
The intensified focus on the realisation of economic social and cultural rights in recent years has contributed to the ‘softening’ of the position that only states are subject to international law.137

A number of specific developments may suggest that there are circumstances in which a non-state actor may currently find itself directly responsible under human rights law, and/or that further developments in this field are to be expected. First, in exceptional circumstances, a non-state entity may exercise the functions of a state, and may, arguably, thus be deemed responsible as a state under international human rights law.138 If an entity such as a political party, corporation, or for that matter an unlawful organisation, assumes control over part of a territory of a state, it may be considered to have assumed the obligations that correspond to this de facto exercise of authority or control. As the Committee against Torture noted, factions [that] exercise certain prerogatives that are normally exercised by legitimate governments may be equated to state officials for the purposes of certain human rights obligations.139

Second, there are important on-going developments towards a broader recognition of direct responsibility of non-state actors that may herald further innovations in this respect.140 Perhaps most advanced are developments towards recognising the responsibility of transnational corporations, as ‘having the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognised in international as well as national law, including the rights and interests of indigenous peoples and other

136 For example, the preambles of the 1981 African Charter on Human and People’s Rights and of the American Declaration on the Rights and Duties of Man. Note that human rights as a corollary of human duties does not equate with respect for rights being conditional on observance of duties.


138 This reflects the rules on state responsibility which recognise the exercise of elements of governmental authority as acts of state. See part 3.1.1, above; ILC Articles, supra note 4 at Article 5.

139 Sadiq Shek Elmi v. Australia, Communication No. 120/1998, UN Doc. CAT/C/22/D/120/1998 (1999), para. 6.5. In respect of warring factions in Mogadishu, the Committee against Torture found that: ‘de facto, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments. Accordingly, the members of those factions can fall, for the purposes of the application of the Convention, within the phrase “public officials or other persons acting in an officials capacity” contained in article 1 [of the Convention against Torture]’.

vulnerable groups’. Alongside developments in standards is increased monitoring of the impact of corporations on human rights, as reflected in the work of non-governmental organisations as well as the establishment of a Special Representative to the Secretary General on business and human rights.

But recent practice indicates the use of the language of ‘human rights’ obligations as applicable to a wider range of non-state actors. This can be seen from condemnations of violence against women, including domestic violence, as a ‘violation of the rights and fundamental freedoms of women’. There are numerous examples, including the reports of the Sierra Leone and Guatemalan truth and reconciliation commissions, as well as decisions of international human rights bodies, on which armed groups have been referred to as responsible not only for violations of humanitarian law but also for violations of ‘human rights’.

A similar phenomenon is increasingly apparent in the context of an international debate, particularly since September 11 2001, in which terrorism is frequently referred to as a violation of human rights. The Security Council for example has noted that ‘acts, methods and practices of terrorism ... and ... knowingly financing, planning and inciting terrorist acts are ... contrary to the purposes and principles of the United Nations, perhaps highlighting recognition of a degree of non-state actor responsibility under the UN Charter.’ Another example is the proposal denouncing the ‘gross violations of human rights perpetrated by terrorist groups,’ adopted at the UN Human Rights Commission. However, the unsettled nature of the issue is clear from the fact that the United States and the EU opposed the proposal on the basis that:

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141 Many of these have occurred on the national level, but they are also apparent through the UN Global Compact on Corporations and the work of the Commission on Human Rights for example. See ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ (UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003)), approved by the UN Sub-Committee on the Protection and Promotion of Human Rights in August 2003. See also, A. Clapham, Human Rights Obligations of Non-State Actors (New York: Oxford University Press, 2006), pp. 195-270.

142 In August 2005, the UN Commission on Human Rights adopted resolution E/CN.4/RES/2005/69 establishing the post of Special Representative of the UN Secretary General on business and human rights. See e.g. ‘Protect, Respect and Remedy’ A/HRC/17/31 (2011).


145 SC Res. 1373, supra note 54. The UN ‘purposes and principles’ include the protection of human rights and the maintenance of international peace and security. See Chapter 5A.1.

146 See Dennis, ‘Current Developments’, supra note 143 at p. 183.
a clear distinction must be made between acts which are attributable to States, and criminal acts which are not, so as to avoid conferring on terrorists any status under international law.\textsuperscript{147}

Among academics, opinion on the human rights responsibility of non-state actors varies. One point of view suggests responsibility should depend on the capacity of an actor to bear obligations, rather than of its ‘subject’ status.\textsuperscript{148} Questions on this remain, including to what extent entities such as terrorist organisations could meet this criteria, as well as broader legal and policy implications of the lack of international enforcement against non-state actors, or the risk of conferring legitimacy on certain non-states actors or detracting from the responsibilities of states.\textsuperscript{149}

Finally, it is recalled that as human rights law is closely interlinked with international criminal law and IHL – with certain violations of human rights amounting to, for example, crimes against humanity, and humanitarian law obligations being interpreted in light of human rights law (and \textit{vice versa}) – responsibility may arise in respect of human rights violations indirectly, through responsibility under criminal law or IHL.\textsuperscript{150}

In conclusion, the question of the direct responsibility of non-state actors is a troublesome one, given the theoretical underpinnings of the international legal system as essentially inter-state, but also given issues of enforcement. One commentator noted post-9/11 that this has left international law at a ‘rhetorical disadvantage’ in the struggle against terrorism.\textsuperscript{151}

It may be that the growing use of language apparently attributing human rights responsibility to non-state actors such as terrorist groups is no more than a rhetorical attempt to redress this perceived disadvantage, or it may be indicative of a more substantive shift towards responsibility and accountability of non-state actors. While far from settled in law, the increased evidence of the willingness of states and others to embrace the idea of ‘human rights violations’ by non-state actors may lead to further legal development in coming years.

\textsuperscript{147} \textit{Ibid.} The US and EU noted however that states’ ‘fight against terrorism must be carried out in accordance with international human rights law’. At the 2002 meeting of the Commission, the resolution was adopted by a vote of 33-14-6. \textit{See also} the positions of states in Clapham, \textit{supra} note 141 at pp. 25-58.

\textsuperscript{148} Clapham, \textit{supra} note 141 at pp. 70-75.

\textsuperscript{149} \textit{See}, e.g., N. S. Rodley, ‘Detention as a Response to Terrorism’, in Salinas de Frias, White and Samuel (eds.), \textit{Counter-terrorism: International Law and Practice} (Oxford: Oxford University Press, 2012). Clapham notes that this is conceptually distinct from the question of whether non-state actors can carry legal responsibility under international law. Clapham, \textit{supra} note 141 at pp. 70-75.


What is clearer is that international law does speak to the responsibility of ‘terrorists’ and ‘terror networks’, including for acts such as 9/11, and international law may be enforced against individuals most notably through international criminal law but also through targeted sanctions. Beyond that, individuals and groups are unquestionably responsible under national law and provided there are effective functioning national systems, with states determined to counter terrorism within the framework of law, there is not so much a gap in the legal order as there are different spheres of regulation. As such, it may be that strengthening national systems, through focusing on the obligations of states under international law and their effective implementation\(^{152}\) is the most effective way of promoting the protection of the individual from terrorist acts. But the discussion of the importance of responsibilities of non-state actors under international law will undoubtedly continue, impelled by the desire to ensure protection from international terrorism. Whether the aforementioned developments, and indications of increased openness to the idea of non-state actor responsibility, eventually crystallise into legal obligations, and have an impact on enforcement, remains to be seen.

### 3.3 Responsibility Arising from Counter-Terrorism

The focus of this chapter has been on responsibility for terrorism, with the lawfulness of state responses to terrorism being addressed in subsequent chapters. It is however worth noting here certain aspects of the law of state responsibility that are relevant to the assessment of responsibility for violations committed in the ‘war on terror’, addressed in subsequent chapters.

#### 3.3.1 Responsibility of the State for its Own and Other States’ Wrongful Conduct

While a state is generally responsible for its own international wrongs, carried out by its agents or attributable to it, the ILC Articles make clear that in certain circumstances, the state will also be responsible in connection with the wrongs of other states.\(^{153}\) For example, where the state exercises ‘direction or control’ over the actions of another state, just as when it exercises such control over private entities,\(^{154}\) or when it ‘coerces’ another state into international

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152 See obligations in relation to terrorism, such as those enshrined in the ‘specific conventions’, set out at Chapter 2, para. 2.1.3, and the positive obligations in respect of human security under human rights law, set out at Chapter 7, part 7A.4.1.

153 ILC Articles, supra note 4 at Chapter IV.

154 See Ibid. at Article 17 and Commentary; see also Article 8 relating to direction and control over acts of private entities.
wrongs, the former state will become responsible for the acts themselves. The state does not evade legal responsibility therefore by acting through ‘proxy’ states, as discussed in relation to the torture in Chapter 7 for example.

States may also contribute to wrongs through ‘aiding and assisting’ other states in connection with a wrongful act. The International Court of Justice (ICJ) has recognised that the rules concerning aiding and assisting in the commission of a wrongful act, as enshrined in Article 16 of the ILC Articles, form part of customary international law.

A number of factors qualify the circumstances in which a state’s support or facilitation of wrongs by another state amount to aiding and assisting. A state may aid or assist another state in breach of its international obligations only if it does so with ‘knowledge’ of the circumstances of the internationally wrongful act of that state. A ‘close connection’ is required between the actions of the states, and a causal link must exist between the states’ actions and the wrong. As explored further in Chapter 10, the knowledge and causality requirements impose a significant threshold that may be difficult to satisfy as a matter of proof in many situations. The act must be such that it would be internationally wrongful if committed by the accessory state, so depends on shared obligations.

These rules are particularly relevant to ensuring that a full range of states can be held to account for wrongs that, in an increasingly interconnected world, involve cooperation between a multiplicity of states. The war on terror has been characterised by massive inter-state intelligence sharing, the use of military force by multiple states cooperating in the detention and interrogation of detainees, law enforcement coordination and evidence sharing, including with irregular criminal processes, vast international surveillance programmes, transnational targeted killing operations, among many others. Widespread international ‘cooperation’ and massive inter-state sharing in relation to many of the issues explored in subsequent chapters will therefore give rise to questions regarding shared responsibility, in accordance with the legal framework set down in this chapter. Particular issues of shared responsibility in relation to the most notable example, the global ‘extraordinary rendition’ programme

155 Ibid. at Article 18.
156 Ibid. at Article 16.
157 See ICJ Genocide case, supra note 35 at para. 420.
158 ILC Articles, supra note 4 at Article 16. Commentaries, supra note 4 at p. 149 notes that the aid or assistance is rendered ‘with a view to facilitating the commission of the act...’ It is debatable to what extent such knowledge can be constructive, but some support for the proposition that at least willful blindness would suffice may be provided by aiding and abetting under international criminal law discussed in Chapter 4.
159 Ibid.
160 See Chapter 10.
161 Ibid.
which implicates the responsibility of a broad range of states (and private entities and individuals), are addressed in more detail at Chapter 10.162

3.3.2 Privatising Counter-terrorism and issues of Responsibility

In recent years, there has been an exponential increase in resort to private actors to fulfil what were previously considered essentially state functions, including in the international counter-terrorism, security and armed conflict contexts.163 The extent and scale of private contractor involvement in the ‘war on terror’ was made clear in, for example, a report describing 1,931 private companies at work in counter-terrorism, security and intelligence functions in the US in 2010.164 The import and implications of this have been brought into sharp focus by reports of violations by private contractors, including hundreds of cases of unlawful use of force by private security companies in Iraq, ‘private’ prisons operational in Afghanistan, and interrogations by contractors resulting in torture and loss of life.165

Questions arise regarding legal responsibility for such conduct. Individual contractors may of course be responsible for crimes committed under applicable national or international law, and commanders or high level officials may also be responsible for ordering or instigating such crimes, or for failing to take reasonable measures to prevent de facto ‘subordinates’ from committing

162 Questions arise as to various forms of ‘complicity’ including through providing information, presence during violations, and benefiting from wrongs. See Chapter 10 and UN Joint Study on Secret Detention, UN Doc. A/HRC/13/42 (2010), pages 4-5 on complicity in international law.

163 Well-known examples from before the ‘war on terror’ include the involvement of military security company Executive Outcomes during the conflict in Sierra Leone in 1995, as well as Military Professional Resources Inc.’s involvement in Croatia in the early and mid 90s.


crimes.\textsuperscript{166} In a few cases, individual contractors have in fact been held to account,\textsuperscript{167} but in the majority of cases they have either enjoyed \textit{de facto} impunity, or been protected by ‘immunities’ which the state has negotiated to protect its own personnel and extended to cover private actors.\textsuperscript{168} To a large extent, the obstacles to individual accountability are similar to those arising in relation to war on terror crimes committed by regular state agents,\textsuperscript{169} but the challenges are heightened by for example less monitoring, oversight or formal disciplinary or prosecutorial structures.

A key difference arises in the relationship between these individuals and the state, raising questions as to the extent of state responsibility and accountability for these private actors. The question of state responsibility is particularly germane in light of allegations of ‘tactical’ privatisation specifically to avoid accountability, evade monitoring responsibilities and other legislative or congressional restrictions or oversight.\textsuperscript{170} Numerous commentators have questioned whether the current legal framework governing state responsibility covers such actors, leading to far-reaching assertions of a ‘legal void’ and ‘regulatory gaps’.\textsuperscript{171} This section considers briefly key provisions of the legal framework and flags some of the challenges raised.

\textbf{i) De Facto Agency: Scope and Limits of Attribution?}

The starting point for assessing the state’s responsibility for private security operations are the rules on attribution, enshrined in Article 8 of the ILC Articles. Referred to above in the context of state responsibility for international terrorism, Article 8 provides that acts of private persons or entities are attributable

\begin{enumerate}
\item See Chapter 4A.12.
\item One such case concerns the CIA contractor who beat an Afghan detainee to death during interrogation at the Asadabad base in Afghanistan. Jones, ‘Implausible Deniability’, supra note 164 at p.18.
\item See Chapter 4 on criminal law, and the accountability discussion in Chapter 7B14 on human rights below.
\end{enumerate}
to the state when the former are ‘in fact acting on the instructions of, or under the direction or control of, the State in carrying out the conduct’.

A difficult question is how much control constitutes ‘effective control’ over conduct in this particular context. Some commentators that lament the ‘juridical gap’ in this field have suggested that as private security contractors (PSCs) generally act with considerable autonomy, and operations are not controlled in detail by the state, the state will not therefore generally be responsible for the conduct of PSCs under the effective control test. While this may be so, it is recalled that the disjunctive test in Article 8 means that the state may give specific instructions or direction or it may, more generally, exercise ‘control’ over the conduct in question. If it does so, the state will be responsible even where individuals go beyond or ignore specific instructions. The state must exercise a considerable degree of control over the operation or activities in question, though there is no apparent authority for requiring that it conducts the detailed planning of every stage of the process. While the ICJ’s finding that arming and supporting armed groups was insufficient for attribution in the Nicaragua case, PSCs are not only armed and supported by the state, but operational and on-site specifically and exclusively by virtue of the state’s authorisation and for that state’s purposes. While the test is not an ‘overall control’ but an effective control of conduct test, the closeness and directness of the association may make it more likely that the conduct of the group would fall under the control of the state.

Particularly difficult questions arise in relation to responsibility for conduct that was not authorised by the state. According to the ILC Commentaries, if the wrongdoing was ‘incidental’ to the authorised conduct the state will still be responsible for it; by contrast if it was ‘clearly beyond’ the scope of the instructions or direction of the state, the state will not be responsible. It is ultimately a challenging question of fact and evidence – as explicit contracts permitting wrongdoing are as unlikely as a transparent relationship between a state and a terrorist organisation – as to the true relationship between the

173 As noted above, the ICJ has held that this test is substantially the same as the ‘effective control’ test which renders the state responsible for the conduct of persons or entities irrespective of any formal link.
175 Undoubtedly under the effective control test, the ‘instructions, direction or control must relate to the conduct which is said to have amounted to an internationally wrongful act’.
176 For example, the ICTY in Tadić suggested that the state must have ‘a role in organising, coordinating or planning the military actions’. Tadić Appeal Judgment, supra note 36.
177 Ibid. As discussed above in the Nicaragua case, the ICJ found that arming and supporting the contras did not meet the very high ‘effective control’ threshold for attribution set down by the Court.
state and private entity, and the true nature of the instructions given, explicitly and implicitly.

The rationale for not making states responsible for all of the actions of its contractors is that ‘in general the state giving lawful orders… does not assume the risk that the instructions will be carried out in an internationally unlawful way.’ The state cannot then be made responsible for conduct it could not reasonably have foreseen and been expected to address. Conversely, there may be circumstances – depending on the nature of the activities or the individuals charged with carrying them out – in which a state may well have assumed such a risk of international unlawful activity arising in the course of the execution of the contract. The extent to which the state took appropriate measures to monitor, control and prevent abuses by private groups active at its behest may be relevant to determining whether the state assumed such a risk.

In conclusion, the limited responsibility of states for unlawful measures beyond the authority of the PSCs are compounded by the fact that contracts will rarely if ever explicitly authorise unlawful activity. It could be expected, consistent with the principle of effectiveness in international law, that Article 8 would not be interpreted to allow states to hide behind the façade of a ‘clean’ contract with an independent contractor to commit violations and escape accountability.\textsuperscript{178} How those rules are applied will depend, however, on particular situations. Actions closely associated with the authorised activity of contractors could be considered part of the conduct over which the state exercises ‘effective control’. There must for example be a distinction between certain types of purely common crimes committed by PSCs in Iraq, outside the scope of, and not incidental to, their authority, and the excessive use of force against civilians closely associated with their security functions, or the abuse of their intelligence role during interrogation.\textsuperscript{179}

\[ ii) {\textquotesingle}Exercising elements of governmental authority\textquotesingle} \]

Although less immediately apparent, Article 5 of the ILC Commentary is also potentially relevant to responsibility for private contractors charged with state functions. It provides that ‘the conduct of a person or an entity that is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of governmental authority shall be considered an act of the State under international law, provided the persons or entity is acting in that capacity in the particular instance’.\textsuperscript{180} So far as the functions that have been ‘contracted out’ involve for example the use of force, establishing or

\textsuperscript{178} On principles of interpretation of IHRL that may be relevant, including a purposive interpretation and one that avoids a vacuum of protection, see Chapter 7A Conclusion.
\textsuperscript{179} See Chapter 7B6.
\textsuperscript{180} ILC Articles, supra note 4 at Article 5.
maintaining law and order, interrogation or intelligence gathering, these would constitute the exercise of ‘elements of governmental authority’. 181

A second requirement enshrined in Article 5, however, is that the private actors are ‘empowered by law’ to exercise such functions. 182 While specific legislation authorising companies to exercise such authority will be rare, there is little clear authority, and some scope for interpretation, as to what form this legal empowerment might take. The ILC Commentaries suggest that specific legislation is not required where there is ‘delegation or authorization by or under the law of the State’. 183 One question is whether authorisation via a contract, entered into under the law of the State, may suffice for this purpose. If that is so, and if the exercise of such official functions by private actors or contractors are covered by Article 5, then the state is responsible for their conduct whether or not it authorised or controlled such conduct: as the Commentaries note, for Article 5 ‘there is no need to show that the conduct was in fact carried out under the control of the state’. 184 Although the commentaries also caution that Article 5 is a ‘narrow category,’ this may provide an appropriate framework to consider state responsibility for private contractors to whom the state transfers key functions from state organs to private contractors, such as use of force or interrogation, despite the attendant risks involved.

In conclusion, increasing resort to private actors to carry out certain functions poses challenges for the framework of state responsibility. Resort to private actors that may lack training, expertise, monitoring and disciplinary structures increases the incidence of violations, and renders less transparent the already opaque world of counter-terrorism abroad.

Nonetheless, the regulatory gap may be less glaring than has been suggested. The state clearly has responsibility for the conduct of de facto agents of the state, and for those to whom it transfers elements of its governmental authority. Whether this criteria has been met depends on an evaluation of the facts of each situation, and there is scope for debate as to the correct interpretation of the law. If the rules are interpreted purposively, in line with the principle of effectiveness, potential gaps may be narrower than might at first appear, removing the incentive to use private companies to commit wrongs or to avoid oversight and accountability. Where conduct exceeds authority, which predictably happens not infrequently in certain contexts, the assessment of what is ‘incidental to’ or ‘closely associated’ with the exercise of the functions conferred or authorised by the state would take into account what was

181 The example in the commentary is of ‘private security firms may be contracted to act as prison guards’. ILC Articles, supra note 4, Commentary at, p. 92. The ICSID tribunal has considered in what situations companies are used as ‘instrument of state action’. See discussion of cases in Jones, ‘Implausible Deniability’, supra note 164 at p. 43.
182 ILC Articles, supra note 4 at Article 5.
183 Commentaries to the ILC Articles, supra note 4.
184 ILC Articles, supra note 4 at Article 5.
reasonably foreseeable for the state, in all the circumstances. The relationship may also be covered by Article 5 where public functions, such as the use of force or interrogation, are transferred to private hands through legal agreements.

3.4 CONCLUSION

A state is responsible for an act of terrorism by private actors where it exercises effective control over the act, or subsequently endorses it as its own. States may also be responsible for other internationally wrongful acts related to acts of terrorism, such as failing to take reasonable measures to prevent their territories being used by terrorists. As a matter of law, state responsibility has serious implications for the wrong-doing state and, potentially, for the rights and obligations of other states.

Yet there has been little clarity as regards assessments of state responsibility for 9/11 and the significance thereof. Was Afghanistan alleged to have been responsible for 9/11 or for a different wrong and was it thought to matter? What were the lawful consequences of its wrong-doing? In practice, while little clarity has attended allegations of responsibility post-9/11, vague suggestions have emerged that the attacks on Afghanistan, and to some degree Iraq, were justified at least in some part due to the relationship between those states and terrorism. The dramatic consequences for those states may illustrate the importance of greater clarity in the future around the nature and scope of states’ obligations in respect of terrorism, the consequences of breach thereof, and permissible responses on the part of other states.

Understanding responsibility for the September 11 attacks and other acts of international terrorism is an important process in itself. If the law is to be taken seriously, responsibility must have at least potential consequences for the wrongdoing state. Confusion as to whether there is responsibility, what the standard of attribution is, and whether it matters at all, therefore has

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185 Uncertainties as to the law include the issues related to ‘terrorism’ discussed in Chapter 2, and those relating to the status and content of different formulations relating to obligations in respect of terrorism, such as those relating to ‘harbouring and support’ highlighted above.

broader, serious implications for international law enforcement. The same principle applies to state responsibility resulting from wrongs committed through terrorism or counter-terrorism, whether committed directly by organs of the state or through other states or private actors.

Claims or proposals have sprung up around the emergence of new or different legal standards for attributing conduct to states. Although some claim the nature of post-9/11 practice – whether through ‘instant custom’ or otherwise – has given rise to new binding law, for the most part commentators provide a skeptical assessment of current law and proposals for more ‘flexible’ rules for the future (lex ferenda). While other standards, including notably the ‘overall control’ test, or perhaps a broader causation based model, may provide a framework which more readily allows for the attribution of conduct of terrorist groups, and indeed of PSCs, to a state, they remain doubtful as statements of the law as it currently stands. The challenges to state responsibility in the particular contexts of international terrorism, or of the responsibility of private contractors, are however relevant to the interpretation and application of the legal framework to the particular facts. Caution is doubtless due before discarding the law of state responsibility developed over many decades, and claims of new standards having emerged may be overstated. Legal standards should certainly be applied in a manner that is mindful of the reality in which the law operates and the need to ensure that the law can be effective and meet its purpose, particularly where the result would otherwise be a juridical gap.¹⁸⁷

The law of responsibility is controversial, and arguably in flux, but it does provide important parameters for assessing and responding to international wrongs. The greatest challenge to injured states – and to others that, as the above framework reflects, share responsibility to act in the face of serious wrongs¹⁸⁸ – is to ensure that international law is upheld and enforced against those responsible for ‘terrorism’ or for unlawful responses thereto.

¹⁸⁷ For states obligations extra-territorially under IHRL, which usually involve control of territory or acting through agents, see Chapter 7A2. See however the progressive approach of the Human Rights Committee in the Concluding observations on the sixth periodic report of Germany, 2 November 2012, para. 16 on the possibility of German responsibility for companies domiciled on its territory but active abroad.

¹⁸⁸ As discussed above, depending on the status of the norm infringed (i.e., on whether the norm is a ‘peremptory norm of international law’) and on the seriousness of the breach, the commission of an internationally wrongful act may give rise to an obligation of every state of the international community to react to the wrongful conduct. As will be seen, this is relevant to various aspects of the framework of international law relevant to responses to 9/11, from the use of force to violations of international humanitarian law and human rights law.