3. Terrorism and the international law of state responsibility[1]

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1. INTRODUCTION

The international community has long co-operated in its efforts to suppress international terrorism.[2] These efforts have principally taken one of three forms: (i) international treaties aimed at securing the individual criminal responsibility of terrorist actors;[3] (ii) individual or multi-lateral responses to terrorist attacks in reliance on Article 51 of the UN Charter;[4] and (iii) Security Council measures adopted under Chapter VII of the UN Charter,[5] straddling the individual criminal responsibility and *jus ad bellum* approaches. While these responses are important weapons in the international community's counter-terrorism arsenal, ensuring that individual actors are held criminally responsible for

[1] This chapter will be published in the forthcoming 2nd edition of Ben Saul (ed.), RESEARCH HANDBOOK IN TERRORISM AND INTERNATIONAL LAW (Edgar Elgar Publishing, forthcoming 2019) and is not to be cited without permission.

[2] The first terrorism suppression convention was adopted under the auspices of the League of Nations in response to the assassination of King Alexander of Yugoslavia in Marseilles on 9 October 1934. Convention for the Prevention and Punishment of Terrorism, adopted 16 November 1937, League of Nations Doc C.546(I).M.383(I).1937.V (never entered into force).

[3] There are currently 13 international conventions and protocols addressing various manifestations of terrorism (including hijackings, ship-jackings, hostage takings, crimes against internationally protected persons, terrorist bombings and acts of nuclear terrorism) which require states parties to (i) criminalize the defined terrorist conduct; (ii) co-operate in the prevention of that conduct; and (iii) extradite or submit the alleged offender to prosecution. A full list of the international terrorism suppression conventions and protocols can be found at UN, *United Nations Action to Counter Terrorism: International Legal Instruments* <www. un.org/en/terrorism/instruments.shtml>, and are referred to in this chapter as the 'Terrorism Suppression Conventions'.

[4] See Chapter 12 in this book on terrorism and the international law on the use of force.

[5] On the Security Council's activities in regard to terrorism, see Chapters 35–36 in this book.

their terrorist offences and responding to terrorism through a security paradigm does not fully address the systemic consequences of un-remedied breaches of international law. As discussed in this chapter, states have obligations to refrain from engaging in and to prevent acts of international terrorism, and to extradite or submit terrorist actors for prosecution.[6] Holding states responsible for breaches of these obligations can play an important role in maintaining respect for international law[7] and can prevent the escalation of threats to international security by promoting the reconciliation of the relevant states and restoring "confidence in a continuing relationship".[8] This chapter provides an introductory overview and analysis of questions of state responsibility in the terrorism context, focusing on contested legal issues.[9]

2. THE BASIC FRAMEWORK OF STATE RESPONSIBILITY

The ILC Articles on State Responsibility adopt a distinction between primary rules, consisting of the substantive rules of international law, and the secondary rules of state responsibility – rules of general application, which identify a breach of the primary rules and the consequences of any such breach.[10] This chapter follows that framework of analysis.

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[6] See Section 3 below.

[7] See International Law Commission ('ILC'), *Draft Articles on State Responsibility for Internationally Wrongful Acts, with Commentaries*, in *Report of the International Law Commission on the work of its 53rd session*, UN Doc A/56/10 (2001) IV State Responsibility, Part II, Chapter I, [2] ('ILC Articles on State Responsibility').

[8] James Crawford (Special Rapporteur), *Third Report on State Responsibility*, UN Doc A/CN.4/507 (15 March 2000) [57].

[9] For a fuller account, see Kimberley N Trapp, *State Responsibility for International Terrorism* (OUP, 2011).

[10] See Robert Ago (Chairman of the Sub-Committee on State Responsibility), *Report on State Responsibility*, UN Doc A/CN.4/152 (16 January 1963) annex I, [5]; James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP, 2002) 16.

Conduct that is attributable to a state and is in breach of a primary obligation of international law gives rise to the wrongdoing state's responsibility for the internationally wrongful act by operation of the law.[11] As a result of its responsibility, a wrongdoing state is under a secondary obligation to cease the internationally wrongful act (if it is continuing),[12] and to make full reparation for any injury caused (whether material or moral).[13]

Following initial protests by an injured state, wrongdoing states only rarely (if ever) acknowledge responsibility for international terrorism, as evidenced by important cases like the *Rainbow Warrior Affair*[14] and the *Lockerbie Incident.*[15] To the extent that a wrongdoing state does not acknowledge its responsibility for an internationally wrongful act related to terrorism, and fails to comply with the secondary obligations flowing therefrom, the injured state is entitled to take action to secure the wrongdoing

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[11] See ILC Articles on State Responsibility, Commentary to Article 43, [2]; James Crawford, 'The System of International Responsibility' in James Crawford et al (eds), *The Law of International Responsibility* (OUP, 2010) 17, 23. See further Section 3 below.

[12] ILC Articles on State Responsibility, art 30(a). See further Oliver Corten, 'The obligation of cessation' in James Crawford et al (eds), *The Law of International Responsibility* (OUP, 2010), 545.

[13] ILC Articles on State Responsibility, art. 31. A state may also be under a secondary obligation to 'offer appropriate assurances and guarantees of non- repetition, *if circumstances so require*': ILC Articles on State Responsibility, art 30(b) (emphasis added). The ILC considers that assurances and guarantees of non-repetition are of a 'rather exceptional character' (ILC Articles on State Responsibility, art 30(b)), but injured states often request them in regard to the breach of international terrorism obligations given the importance of the security interests at stake: For examples, see Trapp, above n 8, section 5.1.4.

[14] *The Differences Between New Zealand and France Concerning the Interpretation and Application of Two Agreements, concluded on 9 July 1986, between the Two States and which Related to the Problems Arising from the Rainbow Warrior Affair (New Zealand v France) (Decision)* XX RIAA 215 (1990) ('*Rainbow Warrior Affair*').

[15] *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America) (Preliminary Objections)* [1998] ICJ Rep 115 ('*Lockerbie Incident*'). The refusal to acknowledge responsibility may in some cases be the result of actual non-responsibility, rather than a refusal to 'own up'. In respect of the *Lockerbie Incident*, it was long rumoured that Iran was in fact responsible for the attack, as retribution for the US downing of an Iran Air 655 over the Gulf by the USS *Vincennes*. See the Telegraph, 'Lockerbie bombing 'was work of Iran, not Libya' says former spy', 10 March 2014, <https://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/10688067/Lockerbie-bombing-was-work-of-Iran-not-Libya-says-former-spy.html>.

state's compliance with its obligations of cessation and reparation. The implementation of state responsibility for international terrorism is examined in Section 5 below.

3. ELEMENTS OF AN INTERNATIONALLY WRONGFUL ACT

Article 2 of the ILC Articles on State Responsibility stipulates that, 'There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State'. This section examines these elements of an internationally wrongful act in the terrorism context in reverse order.

A. Breach of an International Obligation of the State

(i) Prohibition of 'state terrorism'

The rule prohibiting states from engaging in terrorism is an instantiation of rules under general international law which regulate the use of force. Engaging in or supporting acts of trans-national terrorism is but a particular form of using force in international relations, which is amply regulated by the UN Charter and customary international law.[16] For instance, a state's participation in terrorism will amount to an act of aggression where the terrorist attack is attributable to the state and is of such gravity as to amount to an act of aggression had it been carried out by the state's military forces.[17] If the terrorist attack is not grave enough to be characterised as an act of aggression, but is nevertheless attributable to the state, the state's conduct will amount to a prohibited

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[16] See *In Larger Freedom: Towards Development, Security and Human Rights for All – Report of the Secretary General*, UN Doc A/59/2005 (21 March 2005) [91]. See also *Report of the High Level Panel on Threats, Challenges and Change – A More Secure World: Our Shared Responsibility*, UN Doc A/59/565 (2 December 2004); Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN General Assembly Res 2625 (24 October 1970).

[17] Definition of Aggression, UN General Assembly Res 3314 (14 December 1974) art 3(g).

use of force (in breach of Article 2(4) of the UN Charter and customary international law reflected in the UN Declaration on Friendly Relations). Where terrorist conduct is not attributable to a state, a state's support for such conduct may nevertheless amount to a prohibited use of force if the support is military in nature (for example training in military tactics and the provision of weapons, weapons systems, or ammunition to non-state actors).[18] Other forms of support, for instance financial and diplomatic assistance, breach the principle of non-intervention.[19]

(ii) Counter-terrorism obligations

A state's active participation in international terrorism undoubtedly undermines international peace and security, and is therefore appropriately viewed through the prism of the UN Charter. Efforts to suppress international terrorism, however, have equally addressed threats emanating from the terrorist conduct of non-state actors, and obligations to prevent and to extradite or submit cases to prosecution are the corner-stone of such efforts.

Obligation to prevent international terrorism

Customary international law has long imposed an obligation on states not to "allow knowingly [their] territory[ies] to be used for acts contrary to the rights of other

[18] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Judgment)* [1986] ICJ Rep 14 [228] ('*Nicaragua*').

[19] Ibid. But see Trapp, above n 8, section 2.1.2, arguing that the *Nicaragua* distinction between support which breaches the prohibition on the use of force, and support which breaches the prohibition on intervention, is a mis-reading of the UN Declaration on Friendly Relations.

States",[20] subject to a due diligence standard of conduct.[21] A state's obligation to prevent international terrorism (as a type of harm that might emanate from a state's territory) is a specific instantiation of this general obligation, and is codified in each of the Terrorism Suppression Conventions.[22] As is the case for the customary international law obligation to prevent, the TSC obligations to prevent international terrorism have a territorial component and are subject to a due diligence standard.[23] Traditionally, compliance with a due diligence obligation of prevention would be evaluated in light of what the state knew (or ought to have known) about the threat emanating from its territory and its genuine capacity to avert the threat.[24] But there have arguably been

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[20] See *Corfu Channel Case (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 22. See further ILC, *Survey of International Law in Relation to Its Work of Codification of the International Law Commission*, UN Doc A/CN.4/1/Rev.1 (10 January 1949) 56, [97].

[21] See, e.g., *Alabama Claims Case (United States of America v Great Britain)* (1871) in John Bassett Moore (ed.), *History and Digest of the International Arbitrations to which the United States has been a Party* (Government Printing Office, 1898) vol 1, 495, 572–3; *Neer Case (United Mexican States v United States of America) (Decision)* (1926) IV RIAA 60, 61–2; Hersch Lauterpacht, 'Revolutionary activities by private persons against foreign states (1927)' in Elihu Lauterpacht (ed), *The Collected Papers of Hersch Lauterpacht* (CUP, 1970) vol 3, 251, 276; Ian Brownlie, *System of the Law of Nations: State Responsibility* (Clarendon Press, 1983) Part I, 37–49; Ricardo Pisillo-Mazzeschi, 'Due diligence and the international responsibility of states' (1992) 35 *German Yearbook of International Law* 9, 34–6; Liesbeth Zegfeld, *Accountability of Armed Opposition Groups in International Law* (CUP, 2002) 181–2.

[22] See, e.g., Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, adopted 23 September 1971, 974 *UNTS* 177 (entered into force 26 January 1973) art 10 ('Montreal Convention'); International Convention for the Suppression of Terrorist Bombings, adopted 15 December 1997, 2149 *UNTS* 256 (entered into force 23 May 2001) art 15(a) ('Terrorist Bombing Convention').

[23] See, e.g., Richard Lillich and John Paxman, 'State responsibility for injuries occasioned by terrorist activities' (1977) 26 *American University Law Review* 217, 309–10; International Law Association, *Report of the Sixty-First Conference: Held at Paris, 26 August–1 September (1984)* (ILA, 1985) 7; Luigi Condorelli, 'The imputability to states of acts of international terrorism' (1989) 19 *Israel Yearbook on Human Rights* 233, 240–1; John F. Murphy et al., 'Report of the Special Working Committee on Responses to State Sponsored Terrorism' (1991) 22 *Studies in Transnational Legal Policy* 9, 22; Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (OUP, 2006) 140–1; Ben Saul, *Defining Terrorism in International Law* (OUP, 2006) 196. As the obligation of prevention set forth in each of the TSCs requires only that states take 'all practicable measures' in preventing terrorism, it too is subject to a due diligence standard of conduct, and cannot be interpreted as an obligation of result. See, e.g., Montreal Convention, art 10; Terrorist Bombing Convention, art 15.

[24] See Robert Barnidge, 'States' Due diligence obligations with regard to international non-state terrorist organizations post-11 September 2001: The heavy burden that states must bear' (2005) 16

changes to the standard for compliance with terrorism prevention obligations in the post 9/11 era.

In particular, one might argue that there has been a decrease in the margin of appreciation which states enjoy in setting their own counter-terrorism priorities and determining appropriate measures to meet those priorities. Through the adoption of rather controversial Chapter VII legislative resolutions,[25] the Security Council has put states on notice that the threat of terrorism is global. As a result, the discretion afforded states in assessing the risk of terrorists operating from within their territory (and acting accordingly) has effectively been limited. In addition, there is a *vast* UN Counter-Terrorism machinery to assist States in adopting measures to prevent terrorism – arguably setting the gold standard for compliance with international terrorism suppression obligations.[26] Together, these features of the post 9/11 terrorism prevention terrain heighten the standard of conduct to which states are held. Whereas states had a margin of appreciation in determining appropriate prevention measures prior to 9/11, they are now more likely to be required to account for having failed to take the precise measures called for by UN counter-terrorism bodies, specialised UN agencies and relevant capacity building partners. That said, much of the UN capacity building

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Irish Studies in International Affairs 103; Trapp, above n 8, 64–74. Cf. Vincent-Joël Proulx, *Transnational Terrorism and State Accountability: A New Theory of Prevention* (Hart, 2012) in which he evaluates the implementation of a strict liability inspired model of responsibility in the terrorism prevention context.

[25] See, e.g., Paul Szasz, 'The Security Council starts legislating' (2002) 96 *American Journal of International Law* 901; Stefan Talmon, 'The Security Council as world legislature' (2005) 99 *American Journal of International Law* 175.

[26] See Chapters 33–34 in this book. See also UN Secretary General, *Report on Capability of the United Nations system to assist Member States in implementing the United Nations Global Counter-Terrorism Strategy*, UN Doc A/71/858 (3 April 2017); *Strengthening the capability of the United Nations system to assist Member States in implementing the United Nations Global Counter-Terrorism Strategy*, UN General Assembly Res 71/291 (19 June 2017); *The United Nations Global Counter-Terrorism Strategy Review*, UN General Assembly Res 72/284 (2 July 2018).

assistance relates to developing an institutional infrastructure aimed at preventing international terrorism. Small states with limited financial and human resources will still have difficulty in putting any resulting institutional capacity to good use.[27] In assessing a state's compliance with its due diligence obligations, significant attention will therefore still need to be paid to available material resources and states' competing priorities.

Obligation to extradite or submit to prosecution

Each of the TSCs imposes the following obligation on states: 'The State Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution [...]'.[28] It is debatable[29] but unlikely that the *aut dedere aut judicare* obligation in regard to terrorist offences has attained customary international law status.[30]

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[27] See *Report of the High Level Panel on Threats, Challenges and Change – A More Secure World: Our Shared Responsibility*, UN Doc A/59/565 (2 December 2004) [154].

[28] See, e.g., Montreal Convention, art 7; Terrorist Bombing Convention, art 8.

[29] For e.g., taking the position that there is no customary international law *aut dedere aut judicare* obligation in reference to terrorist crimes, see, e.g., John F Murphy, *Legal Aspects of International Terrorism: Summary Report of an International Conference, American Society of International Law* (West Publishing Co, 1980) 27–8; Christopher C Joyner, 'International extradition and global terrorism: Bringing international criminals to justice' (2003) 25 *Loyola of Los Angeles International and Comparative Law Review* 493, 499–500. Cf, e.g., M Cherif Bassiouni, *International Extradition: United States Law and Practice* (Oceana Publications, 1981) 2; Amrith Rohan Perera, 'Reviewing the UN Conventions on Terrorism: Towards a comprehensive convention' in Fihnaut, Wouters and Naert (eds), *Legal Instruments in the Fight Against Terrorism: A Transatlantic Dialogue* (Martinus Nijhoff, 2004) 567, 569. On *aut dedere aut judicare* more generally, also noting reservations as to its customary status, see ILC, *Final Report on the Obligation to Extradite or Prosecute* (aut dedere aut judicare), [2014] *Yearbook of the ILC*, vol II (Part Two), [49[- [55].

[30] The extensive treaty practice over the past 40 years imposing an *aut dedere aut judicare* obligation on states in regard to terrorist offences undermines claims as to its customary status.

The *aut dedere aut judicare* obligation has been interpreted by an ILC Special Rapporteur and the Committee against Torture as an 'either/or' obligation – that is to say that states must submit to prosecution in default of extradition, *and* must extradite in default of submission to prosecution.[31] Such a reading, however, is inconsistent with the way in which these treaty obligations are framed. Extradition under the TSCs (and other criminal law enforcement treaties) is not an obligation – it is an option.[32] Only submission to competent authorities for the purposes of prosecution is framed in terms of an obligation – triggered by failure to exercise the option of extradition.[33] Even in the form of an obligation, however, submission to prosecutorial authorities requires relatively little of states. Under the TSCs, states do not commit themselves to going

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See *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Preliminary Objections)* [2007] ICJ Rep 582, [90]. See further UN General Assembly Sixth Committee, *Summary Record of the 22nd meeting*, UN Doc A/C.6/62/SR.22 (4 December 2007) [90] (United States); ILC, *The Obligation to Extradite or Prosecute* (aut dedere au judicare): *Comments and Information Received from Governments*, UN Doc A/CN.4/599 (30 May 2008) [47]–[55] (Russian Federation).

[31] See Zdzislaw Galicki (Special Rapporteur), *Preliminary Report on the Obligation to Extradite or Prosecute* (aut dedere aut judicare), UN Doc A/ CN.4/571 (7 June 2006) [49]; Zdzislaw Galicki (Special Rapporteur), *Fourth Report on the Obligation to Extradite or Prosecute* (aut dedere aut judicare), UN Doc A/CN.4/648 (31 May 2011), para 95; Committee Against Torture, *Suleymane Guengueng et al. v Senegal, Communication No 181/2001*, UN Doc CAT/C/36/D/181/2001 (17 May 2006) [9.11].

[32] With the exception of TSCs adopted from 1997 onward (which prohibit invocation of the political offence exception in regard to extradition for terrorist offences), there is nothing in the language of the TSCs which limits a state's discretion to refuse extradition. Indeed extradition is subject to the conditions provided for by the law of the requested state (for instance domestic law which precludes the extradition of nationals). One possible reading of the regime interaction issues raised by the *Lockerbie Incident* is that the Security Council, through its adoption of Chapter VII resolutions requiring Libya to transfer its agents to the US or UK, interfered with Libya's rights to refuse such requests under the Montreal Convention. Security Council Res 748 (31 March 1992) would nevertheless take precedence over any such treaty rights in virtue of Article 103 of the UN Charter.

[33] The ICJ initially considered Belgium's interpretation of an *aut dedere aut judicare* obligation as an 'either/or' obligation to be 'plausible' at the Provisional Measures stage in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Provisional Measures)* [2009] ICJ Rep 139, [58], but has since rightly interpreted extradition as optional and submission to prosecution as an obligation: *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Judgment)*, unreported (21 July 2012) [95].

ahead with a prosecution, and indeed there are any number of reasons why a state's prosecutorial authorities might exercise discretion against proceeding, including lack of evidence and immunity issues.[34] As long as the decision not to proceed with a prosecution is undertaken in good faith and with due consideration to available evidence, a state should not be held to be in breach of its *aut dedere aut judicare* obligation under the TSCs. The unlikelihood of implementing state responsibility for a breach of these obligations is therefore not down to the application of the secondary rules, but is a product of the weak obligations imposed by the primary rules and the balance they strike between respecting the independence of prosecutorial decision making in the domestic criminal systems of state parties and eliminating impunity for terrorist offences.

4. ACTION OR OMISSION THAT IS ATTRIBUTABLE TO THE STATE

Attributing a breach of counter-terrorism obligations, whether in the form of a failure to diligently prevent, or a failure to extradite or submit to prosecution in good faith, raises no particular difficulties. Prevention and *aut dedere aut judicare* obligations, by their nature, call for action on the part of state organs. Any inaction amounting to a breach will therefore be attributable to those state organs and fulfil the attribution requirement for an internationally wrongful act,[35] giving rise to the state's responsibility by operation of the law.[36] Responsibility for state terrorism (amounting to an act of

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[34] See ILC, *Final Report on the Obligation to Extradite or Prosecute* (aut dedere aut judicare), [2014] *Yearbook of the ILC*, vol II (Part Two) [21]-[22], citing to Trapp, above n 9, section 3.2. See further Roger O'Keefe, *International Criminal Law* (OUP, 2015) [9.23] – [9.24].

[35] The conduct of a state organ (acting within its official capacity) is attributable to the state: ILC Articles on State Responsibility, arts 4 and 7.

[36] ILC Articles on State Responsibility, Commentary to Article 43, [2].

aggression or a prohibited use of force), which requires the attribution of an act of terrorism to a state, is however a much more complicated matter.

In particular, successful application of the rule attributing the conduct of state organs to a state is complicated by difficulties in situating terrorism within a sphere of legitimate state activity. A state is responsible for the conduct of its organs even if they have exceeded their competence under municipal law or disobeyed instructions (*ultra vires* conduct),[37] as long as the organ acted in an official capacity (that is to say has *not* acted in a purely private capacity).[38] But the distinction between *ultra vires* and private conduct is particularly problematic to apply in the terrorism context given that acts of terrorism carried out by state organs will often be in the form of covert operations, carried out by secret service agents who do not display any outward manifestation of the authority under which they act. The state organs will appear to be private citizens, engaging in private conduct.

Consider, for example, the *Rainbow Warrior* bombing, carried out by French secret service agents travelling in New Zealand as tourists on Swiss passports – without any outward manifestation of the French authority under which they acted. As a result, the

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[37] Because *ultra vires* conduct, by definition, will not be in the *actual* official capacity of the state organ (but beyond it, while connected to it), official capacity is determined both in reference to the real and apparent authority of a state organ: ILC Articles on State Responsibility, Commentary to Article 7, [3]. Apparent authority exists when the state organ acts under 'cover of [its] official character' (League of Nations, *Acts of the Conference for the Codification of International Law held at The Hague from 13 March to 12 April 1930 (Minutes of the Third Committee)*, League of Nations Doc C.351(c) M.145(c).1930.V (1930) vol IV, 237); or while 'cloaked with governmental authority.' (*Petrolane Inc. v The Government of the Islamic Republic of Iran* (1991) 27 IUSCTR 64, 92).

[38] See, e.g., Robert Ago (Special Rapporteur), *Fourth Report on State Responsibility: The Internationally Wrongful Act of the State, Source of International Responsibility*, UN Doc A/CN.4/264 and Add.1 (30 June 1972 and 9 April 1973) [11]-[52]; ILC, *Report on the Work of its 25th session, 7 May – 13 July*, UN Doc A/9010/Rev.1 (1973) 191–193; Brownlie, above n 20. This rule is now codified in the ILC Articles on State Responsibility, art 7.

Rainbow Warrior bombing could not be said to have been carried out 'under colour of authority'. Attributing such conduct to a state would require finding that, in carrying out the act of terrorism, the state organ concerned was acting in its *actual* (rather than *apparent*) official capacity. Such a determination will invariably involve sensitive policy judgments as to the proper sphere of state activity. The *Rainbow Warrior Affair* did not come to this, as France eventually abandoned its claim of non-responsibility and admitted that the persons in New Zealand's custody were Direction Genérale de la Sécurité Exterieure agents.[39]

Such admissions of responsibility are, however, rare indeed.[40] For example, more recently and closer to home (for this author in any event), there is a continuing dispute regarding the responsibility of the Russian Federation for the 'Skripal poisoning.'[41] The UK Government has named two suspects, who travelled to the UK on Russian passports, both of whom are alleged to be members of the Russian Military Intelligence Services.[42] The two suspects, and the Russian government, claim the named men were tourists – in the 'wonderful town' of Salisbury to visit its cathedral.[43] The UK has formally invoked the Russian Federation's

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[39] Communiqué from the French Prime Minister dated 22 September 1985 (1987) 74 *International Law Reports* 261.

[40] See Trapp, above n 8, 36–7.

[41] Sergei Skripal (a former Russian military intelligence officer) and his daughter Yulia were deliberately exposed to the nerve agent Novichok, in Salisbury, UK, on 4 March, 2018. BBC, 'Russian spy poisoning: What we know so far', 26 September 2018, <https://www.bbc.co.uk/news/uk-43315636>. In their presentations to the Security Council ('SC'), states have framed the incident in terms of the prohibition on chemical weapons, and not as a 'terrorist' attack, (see generally UNSC, Provisional Records, UN Doc S/PV.8343 (6 September, 2018)), but the criminal investigation in the UK was undertaken in part by the counter-terrorism policing unit of the Metropolitan police (see Metropolitan Police, 'Counter-terrorism police release images of two suspects in connection with Salisbury attack', 5 September, 2018, <http://news.met.police.uk/news/counter-terrorism-police-release-images-of-two-suspects-in-connection-with-salisbury-attack-320534>).

[42] UN Doc S/PV.8343 (2018), above n 41, 3

[43] See BBC, 'Russian spy poisoning: What we know so far', above n 41.

responsibility, and has responded to the Skripal poisoning (along with allied States and NATO) through the adoption of retorsive measures.[44] Russia is however unlikely to comply with any secondary obligations given its repeated denial of responsibility.

Even where State organs are not acting as secret service agents, doubts can be manufactured as to the capacity (official or private) in which they act. Consider for instance the reported practice of Russian soldiers' removing the identification badges and flags from their uniform before crossing the border into the Ukraine for the purposes of participating in the conflict in Crimea.[45] While some of the soldiers confirmed that they remained members of the Russian armed forces, the Russian government insisted these soldiers had acquired their military uniforms from army surplus stores.[46] Such 'ruses', not strictly perfidious, create evidential complications in proving attribution to a State – complications which are compounded in the terrorism context. This said, proving attribution in respect of (or at least state organ involvement in) acts of terrorism is not impossible. The Joint Investigation Team charged with determining responsibility for the downing of MH17 over Eastern Ukraine on 17 July 2014[47] has determined that the attack was carried out with a BUK missile system belonging to the 53rd Anti-Aircraft Missile brigade (a unit of the Russian army from Kursk).[48] Australia and the Netherlands formally invoked

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[44] See Section 5.B below.
[45] Ewen MacAskill, 'Russian troops removing ID markings 'gross violation'', The Guardian (6 March 2014) <https://www.theguardian.com/news/defence-and-security-blog/2014/mar/06/ukraine-gross-violation-russian-troops>.
[46] Ibid.
[47] See BBC, 'Malaysia jet crashes in east Ukraine conflict zone', 17 July 2014, <https://www.bbc.co.uk/news/world-europe-28354856>. The Joint Investigation Team is a cooperative police investigation between the Netherlands, Australia, Malaysia and Belgium, working together with the Ukraine. See Openbaar Ministry, <https://www.om.nl/onderwerpen/mh17-crash/>.
[48] BBC, 'Malaysia jet crashes in east Ukraine conflict zone', above n 47.

Russian responsibility for the attack,[49] and requested negotiations with the Russian Federation with a view to 'finding a solution that would do justice to the tremendous suffering and damage caused by the downing of MH17.'[50] Both States may also choose to invoke Russia's responsibility before the International Court of Justice, as the Ukraine has done.[51]

Despite the alarming increase in Russia's use of State organs to carry out acts which might be characterized as terrorist discussed above, it nevertheless remains exceptional for acts of terrorism to be carried out by organs of a state. States are more likely to conduct terrorist activities through private persons or groups who act secretly (and deniably) on their behalf – and are therefore necessarily outside the formal structure of the state.[52] The applicable standard of attributability in these cases is set forth in Article 8 of the ILC Articles on State Responsibility:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, the State in carrying out the conduct.

Acting on 'instructions of, or under the direction' of a state is a fairly clear standard of attribution, but in most cases, it will pose insurmountable evidentiary difficulties. The control basis of attribution in Article 8, however, raises interesting legal questions in the terrorism context.

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[49] See Australia, Ministry of Foreign Affairs, <https://foreignminister.gov.au/releases/Pages/2018/jb_mr_180525c.aspx>; 'MH17: The Netherlands and Australia hold Russia responsible', 25 May 2018, <https://www.government.nl/latest/news/2018/05/25/mh17-the-netherlands-and-australia-hold-russia-responsible>.

[50] Ibid.

[51] Ibid. In reference to the Ukrainian suit, see Section 5.A below.

[52] See Bruce Hoffman, *Inside Terrorism* (Columbia University Press, 2006) 27; Daniel Byman, *Deadly Connections: States that Sponsor Terrorism* (CUP, 2005) Chapter 2.

To a certain extent, Article 8 represents a codification of the ICJ's decision in *Nicaragua*. In that case, the Court held that the war crimes and crimes against humanity perpetrated by the *contras* "could well be committed [...] without the control of the United States [and that for] such acts to give rise to the legal responsibility of the United States, it would in principle have to be proved that the state had *effective control* of the military and paramilitary operations *in the course of which the alleged violations were committed*."[53] The Court re-affirmed the 'effective control' standard in its *Bosnia Genocide Case* Judgment – and held that Article 8 of the ILC Articles on State Responsibility must be understood in the light of the Court's decision in *Nicaragua*,[54] rendering 'effective control' the exclusive standard of control under Article 8.

The ILC, in codifying *Nicaragua*, however, did not specify the standard of control necessary for attribution. Members of the ILC, when endorsing Special Rapporteur Crawford's formulation of Article 8 (which refers only to 'control'), suggested that varying degrees of sufficient control were required in different legal contexts.[55] States have equally interpreted Article 8 as allowing for flexibility in the applicable standard of control, so that it may be adapted to the particular factual matrix in question. [56] While such approaches to 'control' under Article 8 of the ILC Articles on

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[53] *Nicaragua*, [115] (emphasis added).

[54] *Nicaragua*, [115] (emphasis added).

43 See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43, [399]-[400] ('*Bosnia Genocide*').

[55] ILC, *Report on the Work of its 50th session*, UN Doc A/53/10 and Corr.1 (20 April–12 June and 27 July–14 August 1998) [395]. See also Pierre Dupuy, 'State Sponsors of Terrorism: Issues of International Responsibility' in Bianchi (ed), *Enforcing International Law Norms Against Terrorism* (Hart, 2004), 10. But see *Bosnia Genocide*, [401].

[56] See, e.g., ILC, *Comments and Observations Received from Governments on State Responsibility*, UN Doc A/CN.4/515 (19 March 2001) 23.

State Responsibility have in fact been adopted in other judicial dispute settlement contexts,[57] the ICJ has not suggested itself to be flexible in this regard.

The difficulty with 'effective control' as the *only* applicable control threshold is that adoption of the standard was driven by the particular (and identical) factual matrix in *Nicaragua* and the *Bosnia Genocide Case*. In both cases, the ICJ was dealing with two separate levels of activity: the first was the paramilitary operations of the non-state actors (the *contras* and the VRS respectively), carried out with the support of a state (the US and Serbia), and with the objective of overthrowing a government and/or securing territorial control; the second level of activity involved international crimes perpetrated by the non-state actors in the course of their paramilitary operations. In both cases, the international crimes were a non-inherent feature of the paramilitary operations – in that a military campaign with the objective of territorial control or the overthrow of a government can, in principle, be carried out without the commission of international crimes. As a result, the ICJ's 'effective control' test was formulated to ensure that a state's direct responsibility for such crimes only arises where the state's control extends to the non-inherent features of the military campaign and operations which it supports. In the terrorism context, however, there is not necessarily a second level of activity – the breach of international law (in the form of an act of terrorism) will often be an inherent feature of the relevant operations. This will particularly be the case in regard to support for known terrorist organizations operating outside the context of an armed conflict. Contrary to the case in *Nicaragua* or the *Bosnia Genocide Case*, material support (including logistical support, munitions, and tactical training) for the activities of such terrorist organizations will necessarily imply support for the offences committed

[57] See, e.g., *Bayindir v Pakistan (Award)* ICSID Case No. ARB/03/29 (27 August 2009) [130].

by the terrorists in the course of their use of force (in that the terrorist offence is the use of force, rather than incidental to broader military operations).[58] A more flexible approach to 'control' under Article 8 (for instance the 'overall control' standard applied by the ICTY Appeals Chamber in its *Tadić* decision)[59] is therefore necessary if the rules on state responsibility are to respond to the particularities of the terrorism context in a way that rigid adherence to the *Nicaragua* standard does not allow for.

5. IMPLEMENTATION OF STATE RESPONSIBILITY

The two methods of implementing state responsibility contemplated in the ILC Articles on State Responsibility are (i) the invocation of responsibility and (ii) the adoption of countermeasures.[60]

A. Invocation of Responsibility by an Injured State

A formal invocation of state responsibility includes filing an application before a competent international tribunal – in the terrorism context, this is likely to be the ICJ.[61] Disputes relating to responsibility for an act of aggression or an unlawful use of force (in the form of sponsorship of or support for acts of international terrorism), or a failure to prevent acts of international terrorism, all as breaches of customary international law,

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[58] Financial and other forms of non-military support for organizations designated by the West as 'terrorist' which equally carry out governance functions in the regions within which they operate (for instance Hamas in Gaza and Hezbollah in Lebanon) raise more complicated issues. Such assistance may well be intended to assist the organization in carrying out its governance responsibilities, and the *Nicaragua* 'effective control' test would therefore have to be applied to ensure that the supporting state was only directly responsible for that over which it exercised sufficient control.

[59] *Prosecutor v Tadić (Judgment of the Appeals Chamber)* (ICTY, Case No IT- 94–1-A, 15 July 1999) [137].

[60] This chapter will only examine the implementation of state responsibility by an injured state, as defined in the ILC Articles on State Responsibility, art 42.

[61] See, ILC Articles on State Responsibility, Commentary to Article 42, [2].

may fall within the ICJ's jurisdiction pursuant to a declaration under Article 36(2) of the ICJ Statute.

There is however one important factor which militates against the ICJ's having jurisdiction over international terrorism disputes pursuant to an Article 36(2) declaration – and that is the limited number of relevant declarations accepting the ICJ's compulsory jurisdiction. Only approximately one third of UN member states have accepted the ICJ's compulsory jurisdiction,[62] and very few are states which are habitually charged with sponsorship of, support for, or failure to prevent international terrorism.[63]

This said, the Terrorism Suppression Conventions and their compromissory clauses are a promising basis of the Court's jurisdiction[64] – and not only in regard to a state's breach of the expressly stated obligations to prevent terrorism and to extradite or submit alleged terrorists to prosecution. On the basis of the ICJ's decision in the *Bosnia Genocide Case*, the TSCs may also form the basis of the Court's jurisdiction in regard

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[62] For a list of states which have made optional clause declarations, and the text of any reservations to such declarations, see United Nations Treaty Collection, *Status of the Charter of the United Nations and Statute of the International Court of Justice* <http://treaties.un.org/pages/ViewDetails. aspx?src5TREATY&mtdsg_no5I-4&chapter51&lang5en>.

[63] With the exception of the Sudan, none of the current US designated 'State Sponsors of Terrorism' have filed Article 36(2) declarations. In addition, a number of states with designated terrorist organisations operating from their territory, including Yemen, Algeria, Lebanon and Afghanistan, have not made Article 36(2) declarations. Of the remaining four states identified as terrorist safe havens by the US Department of State which have made an optional clause declaration (Pakistan, Somalia, Colombia and the Philippines), Pakistan has done so subject to a multilateral treaty reservation. See US Department of State, *State Sponsors of Terrorism* <https://www.state.gov/j/ct/list/c14151.htm>; US Department of State (Bureau of Counterterrorism and Countering Violent Extremism), *Country Reports on Terrorism 2017* https://www.state.gov/j/ct/rls/crt/2017/282849.htm>; United Nations Treaty Collection, *Status of the Charter of the United Nations and Statute of the International Court of Justice* <http://treaties.un.org/pages/ViewDetails. aspx?src5TREATY&mtdsg_no5I-4&chapter51&lang5en#5>.

[64] For the TSCs to form the basis of the Court's jurisdiction: (i) the act of terrorism must meet the elements of the offences defined in a convention; (ii) the act of terrorism must not be excluded from the scope of the TSC (such as acts committed during an armed conflict and governed by international humanitarian law, and any acts of the armed forces of a state otherwise governed by international law in respect of terrorist bombings, nuclear terrorism, maritime terrorism and aviation terrorism); and (iii) the states involved in the dispute must be parties to the TSC (without reservation to the compromissory clause).

to alleged breaches of the prohibition on state participation in terrorism, even though the TSCs do not expressly prohibit states from engaging in the acts of terrorism they are required to prevent, criminalize and submit for prosecution.[65]

The ICJ's decision in the *Bosnia Genocide Case* suggests that two types of obligation imposed on states (the one prohibiting the state itself from engaging in a particular act, the other regarding the state as the vehicle for criminal law enforcement against non-state actors engaging in that act) overlap in the obligation to prevent. In its judgment on the merits, the ICJ held that a state's obligation to prevent genocide under the Genocide Convention[66] necessarily implies a prohibition of the commission of genocide by the state itself[67] and that a dispute regarding breach of the prohibition by a state is thereby decidable by the Court pursuant to the compromissory clause of the Genocide Convention. Like the Genocide Convention, the TSCs require states to prevent the particular terrorist conduct they address.[68] As a result of the Court's interpretation of the obligation to prevent, the TSCs – drafted principally with a view to ending impunity for international terrorism committed by natural persons – might also be the vehicle for judicial determinations of a state's direct responsibility for such offences.

Indeed, the Ukraine has relied on a *Bosnia Genocide* argument in its suit against Russia regarding the downing of a civilian airliner, the bombing of peaceful protestors, and attacks against civilian residential areas (all carried out by non-state actors in the context of the armed conflict in Eastern Ukraine). The Ukraine has invoked

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[65] See Kimberley N Trapp, 'Holding states responsible for terrorism before the International Court of Justice' (2012) 3 *Journal of International Dispute Settlement* 279.

[66] Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) ('Genocide Convention').

[67] *Bosnia Genocide*, [166].

[68] See, e.g., Montreal Convention, art 10; Terrorist Bombing Convention, art 15.

responsibility pursuant to the Terrorism Financing Convention[69] and is arguing that the Convention obliges state parties to both prevent the financing of terrorism (which it does expressly),[70] and to refrain from financing acts which fall within the definition of 'terrorism' under the Convention (based on the reasoning in *Bosnia Genocide*).[71] In its Order deciding the Ukraine's Request for the Indication of Provisional Measures, the Court leaves the question as to whether it will apply the *Bosnia Genocide* case analysis to the Terrorism Financing Convention open.[72] Given that the underlying conduct which forms the basis of the Ukraine's Application took place in the context of an armed conflict, there are difficult issues of regime interaction with IHL at stake. It is nevertheless at least this author's hope that the Court will take this opportunity to exercise its jurisdiction with a view to serving the interests of international peace and security.[73]

B. Countermeasures

In the context of an imperfectly centralised international legal system, injured states occasionally have to engage in 'self-help' for the purposes of "vindicating their rights and [...] restor[ing] the legal relationship with the responsible state which has been

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[69] International Convention for the Suppression of the Financing of Terrorism, adopted 9 December 1999, UN Doc. A/RES/54/109 (1997) ('Terrorism Financing Convention'), art 24; Application Instituting Proceedings, *Terrorism Financing and Racial Discrimination in Ukraine (Ukraine v Russian Federation)*, filed in the Registry of the Court 16 January 2017.
[70] Terrorism Financing Convention, art 18.
[71] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Request for the Indication of Provisional Measures, Oral Proceedings, CR 2017/3, [37]-[43].
[72] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Request for the Indication of Provisional Measures, Order of 19 April 2017, <https://www.icj-cij.org/en/case/166/orders>, para 30.
[73] See further Kimberley N Trapp, 'Ukraine v Russia (Provisional Measures): State 'Terrorism' and IHL', EJIL:Talk!, 2 May 2017, <https://www.ejiltalk.org/ukraine-v-russia-provisional-measures-state-terrorism-and-ihl/>.

ruptured by the internationally wrongful act."[74] As far as possible, states have tended to respond to breaches of international obligations related to terrorism without breaching their own international obligations toward the wrongdoing state.[75] International law does, however, recognise that the commission of an internationally wrongful act by one state may excuse a responsive breach by the injured state for the limited purposes of securing the wrongdoing state's compliance with its primary and secondary obligations. Such measures are referred to as countermeasures within the framework of the ILC Articles on State Responsibility[76] and must be peaceful, purpose-limited, and proportionate to the injury suffered.[77]

In adopting countermeasures, an injured state often needs to rely on its unilateral assessment of the wrongfulness of the conduct to which it is responding. The injured state 'does so at its own risk and may incur responsibility for an unlawful act in the event of an incorrect assessment.'[78] This 'at your own risk' element of countermeasures will be particularly notable in the terrorism context, given the clandestine nature of terrorist conduct and the resulting evidentiary difficulties in establishing sponsorship of

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[74] ILC Articles on State Responsibility, IV State Responsibility, Part Three, Chapter II: Countermeasures, [1].

[75] See Trapp, above n 8, Chapter 5. More recently, in response to the UK's invocation of Russian responsibility for the Skripal poisoning (see above n 41 and accompanying text), 29 countries (including the US, Canada, Germany and France) expelled 145 Russian officials, and NATO ordered 10 Russians out of its mission in Brussels. UN Doc. S/PV.8343 (2018), 3; BBC, 'Russian spy poisoning: What we know so far', above n 41. The expulsions were characterised by the UK Ambassador to the United Nations as a 'proportionate and direct response' (UN Doc. S/PV.8343 (2018), 3) – even though retorsive measures, strictly speaking, need not be proportionate to the injury suffered as a result of the internationally wrongful act given that such measures are not unlawful to begin with. The adoption of retorsive measures (as distinguished from countermeasures) nevertheless signal an intention to avoid escalating a dispute, and the proportionality of any such measures is therefore a sound policy choice.

[76] See ILC Articles on State Responsibility, art 22.

[77] See ILC Articles on State Responsibility, arts 49 and 51.

[78] ILC Articles on State Responsibility, Commentary to Article 49, [3]. See also James Crawford (Special Rapporteur), *Second Report on State Responsibility*, UN Doc A/CN.4/498/Add.4 (19 July 1999) 12, n 724.

or support for terrorism. In the absence of compulsory dispute settlement in international law, these dangers of auto-determination can give rise to an escalation in tensions between the parties to a dispute – particularly in cases where the target state does not accept (admit) that its conduct is internationally wrongful.[79]

The requirement that countermeasures be proportionate may also give rise to particular difficulties in the terrorism context. Proportionality is not strictly a matter of balancing the relative harm suffered by the injured state as a result of the initial breach against that suffered by the wrongdoing state as a result of the countermeasure.[80] The importance of the interests being protected by the injured state in its adoption of countermeasures must also be balanced against the importance of the interests affected by the countermeasures.[81]

But assessing the character and severity of an internationally wrongful act related to terrorism, for the purposes of adopting a proportionate response, is not an easy task for an injured state. Absent third party dispute settlement, it is for the injured state alone to assess whether the wrongdoing state is 'directly' responsible for an act of terrorism (through the mechanism of attribution), or 'indirectly' responsible for acts of terrorism through its support for, acquiescence in, or failure to exercise the required due diligence in preventing terrorism. Depending on the injured state's appreciation of the facts and law, there is a danger of over-responding with measures that are not proportionate to the

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[79] See René Provost, 'Introduction' in René Provost (ed.), *State Responsibility in International Law* (Ashgate, 2002) xii, xv.

[80] See *Air Service Agreement of 27 March 1946 between the United States of America and France (United States of America v France) (Decision)* (1978) XVIII RIAA 417, [83].

[81] *Gabčíkovo–Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 8, [85]–[87]. See also James Crawford, 'Counter-measures as interim measures' (1994) 5 *European Journal of International Law* 65, 68.

actual wrong committed.[82] This is particularly the case given (i) the difficult application of the rules of attribution (which should be applied in a context-sensitive manner but have to date been applied rigidly by the ICJ), and (ii) the increasing perception that states ought to be in a position to prevent acts of international terrorism as a result of the capacity building efforts of the international community, with a sensitive evaluation of actual financial and human resource capacity of the target state beyond the injured state's appreciation.

It is important to bear in mind, however, that the interest being protected in responding to the breach of international obligations related to terrorism is clearly held to be of the highest importance by the international community.[83] As balanced against the importance of the interests affected by the types of measures states usually adopt (for instance trade and air service interruptions[84]), states will likely have some flexibility in deciding on responsive measures to state involvement in international terrorism.

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[82] See Kenneth W Abbott, 'Economic sanctions and international terrorism' (1987) 20 *Vanderbilt Journal of Transnational Law* 289, 310; Robert Axelrod and Robert O Keohane, 'Achieving cooperation under anarchy: Strategies and institutions' (1985) 38 *World Politics* 226, 235.

[83] See generally United Nations Global Counter-Terrorism Strategy, UN General Assembly Res 60/288 (8 September 2006); UN Secretary General, *Uniting against Terrorism: Recommendations for a Global Counter-Terrorism Strategy*, UN Doc A/60/825 (27 April 2006).

[84] For example, in response to Lebanon's refusal to extradite or submit the persons allegedly responsible for the hijacking of Flight TWA 847 (14 June 1985) to prosecution, the United States halted all flights to and from Beirut International Airport (in breach of its limited air services arrangement with Lebanon). While Lebanon argued that the countermeasure was disproportionate, the measure responded precisely to the United States' inability to rely on Lebanon to act broadly in support of the safety of civil aviation and had it been the subject of judicial decision, would likely have been deemed appropriate on that basis. See Trapp, above n 8, section 5.1.4.

6. CONCLUSION

Terrorism has long been a phenomenon which has both united and divided the international community: united in that acts of headline grabbing terrorism have catalysed international co-operation in their suppression (resulting in the adoption of 13 terrorism suppression conventions and protocols to date); divided in that states have nevertheless continued to use 'terrorist' force (as they have defined it through the TSCs) against each other.

As a result, the international community's response to terrorism has been pendulum like – swinging between a preoccupation with the acts of states (conceptualising the state as a terrorist actor and viewing its conduct through the lens of the *jus ad bellum*) and a preoccupation with the acts of individuals (conceptualising states as the vehicle for imposing criminal responsibility on non-state terrorist actors in reliance on the TSC regime). The framework of state responsibility for international terrorism is, however, neutral in its conception of the state in that questions of state responsibility arise whether states are directly responsible for acts of terrorism or indirectly responsible for failures to prevent or punish the conduct of non-state actors. By responding to the full range of primary obligations in relation to terrorism, state responsibility covers both the *jus ad bellum* and individual criminal responsibility paradigms, but doesn't involve recourse to force, and can therefore play an important role in maintaining respect for these fundamental rules of international law without the escalation of recourse to arms. Despite this potential, successful invocations of state responsibility are relatively rare. This chapter has sought to identify why that might be through an analysis of the problems and prospects for giving effect to state responsibility in the terrorism context. In regard to the applicable primary rules, there are a number of challenges – including

the post 9/11 specificity with which terrorism prevention obligations are imbued and the resulting importance of a sensitive evaluation of states' resource capacity in meeting those obligations. Also of interest is the way in which the TSCs frame the *aut dedere aut judicare* obligation. The obligation to submit to prosecution in default of extradition requires relatively little of states and thereby limits the relevance of the framework of state responsibility in securing the individual criminal responsibility of terrorist actors – breaches of the minimal standard of conduct required by the primary rule will generally only arise in cases of bad faith. As to the application of the secondary rules of attribution, they may require controversial determinations regarding the appropriate sphere of official state activities, or may encounter evidentiary difficulties. In either case, the challenges arise not out of any legal flaw in the secondary rules themselves, but from the clandestine nature of terrorism and state involvement therein. But in cases calling for the application of Article 8 of the ILC Articles on state Responsibility, the ICJ's insistence on the 'effective control' threshold creates a disconnect between what states are doing *in fact* and what they can be held directly responsible for *in law*. This disconnect will not encourage reliance on the framework of state responsibility (over *jus ad bellum* responses) as a way of resolving disputes involving state involvement in terrorism, and should be addressed in the Court's jurisprudence if the opportunity arises. And such an opportunity may arise, as the Court is seised of a dispute regarding Russian responsibility for supporting terrorism,[85] and may in the future be seised of further disputes in reference to the same facts brought by the Netherleands and Australia,[86] on the basis of its *Bosnia Genocide Case* analysis and the compromissory clauses in the TSCs. The importance of the Court's availability to resolve disputes involving state

[85] See above n 69-71 and accompanying text.
[86] See above n 51 and accompanying text.

responsibility for international terrorism should not be underestimated. State involvement in terrorism, with its *jus ad bellum* implications, has often been responded to in reliance on Article 51 of the UN Charter. While such responses may, in limited circumstances[87], be lawful – they often lead to escalation and if recent history serves, long engagement in foreign armed conflicts. An invocation of state responsibility – particularly one which results in an impartial determination of questions of fact and law – may well also respond to domestic pressures within a victim state for 'justice' without risking further (unnecessary) disruptions to international peace and security.

[87] See Kimberley N Trapp, 'Back to basics: Necessity, proportionality and the right of self-defence against non-state terrorist actors' (2007) 56 *International Comparative Law Quarterly* 141; Kimberley N Trapp, 'Actor-Pluralism and the 'Turn to Responsibility' in the Jus ad Bellum: 'Unwilling or Unable' in Context' (2015) 2 *Journal on the Use of Force in International Law* 1.