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Babysitting Terrorists: Should States Be Strictly Liable for Failing to Prevent Transborder Attacks

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Babysitting Terrorists: Should States Be Strictly Liable for Failing to Prevent Transborder Attacks?

By
Vincent-Joël Proulx*

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I.
INTRODUCTION

Of all the current challenges facing the international community, the question of state responsibility is certainly a source for concern. In fact, it has been described as the “most ambitious and most difficult topic of the codification work of the International Law Commission.”¹ In the days of the famous *Caroline* incident, things seemed a lot simpler.² Whenever armed hostilities arose, the “tit for tat” principle reverberated as the guiding hymn. Self-defense appeared to be a reliable concept, imbued with rationality. In fact, an eloquently crafted three-part test was developed following the *Caroline* affair. From that point onward, any retaliatory recourse to force³ would be governed by a standard involving the imminent threat of an attack, necessity and proportionality.⁴

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1. PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 254 (7th ed. 1997); see also ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 148 (1994) (noting the inherent difficulty of codifying the law of state responsibility).

2. On a possible application of the *Caroline* doctrine to states that provide refuge to terrorists, see Michael Reisman, *International Legal Responses to International Terrorism*, 22 *HOUS. J. INT'L L.* 3, 42-50 (1999).

3. It is interesting to note that anticipatory self-defense is also governed by the requirements of necessity, imminence and proportionality. See Robert Y. Jennings, *The Caroline and McLeod Cases*, 72 *AM. J. INT'L L.* 32, 82 (1978); see also Michael Byers, *Letting the Exception Prove the Rule*, at <http://www.carnegiecouncil.org/viewMedia.php/prmTemplateID/8/prmID/852> (last visited Aug. 20, 2004); Jutta Brunée & Stephen J. Toope, *Canada and the Use of Force: Reclaiming Human Security*, 59 *INT'L J.* 247, 251-52 (2004).

4. As Thomas Franck points out, some scholars contest the modern relevance of the *Caroline* elements. THOMAS FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 67 n.82 (2002); see also CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 105-06 (2000); I OPPENHEIM'S *INTERNATIONAL LAW* 420 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992); MALCOLM SHAW, *INTERNATIONAL LAW* 691-92 (3rd ed. 1991); Tawia Ansah, *War: Rhetoric and Norm-Creation in Response to Terror*, 43 *VA. J. INT'L L.* 797, 841, n.143

This statement of the doctrine⁵ was a law student's dream and an undeniable legacy to the international system for the century to come, leading up to the inception of Article 2(4) of the United Nations Charter. It is fair to say that some tenets of the *Caroline* doctrine, namely the concepts of proportionality and necessity, have remained central debate topics in the international arena, whether in the 1968 Beirut raid or in the 2001 military campaign in Afghanistan. Still, this doctrine of self-defense fails to elucidate the question of state responsibility. Given the current state of modern warfare⁶ and ideology-motivated violence, it appears that the simple days are long over.

To say that the events surrounding 9/11 changed the world forever has become *cliché*. It is nonetheless true with regard to international law and, more specifically, state responsibility. Many factors are now extending the debate beyond simply assigning blame to negligent or "wilfully blind" governments. Whether obscured by intricate information networks, new technologies like the Internet, the sophisticated cellular structure of organizations like al Qaeda, complex financial systems, convoluted political realities, or other factors, the level of government involvement in terrorist activities is no longer readily discernible in all instances. We now live in an era dominated by security concerns and the parameters of state responsibility need to be revamped accordingly. It is common knowledge that some countries are used as frequent launch pads or training grounds for terrorist organizations. If the events following 9/11 have taught us anything, it is that we must avoid attributing responsibility to those states indiscriminately and, rather, engage in a serious and methodical analysis of the conduct of the governments involved. In doing so, Professor Bowett's work on Israeli reprisals and the use of force in the 1960s should be considered as a starting point.

In his seminal article, *Reprisals Involving Recourse to Armed Force*,⁷ Pro-

(discussing "the doctrine of self-defense beyond the customary law's ontological elements").

5. It is interesting to note that Thomas Franck takes issue with what seems to be a prevailing interpretation of the *Caroline* case: "The assertion that self-defense requires 'immediate' action comes from a misunderstanding of the *Caroline* decision, which deals only with *anticipatory* self-defense." Thomas Franck, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 839, 840 (2001) (emphasis in original).

6. On the fundamentals of modern terrorism and warfare, generally, see Matthew Lippman, *The New Terrorism and International Law*, 10 TULSA J. COMP. & INT'L L. 297 (2003).

7. Derek W. Bowett, *Reprisals Involving Recourse To Armed Force*, 66 AM. J. INT'L L. 1 (1972). Given that Professor Bowett's article addresses the question of armed reprisals and not state responsibility *per se*, I will only invoke and analyze certain elements of his work. It should be mentioned, at the outset, that there has been some thought-provoking scholarly output on specific issues dealing with state responsibility and terrorism after 9/11. Interesting accounts on the issue include Giovanni Battaglini, *War Against Terrorism Extra Moenia, Self-Defence and Responsibility: A Pure Judicial Approach*, in INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 137-150 (Maurizio Ragazzi ed., Martinus Nijhoff Publishers 2005); Alison Elizabeth Chase, *Legal Mechanisms of the International Community and the United States Concerning State Sponsorship of Terrorism*, 45 VA. J. INT'L L. 41-137 (2004); John Alan Cohan, *Formulation of a State's Response to Terrorism and State-Sponsored Terrorism*, 14 PACE INT'L L. REV. 77-119 (2002); Mark A. Drumbl, *Terrorist Crime, Taliban Guilt, Western Victims, and International Law*, 31 DENV. J. INT'L L. & POL'Y 69-79 (2002); Pierre-Marie Dupuy, *State Sponsors of Terrorism: Is-*

fessor Bowett provides useful insights into the question of a host-state's responsibility with regard to attacks launched from its territory. Although written in the aftermath of the '68 Beirut raid and presented from the perspective of armed reprisals, as opposed to the analytically different angle of establishing state responsibility alone, the paper contributed tremendously to the debate and remains authoritative to this day. Of course, many subsequent and contemporaneous changes have come to complicate the equation of state responsibility.

Of particular importance to the discussion of state responsibility are the jurisprudential developments that have occurred over the last 30 years. For instance, one might invoke the influential *Nicaragua*⁸ decision, and the *Tadic*⁹ judgment which tempered it. In the same spirit, the *Tehran*¹⁰ case is also instrumental in this area and, in many ways, marks the starting point of the modern concept of indirect state responsibility. Needless to say, many terrorist attacks have punctuated our collective history and stirred the discussion since the Beirut raid days, be they the 1982 events between Israel and Lebanon or the 1998 bombing of U.S. Embassies in Africa. Some of these accounts must be revisited in order to shed light on the level of responsibility of the host-states involved.

In 2001, the International Law Commission (ILC) adopted the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*,¹¹ a monumental portion of the legal mosaic on state responsibility. The same year, unprecedented attacks were carried out on U.S. soil by al Qaeda terrorists, events that are remembered as "9/11." Following the attacks, the United States staged a military campaign in Afghanistan that subverted the *Nicaragua* and *Tadic* legacy,¹² and somewhat crystallized the move toward implementation of in-

sues of International Responsibility, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 3-16 (Andrea Bianchi ed., Hart Publishing, 2004); Barry Kellman, *State Responsibility for Preventing Bioterrorism*, 36 INT'L LAW. 29-38 (2002); Michael J. Kelly, *Understanding September 11th—An International Legal Perspective on the War in Afghanistan*, 35 CREIGHTON L. REV. 283-93 (2002); Scott M. Malzahn, *State Sponsorship and Support of International Terrorism: Customary Norms of State Responsibility*, 26 HASTINGS INT'L & COMP. L. REV. 83-114 (2002); Sarah E. Smith, *International Law: Blaming Big Brother: Holding States Accountable for the Devastation of Terrorism*, 56 OKLA. L. REV. 735-75 (2003).

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

9. Prosecutor v. Dusko Tadic, Case No. IT-94-I-A, I.C.T.Y. App. Ch., 15 July 1999 [hereinafter *Tadic*].

10. Tehran Hostages Case (U.S. v. Iran), 1980 I.C.J. 64 (May 24) [hereinafter *Tehran*].

11. State Responsibility: Titles and text of the draft articles on Responsibility of States for international wrongful acts adopted by the Drafting Committee on second reading. U.N. Doc. A/CN.4/L.602/Rev.1 (2001) [hereinafter *Draft Articles*].

12. For example, several commentators agree that the military campaign in Afghanistan has, for all intents and purposes, disabled the effective control test. See, e.g., Carsten Stahn, *Terrorist Acts As "Armed Attack": The Right to Self-Defense, Article 51 (1/2) of the UN Charter, and International Terrorism*, 27 FLETCHER F. WORLD AFF. 35, 37 (2003) ("If there is one certainty after September 11, it is that the 'effective control test' articulated in the International Court of Justice's (ICJ) decision in *Nicaragua* has been over-turned."). See also Carsten Stahn, "*Nicaragua is Dead, Long Live Nicaragua*": *The Right to Self-Defense Under Art. 51 UN Charter and International Terrorism*, in TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS

direct state responsibility in international law. These events, coupled with today's soaring technological possibilities and the far-reaching effects of terrorist structures, constitute a larger reality that undoubtedly falls within the ambit of Professor Bowett's work.

However, as time passes, international law evolves and, with it, the literature and jurisprudence should follow suit. Many unforeseen elements impacted the equation of indirect state responsibility and, as if confronted with a complex algorithm, we must now break down the pieces of this legal puzzle. Since the literature is far from dispositive on the issue, I propose to reopen the debate on indirect state responsibility and weigh different arguments in order to shed light on the law that governs this politically charged area. In doing so, I first draw a distinction between direct and indirect responsibility and argue that the international community has, in fact, moved toward a model of indirect responsibility. Second, I advocate a two-tiered model of strict liability *vis-à-vis* terrorism, in order to address the new and polymorph threats. Finally, I attempt to identify significant considerations in delineating the parameters of the obligation to prevent terrorist attacks.

II.

DIRECT RESPONSIBILITY VS. INDIRECT RESPONSIBILITY

A. *The Concept of Attribution*

It is well documented in international law that a state will usually not answer for the acts of private or non-state actors or, at the very least, that the conduct will not be attributable to the host-state.¹³ In other words, only conduct of

LIBERTY? 827-77 (Christian Walter et al. eds., Springer 2004); Rüdiger Wolfrum, *The Attack of September 11, 2001, the Wars Against the Taliban and Iraq: Is There a Need to Reconsider International Law on the Recourse to Force and the Rules in Armed Conflict?*, 7 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 1-78 (2003); J. Wouters and F. Naert, *Shockwaves Through International Law After 11 September: Finding the Right Responses to the Challenges of International Terrorism*, in LEGAL INSTRUMENTS IN THE FIGHT AGAINST INTERNATIONAL TERRORISM: A TRANSATLANTIC DIALOGUE 411-546 (C. Fijnaut, J. Wouters & F. Naert eds., Martinus Nijhoff Publishers 2004). Others generally conclude that Operation Enduring Freedom has fundamentally challenged international law. See Asli Bâli, *Stretching the Limits of International Law: The Challenge of Terrorism*, 8 ILSA J. INT'L & COMP. L. 403-16 (2002); Richard A. Falk, *Rediscovering International Law after September 11th*, 16 TEMP. INT'L & COMP. L.J. 359-69 (2002); Christine Gray, *A New War for a New Century?: The Use of Force Against Terrorism After September 11, 2001*, in SEPTEMBER 11, 2001: A TURNING POINT IN INTERNATIONAL AND DOMESTIC LAW 97-126 (P. Eden & T. O'Donnell eds., Transnational Publishers 2005); Laurence R. Helfer, *Transforming International Law After the September 11 Attacks?: Three Evolving Paradigms for Regulating International Terrorism*, in SEPTEMBER 11 IN HISTORY: A WATERSHED MOMENT? 180-93 (M.L. Dudziak ed., Duke University Press 2003); John F. Murphy, *International Law and the War on Terrorism: The Road Ahead*, 32 ISRAEL YEARBOOK ON HUMAN RIGHTS 117-63 (2003); Nico J. Schrijver, *Responding to International Terrorism: Moving the Frontiers of International Law for 'Enduring Freedom'?*, 48 NETHERLANDS INT'L L. REV. 271-91 (2001); Nico J. Schrijver, *September 11 and Challenges to International Law*, in TERRORISM AND THE UN: BEFORE AND AFTER SEPTEMBER 11, 55-73 (J. Boulden & T.G. Weiss eds., Indiana University Press 2004).

13. See MALANCZUK, *supra* note 1, at 259. For a thoughtful and recent account on the issue,

the host-state's organs will be imputable to it. However, international law also recognizes that the actions of private persons may bind the host-state, should those actors or groups qualify as "agents" of the state.¹⁴

Since the publication of Professor Bowett's *Reprisals Involving Recourse to Armed Force*, international courts have formally adopted this concept of attribution. The International Court of Justice (ICJ) crafted the classical formulation in 1986.¹⁵ In the *Nicaragua* decision, the ICJ was confronted with the United States' involvement in the funding and training of *contra* rebels in the Nicaragua-El Salvador conflict. Although the United States was found to have provided various forms of assistance to the rebels, and the guerrillas were at times completely dependent on U.S. support, the ICJ refused to pronounce the *contra* rebels *de facto* U.S. agents:

The Court has taken the view . . . that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua.¹⁶

The court then proceeded to elaborate a test for establishing state responsibility, a standard that would quickly gain international notoriety as the "effective control test." In short, the ICJ opined that, in order to find the United States legally responsible for the activities of the Nicaragua *contras*, it would "have to be proved that that State had effective control of the military or paramilitary opera-

see Rüdiger Wolfrum, *State Responsibility for Private Actors: An Old Problem of Renewed Relevance*, in *INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER* 423-34 (Maurizio Ragazzi ed., Martinus Nijhoff Publishers 2005).

14. See IAN BROWNLIE, *SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY (PART I)* 132-66 (1983); David D. Caron, *The Basis of Responsibility: Attribution and Other Trans-Substantive Rules*, in *THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY* 109 (Richard B. Lillich & Daniel B. Magraw eds., 1998). On the specific question of Osama bin Laden's status as an agent of the state, see John Quigley, *International Law Violations by the United States in the Middle East as a Factor Behind anti-American Terrorism*, 63 U. PITT L. REV. 815, 826 (2002).

15. It is also interesting to note that the Definition of Aggression, Annex to G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, at 143, U.N. Doc. A/9631 (1974), also alludes to the question of attribution to states of the acts of their agents. Article 3(g) of the Definition defines as "aggression" the "sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force of such gravity as to amount to the acts listed [in the preceding paragraphs]." With regard to this definition of aggression, Thomas Franck points out: "The prohibition does not specify what 'sending' means. Does it include 'permitting,' or 'tolerating'?" FRANK, *supra* note 4, at 65. These considerations will be extremely relevant in the subsequent portions of this paper, as I will discuss the shift toward indirect state responsibility at international law, along with the importance of the "harboring terrorists" rule. See also Davis Brown, *Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses*, 11 CARDOZO J. INT'L & COMP. L. 1, 8 (2003).

16. *Nicaragua*, *supra* note 8, at 64-65. For more background on the issue of state responsibility for the acts of *de facto* agents, see Gregory Townsend, *State Responsibility for Acts of De Facto Agents*, 14 ARIZ. J. INT'L & COMP. L. 635-78 (1997).

tions in the course of which the alleged violations were committed.”¹⁷ From this decision onward, it became common practice to analyze the degree of effective control exercised by a state over non-state actors in order to determine the level of involvement of that state and, as a necessary corollary, its level of responsibility.

Thirteen years later the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) revisited the “effective control test” in *Tadic*. The court found that, when private individuals carry out acts contrary to international law, the only way to attribute such acts to the host-state is to demonstrate “that the State exercises control over the individuals.”¹⁸ The court also pointed out that the degree of control might vary according to the circumstances and that the analysis should be guided by a flexible approach.¹⁹ The court then purported to draw a distinction between an individual and an organized group. In the latter case, it was now necessary to demonstrate that the host-state exercised “overall control” over the group in question, a legal inquiry that marked a significant relaxation of the “effective control test”:

Plainly, an organised group differs from an individual in that the former normally has a structure, a chain of command and a set of rules as well as the outward symbols of authority. Normally a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group. Consequently, for attribution to a State of acts of these groups it is sufficient to require that the groups as a whole be under the overall control of the State.²⁰

The ICTY pursued the analysis by making a crucial distinction between groups that are militarily organized and groups that are not.²¹ For the former, it would have to be proved that the host-state “wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity.”²² For non-military groups, the threshold was higher, as overall control was deemed insufficient, and specific instructions²³ flowing from the host-state to the group in question were required.²⁴ Alternatively, the threshold could be satisfied if the host-state had

17. *Id.*

18. *Tadic*, *supra* note 9, at 47.

19. *Id.* The court also identified various situations where the threshold of control would vary.

20. *Id.* at 49. For support of the proposition that *Tadic* significantly relaxed the *Nicaragua* standard, see Ahmed S. Younis, *Imputing War Crimes in the War on Terrorism: The U.S., Northern Alliance, and “Container Crimes”*, 9 WASH. & LEE RACE & ETHNICITY J. 109, 114-15 (2003) (arguing that *Tadic* strengthened the effective control test by excepting organized armed forces).

21. *Tadic*, *supra* note 9, at 58.

22. *Id.* at 56, 58.

23. The *Tadic* decision essentially did away with the requirement of having specific orders issued from host-states to militarily organized groups. See, e.g., Stahn, *Terrorist Acts As “Armed Attack”*, *supra* note 12, at 47; see also Mikael Nabati, *International Law at a Crossroads: Self-Defense, Global Terrorism, and Preemption (a Call to Rethink the Self-Defense Normative Framework)*, 13 TRANSNAT’L L. & CONTEMP. PROBS. 771, 781 (2003).

24. *Tadic*, *supra* note 9, at 56, 58.

publicly endorsed or approved the acts *ex post facto*.²⁵ The ICTY greatly advanced the debate on state responsibility by expanding the analysis to include not only a group's relationship to the host-state, but also the group's organizational structure.²⁶ *Tadic*'s legacy has come to be known as the "overall control test" and, in the post-*Nicaragua* era, it governs debates on the question of a state's involvement in funding and training insurgents or terrorists.²⁷

Following these jurisprudential developments, the adoption of the ILC *Draft Articles* in 2001 constituted another crucial international effort to define state responsibility.²⁸ This landmark document ultimately codified the law to read: "Every internationally wrongful act of a State entails the international responsibility of that State."²⁹ Under the ILC framework, an act is wrongful if it

25. *Id.* It is also interesting to note that in the *Tehran* case, Iranian responsibility for an attack carried out by militants on a U.S. embassy was predicated, in part, on the state authorities' subsequent approval of the attack. *Tehran*, *supra* note 10, at 33-35. Following the Ayatollah Khomeini's endorsement of the continuing occupation of the embassy and hostage-taking, the Tribunal equated them to state acts. However, it did not attribute the attack and takeover of the embassy to Iran. On the topic of responsibility by endorsement, see Brown, *supra* note 15, at 10-12. On the possibility of imputing responsibility to the Taliban for endorsing the 9/11 attacks, Brown argues that "the publicly available facts are insufficient to impute the September 11th attack to Afghanistan. They do not establish that Al-Qa'ida acted as an agent or instrumentality of the 'Afghan state,' but rather that Al-Qa'ida acted autonomously within Afghanistan." *Id.* at 11.

26. A case could be made that an organization like Al Qaeda resembles a military group, given its organization, training, complex yet independent cellular structure, and efficient financial structures. See, e.g., Jeffrey F. Addicott, *Legal and Policy Implications for a New Era: The "War on Terror"*, 4 SCHOLAR 209, 218 (2002) (referring to Al Qaeda as a "sophisticated para-military" terrorist network); ROHAN GUNARATNA, *INSIDE AL QAEDA: GLOBAL NETWORK OF TERROR* 93-112 (2002).

27. Although there is still no consensus in international law on a universal definition of "terrorism," most states share a similar conception of the requisite elements of this crime. Whether through legislation, state treatment of terrorism, or multilateral instruments on the subject, it seems that the international community has sufficiently circumscribed the concept and identified two necessary elements: the *targeting of civilians* and the *ideological/political purpose*. Hence, an attack will be tantamount to an act of terrorism when it targets civilians and is inspired by an ideological purpose, namely, an intent that transcends the ordinary criminal standard. These considerations are consistent with the position I defended in an earlier article. See Vincent-Joël Proulx, *Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of Terrorism Qualify As Crimes Against Humanity?*, 19 AM. U. INT'L L. REV. 1009, 1030-41 (2004).

In this article, I construe "terrorism" as having an international character. For example, one might think of a terrorist organization that trains its forces, engages in fundraising, and orchestrates an attack from the territory of Ruritania against the territory and civilians of State B. The aim of this article is to elucidate the elements surrounding the responsibility of Ruritania in the attack. Thus, I do not discuss cases such as the Timothy McVeigh situation where a terrorist attack is organized, planned, and carried out within the same national boundaries. In such scenarios, the accused are charged, tried, and convicted in conformity with national criminal law. Therefore, terrorist strikes lacking an extra-territorial component fall beyond the scope of this paper. Consequently, legal scholars have often differentiated between "domestic terrorists" and "international terrorists." See, e.g., Lawrence Azubuike, *Status of Taliban and Al Qaeda Soldiers: Another Viewpoint*, 19 CONN. J. INT'L L. 127, 136, n.69 (2003); Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 1, 65 (2002).

28. On the enormous challenges posed by the codification of the law of state responsibility, see MALANCZUK, *supra* note 1, at 254.

29. *Draft Articles*, *supra* note 11, art. 1. As ILC Special Rapporteur James Crawford points

amounts to a breach of a host-state's international obligations, whether derived from treaty law,³⁰ customary law,³¹ general rules of international law³² or *jus cogens*.³³ This principle, now codified in Article 2 of the *Draft Articles*, has also received wide support in international jurisprudence.³⁴ In tandem, these provisions operate on the premise that if a state has violated a primary rule of international law, whether through an act or omission,³⁵ the secondary rules of state responsibility contained in the *Draft Articles* will apply.³⁶

B. The Direct/Indirect Dichotomy

An overarching dichotomy guides the law of state responsibility for inter-

out, the principle stated in Article 1—that once a wrongful act is committed, supplementary legal obligations are juxtaposed to existing state obligations—has been recognized prior to the Commission's adoption of that provision. JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 78, 110 (2002); see also Mark B. Baker, *Terrorism and the Inherent Right of Self-Defense (A Call to Amend Article 51 of the United Nations Charter)*, 10 *HOUS. J. INT'L L.* 25, 26-27 (1987) (providing instances where the principle contained in Article 1 was recognized after its formulation by the ILC).

30. For example, see *North Sea Continental Shelf (F.R.G.-Den.)*, 1969 *I.C.J. Rep.* 3, 38-39 (Feb. 20); *Nicaragua*, *supra* note 8, at 95.

31. *Nicaragua*, *supra* note 8, at 95.

32. See CRAWFORD, *supra* note 29, at 126.

33. See *Vienna Convention on the Law of Treaties*, May 23, 1969, 1155 *U.N.T.S.* 331; CRAWFORD, *supra* note 29, at 127; see also Article 12 of the *Draft Articles*, *supra* note 11 (establishing that the "origin and character" of an international obligation is irrelevant in demonstrating a breach of that obligation).

34. Article 2 of the *Draft Articles*, *supra* note 11, reads as follows: "There is an internationally wrongful act of a State when conduct consisting of an action or omission:

Is attributable to the State under international law; and Constitutes a breach of an international obligation of the State."

This principle is also recognized in jurisprudence, albeit sometimes by different terminology. See, e.g., *Nicaragua*, *supra* note 8, at 23; *Phosphates in Morocco, Preliminary Objections*, 1938 *P.C.I.J.* (ser. A/B) No. 74 (June 14), at 10, 28; *Tehran*, *supra* note 10, at 28-29, 41-42; *Gabčíkovo-Nagymaros Project (Hung.-Slovk.)*, 1997 *I.C.J. Rep.* 7 (Sept. 25) [hereinafter *Gabčíkovo-Nagymaros*]; *Dickson Car Wheel Company (U.S.-Mex.)*, 4 *U.N.R.I.A.A.* 669, 679 (1931).

35. The *Draft Articles* make clear that both an act and an omission can constitute an internationally wrongful act. See *Tehran*, *supra* note 10, at 63, 67; *Corfu Channel (U.K.-Alb.)*, 1949 *I.C.J.* 4, 22-23 (Apr. 9); *Affaire relative à l'acquisition de la nationalité polonaise (Fr.-Pol.)*, 1 *R.I.A.A.* 26, 425 (July 10, 1924); *Velásquez Rodríguez, Inter-Am. Ct. H.R., Ser. C, No. 4*, at 154 (July 29, 1988) ("[U]nder international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions."). Yet it is probably erroneous to contend that a host-state is inherently responsible for a terrorist attack on account of omission simply because the attack is launched from the host-state against another state. In fact, I discuss below scenarios where states are actively attempting to thwart terrorist threats emanating from their territory. For now, it is fair to say that internationally responsible host-states are not always complacent, inactive, or willfully blind to terrorist activities within their territory.

36. The significance of establishing the parameters of secondary rules of state responsibility in international law cannot be over-emphasized. For a quintessential appreciation of the importance of the ILC's work in this area, see UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY (Marina Spinedi & Bruno Simma eds., 1987). On the distinction between and philosophy behind primary and secondary rules of state responsibility, see Roberto Ago, *Report of the Sub-Committee on State Responsibility*, U.N. Doc. A/CN.4/152 (1963), reprinted in 2 *Y.B. Int'l L. Comm'n* 227; J. Combacau and D. Alland, "Primary" and "Secondary" Rules in the Law of State Responsibility: *Categorizing International Obligations*, 16 *NETH. Y.B. INT'L L.* 81-109 (1985).

nationally wrongful acts. On the one hand, a state may be held accountable if its direct act or omission led to harm. Cases such as *Nicaragua* and *Tadic*, as well as the *Draft Articles*, focused on this sort of direct responsibility. Such responsibility can attach where a terrorist group acts as a state agent or *de facto* state agent,³⁷ or where the state subsequently approves of the terrorist act. It is now fair to say that a state that overtly and directly supports,³⁸ endorses,³⁹ authorizes,⁴⁰ or condones a terrorist attack on another state will presumably be held to have violated international law.⁴¹ Hence, from both a conceptual and practical point of view, the issues surrounding direct state responsibility are relatively clear and require no further discussion here.⁴²

On the other hand, there exists a subtler type of responsibility, one that hinges on the indirect involvement of a state in a wrongful act. Indirect responsibility usually arises when there is no causal link between the wrongdoer and the host-state.⁴³ For instance, it is difficult to impute liability for an attack to a state when the state has no knowledge of, or ties to, terrorist activities arising from within its borders. At that juncture, the analysis focuses on the state's duty of preventing terrorist attacks and whether the state failed to thwart a given terrorist strike emanating from its territory. Not unlike the inquiry under direct responsibility, the focus here is on the host-state's breach of an international obligation. However, a breach under indirect responsibility will likely translate into an omission, whether deliberate or innocent, rather than an act. Hence, a state's passiveness or indifference toward terrorist agendas within its own territory might trigger its responsibility, possibly on the same scale as though it had actively participated in the planning. As Mark Baker stated in the aftermath of the

37. See CRAWFORD, *supra* note 29, at 110 (describing groups that, while not officially arms of the state, the state sends out to accomplish particular missions).

38. Some commentators express that this type of state support for terrorist activities could be addressed by the UN Security Council and punished through, for example, sanctions. See, e.g., Baker, *supra* note 29, at 26-27.

39. On the question of responsibility by endorsement, see Brown, *supra* note 15, at 12 ("Thus, a state that endorses a terrorist attack and adopts it as its own will be responsible to the injured state for the continuing threat posed by the attackers, just as if the continuing threat came from the state itself.").

40. Many important international decisions recognize that conduct authorized by a host-state may be attributed to it. See, e.g., *Earnshaw* (U.K.-U.S.), 6 R.I.A.A. 160 (Nov. 30, 1925) (the "Zafiro Case"); *Stephens* (U.S.-Mex.), 4 R.I.A.A. 265, 267 (July 15, 1927); *Lehigh Valley R.R. Co.* (U.S.-Ger.) (the "Sabotage Cases"); *The Black Tom* (U.S.-Ger.), 8 R.I.A.A. 84 (1930); *The Kingsland* (U.S.-Ger.), 8 R.I.A.A. 225, 458 (1939).

41. However, based on the theory of the *Nicaragua* and *Tadic* decisions, a finding of direct responsibility would require more than this, namely an effective or overall control by the host-state.

42. See Baker, *supra* note 29, at 36 ("Of course, where the state itself is directly behind the terrorist attacks, its responsibility is clear.").

43. The concept of indirect responsibility, as I construe it, is compatible with the notion of "vicarious responsibility" described by others. See I OPPENHEIM'S INTERNATIONAL LAW, *supra* note 4, at 502-03. Using similar terminology, Brown describes the difference between direct responsibility (or original responsibility) and indirect responsibility so: "The difference between original responsibility and vicarious responsibility is that in the former, responsibility flows from the injurious acts, and in the latter, responsibility flows from the failure to take measures to prevent or punish the act." Brown, *supra* note 15, at 13.

1986 bombings of Libyan terrorist camps:

[T]errorism involves indirect aggression. Indirect aggression occurs when the state, without committing any aggressive acts, operates through its nationals or other foreigners who appear to be acting on their own. This appears to be the situation in Libya. The Libyan government is in violation of international law and can be held responsible for the terrorist actions of its nationals. The question is whether or not state responsibility is equivalent to a state sponsored armed attack and becomes even more sensitive when the state's responsibility results from mere toleration of the terrorist groups instead of active support of the groups.⁴⁴

Some scholars have rejected the direct/indirect dichotomy because direct and indirect responsibility can be conceptually difficult to distinguish, and the delineation between both paradigms has blurred on occasion.⁴⁵ In fact, the post-9/11 U.S. military campaign in Afghanistan has exacerbated the confusion surrounding this legal distinction. The decision to take action against the Taliban government⁴⁶ has collapsed both branches of state responsibility into one confused framework.⁴⁷ I examine below how the military campaign in Afghanistan has created a new precedent in international law, along with a significant shift in the law of state responsibility. In other words, I attempt to re-establish and delineate the significant boundary between direct and indirect responsibility, while devoting careful analysis to the question of indirect state responsibility in preventing terrorist attacks.

We may start from the premise that most scholars acknowledge that 9/11 created a significant shift in international law, or, at least, made combating international terrorism a priority.⁴⁸ The events of 9/11 created incentives for governments, policymakers, and judiciaries around the globe to revisit and revamp

44. Baker, *supra* note 29, at 41. For more background on the Libyan incident, see David Tumdorf, *The U.S. Raid on Libya: A Forceful Response to Terrorism*, 14 BROOK. J. INT'L L. 187-221 (1988).

45. Some jurists opine that the direct/indirect dichotomy is erroneous. For instance, Judge Ago, in his separate judgment in *Nicaragua*, equates indirect responsibility with the transfer of responsibility flowing from one state to another, when the latter exercises control over the former. 1986 I.C.J. at 189-90 (separate opinion of Judge Ago). In the same spirit, see Gordon A. Christenson, *Attributing Acts of Omission to the State*, 12 MICH. J. INT'L L. 312, 350, 360-64 (1991). As I discuss below, my conception of indirect responsibility has sometimes been labeled "vicarious responsibility," much to the dismay of Ian Brownlie. BROWNLIE, *supra* note 14, at 136. Nevertheless, the concept of indirect responsibility, as I construe it, has been invoked by the ICJ in *Nicaragua* and by the Israeli Commission in THE BEIRUT MASSACRE: THE COMPLETE KAHAN COMMISSION REPORT 50-63 (1983).

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

47. The Iraq conflict has also extended the confusion by merging other conceptually separate legal principles. See Brunnée & Toope, *supra* note 3, at 250 (noting the confusion created by the United States' justifications for the Iraq war, which have collapsed several distinct legal concepts, including, human rights, refugee protection, and threats to international peace and security, into one overarching doctrine of pre-emption).

48. *Id.* at 247 ("The events of 11 September 2001 propelled the issue of global terrorism to the top of the international agenda, and prompted dramatic shifts in international political dynamics."); see also *supra* note 12.

their domestic laws dealing with national security,⁴⁹ funding of terrorist organizations,⁵⁰ and immigration.⁵¹ International law should be no exception. On September 12, 2001, Ambassador Valeriy Kuchinsky, Ukrainian Representative to the United Nations, declared: “The magnitude of yesterday’s acts goes beyond terrorism as we have known it so far We therefore think that new definitions, terms and strategies have to be developed for the new realities.”⁵² More than four years after 9/11, this need, highlighted by the March 2004 terrorist attack in Madrid and recent bombings in London, has only gained relevance and urgency. More importantly, international law seems to be progressively following the path Ambassador Kuchinsky set for it, despite some notable shortcomings in the global legal order.⁵³

III.

A PARADIGM SHIFT: TOWARD A LAW OF INDIRECT RESPONSIBILITY OR STRICT LIABILITY?

A. *The Evolution of Indirect Responsibility in International Law*

The old paradigm of direct state responsibility, codified in Article 2 of the *Draft Articles*, indicated that the conduct underlying an internationally wrongful act must be attributed to a state’s act or omission if the state is to be held responsible.⁵⁴ That logic was founded on a concept of terrorist action that, as with *Nicaragua* and *Tadic*, involved actors that shared an intimate link with the host-state or that became *de facto* state actors through the mechanisms of control and attribution.⁵⁵ However, those cases did not foresee modern terrorism.⁵⁶ The world is now faced with new and significant threats, sophisticated terrorist or-

49. See, e.g., Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (“USA PATRIOT”) Act of 2001, Pub. L. No. 107-56, 115 Stat 272.

50. On the U.S. government’s attempt to suppress terrorist funding, see Montgomery E. Engel, *Donating “Blood Money”: Fundraising for International Terrorism by United States and the Government’s Efforts to Constrict the Flow*, 12 CARDOZO J. INT’L & COMP. L. 251 (2004).

51. On the question of the United States’ changes to immigration policies post-9/11, see Lawrence Lebowitz & Ira Podheiser, *A Summary of the Changes in Immigration Policies and Practices After the Terrorist Attacks of September 11, 2001: The USA Patriot Act and Other Measures*, 63 U. PITT. L. REV. 873-88; Karen C. Tumlin, *Suspect First: How Terrorism Policy Is Reshaping Immigration Policy*, 92 CAL. L. REV. 1173 (2004).

52. Statement of Valeriy Kuchinsky, Permanent Representative of Ukraine to the United Nations, U.N. SCOR, 56th Sess., 4370th mtg., at 3, U.N. Doc. S/PV.4370 (2001).

53. Some commentators argue that international law is inadequate or, at best, inefficiently tailored to address the phenomenon of modern terrorism. See, e.g., M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARV. INT’L L. J. 83 (2002).

54. See CRAWFORD, *supra* note 29, at 82 (arguing that there is no real difference between acts and omissions in such a context).

55. See, e.g., Derek Jinks, *State Responsibility for the Acts of Private Armed Groups*, 4 CHI. J. INT’L L. 83, 89 (2003) (“Although the ‘overall control’ test applied in *Tadic* did indeed lower the threshold for imputing private acts to states when compared to the ICJ rule, the touchstone of both approaches is that states must direct or control—rather than simply support, encourage, or even condone—the private actor.”).

56. See generally Lippman, *supra* note 6.

ganizations, and complex financial structures. Modern technology provides terrorists with increased means and methods of inspiring fear and carrying out attacks.⁵⁷ There are cases where host-states have no knowledge of and wield no control over, terrorist organizations operating within their territory. The only causal link between such a state and the organization is the fact that both coexist in the same geographically and politically delineated area. In such instances, it is imperative to establish new parameters for indirect responsibility. Before embarking on such an endeavor, however, it is helpful to briefly review important developments in the law of indirect state responsibility.

The *Tellini* case of 1923 provides a useful starting point. Following the assassination on Greek territory of several members of an international commission overseeing the delimitation of the Greek-Albanian border, the League of Nations organized a special committee⁵⁸ to address the legal issues raised by the incident.⁵⁹ Although the Committee clearly rejected the possible attribution of the assassination to Greece, it opined that a host-state could be held responsible in like circumstances if it “neglected to take all reasonable measures for the prevention of the crime and pursuit, arrest and bringing to justice of the criminal.”⁶⁰ This language clearly foreshadowed a move from the more traditional analysis of the connection between state actors and the host-state to a rigorous examination of the conduct of the host-state itself *vis-à-vis* the wrongful act authored by private persons.

These considerations are even more relevant when contrasted with the findings in the *Tehran* case, which was instrumental in advancing the law of indirect state responsibility further. In 1979, a student militant group took over a U.S. embassy and its consulates in Iran, leading to serious vandalism, destruction of property and the capture and detention of 50 American citizens, mostly diplomatic and consular personnel.⁶¹ In light of these facts, the ICJ had to establish whether the takeover, ransacking of the embassy, and hostage-taking—an operation that lasted approximately three hours—was attributable to the Iranian state. The court first considered whether Iran was directly responsible. Somewhat foreshadowing the reasoning in *Tadic*, the court asked whether “the militants acted on behalf of the State, having been charged by some competent organ of the Iranian State to carry out a specific operation.”⁶² The ICJ found no direct involvement on the facts given.⁶³

57. See, e.g., Reisman, *supra* note 2, at 4 (noting how modern transportation and weaponry makes terrorism easier to engage in and more deadly).

58. Twenty & Twenty-First Meetings, 11 LEAGUE OF NATIONS O.J. 1338, 1349 (1923) (discussing proper jurisdiction for such matters under article 15 of the League of Nations Covenant).

59. See CRAWFORD, *supra* note 29, at 91.

60. 4 LEAGUE OF NATIONS O.J. 524 (1924); see also CRAWFORD, *supra* note 29, at n.99.

61. See *Tehran*, *supra* note 10, at 8-9.

62. *Id.* at 29 (emphasis added). See also Brown, *supra* note 15, at 10-11 (noting that a finding of direct responsibility in this scenario “would have required that the attackers act as agents or organs of the Iranian government, but no evidence indicated that to be the case”).

63. See *Tehran*, *supra* note 10, at 29 (concluding that, in light of the evidence before it, the court could not establish the requisite nexus between the state and the militant group).

The court then proceeded to analyze whether Iran was indirectly responsible for the attacks in that it failed to fulfill its duty to protect foreign diplomatic missions from assault. The court held that, even though the attacks could not be attributed directly to the state, Iran was not “free of any responsibility in regard to those attacks; *for its own conduct was in conflict with its international obligations.*”⁶⁴ By virtue of several treaty provisions and principles of international law, the court noted that Iran had a “categorical duty” to protect the victims of the attack, along with the embassy.⁶⁵ In an excerpt that would mark the real starting point of the modern law of indirect responsibility, and that can be applied today to the obligation to prevent terrorist attacks, the ICJ opined that “the Iranian Government failed altogether to take any ‘appropriate steps’ to protect the premises, staff and archives of the United States’ mission against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion.”⁶⁶

A more limpid boundary between direct responsibility and indirect responsibility was finally drawn in the *Tehran* decision. It is now clear that, under the direct responsibility paradigm, the initial focus of the inquiry hinges on the conduct of an extraneous person or group and not on the actions of the host-state itself. The overarching objective is to establish whether the wrongful action or omission, as engendered by the person or group, is directly attributable to the state. Interestingly enough, through the lens of *Nicaragua* and *Tadic*, this primary objective becomes somewhat ancillary to the question of control and direction by the host-state over the person or group that committed the wrongful act. In fact, the question of control, as exercised by the host-state, has become a sort of touchstone in modern scholarly attempts to reconcile both judgments.⁶⁷

The final analysis culminates in three possible scenarios: the acts of state agents are binding on the host-state; non-state actors are deemed to be *de facto* government agents; or the acts of terrorist groups or insurgents are directly attributable to the host-state without labeling them formal instrumentalities or agents of the state *per se*. When considering the events of 9/11, it seems improbable that the attacks could, in fact, be attributed to the Taliban government, even if analyzed through the lens of subsequent endorsement. The public record indicates that Al Qaeda benefited from a large margin of autonomy within Afghanistan. Furthermore, there is no evidence that the Taliban regime endorsed

64. *Id.* at 30 (emphasis added).

65. *Id.* at 30-31 (noting how the Vienna Conventions required Iran to “ensure the protection of” the U.S. embassy and consulates, as well as their staff, belongings, and freedom of movement).

66. *Id.* at 31. The ICJ added that “the failure of the Iranian Government to take such steps was due to more than mere negligence or lack of appropriate means.” *Id.* It is also interesting to note that, among several factors that the court considered in this case, the question of the state’s inaction on that specific day bears special consideration. In fact, the ICJ mentioned several other similar instances where Iranian authorities reacted pro-actively to thwart hostage situations. In light of previous efforts of the state to combat insurrectional conduct, the court found that Iran’s passiveness in the *Tehran* case was inconsistent with that line of precedents.

67. *See supra* note 55.

the attacks.⁶⁸ It is nonetheless possible to conclude that, in some circumstances, the actions of a non-state actor amount to the acts of the government itself, as though committed through a prolongation of the state. For instance, several scholars opined that the finding of direct responsibility against the Taliban government in the events of 9/11 would probably justify a military campaign in Afghanistan.⁶⁹

It logically follows from the foregoing considerations that, contrary to direct responsibility, which focuses on the wrongful act in itself, indirect responsibility is concerned with the conduct of the host-state, namely its failure to fulfill an international obligation rather than committing some positive act. It should be noted that this type of indirect responsibility has sometimes been referred to as “vicarious responsibility.”⁷⁰

The parallel between the *Tellini* and *Tehran* cases is striking, even though they were decided nearly 60 years apart. In both instances, the inquiry hinged on a rationale of indirect state responsibility, with particular emphasis placed on the host-state’s failure to bring its conduct within the realm of its international obligation to prevent the occurrence of the given event. “For example a receiving State is not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it.”⁷¹ Based on this reasoning, and bearing in mind that modern terrorism poses a significant and sometimes polymorph threat, it is apparent that the inaction of host-states will be thoroughly scrutinized when a given terrorist strike could have been avoided or even partially thwarted. The analysis will ineluctably shift towards establishing the duty of host-states to forestall attacks rather than on their involvement in funding, supporting, or directing terrorist activities. In addition, a paradigm shift toward indirect responsibility signals the imposition of a greater burden of precaution or prevention on host-states.⁷²

Thus, the contents of the 1970 UN Declaration on Friendly Relations required every state to “refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or *acquiescing in organized activities within its territory* directed towards the commission of such acts.”⁷³ From this, it is apparent that the UN General Assembly was concerned

68. See *infra* note 113.

69. See *infra* note 117.

70. See *supra* note 43.

71. CRAWFORD, *supra* note 29, at 92.

72. Below, I attempt to analogize the U.S. products liability paradigm to the law of indirect state responsibility. It is interesting to note, in passing, that the cost of preventing terrorist acts is acute in the context of landowner liability. See, e.g., Melinda L. Reynolds, *Landowner Liability for Terrorist Acts*, 47 CASE W. RES. L. REV. 155, 175 (1996) (“Further, while the cost of safer alternatives may be generally low for ordinary criminal acts (e.g., safer locks, more lighting), the costs of preventing terrorism are generally significant.”).

73. 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 76, U.N. Doc. A/8028 (1971) [hereinafter Declaration on

not only with host-states directly orchestrating attacks on other states, but also with the possibility of passive or willfully blind governments not exercising any degree of control over terrorist organizations.

B. *The Shift Toward Indirect Responsibility*

1. *The Law Before 9/11*

The attitude of the UN Security Council toward the repression of international terrorism has been, at best, confused or fact-specific.⁷⁴ In some instances, the Council has allowed a state to enter a host-state and eliminate the bases of terrorist operations there. The 1995-96 entry of Turkish forces onto Iraqi soil in pursuit of Kurdish irregulars is one example.⁷⁵ Iran shortly followed suit, resorting to aerial attacks on Kurdish bases from which insurgent troops had launched excursions.⁷⁶ Senegal set foot in Guinea-Bissau both in 1992 and 1995 “to strike at safe havens used as bases by opposition forces;”⁷⁷ “Tajikistan pursued irregulars into Afghanistan;”⁷⁸ and the United States bombed parts of the Sudan and Afghanistan following the 1998 attacks on U.S. embassies in Tanzania and Kenya.⁷⁹ In these instances, the Council recognized an injured state’s right to pursue terrorists into a neighboring country: “It is becoming clear that a victim-state may invoke Article 51 [of the UN Charter] to take armed countermeasures . . . against any territory harboring, supporting or tolerating

Friendly Relations] (emphasis added); see also Baker, *supra* note 29, at 38 (“Therefore, under international law, as interpreted by the United Nations, even if a government does not specifically support or approve a particular act of terrorism, if such activities are generally tolerated or encouraged, they become the responsibility of that government”).

74. On the incongruities found in post-*Tehran* practice, see FRANCK, *supra* note 4, at 64-68.

75. See *infra* note 143.

76. See U.N. Doc. S/25843; U.N. Doc. S/1996/602 (1996); see also 1996 U.N.Y.B. 268-69.

77. FRANCK, *supra* note 4, at 65; see also GRAY, *supra* note 4, at 103.

78. FRANCK, *supra* note 4, at 64.

79. As Thomas Franck notes in *RECOURSE TO FORCE*, this action was met by criticism in non-UN forums. *Id.* at 66. Franck adds that “a year later, the Security Council condemned the sheltering and training of terrorists by the Taliban [through Resolution 1267, and] . . . in May 2000, Russian President Vladimir Putin warned the Taliban authorities of his intent to take ‘preventive measures if necessary’ to stop support for Islamic militants fighting in Chechnya and the former Soviet Republics of Central Asia.” *Id.* It is also interesting to contrast the Russian initiative with the recently adopted Bush Doctrine. See THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), available at <http://www.whitehouse.gov/nsc/nss.pdf> (last visited Mar. 10, 2005). The Bush Doctrine devolves vast powers to the U.S. administration, namely the ability to engage in preemptive counter-terrorism activities. In the same spirit, Christopher Clark Posteraro argues that the tenets of self-defense are inadequate and that, in certain circumstances, preemptive counter-terrorism is preferable. Christopher Clark Posteraro, *Intervention in Iraq: Towards a Doctrine of Anticipatory Counter-Terrorism, Counter-Proliferation Intervention*, 15 FLA. J. INT’L L. 151-213 (2002). Whenever addressing the concept of preemptive strikes, it is imperative to reference Security Council Resolution 487 regarding Israel’s preemptive attack on the Iraqi nuclear facility at Osirac. S.C. Res. 487, U.N. SCOR, 2288th mtg., U.N. Doc. S/RES/487 (1981). On the problem of applying a clear concept of preemptive self-defense, see KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 210-11 (2001). On applying preemptive strikes against terrorist activities, see Reisman, *supra* note 2, at 17-20.

activities that culminate in, or are likely to give rise to, insurgent infiltrations or terrorist attack.”⁸⁰

In other instances, the Security Council remained unmoved by a host-state’s plea of territorial infringement when a neighboring state invaded the host-state’s territory in pursuit of terrorists. For instance, “in September 2000, the Security Council specifically rejected the Rwandan authorities’ claim to a right to attack Hutu insurgents operating out of neighboring territory”⁸¹ on the grounds that it would violate the host-state’s territorial integrity.⁸²

The Security Council’s unpredictability has been most extreme in the context of the ongoing Arab-Israeli hostilities.⁸³ One notable case was the Beirut raid of 1968. Following an attack on an El Al Boeing 707 at Athens airport, Israel sought to establish the responsibility of two members of the Popular Front of the Liberation of Palestine, as well as that of Lebanon.⁸⁴ In fact, a flight from Beirut to Athens constituted the only territorial link between the two perpetrators and Lebanon.⁸⁵ In language reminiscent of the new paradigm of indirect responsibility, Israel accused Lebanon of “assisting and abetting acts of warfare, violence, and terror by irregular forces and organizations.”⁸⁶ The argument did not, however, convince the Security Council.⁸⁷ The decision by the Security Council not to endorse the reprisal was met with great disapproval by Israel, which stated that the Council was one-sided in its finding of responsibility and emphasized the fact that Lebanon’s role had not been thoroughly scrutinized.⁸⁸

80. FRANCK, *supra* note 4, at 67 (emphasis added).

81. *Id.* at 66.

82. See S.C. Res. 1304, U.N. SCOR, 4159th mtg., U.N. Doc. S/RES/1304 (2000) (speaking of the “violation of the sovereignty and territorial integrity of the Democratic Republic of Congo”).

83. In the Arab-Israeli context, the Armistice Agreements recognized the responsibility of the territorial state for “non-regular” forces: “No element of the land, sea or air, military or paramilitary forces of either Party, including non-regular forces, shall commit any war-like or hostile acts against” the other Party. Bowett, *supra* note 7, at 17 (citing the Armistice Agreement) (emphasis added). This development was crucial for the sustainability of international law, as it indicated the will of the parties to empower a mechanism of indirect state responsibility. It should be noted, however, that this agreement did not withstand the test of time and was quickly violated. Nonetheless, in a subsequent resolution dealing with the truce, the Security Council unequivocally brought back the terms of the agreements within the ambit of the “effective/overall” control scheme. See S.C. Res. 56, U.N. SCOR, 354th mtg., U.N. Doc. S/RES/56 (1948) (stating that “(a) Each party is responsible for the actions of both regular and irregular forces operating under its authority or in territory under its control; (b) Each party has the obligation to use all means at its disposal to prevent action violating the Truce by individuals or groups who are subject to its authority or who are in territory under its control.”).

84. For more details of the account, see Bowett, *supra* note 7, at 14 n.53.

85. For a more detailed account of the facts surrounding the Beirut raid, see Baker, *supra* note 29, at 34-35.

86. Letter dated 29 December 1968 from Israel to the President of the Security Council, U.N. SCOR, 23d Sess., U.N. Doc. S/8946 (1968).

87. U.N. Doc. S/PV.1460, at 28-30. The Beirut raid is not the only course of action of its kind, as countries have used recourse to force to retaliate against terrorist attacks. Israel’s raid of Entebbe in 1976 and the United States’ bombing of Libyan terrorist camps in 1986 come to mind. For a detailed account of the facts surrounding both incidents, see Baker, *supra* note 29, at 39 n.76, 43 n.94.

88. See Richard A. Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J.

A similar case was the 1982 Israel-Lebanon conflict, which stemmed from the 1956 Sinai incident between Israel and Egypt.⁸⁹ Since the Sinai incident, it had become common practice for Palestinians to launch strikes from Lebanon into Israel.⁹⁰ After Israel invaded a large part of the Lebanese territory in 1982, it contended that the Palestinian Liberation Organization (PLO) had effectively turned the southern part of Lebanon into a launch pad for terrorist attacks⁹¹ and that Lebanon had failed to fulfill its “duty to prevent its territory from being used for terrorist attacks against other States.”⁹² Lebanon denied responsibility, alleging that the bases from which the attacks were launched evaded its own control.⁹³ The Security Council unanimously called on Israel to withdraw from Lebanon.⁹⁴ In the following days, Israel made several vivid arguments in support of its decision to take military action after years of incursions perpetrated by PLO members against Israelis.⁹⁵ In its plea, Israel referred to Lebanon as a “logistic centre and refuge for members of the terrorist internationale from all over the world.”⁹⁶ The Security Council remained undeterred in its objective to restore peace in the region and demanded the cessation of hostilities.⁹⁷

INT’L L. 415 (1969).

89. After sending troops across the 1949 cease-fire line into the Sinai, Israel invoked precedents of transborder excursions by Palestinian *fedayeen* as a basis for its resort to self-defense. See Provisional Agenda 748, U.N. SCOR, 11th Sess., U.N. Doc. S/Agenda/748 (1956). The argument was not well-received by the UN Security Council, but the ensuing draft resolution implicitly recognized a link between the Palestinian excursions and Israel’s use of force by calling upon Israel to withdraw from the Egyptian territory. Draft S.C. Res. 3710, U.N. SCOR, 11th Sess., U.N. Doc. S/3710 (1956). This implicit message was later substantiated through Security Council Resolution 1125, which approved of allowing the United Nations Emergency Force to prevent further Palestinian excursions into Israel as part of its peace-keeping mandate. G.A. Res. 1125, U.N. GAOR, 1st Emerg. Sess. (1957) (considering that, “after full withdrawal of Israel from the Sharm el Sheikh and Gaza areas, the scrupulous maintenance of the Armistice Agreement requires the placing of the United Nations Emergency Force on the Egyptian-Israeli demarcation line and the implementation of other measures”) (emphasis added).

90. Letter dated 13 March 1978 from Representative of Israel to UN Secretary-General, U.N. Doc. A/33/64 (1978).

91. See FRANCK, *supra* note 4, at 57; DESMOND MCFORAN, THE WORLD HELD HOSTAGE: THE WAR WAGED BY INTERNATIONAL TERRORISM 46-47 (1987) (stating that the PLO operated as a “state within a state”).

92. Letter dated 27 May 1982 from the Representative of Israel to the UN Secretary-General, U.N. SCOR, 37th Sess., 2375th mtg., at 119, U.N. Doc S/15132 (1982).

93. FRANCK, *supra* note 4, at 57.

94. S.C. Res. 509, U.N. SCOR, 2375th mtg., U.N. Doc. S/RES/509 (1982).

95. See, e.g., Letter from the Ambassador from Israel to the UN, U.N. SCOR, 37th Sess., 2375th mtg., at 4 (1982) [hereinafter 1982 Letter].

96. *Id.* at 5. See also MCFORAN, *supra* note 91, at 45-46 (stating that the “Lebanese Government’s inability to rectify the situation, resulted in Lebanon sacrificing its sovereignty to the Palestinian terrorists.”).

97. See S.C. Res. 508, U.N. SCOR, 2374th mtg., U.N. Doc. S/RES/508 (1982); S.C. Res. 509, *supra* note 9. Professor Bowett has even speculated that other instances of Israeli reprisal would have encountered the same reaction from the Security Council. For example, in 1969 Israel proceeded with aerial assaults on foreign terrorist camps belonging to the Popular Front for the Liberation of Palestine. Bowett, *supra* note 7, at 14. Israel believed that the organization was responsible for terrorist attacks against an Israeli aircraft and supermarket, but a rival terrorist organization known as Al Fatah claimed responsibility for the incidents. *Id.* As Professor Bowett emphasized, the Security Council would likely not have been convinced of the legitimacy of Israel’s retaliation

Despite this inconsistent precedent, the concept of “harboring and supporting” terrorists has achieved international precedence over the general concept of attribution. This change is particularly significant considering that both *Nicaragua*⁹⁸ and *Tadic*⁹⁹ rejected financial and military assistance as a basis for imputing direct responsibility to a host-state, even when such aid proved preponderant or decisive. Thus, given that terrorists need assets to operate and that governments across the globe have been trying to forestall their financial autonomy,¹⁰⁰ it becomes obvious that the international community has abandoned the reasoning of *Nicaragua* and *Tadic*, which imposed a stringent burden on the attacked state to establish direct responsibility, in favor of an expansive rule of indirect responsibility, which alleviates the injured state’s onus exponentially. Based on that logic, the mere provision of logistical support to, or the sheltering of terrorists within, a given territory will supplant any inquiry into the level of control a host-state exercises over a given attack. This shift in international law, which still requires a few adjustments,¹⁰¹ now centers completely on a host-state’s failure to prevent an excursion by terrorists from its territory into that of another.

and much of the analysis would have hinged on whether the guerilla bands actually fell under the host-state’s “unified command.” *Id.* at 15. Once again, the legal discussion would have reverted back to the question of control over terrorist organizations rather than the establishment of the host-state’s responsibility for harboring terrorists.

98. The ICJ also added in *Nicaragua* that participation by the host-state, “even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself . . . for the purpose of attributing to the United States the acts committed by the *contras*.” 1986 I.C.J. at 62, 64-65.

99. 1986 I.C.J. at 72 (“[I]t is not sufficient for the group to be financially or even militarily assisted by a State.”).

100. Much has been written on the United States’ efforts to freeze terrorist assets and to obstruct fundraising channels of organizations such as Al Qaeda. See, e.g., Engel, *supra* note 50; Fletcher N. Baldwin, *The Rule of Law, Terrorism and Countermeasures Including the USA Patriot Act of 2001*, 16 FLA. J. INT’L L. 43 (2004); Nina J. Crimm, *High Alert: The Government’s War on the Financing of Terrorism and its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy*, 45 WM. & MARY L. REV. 1341 (2004); Eric J. Gouvin, *Bringing Out the Big Guns: The USA Patriot Act, Money Laundering, and the War on Terrorism*, 55 BAYLOR L. REV. 955 (2003).

101. Some commentators also argue that Operation Enduring Freedom may have engendered a shift in the law of state responsibility. See, e.g., Jinks, *supra* note 55, at 83-84 (“The legal response to the terrorist attacks (and other recent developments) strongly suggest that the scope of state liability for private conduct has expanded . . . [T]he response to the September 11 attacks may signal and important shift in the law of state responsibility”); Brown, *supra* note 15, at 2 (“The attack of September 11th and the American response represent a new paradigm in the international law relating to the use of force.”). I will follow a different route in this paper by arguing a more radical paradigm shift. See also generally Yutaka Arai-Takahashi, *Shifting Boundaries of the Right of Self-Defence—Appraising the Impact of the September 11 Attacks on Jus Ad Bellum*, 36 INT’L LAW. 1081-1102 (2002); Erin L. Guruli, *The Terrorism Era: Should the International Community Redefine Its Legal Standards on Use of Force in Self-Defense?*, 12 WILLAMETTE J. INT’L L. & DISP. RES. 100-23 (2004); Lauri Hannikainen, *The World After 11 September 2001: Is the Prohibition of the Use of Force Disintegrating?*, in NORDIC COSMOPOLITANISM: ESSAYS IN INTERNATIONAL LAW FOR MARTTI KOSKENNIEMI 445-468 (J. Petman & J. Klabbbers eds., Martinus Nijhoff Publishers 2003).

2. *The Impact of 9/11*

The pivotal point of reference in the modern development of indirect state responsibility is the events of 9/11. Following the attacks carried out by al Qaeda on the World Trade Center, the Pentagon, and in Pennsylvania, the United States and its allies launched a military campaign in Afghanistan.¹⁰² Some commentators have questioned the legality of that retaliation¹⁰³ while others have condoned it, or, at least, found it justified under the existing scheme of *jus ad bellum*.¹⁰⁴ Other commentators opine that Operation Enduring Freedom has relaxed international legal standards by loosening use of force principles¹⁰⁵ and contorting the self-defense standard.¹⁰⁶ Regardless of which inter-

102. With regard to the considerations underlying the U.S. decision to attack Afghanistan, including self-defense concerns and alternative routes contemplated by the United States before launching the military campaign, see David Abramowitz, *The President, Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism*, 43 HARV. INT'L L.J. 71-81 (2002).

103. See, e.g., John Quigley, *The Afghanistan War and Self-Defense*, 37 VAL. U. L. REV. 541-62 (2003); FRANCK, *supra* note 4. See generally Steven Becker, "Mirror, Mirror on the Wall . . .": *Assessing the Aftermath of September 11th*, 37 VAL. U. L. REV. 563-626 (2003). For thoughtful commentaries on the legality of the war on terror, see Stacie D. Gorman, *In the Wake of Tragedy: The Citizens Cry Out for War, but Can the United States Legally Declare War on Terrorism?*, 21 PENN. S. INT'L L. REV. 669 (2003); Emanuel Gross, *The Laws of War Waged Between Democratic States and Terrorist Organizations: Real or Illusive?*, 15 FLA. J. INT'L L. 389, 394-405 (2003); Matthew Scott King, *The Legality of the United States War on Terror: Is Article 51 a Legitimate Vehicle for the War in Afghanistan or Just a Blanket to Cover-Up International War Crimes?*, 9 ILSA J. INT'L & COMP. L. 457 (2003); Karl M. Meessen, *Unilateral Recourse to Military Force Against Terrorist Attacks*, 28 YALE J. INT'L L. 341 (2003); Mary Ellen O'Connell, *American Exceptionalism and the International Law of Self-Defense*, 31 DENVER J. INT'L L. & POL'Y 43 (2002); and Jordan J. Paust, *Terrorism: The Legal Implications of the Response to September 11, 2001*, 35 CORNELL INT'L L.J. 533, 533-41 (2002). For different views on this debate, see Mary Ellen O'Connell, *Lawful and Unlawful Wars Against Terrorism*, in Ved P. Nanda (ed.), *LAW IN THE WAR ON INTERNATIONAL TERRORISM* 79-96 (Transnational Publishers 2005); Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L.J. 533-57 (2002). For an American-centric view of this issue, see Ruth Wedgwood, *Al-Qaida, Military Commissions, and American Self-Defence*, in LEGAL INSTRUMENTS IN THE FIGHT AGAINST INTERNATIONAL TERRORISM: A TRANSATLANTIC DIALOGUE 547-66 (C. Fijnaut, J. Wouters & F. Naert eds., Martinus Nijhoff Publishers 2004); Ruth Wedgwood, *Countering Catastrophic Terrorism: An American View*, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 103-18 (Andrea Bianchi ed., Hart Publishing 2004); Ruth Wedgwood, *Responding to Terrorism: The Strikes Against Bin Laden*, 24 YALE J. INT'L L. 559-76 (1999).

104. See, e.g., Brown, *supra* note 15; Gorman, *supra* note 103; Sean Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HARV. INT'L L.J. 41-51 (2002); Mary Ellen O'Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889-909 (2002); Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1344 (2004); George Walker, *The Lawfulness of Operation Enduring Freedom's Self-Defense Responses*, 37 VAL. U. L. REV. 489-540 (2003).

105. See Michael Byers, *Terrorism, the Use of Force, and International Law After 11 September*, 51 INT'L & COMP. L.Q. 401, 405-10 (2002).

106. It is interesting to note that some scholars, like Brown, argue that the principles of *jus ad bellum* and state responsibility are sufficiently tailored to respond to terrorism, as long as they are viewed in a different light. See Brown, *supra* note 15. Other commentators, such as Franck, counter-argue that the facts relied upon by the United States to describe its Afghanistan military campaign as self-defense should not be distorted to "fit" under the principles of lawful use of force.

pretation one prefers, the U.S. action in Afghanistan has significantly impacted international law, especially in the realm of state responsibility.

International law could not endorse a U.S.-led war in Afghanistan solely against bin Laden and high-ranking members of al Qaeda, as a terrorist organization is simply not tantamount to a state.¹⁰⁷ Consequently, the United States could not simply pin responsibility on al Qaeda alone but “sought to impute al Qaeda’s conduct to Afghanistan simply because the Taliban had harbored and supported the group.”¹⁰⁸ As the stage was being set for the retaliatory strikes, President Bush accused the Taliban of murder, declaring that its members had supported and harbored the al Qaeda terrorists responsible for 9/11.¹⁰⁹ These remarks were eventually substantiated by a congressional authorization to “use all necessary and appropriate force” against Afghanistan and any other state or organization that aided or harbored the terrorists involved in the 9/11 attacks.¹¹⁰ As the war on terrorism transitioned into a full-fledged military operation, it became clear that the United States would not differentiate between host-states and terrorists¹¹¹ and would attempt to extirpate 9/11 perpetrators from any territory that offered them shelter.¹¹²

Publicly available facts tend to demonstrate that the Taliban harbored ter-

Franck, *supra* note 5. On the difficulties related to the evidentiary burden required to invoke self-defense against terrorist attacks, see Jonathan I. Charney, *Use of Force Against Terrorism and International Law*, 95 AM. J. INT’L L. 835-39 (2001).

107. Some commentators claim that the United States cannot wage war against non-state actors such as members of Al Qaeda. See, e.g., Byers, *supra* note 105; Paust, *supra* note 104, at 1344 (arguing that, although the United States could fight al Qaeda members on its own soil, doing so in Afghanistan without that nation’s consent was illegal); Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE J. INT’L L. 325, 326 (2003).

108. Jinks, *supra* note 55, at 89.

109. See, e.g., *Bush’s Remarks on U.S. Military Strikes in Afghanistan*, N.Y. TIMES, Oct. 8, 2001, at B6; President Bush, Remarks to the United Nations General Assembly (Nov. 10, 2001), available at <http://www.whitehouse.gov/news/releases/2001/11/20011110-3.html> (last visited Mar. 17, 2005) [hereinafter November 10 Speech]; Letter from President Bush to Congress on American Response to Terror (Oct. 9, 2001), available at <http://www.whitehouse.gov/news/releases/2001/10/20011009-6.html> (last visited Mar. 13, 2005) (“U.S. Armed Forces began combat action in Afghanistan against Al Qaida terrorists and their Taliban supporters. This military action is a part of our campaign against terrorism and is designed to disrupt the use of Afghanistan as a terrorist base of operations.”) (emphasis added).

110. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). It must be noted that the United States and the international community never recognized the Taliban as the legitimate government of Afghanistan. See S.C. Res. 1193, U.N. SCOR, 3921st mtg., U.N. Doc. S/RES/1193 (1998); S.C. Res. 1214, U.N. SCOR, 3952d mtg., U.N. Doc. S/RES/1214 (1998); S.C. Res. 1267, U.N. SCOR, 4051st mtg., U.N. Doc. S/RES/1267 (1999); S/RES/1333 (2000); S.C. Res. 1363, U.N. SCOR, 5113th mtg., U.N. Doc. S/RES/1363 (2001). Thus, it might be hard to justify the U.S. strikes in Afghanistan. Some commentators have resolved this discrepancy by asserting that the Taliban was the *de facto* government in Afghanistan, irrespective of the views of the United States or other nations. See, e.g., Brown, *supra* note 15, at 6. It is also important to mention that not having been recognized as an official government did not, in any way, relieve the Taliban from its obligations toward the state of Afghanistan. See *id.* at 6, n.24.

111. See Jinks, *supra* note 55, at 84-85.

112. See also November 10 Speech, *supra* note 109 (“The allies of terror are equally guilty of murder and equally accountable to justice. The Taliban are now learning this lesson—that regime and the terrorists who support it are now virtually indistinguishable.”).

rorists and, at best, provided them with limited logistical support. However, it is difficult to contend that the Taliban government did in fact exercise effective or overall control over al Qaeda; al Qaeda had a complex structure and much organizational and operational autonomy from the Taliban.¹¹³ The Taliban probably did not know of the 9/11 attacks beforehand and never endorsed them.¹¹⁴ Further, it does not appear that al Qaeda was acting as a *de facto* agent of the Taliban.¹¹⁵ Thus, under the *Nicaragua* and *Tadic* line of reasoning, these facts would not support a finding that the Taliban, and thus Afghanistan, was responsible for the 9/11 attacks.

The U.S. strike in Afghanistan has therefore subverted, or at least “lowered substantially,”¹¹⁶ the classical direct responsibility threshold for attribution. Although the United States argued that the Taliban was directly responsible for the 9/11 attacks,¹¹⁷ it also justified its response by declaring that the Taliban harbored and supported al Qaeda. Thus, through a conceptually nebulous application of international law, the United States seems to have collapsed direct and indirect state responsibility into one approach.¹¹⁸ Some suggest the existence of a varying scale under the *Nicaragua* framework in characterizing acts of terrorism as “armed attacks,” by reference to Article 51 of the *UN Charter*.¹¹⁹ How-

113. See Brown, *supra* note 15, at 11 (arguing that, under *Tehran*, Al Qaeda’s acts cannot be imputed to the Taliban government of Afghanistan); GUNARATNA, *supra* note 26, at 72-112. In fact, it appears that Al Qaeda operated independently from the Taliban regime within Afghanistan. See, e.g., Manooher Mofidi & Amy E. Eckert, “Unlawful Combatants” or “Prisoners of War”: *The Law and Politics of Labels*, 36 CORNELL INT’L L.J. 59, 75 (2003). It is interesting to note that the United States’ position in justifying self-defense against Afghanistan was premised on a two-prong approach. First, the United States characterized the acts of 9/11 as an “armed attack” under Article 51 of the *UN Charter*. Second, it predicated its right to use force on the fact that the Taliban had “supported” and “harbored” members of Al Qaeda. See Charney, *supra* note 106; Jinks, *supra* note 55.

114. See Jinks, *supra* note 55, at 89; Brown, *supra* note 15, at 11.

115. Although difficult to substantiate, such a claim is not novel. For example, the possibility of a host-state waging war against the United States through a terrorist organization has been raised very recently in the context of Iraq. See, e.g., Jason Pedigo, *Rogue States, Weapons of Mass Destruction, and Terrorism: Was Security Council Approval Necessary for the Invasion of Iraq?*, 32 GA. J. INT’L & COMP. L. 199, 217 (2004).

116. Jinks, *supra* note 55, at 89.

117. Several scholars have argued that, were the Taliban directly responsible for the 9/11 attacks, that responsibility would have justified the U.S. invasion. See, e.g., Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT’L L.J. 1, 19-21 (2002); Byers, *supra* note 105, at 405-10; Drumbl, *supra* note 27, at 34-35; Marco Sassòli, *State Responsibility for Violations of International Humanitarian Law*, 84 INT’L REV. RED CROSS 401, 406-09 (2002); Mary Ellen O’Connell, *Evidence of Terror*, 7 J. CONFLICT & SECURITY L. 19, 28-32 (2002); Helen Duffy, *Responding to September 11: The Framework of International Law*, Parts I-IV, at 20-23, available at <http://www.interights.org/doc/Sept11,%20Section%201.pdf> (last visited Aug. 20, 2004).

118. See, e.g., Brunnée & Toope, *supra* note 3, at 248 (“Around the globe, the debate over responses to global terrorism has raised hard issues concerning the interplay of security concerns, human rights, democratic governance and the use of force. Within the U.S., influential voices are articulating a merging of these concerns in a way that fundamentally challenges the concepts of state sovereignty, non-intervention and political independence.”).

119. See Murphy, *supra* note 104. Similarly, it is widely accepted that international responsibility also entails varying degrees of actual liability. See Gaetano Arangio-Ruiz, *State Fault and the Forms and Degrees of International Responsibility: Questions of Attribution and Relevance*, in

ever, it is more appropriate to describe the U.S. strikes on Afghanistan as having signaled a monumental shift in international law from direct to indirect state responsibility.¹²⁰ Indirect responsibility is no longer a second-best when direct responsibility cannot be established; rather, it has supplanted direct responsibility as the dominant theme in the field of attribution.

3. *The Law After 9/11*

On September 12, 2001, the UN General Assembly adopted a resolution calling for “international cooperation to prevent and eradicate acts of terrorism” and stressing that “those responsible for *aiding, supporting or harbouring* the perpetrators, organizers and sponsors of such acts will be held accountable.”¹²¹ On the same day, the Security Council adopted Resolution 1368, emphatically prompting all states “to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks . . . that those responsible for *aiding, supporting or harbouring* the perpetrators, organizers and sponsors will be held accountable.”¹²² Sixteen days later, the Security Council adopted Resolution 1373,¹²³ a landmark document in the modern counter-terrorism campaign. Although Resolution 1368 recognized the inherent right to individual or collective self-defense, Resolution 1373 additionally reaffirmed “the need to combat *by all means*, in accordance with the Charter [of the United Nations], threats to international peace and security caused by terrorists acts.”¹²⁴ These

LE DROIT INTERNATIONAL AU SERVICE DE LA PAIX, DE LA JUSTICE ET DU DÉVELOPPEMENT: MÉLANGES MICHEL VIRALLY 25-42 (Michel Virally ed., Pedone 1991); Willem Riphagen, *Second Report on the Content, Forms and Degrees of International Responsibility*, U.N. GAOR., U.N. Doc. A/CN.4/344 (1981), *reprinted in* [1981] 2 YEARBOOK OF INTERNATIONAL LAW COMMISSION 79, U.N. Doc. A/CN.4/SER.A/1981/Add.1 (Part I).

120. See FRANCK, *supra* note 4, at 54, 66-67.

121. G.A. Res. 56/1, U.N. GAOR, 56th Sess., 1st mtg. U.N. Doc. A/Res/56/1 (2001) (emphasis added).

122. S.C. Res. 1368, U.N. SCOR, 4370th mtg., U.N. Doc. S/RES/1368 (2001) (emphasis added).

123. S.C. Res. 1373, U.N. SCOR, 4385th mtg., U.N. Doc. S/RES/1373 (2001). For a detailed discussion on Resolution 1373 and its implications for counter-terrorism, see Eric Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism*, 97 AM. J. INT'L L. 333-41 (2003); Eric Rosand, *Security Council Resolution 1373 and the Counter-Terrorism Committee: The Cornerstone of the United Nations Contribution to the Fight Against Terrorism*, in LEGAL INSTRUMENTS IN THE FIGHT AGAINST INTERNATIONAL TERRORISM: A TRANSATLANTIC DIALOGUE 603-32 (C. Fijnaut, J. Wouters & F. Naert eds., Martinus Nijhoff Publishers 2004).

124. *Id.* (emphasis added). These two documents have also paved the way for other Security Council Resolutions on the United States-Afghan relationship. See, e.g., S.C. Res. 1383, U.N. SCOR, 4434th mtg., U.N. Doc. S/RES/1383 (2001); S.C. Res. 1386, U.N. SCOR, 4443d mtg., U.N. Doc. S/RES/1386 (2001). Most importantly, the UN Security Council adopted Resolution 1378, which expressly embraces the new indirect responsibility paradigm by condemning “the Taliban for *allowing Afghanistan to be used as a base for the export of terrorism* by the Al-Qaida network and other terrorist groups and for *providing safe haven* to Usama Bin Laden, Al-Qaida and others associated with them.” S.C. 1378, U.N. SCOR, 4415th mtg., U.N. Doc. S/RES/1378 (2001) (emphasis added).

resolutions signaled a departure from previous Security Council practice¹²⁵ and consecrated the international community's newfound obdurate will in combating terrorism.

The strongest case that can be made against the Taliban is that it failed to prevent a terrorist attack from emanating from its territory and it refused to stop harboring al Qaeda members.¹²⁶ The UN Security Council had frequently deplored the continuing use of Afghan territory for the "sheltering" and "training" of terrorists and accused the Taliban of perpetrating egregious violations of international law.¹²⁷ In Resolution 1267, the Council insisted that the Taliban "cease the provision of sanctuary and training for international terrorists and their organizations."¹²⁸ In Resolution 1373,¹²⁹ the Council decided that all states must "[r]efrain from providing any form of support, *active or passive*," to terrorists and must "[d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens."¹³⁰ These claims had also been made in other contexts, especially for the purpose of justifying retaliatory use of force or self-defense against a host-state. Consequently, commentators have recognized the right to use force in such instances: "This clearly confirms the right of a victim state to treat terrorism as an armed attack and those that facilitate or harbor terrorists as armed attackers against whom . . . military force may be used in self-defense."¹³¹

125. For example, the Security Council did not recognize a right to self-defense in favor of the United States following the 1998 bombing of the embassies in Tanzania and Kenya. See Jinks, *supra* note 55, at 85-86. In response to 9/11, Jinks argues that "the Security Council impliedly endorsed, without expressly authorizing, the use of force against Afghanistan." *Id.* at 86. See also Nicholas Rostow, *Before and After: The Changed UN Response to Terrorism Since September 11th*, 35 CORNELL INT'L L.J. 475-90 (2002). On the Security Council's role in combating international terrorism, see Curtis A. Ward, *Building Capacity to Combat International Terrorism: The Role of the United Nations Security Council*, 8 J. CONFLICT & SECURITY L. 289-305 (2003).

126. There are hints of this reasoning in a letter sent by the U.S. to the UN. Letter from the Permanent Representative of the United States of America to the United Nations (Oct. 7, 2001), U.N. Doc. No. S/2001/946 (2001) [hereinafter October 7 Letter] (stating that the United States had "clear and compelling information" that Al Qaeda, supported by the Taliban in that the Taliban gave it a "base of operation," had a "central role" in the 9/11 attacks).

127. S.C. Res. 1267, *supra* note 110. Similar concerns pertaining to the "use of Afghan territory" for the "sheltering and training of terrorists" have been expressed in Security Council Resolutions 1214 and 1363. S.C. Res. 1214, *supra* note 110; S.C. Res. 1363, *supra* note 110.

128. S.C. Res. 1267, *supra* note 110.

129. S.C. Res. 1373, *supra* note 123.

130. *Id.* (emphasis added).

131. FRANCK, *supra* note 4, at 54. This phenomenon had somewhat been recognized or discussed before 9/11. See, e.g., Baker, *supra* note 29, at 40 ("The attacked state has the right to use force against both the terrorists and the government which harbors them."). See also Robert J. Beck & Anthony Clark Arend, "Don't Tread on Us": *International Law and Forcible State Responses to Terrorism*, 12 WIS. INT'L L.J. 153-221 (1994); Leah M. Campbell, *Defending Against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan*, 74 TUL. L. REV. 1067-96 (2000); William A. O'Brien, *Reprisals, Deterrence and Self-Defense in Counter Terror Operations*, 30 VA. J. INT'L L. 421-78 (1990); Oscar Schachter, *The Extraterritorial Use of Force Against Terrorist Bases*, 11 HOUS. J. INT'L L. 309-16 (1989); Oscar Schachter, *The Lawful Use of Force by a State Against Terrorists in Another Country*, in TERRORISM & POLITICAL VIOLENCE: LIMITS & POSSIBILITIES OF LEGAL CONTROL 241-66 (H.H. Han ed., Oceana 1993). It is also interesting to note

It is inherently difficult to analogize a collective history of terrorism and reprisals, such as the Arab-Israeli situation, to isolated events such as the 9/11 attacks or the recent train bombing in Madrid.¹³² However, both the Beirut and the Sinai incidents can be analogized to the U.S.-Afghanistan situation, because in each case the attacks were instigated by irregular forces and launched from a third-party host-state.¹³³ The Security Council rejected Israel's plea of self-defense¹³⁴ and Lebanon eventually relocated the PLO irregulars to Tunis.¹³⁵ In contrast, the Security Council permitted U.S. action in Afghanistan.¹³⁶ This difference in the application of international law is difficult to explain¹³⁷ but illus-

that Professor Bowett underlined a shift in argument from self-defense to reprisals in the context of terrorist strikes and Israeli responses in the 1960s. Bowett, *supra* note 7, at 10.

132. The fact that the UN Security Council has never recognized the Taliban as a legitimate government, coupled with its insistence on having Osama Bin Laden brought to justice, contributes to establishing an overall relationship between the Taliban and al Qaeda, making the United States-Afghanistan record somewhat similar to the Arab-Israeli situation. The fact that the Taliban has always ignored the international community's plea to stop harboring members of Al Qaeda also indicates a continued adversarial relationship between the United States and Afghanistan. On the refusal of the Taliban to revise its policy on harboring terrorists, see October 7 Letter, *supra* note 126. These considerations will become even more relevant in light of Article 14 of the *Draft Articles*, which expressly provides for the extended breach of an obligation, when premised on an obligation to prevent: "[t]he breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation." *Draft Articles*, *supra* note 11 (emphasis added). I will discuss the obligation to prevent terrorist attacks below, but a few preliminary remarks are helpful. A case can be made that Afghanistan has repeatedly failed to fulfill its obligation to prevent a terrorist attack emanating from its territory when considering the bombing of the embassies in Africa, the U.S.S. Cole, and so forth. Hence, there is a continuing breach by Afghanistan in not conforming to its international obligations. Based on that logic, Afghanistan would be indirectly responsible for an internationally wrongful act. Article 14 of the *Draft Articles*, coupled with the *Tehran* decision, which mentions "successive and still continuing breaches by Iran of its obligations to the United States under the Vienna Conventions of 1961 and 1963," *Tehran*, *supra* note 10, at 36-37, makes a compelling case for a finding of indirect responsibility in the United States-Afghanistan scenario. The mechanism of Article 14 is probably better tailored to govern a lasting relationship, albeit punctuated by attacks and reprisals, between two or more states. On the distinction between instantaneous and continuing breaches, see *Rainbow Warrior* (N.Z.-Fr.), 20 R.I.A.A. 217, 264 (1990). On the question of continuing breaches, generally, see Joost Pauwelyn, *The Concept of a "Continuing Violation" of an International Obligation: Selected Problems*, 66 BRIT. Y.B. INT'L L. 415 (1995).

133. In the context of the 1982 incident, Thomas Franck's *RECOURSE TO FORCE* explores the responsibility of the third-party host-state through the lens of self-defense. FRANCK, *supra* note 4, at 59. ("In that light, Israel's claim to be acting in self-defense precisely poses the question whether such a right arises against a state which harbors infiltrators and permits transborder subversion, yet has not itself participated in these armed attacks.") (emphasis added). Based on the 2001 United States-Afghan precedent, the answer to this question seems to be affirmative.

134. Some scholars also opine that Israel's claim to self-defense is barred by the illegal occupation of certain territories. See, e.g., GRAY, *supra* note 4, at 102 ("the mere fact that many states regarded Israel's occupation of the West Bank and Gaza, the Golan and (until 2000) areas of South Lebanon as illegal was enough for them to condemn Israel's use of force against cross-border attacks by irregulars."). This proposition seems to distinguish the Israeli case from the United States-Afghan example because, before attacking Afghanistan in 2001, the United States did not occupy the Afghan territory illegally.

135. FRANCK, *supra* note 4, at 59.

136. S.C. Res. 1368, *supra* note 122.

137. This argument must be appreciated with caution. One could claim that the history of

trates the shift within the international community from a model of direct state responsibility, focused on “effective” or “overall” control, to one of indirect responsibility. In other words, the arguments presented by Israel in 1982 did not resonate well with the international community. In 2001, when the Taliban provided safe haven to members of al Qaeda, a very similar factual situation engendered an unprecedented level of approval for retaliatory recourse to force. Operation Enduring Freedom not only gathered significant support from the Security Council but also from other high-profile international bodies. For instance, the North Atlantic Treaty Organization (NATO) supported the right to collective self-defense¹³⁸ and found that the Taliban had indeed harbored Osama bin Laden and al Qaeda.¹³⁹ The Organization of American States followed suit, recognizing the United States’ inherent right to self-defense and referring to the appropriate provisions in the *Inter-American Treaty of Reciprocal Assistance*.¹⁴⁰ The United States also received vast support from other promi-

Palestinian attacks on Israeli targets, dating back to the Sinai incident and before, further distinguishes it from the United States-Afghanistan precedent. In fact, Israel made that argument, asking “how many Israelis have to be killed by the PLO terrorists for the Council to be persuaded that the limits of our endurance have been reached?” 1982 Letter, *supra* note 95. As Professor Bowett notes, following the Qibya raid in 1953, Israel shifted from a narrow view of self-defense and, “for the first time, argued that its action was justified in the whole context of repeated theft, pillaging, border raids, sabotage and injury to Israeli property and life.” Bowett, *supra* note 7, at 5. It is true that, when considered on its face, the U.S. attack on Afghanistan does not appear to be fueled by decades of terrorist incursions into the United States, but rather by the horrendous acts of 9/11. However, one could also argue that the attacks on the World Trade Center in 1993, the Khobar Towers in 1996, the U.S. embassies in Kenya and Tanzania in 1998, and the U.S.S. Cole in 2000 have all contributed in establishing a similar situation to that of Israel, albeit shorter in duration. In sum, the United States has maintained an adversarial posture *vis-à-vis* Afghanistan following several terrorist acts substantially linked with the Afghan territory. From that perspective, it appears that the United States-Afghan situation could easily fit under the “continuing relationship” paradigm, as inspired by Israeli-Palestinian reprisals, or under the “single event/chain of events” model, for which the 9/11 military campaign seems to stand. These concerns were central to Professor Bowett’s thesis in the post-Beirut Raid days, when he asked, “Is the legality of the action to be determined *solely by reference to the prior illegal act* which brought it about or by reference to the *whole context of the relationship between the two states*?” *Id.* at 4 (emphasis added). The disproportionate nature of the Israeli response constitutes another important reason why states felt compelled to denounce the Israeli reprisals generally. See FRANCK, *supra* note 4, at 65.

138. See Press Release, North Atlantic Council, Statement by the North Atlantic Council (Sept. 12, 2001), at <http://www.nato.int/docu/pr/2001/p01-124e.htm> (last visited Mar. 15, 2005). It is interesting to note that, in characterizing the attack of 9/11, the Council specified that said attack “was directed from *abroad* against the United States,” *id.* (emphasis added), thereby fitting the attack within my model of “international terrorism.” See *supra* note 27. Based on that finding, the Council invoked Article 5 of the Washington Treaty in dealing with the armed attack. See Press Release, North Atlantic Council, Invocation of Article 5 Confirmed (Oct. 2, 2001), at <http://www.nato.int/docu/update/2001/1001/e1002a.htm> (last visited Mar. 15, 2005).

139. See Statement of Lord Robertson, NATO Secretary-General (Oct. 2, 2001), at <http://www.nato.int/docu/speech/2001/s011002a.htm> (last visited Mar. 10, 2005) (“We know that the individuals who carried out these attacks were part of the world-wide terrorist network of Al-Qaida, headed by Osama bin Laden and his key lieutenants and protected by the Taleban.”).

140. OAS RC.24/RES.1/01, Terrorist Threat to the Americas, 1st Sess., 24th mtg., OAS Doc. No. OEA/Ser.F/II.24 (Sept. 21, 2001), available at <http://www.oas.org/OASpace/crisis/RC.24e.htm> (last visited Mar. 10, 2005).

nent intergovernmental bodies.¹⁴¹

One could also seek to explain the Security Council's different attitude to the United States' 9/11 response on grounds of state sovereignty.¹⁴² At the heart of this dilemma is the question whether a host-state that cannot effectively thwart terrorist activities emanating from its own territory, or that has lost control over the region where bases of operation are located, should be required to allow foreign forces to enter its territory and repress the terrorist threat.¹⁴³ In 1982, when the attacks were based in the Middle East, far from UN headquarters, and the response was perhaps disproportionate, the Security Council allotted more weight to questions of Lebanese sovereignty. "Clearly, even under traditional law, the target of any reprisal had to be shown to have committed a prior delict so that, without proof of delictual conduct *by the Lebanon*, the Council was disinclined to accept Israel's plea of justification."¹⁴⁴ But with the 9/11 attacks, the situation was different: the world had come to recognize the need to change old legal notions to deal with the new threats of terrorism.¹⁴⁵ It is perhaps fair to say that the underlying legal tests found in *Nicaragua* and *Tadic* are now obliterated from the equation, save in clear cases of direct state involvement in terrorist activities. Thus, even with sovereignty as a factor, the Council's acquiescence in the U.S. strike on Afghanistan can best be explained

141. See, e.g., Jinks, *supra* note 55, at 90-91.

142. It is helpful to recall that, in the context of the 1982 incident, a few days after Israel declared a cease-fire, the UN General Assembly sought to consecrate Lebanon's "sovereignty, territorial integrity, unity and political independence." See G.A. Res. 7/5, U.N. GAOR, 7th Emerg. Sess., U.N. Doc. A/RES/ES-7/5 (1982), available at <http://domino.un.org> (last visited Mar. 10, 2005). On the question of Israel's unilateral cease-fire, see 1982 U.N.Y.B. 440.

143. This tension also came to life in the 1995 Turkey-Iraq crisis. Turkish forces invaded the northwestern portion of the Iraqi territory, as it was used as a frequent launch pad for attacks against Turkey by Kurdish irregulars. Iraq made the usual claim as to the violation of its territorial integrity and sovereignty. See 1995 U.N.Y.B. 494, U.N. Doc. S/1995/272. Although Iraq persisted in making claims against the Turkish invasion, the Security Council remained unmoved by the Iraqi plea. See U.N. Doc. S/1996/401; U.N. Doc. S/1996/762; U.N. Doc. S/1996/860; U.N. Doc. S/1996/1018; 1996 U.N.Y.B. 236-37. This type of inaction by the Security Council would foreshadow the new indirect responsibility paradigm: a state could now attempt to repress transborder subversion into a neighboring country where terrorist launch pads and bases of operation are located. The guiding principle seemed to hinge on the proportionality of the response to the cross-border insurgency. For an application of this principle to the post-9/11 era and other guidelines purporting to regularize recourse to force against terrorism, see Michael C. Bonafede, *Here, There, and Everywhere: Assessing the Proportionality Doctrine and U.S. Uses of Force in Response to Terrorism after the September 11 Attacks*, 88 CORNELL L. REV. 155-214 (2002); Sage R. Knauff, *Proposed Guidelines for Measuring the Propriety of Armed State Responses to Terrorist Attacks*, 19 HASTINGS INT'L & COMP. L. REV. 763-88 (1996). On the Turkey-Iraq situation, see Franck, *supra* note 5, at 63-64. It is also interesting to note that, prior to 9/11, some commentators expressed that the harboring of terrorists by a host-state should in fact preempt any claim of sovereignty. See, e.g., Baker, *supra* note 29, at 40 ("The right of self-defense trumps the claim of sovereignty. Allowing terrorist groups to wage war from one's territory is a clear act of aggression and not one of the privileges of sovereignty.").

144. Bowett, *supra* note 7, at 14.

145. See Reisman, *supra* note 2, at 50-51 (noting that international law has been reluctant to limit state sovereignty and asking whether it might be appropriate to do so when a state is a "launch pad" for terrorist activities and the target state of those activities wants to "destroy the terrorist infrastructure").

as a concrete affirmation of the indirect responsibility paradigm in response to a changing global order. Indeed, it is now an accepted practice for an injured state to accuse a host-state of not preventing excursions into the former state's territory. Most importantly, as a direct consequence of finding another state responsible for terrorism, the aggrieved state can use force to restore peace and security in most cases: "Although traditionally addressed as a law enforcement problem, it is now clear that international terrorism will often necessitate some sort of military response."¹⁴⁶

The new paradigm is not without problems of its own, however. In the past, the Security Council had often rejected the idea of "collective guilt,"¹⁴⁷ the lumping together of terrorists and the states in which they base their operations, along with a finding of responsibility solely based on a state's harboring of terrorists. In the cases where the Council found a host-state responsible on that basis, it often condemned the reaction of the aggrieved state as disproportionate. Professor Bowett implies that this may have been due, in part, to the Council's reluctance to assume "that the territorial state assumed responsibility because it had the power to prevent these activities."¹⁴⁸ Bowett claimed that it is probably unrealistic, based on arguments of size and capacity of host-states, to expect countries like Jordan and Lebanon to effectively thwart all terrorist operations within their territory.¹⁴⁹ These concerns demonstrate the complexity of the new legal paradigm, which somewhat ignores them, and evoke the abovementioned tension¹⁵⁰ between respecting territorial integrity and sovereignty, and combating terrorism. For instance, if we accept that Lebanon cannot effectively thwart terrorist activities within its own territory because of widespread guerrilla activities, what exactly do we expect it to do? Based on the logic of Resolution 1373, we would have to require it to forego its sovereignty and allow foreign forces into its territory to suppress the terrorist threat.

An effective anti-terrorism campaign will require a substantial strengthening of the international regime of state responsibility or a significant degradation of state sovereignty. The latter option would probably prove temporarily adequate to address Professor Bowett's concerns with regard to ineffective states, as

146. *Id.* at 91. See also Robert O. Keohane, *The Globalization of Informal Violence, Theories of World Politics, and the "Liberalism of Fear"*, DIALOGUE I-O 29-43 (2002), available at http://mitpress.mit.edu/journals/INOR/Dialogue_IO/keohane.pdf (last visited Mar. 10, 2005). The prospect of governments waging surrogate warfare through private individuals poses a significant challenge to the mechanism of attribution. Christenson, *supra* note 45, at 313 ("The tendency for those in power to achieve their ends through private or non-State actors, thereby avoiding attribution, engenders a wide range of conduct by inaction were both deniability and non-attribution serve to enhance the power of those in control of a State, if they in fact have control.").

147. Bowett, *supra* note 7, at 13 ("The Beirut raid also illustrates the Security Council's tendency to reject any notion of 'collective guilt' which might justify a reprisal against an Arab state irrespective of the origin of the injury which is the immediate cause of the reprisal action."); see also *id.* at 15, n.61.

148. *Id.* at 20.

149. *Id.* at 14.

150. See *supra* note 143.

the harboring of terrorists by a host-state has sometimes been equated with the relinquishment of sovereignty or, at least, with the exercise of a state function that is deeply incompatible with the cardinal principles of sovereignty.¹⁵¹ However, an increase in state responsibility seems far better suited to the current state of international law and is the most effective way to empower a global counter-terrorism campaign while upholding some fundamental values of the international legal order.

C. Doing Away with Attribution: A Shift Toward a Model of Strict Liability?

Given the international community's will to eradicate terrorism, coupled with the Security Council's emphatic condemnation of terrorist acts and its resolve to eliminate threats to peace and security "by all necessary means," it is imperative to rethink the underlying tenets of indirect responsibility.¹⁵² Although it is important to address the substantiality of a host-state's obligation to prevent terrorist attacks, the trans-substantive rules of state responsibility must also be revisited in light of the paradigm shift. The thrust of my policy argument is that the interests and priorities of the international community, especially with regard to combating terrorism, would be better achieved by circumventing certain trans-substantive rules, namely attribution.¹⁵³

Both before and after 9/11, several commentators highlighted the inadequacy of the current scheme of state responsibility in dealing with terrorism, while placing significant emphasis on the shortcomings of the *Nicaragua* and *Tadic* formulation of attribution.¹⁵⁴ Following 9/11, most of the criticism per-

151. See, e.g., BINYAMIN NETANYAHU, *TERRORISM: HOW THE WEST CAN WIN* 220 (1986); Jordan J. Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Non-immunity for Foreign Violators Under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191, 221-25 (1983).

152. In *International Legal Responses to International Terrorism*, Reisman delivered a quintessential formulation of the problem at hand, stating "We are concerned here with the policies that have been prescribed in contemporary international law with respect to a state in whose territory terrorist acts are planned when the state has the capacity to prohibit such action." Reisman, *supra* note 2, at 42.

153. In *Attributing Acts of Omission to the State*, Christenson raised the possibility of rethinking attribution in order to better reflect modern reality with regard to the current debate on state responsibility. Christenson, *supra* note 45, at 369 ("The tradition of civil society with intermediate institutions that are neither market nor State offers a form of pluralism to rethink the international legal order's attention to attribution theory. Allocating supervisory responsibility and control to conduct of modern States in relation to non-State actors in an exclusive system of territorial States will revise attribution theory to reflect the new realities of power.").

154. See, e.g., Luigi Condorelli, *The Imputability to States of Acts of International Terrorism*, 19 ISR. Y.B. HUM. RTS. 233 (1989); YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 182-83 (2d ed. 2001) ("[A]rmed attack is not extenuated by the subterfuge of indirect aggression or by reliance on a surrogate. There is no real difference between the activation of a country's regular armed forces and a military operation carried out at one remove, pulling the strings of a terrorist organization (not formally associated with the governmental apparatus)."); Reisman, *supra* note 2, at 39 ("State-sponsored terrorism is the most noxious and dangerous of its species, yet its authors and architects evade all deterrence and prospect of punishment if the fiction is that states are not involved and only their agents are deemed responsible for the terrorism."); Slaughter & Burke-White, *supra* note 117, at 20 ("The traditional 'effective control' test for attributing an act to a state seems insuffi-

taining to the shift in the law of state responsibility deplored the revision of trans-substantive over the primary rules of international law. In other words, some critics believed that revisiting secondary rules of state responsibility, such as attribution, was ineffective and that the policy objectives of the international community would be better vindicated through the reaffirmation of the primary obligations of host-states.¹⁵⁵ This debate generated some academic writing but, to my knowledge, the validity of attribution as a concept has not been called into question. This is not to say that the ILC's treatment of attribution has not generated controversy in the past. For instance, before 2001 there had been significant concern over the distinction between the mechanism of imputation and whether there should be fault on behalf of a state to trigger its international responsibility *vis-à-vis* an internationally wrongful act.¹⁵⁶

1. Revisiting Trans-substantive Rules

I take issue with the claim that revising trans-substantive rules, especially attribution, would not yield effective results. The global effort against terrorism is an exercise in risk assessment. The war on terror definitely has Kantian roots and lends itself to several ethical, social, and philosophical considerations. Kant's theory that a human being should not be used as a means toward the collective well-being comes to mind; namely, that we should not balance human lives in the name of collective security.¹⁵⁷ Starting from that premise, there are no ideal scenarios or perfect solutions. Hence, mitigation of the disparity in po-

cient to address the threats posed by global criminals and the states that harbor them."); *see also* Ian Brownlie, *International Law and the Activities of Armed Bands*, 7 INT'L & COMP. L.Q. 712, 718 (1958) (inferring that the support or toleration of terrorist activities by a host-state amounts to aggression).

155. *See, e.g.*, Jinks, *supra* note 55, at 83 ("[T]he revision of trans-substantive secondary rules is a clumsy, and typically ineffective, device for vindicating specific policy objectives.").

156. *See, e.g.*, Mohammed Bedjaoui, *Responsibility of States, Fault and Strict Liability*, 10 ENCYCLOPEDIA PUB. INT'L L. 358 (1987); Andrea Gattini, *La Notion de faute à la lumière du projet de convention de la Commission du Droit International sur la responsabilité internationale*, 3 EUR. J. INT'L L. 253-84 (1992). On the question of attributing warlike acts to the host-state, *see* Frits Kalshoven, *State Responsibility for Warlike Acts of the Armed Forces*, 40 INT'L & COMP. L.Q. 827 (1991).

157. *See* IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS WITH CRITICAL ESSAYS 52 (Robert Paul Wolff ed., Lewis White Beck trans., Bobbs-Merrill Co. 1969) (1785) ("Now, I say, man and, in general, every rational being exists as an end in himself and not merely as a means to be arbitrarily used by this or that will. In all his actions, whether they are directed to himself or to other rational beings, he must always be regarded at the same time as an end."); *see also id.* at 54 ("The practical imperative, therefore, is the following: Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only."). On the question of Kantian elements as found in the law of state responsibility, *see* Christenson, *supra* note 45, at 319-20, and the authorities cited therein. This phenomenon has carried over to other areas of the war on terrorism, especially in national jurisdictions, where various executives and judiciaries are called upon to balance security and civil liberties concerns. For hints of Kantian elements in these arenas, *see* Alan Gewirth, *Are There Any Absolute Rights?*, 31 PHIL. Q. 1, 8-16 (1981); and Ronald Dworkin, *Terror & the Attack on Civil Liberties*, 50 NEW YORK REVIEW OF BOOKS 37 (Nov. 6, 2003), available at http://www.nybooks.com/articles/article-preview?article_id=16738 (last visited Oct. 25, 2004).

litical and economic power between states, coupled with the essential goal of protecting civilians, remains a noble objective.

Indirect responsibility is now the rule of thumb in terms of counter-terrorism and will often supplant a course of action involving direct responsibility, given the inherent difficulty in substantiating such a claim. In other words, the response to 9/11 has provided aggrieved states with the opportunity to elect indirect responsibility over direct responsibility as the preferred mechanism in establishing the liability of the host-state.¹⁵⁸ Thus, given the recent paradigm shift towards a law of indirect responsibility, Article 2 of the *Draft Articles* is somewhat superfluous in the context of counter-terrorism. In light of recent state and Security Council practice, maintaining a rationale of attribution via indirect responsibility appears to rely predominantly on poor semantics. One only has to look at the precedent set in *Nicaragua* to infer that the notions of control and attribution should be, in most circumstances, excised altogether from the equation of indirect state responsibility. For instance, the ICJ clearly associated attribution with direct state involvement when it stated that it had to investigate “not the complaints relating to alleged violations of humanitarian law by the *contras*, regarded by Nicaragua as imputable to the United States, but rather unlawful acts for which the United States *may be responsible directly in connection with the activities of the contras*.”¹⁵⁹

If the objective is truly, as the Security Council declared it, to eradicate terrorism using “all necessary steps,” international mechanisms should remain unfettered by secondary rules and the case for a responsibility-expanding regime should be more radical. In fact, several commentators also argue that the war on terror should attract new rules.¹⁶⁰ With this in mind, the recent trend in state responsibility should be governed solely by Article 12 of the *Draft Articles* as a matter of hermeneutics alone: “There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.”¹⁶¹

Although the traditional approach has been to attribute an internationally wrongful act to a host-state when that state failed to prevent a given attack, this method should be revisited. Contrary to what certain commentators might anticipate, the idea of circumventing attribution altogether may prove efficient in the war on terror and elude the main criticisms aimed at preventing the revision

158. It is interesting to note that, in the context of the Armistice Agreements in Arab-Israeli relations, the parties expressed the wish to implement a mechanism of indirect responsibility, namely to make the territorial state accountable for the excursions of irregular forces outside its territory.

159. *Nicaragua*, *supra* note 8, 1986 I.C.J. at 65 (emphasis added); *see also* CRAWFORD, *supra* note 29, at 110-11 (confirming that this question “was analyzed by the Court in terms of the notion of ‘control.’”).

160. *See, e.g.*, Slaughter & Burke-White, *supra* note 117, at 2 (“The goal of this war is not economic advantage, territorial gain, or the submission of another state. It is to bring individual terrorists to justice and to punish and to deter the states that harbor them. To respond adequately and effectively to the threats and challenges that are emerging in this new paradigm, we need new rules.”).

161. *Draft Articles*, *supra* note 11.

of international trans-substantive rules. The main argument against revisiting attribution is that the international community should instead focus on delineating and defining primary rules of international law more clearly.

It is obvious that the language surrounding attribution is somewhat dissonant with the new paradigm shift toward indirect responsibility. For example, Article 8 of the *Draft Articles* characterizes the conduct of private persons as an “act of state”, as long as the non-state individuals act “on the instructions” or “under the direction or control” of the host-state.¹⁶² Hence, prior to 9/11 the debate ineluctably reverted back to the question of control in a circuitous fashion, as found in *Nicaragua* and *Tadic*.¹⁶³ By its delivery of the *Draft Articles*, the ILC seems to have narrowed the language of attribution to a more traditional model of state-condoned or state-sponsored insurgency, thereby eluding isolated attacks or massive one-time strikes such as 9/11. For example, the commentary on Article 8 of the *Draft Articles* is a salient example of the narrow application of the concept of attribution before 9/11. On this question, ILC Special Rapporteur, James Crawford, noted that in certain circumstances, “a specific factual relationship [exists] between the person or entity engaged in [terrorism] and the State.”¹⁶⁴ These circumstances include “private persons acting on the instructions of the State” and “private persons act[ing] under the State’s direction or control.”¹⁶⁵ When transposed to the current war on terror, the commentaries appear to make attribution dependent on some level of control by the host-state over a terrorist organization, or on a factual nexus between the host-state and the terrorist organization. It is clear that the provision does not extend to situations where terrorist organizations are acting independently or autonomously from the state organs, as was the case in Afghanistan.

In this light, it is fair to assume that attribution will likely be an appropriate mechanism “only if the nonstate actor was in fact acting on the instructions of, or under the direction or control of, that State in carrying out the [wrongful] conduct.”¹⁶⁶ Furthermore, based on the *Tehran* logic, attribution can also be triggered by subsequent acknowledgment and adoption of the wrongful conduct by the state as its own. In fact, this legal device has been expressly incorporated in Article 11 of the *Draft Articles*.¹⁶⁷ Thus, the logic of attribution is to be understood in conjunction with the notion of control, and as semantically adjacent

162. *Id.*

163. *See supra* note 83.

164. CRAWFORD, *supra* note 29, at 110.

165. *Id.*

166. Jinks, *supra* note 55, at 88 (internal quotation marks omitted).

167. *Draft Articles*, *supra* note 11, art. 11. On the question of responsibility by endorsement, see my comments, *supra* note 25 and accompanying text, and Brown, *supra* note 15, at 10-13. On the specific question of the endorsement of the 9/11 attacks, Brown argues that “the Taliban do not appear to have endorsed the attack . . . [T]hey denied that bin Laden had anything to do with the attacks, asserting that ‘bin Laden lacked the capability to pull off large-scale attacks,’ . . . and proclaiming their confidence that a U.S. investigation would find him innocent.” *Id.* at 11; *see also* Baker, *supra* note 29, at 36 (“But the state may not be as innocent as it appears. Terrorism is often carried out with the encouragement or approval of the sanctuary state.”).

to the direct participation by the host-state to the attack in some way, shape or form. In other words, the work of the ILC prior to 9/11 expounded that control exerted by a host-state constituted the linchpin, or catalytic device, of the mechanism of attribution.¹⁶⁸

It is now recognized that all states have an obligation to prevent terrorist attacks emanating from their territory and injurious to other states. In terms of legal language, though, it should be noted that there is still no consensus within the international community as to a definition of terrorism.¹⁶⁹ Yet, the concept is sufficiently circumscribed to entail international responsibility, when coupled with the well-established principle that states will have to answer for attacks emanating from their territory. This legal scheme clearly evidences that the shortcomings of the international community will not preclude the application of overriding principles of law, such as the prohibition on the use of force and the obligation to prevent injuries to neighboring states.

With regard to the legal characterization of terrorist attacks, the question of retaliation against a host-state has always been difficult, especially when attempting to label the original act wrongful. In short, before 9/11, an aggrieved state would often run into legal and diplomatic problems in characterizing the original attack so as to justify a reprisal against the host-state. As Professor Bowett explained, “[e]ven a policy of reprisal which might seek to avoid condemnation because of its ‘reasonableness’ encounters the initial difficulty of demonstrating the illegality of the activities against which it is directed Apart from using emotive terms such as ‘terrorists,’ Israel has sought to have the guerilla activities condemned as illegal . . . on a variety of grounds.”¹⁷⁰ The international response to 9/11 seems to have done away with these evidentiary problems. In sum, once a terrorist attack is carried out, we must look at it in the abstract—namely, as an attack emanating from another territory—and focus on how the host-state could have limited, or avoided altogether, its responsibility.

Furthermore, the obligation to prevent terrorist attacks can be derived from several international texts, rules, and principles.¹⁷¹ The only margin for polemic with regard to this duty pertains to the actual content of the obligation, especially when contemplating the vast range or shades of state passiveness, inaction, or “willful blindness” *vis-à-vis* terrorist activities taking root within a given territory. It follows from this proposition that the trans-substantive rules must

168. CRAWFORD, *supra* note 29, at 110 (“[C]onduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State’s direction or control.”).

169. On the difficulty of defining terrorism, see *supra* note 27; see also Reisman, *supra* note 2, at 9-13. Particularly strong resistance to formulating an international definition has come from several Arab states.

170. Bowett, *supra* note 7, at 17.

171. See CLYDE EAGLETON, *THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW* 80 (1928) (“A State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction.”).

also be revamped accordingly; the international community must decide whether to lower the threshold for imputation or to forego attribution altogether in the context of modern terrorism. As evidenced by the abovementioned considerations, the latter scenario seems better tailored to fit within the current international framework.

2. *The Temporal Element of the Breach of an International Obligation*

The case for circumventing attribution is particularly compelling when one considers the temporal component of breaches of international obligations. The central theme behind Article 14 of the *Draft Articles* lies in the distinction “between a breach which is continuing and one which has already been completed.”¹⁷² The distinction between instantaneous and continuing breaches was explored in the *Rainbow Warrior* arbitration.¹⁷³ In that case, the Arbitral Tribunal was confronted with France’s failure to detain two individuals pursuant to an agreement between both parties. In finding that the breach at hand had a continuous character, the Tribunal delivered an important statement on the nature of the continuous breach, stating that “this classification is not purely theoretical, but, on the contrary, it has practical consequences, since the seriousness of the breach and its prolongation in time cannot fail to have considerable bearing on the establishment of the reparation which is adequate for a violation presenting these two features.”¹⁷⁴ However, the distinction between instantaneous and continuing breaches has not, so far, been thoroughly applied to international terrorism *per se*. In fact, it has only been the central question in cases involving such matters as contracts,¹⁷⁵ forced or involuntary disappearances,¹⁷⁶ expropriation or wrongful taking of property,¹⁷⁷ treaty obligations,¹⁷⁸ jurisdictional issues,¹⁷⁹ and the loss of social status.¹⁸⁰

The portion of Article 14 dealing with continuing breaches of international obligations, which is premised on a state’s obligation to prevent a given

172. CRAWFORD, *supra* note 29, at 135. On the concept of time in the context of international state responsibility, see Wolfram Karl, *The Time Factor in the Law of State Responsibility*, in UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY 95-114 (Marina Spinedi & Bruno Simma eds., Oceana 1987); Eric Wyler, *Quelques réflexions sur la réalisation dans le temps du fait internationalement illicite*, 95 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 881-914 (1991). On time and the law, generally, see Rosalyn Higgins, *Time and the Law*, 46 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 501 (1997).

173. *Rainbow Warrior* (N.Z.-Fr.), 20 R.I.A.A. 217 (1990).

174. *Id.* at 264.

175. See, e.g., *id.* at 265-66, 279-84 (Sir Kenneth Keith, dissenting); see also *Gabčíkovo-Nagymaros*, *supra* note 34, at 54.

176. See, e.g., *Blake v. Guatemala*, Inter-Am. Ct. H.R., Ser. C, No. 36, at par. 67 (Jan. 24, 1998).

177. See, e.g., *Papamichalopoulos v. Greece*, E.C.H.R., Ser. A, No. 260-B (June 24, 1993); and *Loizidou v. Turkey*, 6 E.C.H.R. Rpts. 2216 (Dec. 18, 1996).

178. See, e.g., *Tehran*, *supra* note 10, at 145.

179. See, e.g., *Papamichalopoulos*, *supra* note 177; and *Loizidou*, *supra* note 177, at 2216.

180. See, e.g., *Lovelace v. Canada*, Communication No. R.6/24, U.N. Doc. A/36/40, at 172 (July 30, 1981).

event,¹⁸¹ can possibly extend to situations of repeated cross-border attacks and reprisals. This argument, however, does not insinuate that a single terrorist attack, such as the one perpetrated on 9/11, would not engender long-lasting consequences or ripple effects.¹⁸² Nevertheless, such attacks would likely fall within the realm of instantaneous breaches, as the one-time failure to prevent the terrorist act itself indicates a breach by the host-state, without having a continuing effect. All of the surrounding repercussions, whether characterized by collateral damage to civilians and property or the ensuing deaths of targeted individuals, fall within the ambit of the consequences of a terrorist attack, without confirming, *per se*, that the failure to prevent the attack has a continuing character.

Conversely, it is also interesting to note that the *in fine* portion of the same provision is couched in negative terms, which does not preclude the application of the *Draft Articles* to a series of terrorist attacks, such as the aggregate acts of al Qaeda, including the 1993 World Trade Center bombing, the bombing of the United States' African embassies, the bombing of the USS Cole, and the events of 9/11. When seen through this lens and compared to the situation in the Middle East, these accounts appear to fit within Bowett's "overall relationship" theory. However, setting aside the Arab-Israeli context for a moment, the duty of a host-state to prevent terrorist attacks may entail the analysis of a different temporal dimension.

Unlike situations of contractual breaches or continued disappearances, the objective of the duty of preventing attacks is to actually stop them from occurring. Such scenarios do not primarily entail economic loss, such as contractual breaches do, but rather focus on the protection of innocent civilians from widespread and systematic annihilation or loss of limb. For example, transferring the contractual notion of "efficient breach"¹⁸³ to the obligation of preventing terrorism would yield perverse results, as host-states could engage in balancing human lives in deciding whether or not to breach their obligation. For example, a

181. *Draft Articles*, *supra* note 11.

182. *See, e.g.*, Reisman, *supra* note 2, at 6-7 (noting that terrorism not only affects those who are killed or injured, it also intimidates others, "influencing their political behavior and that of their government" and "undermining inclusive public order").

183. The contractual doctrine of efficient breach is widely thought to have originated in Oliver Wendell Holmes' statement in *The Path of the Law* that "the duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else." Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897). In essence, this proposition entails that a contractual party might opt to breach a contract, should unforeseen or more advantageous circumstances arise, where the profits of the breach exceed the costs of damages. *See* William R. Corbett, *A Somewhat Modest Proposal to Prevent Adultery and Save Families: Two Old Torts Looking for a New Career*, 33 ARIZ. ST. L.J. 985, 1031 (2001) ("Proponents of efficient breach theory thus argue that there is nothing wrongful about a breach, and that by permitting efficient breaches, the law facilitates movement of resources to their most valuable use."); Lee Shidlofsky, *The Changing Face of First-Party Bad Faith Claims in Texas*, 50 S.M.U. L. REV. 867, 893 (1997) ("Under the efficient breach doctrine, if it is economically advantageous for one party to breach the contract, the law should not deter the breach."). *See also supra* note 157 (commenting on the Kantian roots of the war on terror).

state could decide not to inject significant funds into law enforcement or border security measures if its intelligence concluded that a possible attack would only jeopardize a few human lives. Such a result is unpalatable. Therefore, in the context of international terrorism, the stakes are inherently greater and should justify a stricter regime of state responsibility.

Furthermore, given the international community's involvement and obvious resolve in combating international terrorism, one could argue that every state has an interest in preventing terrorist attacks. In fact, terrorism strikes at the very core of human dignity and security and it would prove illusory to assert that a state has no interest in preventing a terrorist attack involving other states. Based on that logic, the obligation to prevent terrorism might, perhaps, qualify as an obligation *erga omnes*. Should this characterization of the obligation hold, it would entail a significant consequence under the *Draft Articles*: third-party states could raise the failure to fulfill an obligation of preventing a terrorist attack when an excursion is launched from a host-state against another state.¹⁸⁴ The confirmation of this characterization will depend largely on the evolution of international law in the upcoming years. Until that time, a single argument remains immutable: to expect the international legal order to countenance a claim that preventing terrorist attacks does not constitute a concern for the international community, as a whole, is unrealistic.

An obligation such as the one faced by Afghanistan on September 11, 2001, belongs to the realm of instantaneous breaches. This is not to say, however, that the *Draft Articles* preclude the breach of an obligation to prevent a given event from having a continuing character.¹⁸⁵ Once an attack is success-

184. *Draft Articles*, *supra* note 11, art. 48(1)(b) (allowing any state to invoke another state's responsibility when that state breached an obligation "owed to the international community as a whole"). Should this position be endorsed, the obligation of preventing terrorist attacks would fit within the framework and reasoning of *Barcelona Traction, Light and Power Company*, which states that "an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*." *Barcelona Traction, Light & Power Co. (Belg.-Spain) (Second Phase)*, 1970 I.C.J. Rep. 3, 32 (Feb. 5, 1970). For more background on the interplay between Article 48(1)(b) and obligations *erga omnes*, see CRAWFORD, *supra* note 29, at 278; Pierre-Marie Dupuy, *A General Stocktaking of the Connections Between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility*, 13 EUR. J. INT'L L. 1053, 1069-76 (2002); Linos-Alexander Sicilianos, *The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility*, 13 EUR. J. INT'L L. 1127, 1136-38 (2002); Marina Spinedi, *From One Codification to Another: Bilateralism and Multilateralism in the Genesis of the Codification of the Law of Treaties and the Law of State Responsibility*, 13 EUR. J. INT'L L. 1099, 1113-14 (2002). Some commentators assert that *jus cogens* obligations also fall within the ambit of Article 48 of the *Draft Articles* in that they are "owed to the international community as a whole." Dupuy, *supra*, at 1061. On the mechanism of Article 48 generally and the invocation of international state responsibility, see Daniel Bodansky, John R. Crook and Edith Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96 AM. J. INT'L L. 798, 803-06 (2002).

185. See CRAWFORD, *supra* note 29, at 140 ("The breach of an obligation of prevention may well be a continuing wrongful act, although, as for other continuing wrongful acts, the effect of article 13 is that the breach only continues if the State is bound by the obligation for the period during

fully launched from a host-state, the threat has not been thwarted and the object of the obligation is defeated. It is imperative to remember that this context is very different from transboundary environmental damage, for example. Here, the international community is not just concerned with containing the threat if the initial harm is unavoidable; rather, the objective is to forestall the initial wrongful act before it occurs. Furthermore, the failure to prevent terrorism entails far more serious consequences than the mere emission of toxic pollutants. ILC Special Rapporteur James Crawford spoke to this point:

For example, the obligation to prevent transboundary damage by air pollution, dealt with in the *Trail Smelter* arbitration, was breached for as long as the pollution continued to be emitted. Indeed, in such cases the breach may be progressively aggravated by the failure to suppress it. However, *not all obligations directed to preventing an act from occurring will be of this kind. If the obligation in question was only concerned to prevent the happening of the event in the first place (as distinct from its continuation), there will be no continuing wrongful act.*¹⁸⁶

Hence, a more stringent regime of state responsibility should be imposed, as we are sometimes confronted with situations that signal a departure from the Arab-Israeli relationship and, consequently, preclude the application of Article 14(3) of the *Draft Articles*. In sum, if we adopt the consensus that “one attack is too much,” which generally aligns with the philosophy of the laws of war¹⁸⁷ and international law, we must necessarily impose a heavier burden of precaution on host-states.

Once a host-state fails to fulfill its obligation of prevention, thereby defeating the very purpose for which the obligation existed in the first place,¹⁸⁸ that state should not be able to escape scrutiny for not having acted on the right incentives, save in specific circumstances. If we want the war on terror to have a preventive rather than curative character, we must tackle the problem at its roots and provide the right impetus to governments. The objective here is to efficiently forestall terrorist attacks using, as the Security Council termed it, “all necessary steps,” while also preventing an abusive application of state responsibility. Based on this objective, coupled with the abovementioned considerations and the paradigm shift toward indirect responsibility, it would be helpful to forego attribution altogether in the context of modern terrorism. Besides, it is

which the event continues and remains not in conformity with what is required by the obligation.”).

186. *Id.* (emphasis added).

187. The protection of civilians is paramount in the context of the laws of war. *See, e.g., International Committee of the Red Cross, Basic Rules of the Geneva Conventions and Their Additional Protocols* (1988), at http://www.icrc.org/WEB/ENG/siteeng0.nsf/htmlall/p0365?OpenDocument&style=Custo_Final.4&View=defaultBody2 (last visited Oct. 25, 2004); Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 827 (July 8, 1996) (classifying the non-targeting of civilians as one of the “cardinal principles” of humanitarian law).

188. *See* CRAWFORD, *supra* note 29, at n.270 (“An example might be an obligation by State A to prevent certain information from being published. The breach of such an obligation will not necessarily be of a continuing character, since it may be that once the information is published, *the whole point of the obligation is defeated.*”) (emphasis added).

clear that the mechanism of indirect state responsibility has become a sort of “safety net” to pin responsibility on a host-state should an aggrieved state endeavor to establish direct responsibility but fail to do so. With this in mind, the interests of the international community would be better served by a regime of state responsibility underpinned by a rationale of strict liability. Even though much has been written on the notion of fault in international state responsibility, it should be cautioned that conventional wisdom does not preclude the implementation of a mechanism of strict liability in this area of the law.¹⁸⁹

3. Domestic Law Analogies: The Products Liability Paradigm

Although not directly transposable to international law *per se*, we can consider domestic products liability law¹⁹⁰ as a philosophically similar phenomenon to the war on terrorism.¹⁹¹ In the broader context of national tort law, it is sometimes more efficient to opt for a rule of strict liability over a negligence or fault-based rule.¹⁹² Strict liability happens to be the course followed by the United States in products liability litigation. For instance, in the exploding Coke bottle cases, the manufacturer was found strictly liable because public policy demands that manufacturers be responsible for the quality of their products.¹⁹³

189. See, e.g., Andrea Gattini, *Smoking/No Smoking: Some Remarks on the Current Place of Fault in the ILC Draft Articles on State Responsibility*, 10 EUR. J. INT'L L. 397-404 (1999); James Crawford, *Revising the Draft Articles on State Responsibility*, 10 EUR. J. INT'L L. 435, 438 (1999) (agreeing that “it is a serious error to think that it is possible to eliminate the significance of fault from the Draft Articles”). However, Crawford opened the door to the possible implementation of a mechanism of strict liability, stating that “different primary rules of international law impose different standards, ranging from ‘due diligence’ to strict liability, and that all of those standards are capable of giving rise to responsibility in the event of a breach . . . [I]t depends on the interpretation of that rule in the light of its object or purpose.” Crawford, *supra*, at 438. It inevitably follows from this proposition that, given the urgency of combating terrorism, coupled with the purpose of actually preventing terrorist attacks, the regime of indirect responsibility could reasonably transform into a mechanism of strict liability.

190. It should be noted that some commentators contest the importation of domestic law concepts into the international law of state responsibility. See, e.g., BROWNIE, *supra* note 14, at 37-38, 40-47.

191. The legal regime set forth by the *Draft Articles* is ripe for analogizing or importing domestic law principles into the realm of international state responsibility. Even though notions extracted from the national products liability paradigm inform analysis under international law, these notions may be, themselves, subsequently altered by the process of importation. See, e.g., CRAWFORD, *supra* note 29, at 21 (“It is not unusual for domestic analogies to be modified in the course of transplantation to international law. Indeed it is unusual for them not to be.”); Daniel Bodansky et al., *The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 AM. J. INT’L L. 874, 878 (2002) (arguing that “the international law of responsibility is applied across the field of international obligations” and that it “comprises areas that—in terms of domestic analogies—may be seen as like those of contract and tort, and others that might be seen as analogous to public law.”). It is interesting to note that terrorism has sometimes been construed as a tort under the global legal order. For support of this proposition, see Eileen Rose Pollock, *Terrorism As a Tort in Violation of the Law of Nations*, 6 FORDHAM INT’L L.J. 236-60 (1982-83).

192. See, e.g., Steven Shavell, *Strict Liability versus Negligence*, 9 J. LEGAL. STUD. 1-25 (1980).

193. For the underlying policy considerations of strict liability in products liability cases, see Justice Traynor’s concurring opinion in *Escola v. Coca Cola Bottling Company*, 150 P.2d 436 (Cal.

This pro-consumer approach can easily be analogized to terrorist attacks emanating from a given territory, namely through a pro-civilian posture *vis-à-vis* terrorism. Governments are obviously better positioned to thwart terrorist attacks than civilians, just as the manufacturer of goods is more aware of the potential hazardous effects of a product than the unsuspecting consumer: "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."¹⁹⁴ In the post-Beirut raid days, state responsibility seemed more akin to the tort concept of negligence or, at least, it was governed by principles of due diligence and reasonableness.¹⁹⁵ The underlying reasonableness of the use of force *vis-à-vis* the original wrongful act guided much of the Security Council's attitude toward the legitimacy of reprisals against host-states. This certainly entailed a rigorous evaluation of the host-state's failure¹⁹⁶ to prevent a cross-border attack, along with the severity of the terrorist strike.

It is clear that we are not dealing with a typical Law & Economics paradigm, as when addressing products liability litigation. However, products liability regulation and the war on terror do converge in one crucial aspect: they both constitute an exercise in risk assessment.¹⁹⁷ The driving force behind my reform is to provide the right incentives to governments in combating international terrorism. This type of regime could be tantamount to a compromise between sacrificing a host-state's territorial integrity and sovereignty, and upholding its dignity on the international scene. Such a model clearly does not suit all areas within the realm of international state responsibility, which coexist on a continuum. Contractual breaches between states rest at one end of the spectrum and could never attract a rule of strict liability. The obligation to prevent terrorist attacks resides at the other end because, unlike with contract law, the international community engages in the objective of saving lives and protecting civil-

1944), which likely represents the beginning of modern strict products liability in U.S. law.

194. See *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1962); see also Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 89 (2002) ("The underlying rationale of strict liability is to place the burden of precaution on the manufacturers because they have superior information about the product that makes them the 'cheapest cost avoider.'").

195. See generally Bowett, *supra* note 7, at 20-21 (addressing the Security Council's partial acceptance of "reasonable" reprisals). Professor Bowett also raises an interesting question, somewhat akin to the tort concept of contributory negligence, with regard to the aggrieved state's own conduct: "Why could not the state have defended itself against these guerilla activities by measures of defense adopted on its own territory?" *Id.* On the question of contributory negligence as it pertains to state responsibility, see generally David J. Bederman, *Contributory Fault and State Responsibility*, 30 VA. J. INT'L L. 335 (1990). On the question of due diligence as it pertains to state responsibility, see generally Riccardo Pisillo-Mazzeschi, *The Due Diligence Rule and the Nature of International Responsibility of States*, 35 GERMAN Y.B. INT'L L. 9 (1992).

196. On the role of fault in a host-state's failure to act in conformity with an international obligation, see Christenson, *supra* note 45, at 315-16; and Pierre-Marie Dupuy, *The International Law of State Responsibility: Revolution or Evolution?*, 11 MICH. J. INT'L L. 105, 110 (1989).

197. See *infra* note 238.

ians. In addition, international terrorism is a crime so intrinsically repugnant to humanity¹⁹⁸ that it undoubtedly warrants a stringent scheme of state responsibility. It is needless to say that, should the obligation of preventing terrorist attacks be construed as a rule of *jus cogens*, it would necessarily entail a stricter regime of responsibility.¹⁹⁹ It inevitably follows from this proposition that the international community will justifiably impose a higher burden of precaution on host-states. Hence, it seems that the goals of the UN Charter, along with the relevant Security Council Resolutions, would be better served by transference of the onus onto the host-state.

Under the new paradigm, the Security Council has considerably distanced itself from this earlier posture of reasonableness and could ultimately move towards a more radical concept such as strict liability. The objectives of Resolutions 1368 and 1373 would be better served by short-circuiting the concept of attribution altogether. My proposed framework of strict liability is, however, subject to a few *caveats* motivated by policy considerations.

4. *Mitigating Tensions: Implementing a Model of Strict Liability*

In tort law, the concept of strict liability has sometimes been construed as absolute liability. For example, under this approach a manufacturer cannot escape liability to the buyer once the harm is done save in circumstances where causation cannot be established. Generally, defenses are not available under a rationale of absolute liability.²⁰⁰ There has been some tendency within the legal community to impose an obligation of result²⁰¹ on host-states, indicating that, once a terrorist attack is successfully launched, the object of the obligation has been frustrated and responsibility should automatically follow. Otherwise, host-states will elude responsibility and the obligation to prevent will be pointless. However, there exists a second and influential school of thought on the subject, which purports to demonstrate that several defenses do exist against a claim of strict liability,²⁰² and that the pivotal device in such litigation resides in the onus shift from plaintiff to defendant. This school, concerned about weapons of mass

198. See KITTICHAISAREE, *supra* note 79, at 227 (“International terrorism is one of the most heinous crimes that strike at the heart of peoples in virtually every corner of the globe.”).

199. See CRAWFORD, *supra* note 29, at 127-28 (“Moreover, obligations imposed on States by peremptory norms necessarily affect the vital interests of the international community as a whole and may entail a stricter régime of responsibility than that applied to other internationally wrongful acts.”).

200. See, e.g., Carla Ann Clark, *Howard v. Allstate Insurance Co.—Louisiana’s Attempt at Comparative Causation*, 49 LA. L. REV. 1163, 1166 (1989).

201. On the distinction between obligations of means and result, as applicable to the *Draft Articles*, see Pierre-Marie Dupuy, *Reviewing the Difficulties of Codification: On Ago’s Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility*, 10 EUR. J. INT’L L. 371 (1999). Dupuy argues that this distinction should be imposed on international law because certain situations must be avoided, such as “private activities which take place on national territory causing damage to another state.” *Id.* at 375.

202. See, e.g., *id.*; David G. Owen, *Products Liability: User Misconduct Defenses*, 52 S.C. L. REV. 1 (2000).

destruction, argues that a collective duty to prevent terrorism would legitimize infringing sovereignty should host-states fail to eliminate terrorist threats.²⁰³

Regardless of the approach espoused by the international community, it is fair to say that an obligation of prevention based on producing a specific outcome is not feasible, let alone reasonable.²⁰⁴ Thus, my model is somewhat influenced by the second conception of strict liability, although it likely rests on some middle ground between the two categorical positions. Given the serious nature of terrorist activity and the objective of protecting civilians, this context provides us with more leeway in imposing stricter rules of state responsibility. Hence, more moderate views construe the obligation to prevent terrorist attacks as requiring an *ex post facto*²⁰⁵ exercise of factual evaluation, to be performed on a case-by-case basis.

The most convincing argument for the implementation of strict liability *vis-à-vis* international terrorism resides in the evidentiary problems related to attribution.²⁰⁶ When faced with the breach of an obligation to prevent a given event—namely, a terrorist attack—an aggrieved state is at somewhat of a legal impasse in establishing the international responsibility of the host-state. As with the Coke bottle manufacturer who has exclusive knowledge over the manufacturing process, the host-state is better positioned than the injured state to know, for example, what logistical, intelligence, police, and military means are at its disposal to eliminate the threat.²⁰⁷ Furthermore, as the sole sovereign and legal

203. See, e.g., Lee Feinstein & Anne-Marie Slaughter, *A Duty to Prevent*, FOREIGN AFFAIRS (Jan/Feb. 2004), available at <http://www.foreignaffairs.org/20040101faessay83113-p0/lee-feinstein-anne-marie-slaughter/a-duty-to-prevent.html> (last visited Mar. 20, 2004) (“The unprecedented threat posed by terrorists and rogue states armed with weapons of mass destruction cannot be handled by an outdated and poorly enforced nonproliferation regime. The international community has a duty to prevent security disasters as well as humanitarian ones—even at the price of violating sovereignty.”).

204. See also Dupuy, *supra* note 201, at 381 (arguing that, “even in cases in which the situation to be prevented is defined in terms of the occurrence of damage, obligations of prevention are a sub-category, but a sub-category of ‘obligations to endeavour’ (i.e. ‘obligations of conduct’ in the civil law sense), not of ‘obligations of result.’”).

205. Those belonging to the first school of thought have also argued that preemptive strikes are a useful tool against terrorist threats. See, e.g., Posteraro, *supra* note 79. For recent accounts on the debate surrounding preemptive action and self-defense, see, for example, Michael Bothe, *Terrorism and the Legality of Pre-emptive Force*, 14 EUR. J. INT’L L. 227-40 (2003); Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL’Y 539, 546-49 (2002); Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO J. INT’L L. 7 (2003); Miriam Shapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 AM. J. INT’L L. 599 (2003); Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT’L L. 513 (2003); and William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT’L L. 557 (2003).

206. See Dinah Shelton, *Judicial Review of State Action by International Courts*, 12 FORDHAM INT’L L.J. 361 (1989) (reviewing evidentiary concerns related to omissions); see generally Kevin A. Bove, *Attribution Issues in State Responsibility*, 84 AM. SOC’Y INT’L L. PROC. 51 (1990).

207. On the difficulties of proving that a host-state had the means to prevent a terrorist attack, see Christenson, *supra* note 45, at n.14. See also Condorelli, *supra* note 154. Proving a host-state had the means to prevent a terrorist attack becomes particularly difficult when the host-state

guardian of its national borders, the host-state simply has the most insight and reach into terrorist activities conducted within its territory. Establishing attribution based on very limited publicly available facts would pose a significant obstacle for aggrieved states, especially in light of the fact that the content of the obligation to prevent terrorism is far from being settled law. Since failing to prevent a given event from occurring is an inherently nebulous and difficult concept, the objectives of efficiency and legitimacy of international law would be better vindicated through a shift in onus to the host-state.

5. *A Two-Tiered Strict Liability Mechanism*

The objective in a shift in onus to the host-state is not only to transfer the burden of proof but also to shift the incentives to the host-state. This could be achieved through a two-tiered strict liability mechanism; namely, through the elimination of attribution and the recognition that, once a terrorist attack has been launched from a host-state, that state is automatically indirectly responsible for the attack. In other words, a successful cross-border terrorist strike establishes a *prima facie* case of responsibility against the host-state. It is important to clarify that the idea is not to encourage or promote the creation of totalitarian states,²⁰⁸ nor to implement a system of absolute liability²⁰⁹ where host-states are deprived of the opportunity to exculpate themselves *ex post facto*. If poorly conceived, this framework would be ripe for abuse against weaker states, especially developing countries that may not have the same means as industrialized countries to combat terrorism. Hence, we must correspondingly develop safeguards in order to avoid indiscriminate condemnation of host-states, as it is not likely that the international community will accept a rationale of absolute liability and automatic reprisals against ineffective states.²¹⁰

wields exclusive control over the relevant facts. See, e.g., Christenson, *supra* note 45, at 315 (“[P]rocedural questions giving practical effect to expectations of the international community are equally, if not more, important to international legitimacy and the recognition of arrangements of control within a State when a State has exclusive control over internal events, information and communications.”).

208. Christenson, *supra* note 45, at 368 (arguing that, in a totalitarian state where the state controls every aspect of human action, the state would be responsible for any acts of international terrorism conducted by its citizens). Nor is the objective to encourage state sponsorship of terrorism through the imposition of multilateral structures. Although not directly on point, consider Evan Stephenson, *Does United Nations War Prevention Encourage State-Sponsorship of International Terrorism? An Economic Analysis*, 44 VA. J. INT’L L. 1197-1230 (2004).

209. Bowett had not completely ruled out the possible crafting of a rule of absolute liability in the context of indirect state responsibility. Bowett, *supra* note 7, at 19-20 (“The question of the illegality of guerilla activities (and, correspondingly, the reasonableness of reprisals against them) is inevitably linked to that of the responsibility of the state on whose territory these activities are organized. . . . [I]nternational law has not developed any notion of absolute liability in this field and the basic assumption has been that the territorial state assumed responsibility because it had the power to prevent these activities.”) (emphasis added). See also Baker, *supra* note 29, at 48 (“[T]errorism may be the functional equivalent of an armed attack for which the perpetrators and their sanctuary states are *absolutely liable*.”) (emphasis added).

210. See, e.g., Byers, *supra* note 105, at 408 (“Even today, most States would not support a rule that opened them up to attack whenever terrorists were thought to operate within their terri-

It logically follows that the host-state will be able to refute the initial *prima facie* finding of responsibility. In other words, once responsibility has been established and the onus has shifted, the host-state will have an opportunity to demonstrate how it exercised due care and exhausted all available options to thwart the terrorist attack. Considerations pertaining to the distinction between obligations of means and result,²¹¹ such as the logistical capacity of the host-state, and the loss of control over territory by the state, should only be invoked in this second step of the strict liability approach, as an integral part of the defense against the *prima facie* finding of responsibility. The strict liability approach promotes fairness²¹² among states and somewhat levels out the disparity in economic and political power. In sum, this proposed approach would place all host-states on equal footing, irrespective of their economic or social status. In addition, this model would dissipate the direct responsibility paradigm in all cases except those rare circumstances where an aggrieved state can clearly establish direct involvement by the host-state.

6. Other Advantages of a Strict Liability Model

This proposed system would also instill some legitimacy into the Security Council's decision-making. Although different situations warrant different levels of response, the involvement of the Security Council in the assessment of state responsibility has, until now, been far too fact-oriented. It is imperative to define clear rules of state responsibility, as the Council will likely sit as the final arbitrator in legitimizing responses involving force. Shifting the onus to the host-state offers several advantages, including an overhaul of the Council's fact-finding function in establishing responsibility. In demonstrating that it fulfilled

tory.”). Some commentators caution against being selective in the transplantation process, in order to avoid importing a private law analogy without the corresponding procedural and evidentiary safeguards, especially in the context of the war on terror. See, e.g., Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT'L L. 537, 550-51 (1999). The problems associated with the imposition of Western-derived legal transplants have also been raised in a variety of contexts, with particular emphasis on the possible ensuing hegemonic thrust of the West. See, e.g., Mark A. Drumbl, *Toward a Criminology of International Crime*, 19 OHIO ST. J. ON DISP. RESOL. 263, 271-72 (2003); Benedict Kingsbury, “Indigenous Peoples” in *International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT'L L. 414, 455 (1998); and Makauwa Mutua, *Politics and Human Rights: An Essential Symbiosis*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS 150 (Michael Byers ed., 2000).

211. In the context of the *Draft Articles*, any international obligation will necessitate the evaluation of several factors, including the conduct/result dichotomy. See CRAWFORD, *supra* note 29, at 125 (noting that a prohibition may involve “an act or an omission or a combination of acts and omissions; it may involve the passage of legislation, or specific administrative or other action in a given case, or even a threat of such action, whether or not the threat is carried out, or a final judicial decision. It may require the provision of facilities, or the taking of precautions or the enforcement of a prohibition.”).

212. The concept of fairness is undeniably one of the cardinal points of strict liability in U.S. law. See, e.g., James A. Henderson, *Coping with the Time Dimension in Products Liability*, 69 CAL. L. REV. 919, 931-39 (1981). On the moral philosophy underlying products liability law, see David G. Owen, *The Moral Foundations of Products Liability Law: Toward first Principles*, 68 NOTRE DAME L. REV. 427 (1993).

its obligation of prevention, a host-state could convince the Security Council to authorize less invasive peacekeeping arrangements rather than full-scale military invasion. Based on the evidence adduced from the host-state's case, the Security Council might consider that a given course of action is disproportionate and, therefore, gauge the adequate levels of response *ex ante*. More importantly, this type of structure will hopefully strive to eliminate the pursuit of retaliation inspired by retribution alone.

Aside from enhancing the legitimacy of international efforts to combat terrorism and delineating the ambit of state responsibility, this model would also foster states' comparative policy-making and collaborative efforts. Several commentators expound that multilateral collaboration should be preferred over unilateral state action in instilling a preventive character to the war on terrorism.²¹³ In this spirit, states could engage in significant risk control²¹⁴ and risk assessment of possible terrorist threats and, hopefully, encourage multilateral exchanges of information and intelligence, along with financial "red-flagging" of terrorist assets.²¹⁵ In addition to sending a message of deterrence to complacent governments, this approach would also provide states with a forum to voice and test out their counter-terrorism policies. We must remember that the objective is to make the war on terror a preventive rather than a curative effort, and that the imposition of strict liability for failing to prevent a terrorist attack would be resorted to only after a preventable terrorist attack occurs. Beforehand, we must contemplate all reasonable steps to prevent it.

One final argument must be dealt with. Some might argue that a new law of strict liability would impugn the dignity of host-states that honestly do their best to stop terrorism. Even though they would not be held directly responsible for the attack, they would nonetheless face the social stigma of having violated international law.²¹⁶ In response to this argument, it is imperative to recall that

213. See, e.g., Posteraro, *supra* note 79, at 205 (arguing that, before taking unilateral action to defend themselves from terrorist threats, states should first seek to work with international institutions and then with coalition partners); Dove Waxman, *Terrorism: The War of the Future*, 23 FLETCHER F. WORLD AFF. 201, 205 (1999) ("The United States may be the world's only superpower, but even a superpower cannot fight terrorism alone. The increasingly transnational nature of terrorism means that it can only be tackled transnationally, requiring the cooperation of many states, all of whom jealously guard their national sovereignty."); see also Quigley, *supra* note 103.

214. This is another important tenet of domestic strict products liability.

215. Terrorist fundraising is another significant dimension of indirect responsibility, one which extends beyond the scope of this paper. See William Wechsler, *Strangling the Hydra: Targeting Al-Qaeda's Finances*, in HOW DID THIS HAPPEN? TERRORISM AND THE NEW WAR 121-43 (J. Hogue & R. Gideon eds., 2001); Bruce Zagaris, *The Merging of the Anti-Money Laundering and Counter-Terrorism Financial Enforcement Regimes After September 11, 2001*, 22 BERKELEY J. INT'L L. 123-57 (2004).

216. A similar case arose within the context of the World Trade Organization in the *Asbestos Case. European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc. WT/DS135/R (2000) (Dispute Settlement Panel) and WTO Doc. WT/DS135/AB/R (2001) (Appellate Body). In that litigation, France was called upon to justify its ban on asbestos and asbestos-containing products under Article XX of the General Agreement on Tariffs and Trade. The dispute settlement panel concluded that, although France's ban discriminated against other types of carcinogens, that discrimination could be justified under Article XX. Although France "won" before

there are no ideal solutions to preventing international terrorism: mitigation of the tensions between sovereignty and reputation remains a noble objective in making the world a safer place. In addition, this approach seems to be a reasonable ground between the zeal of imposing unreasonable obligations on host-states, namely obligations of result, and envisioning a regime too loosely suited for modern warfare, where states can easily elude responsibility. From that perspective, it would seem desirable and more efficient to slightly sacrifice “saving face,” so to speak, rather than infringe territorial sovereignty and fail to prevent massive deaths and widespread terror. Finally, the social stigma argument can also be interpreted as a positive force, generating realistic incentives and expectations within the international community.

Based on the foregoing reasons and the precedence achieved by indirect responsibility, international law could countenance a regime of strict liability, albeit predicated on the opportunity for host-states to raise defenses or justifications *vis-à-vis* their duty of prevention of terrorist attacks. It is important to briefly explore the second tier of the strict liability approach, namely the possible considerations raised by host-states against a *prima facie* presumption of indirect responsibility. This exercise starts with a brief overview of the obligation of prevention, which constitutes the focal point of my strict liability inquiry and the cornerstone of modern indirect state responsibility.

IV.

THE OBLIGATION OF PREVENTION IN INTERNATIONAL LAW

A. The Emergence of the Obligation of Prevention

It is now established that a state will be responsible for “noxious fumes” emanating from its territory, whether caused by a smelter or a terrorist organization.²¹⁷ The obligation of a host-state to prevent terrorist attacks emanating

the panel, it appealed the case to the appellate body, which rejected the panel’s discrimination rationale and instead focused on the likeness of the products at hand. In short, the appellate body recognized the right of France to afford different treatment to hazardous products without being labeled violators of the national treatment principle. See, e.g., *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, in THE WTO CASE LAW OF 2001: THE AMERICAN LAW INSTITUTE REPORTERS’ STUDIES 38 (Henrik Horn & Petros C. Mavroidis eds., 2004). Thus, it appears that, in this instance, the Appellate Body was aware of the social stigma involved in declaring that a state had violated international law (even if that violation was nullified on technical grounds). It is interesting to note that the rules of state responsibility have sometimes been extended to the WTO system. See Santiago M. Villalpando, *Attribution of Conduct to the State: How the Rules of State Responsibility May Be Applied Within the WTO Dispute Settlement System*, 5 J. INT’L ECON. L. 393-429 (2002). Finally, an argument may also be advanced to the fact that the prospect of incurring liability might prompt states to better thwart terrorist activities. For a recent account on similar issues, see Karl Zemanek, *Does the Prospect of Incurring Responsibility Improve the Observance of International Law?*, in INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 125-36 (Maurizio Ragazzi ed., Martinus Nijhoff Publishers 2005).

217. See *Trail Smelter Case* (U.S. v. Can.), reprinted in 35 AM. J. INT’L L. 716 (1941); see also *Corfu Channel*, supra note 35, at 22-23 (not allowing a territory “knowingly” to be used to harm another state). See generally RENÉ LEFEBER, *TRANSBOUNDARY ENVIRONMENTAL*

from its territory is so widely recognized²¹⁸ that it should not fuel a debate. Many of the pertinent and modern sources of the obligation, such as Security Council Resolutions 1368 and 1373, have already been discussed above. In addition, there are several documents²¹⁹ adopted under the aegis of the UN, including other Security Council resolutions²²⁰ and multilateral treaties,²²¹ which impose an affirmative duty on states to prevent acts of terrorism.²²²

This obligation stems from the basic principle of sovereignty, which entails both rights and obligations.²²³ Under universal neighboring principles, it is well established that the rights of one state end where the territory of another state begins.²²⁴ An obvious source of this obligation lies in Article 2(4) of the UN

INTERFERENCE AND THE ORIGIN OF STATE LIABILITY 19-47 (1996). A third decision, taken in its whole, is sometimes invoked in scholarship to defend this position. *See, e.g.*, Lake Lanoux Case (Fr. v. Spain), 12 R.I.A.A. 281 (1957). It should be noted that some academics call into question the persuasiveness of this line of cases. *See, e.g.*, BENEDETTO CONFORTI, INTERNATIONAL LAW AND THE ROLE OF THE DOMESTIC LEGAL SYSTEMS 170 (1993) (arguing that *Corfu Channel* and *Trail Smelter* do not prove the existence of an obligation to prevent ultra-hazardous and highly polluting activities).

218. Many commentators have recognized this obligation. *See, e.g.*, Brown, *supra* note 15, at 4-5, 13-18; Lippman, *supra* note 6; Feinstein & Slaughter, *supra* note 203.

219. *See, e.g.*, Declaration on Friendly Relations, *supra* note 73. The Declaration on Friendly Relations is repeated almost verbatim in the Declaration on Measures to Eliminate International Terrorism, which requires states, as customary international law, to take "effective and resolute measures" to end international terrorism. Declaration on Measures to Eliminate International Terrorism, Annex to G.A. Res. 49/60, U.N. GAOR, 84th mtg., U.N. Doc. A/RES/49/60, at 5(a) (1994).

220. Several Security Council resolutions stand for the principle that international terrorism should be eradicated. *See, e.g.*, S.C. Res. 883, U.N. SCOR, 3312th mtg., U.N. Doc. S/RES/883 (1993) (declaring "that the suppression of international terrorism . . . is essential for the maintenance of peace and security"); S.C. Res. 1044, U.N. SCOR, 3627th mtg., U.N. Doc. S/RES/1044 (1996) (declaring that the Security Council is "[d]eeply disturbed by the world-wide persistence of acts of international terrorism in all its forms which endanger or take innocent lives, have a deleterious effect on international relations and jeopardize the security of States"); S.C. Res. 1189, U.N. SCOR, 3915th mtg., U.N. Doc. S/RES/1189 (1998) ("reaffirming the determination of the international community to eliminate international terrorism in all its forms and manifestations"); S.C. Res. 1269, U.N. SCOR, 4053d mtg., U.N. Doc. S/RES/1269 (1999) (calling upon "all States to implement fully the international anti-terrorist conventions to which they are parties" and encouraging them "to consider as a matter of priority adhering to those to which they are not parties"); S.C. Res. 1267, *supra* note 110 ("reaffirming its conviction that the suppression of international terrorism is essential for the maintenance of international peace and security"); S.C. Res. 1333, U.N. SCOR, 4251st mtg., U.N. Doc. S/RES/1333 (2000).

221. Several multilateral treaties on combating international terrorism are currently in effect, thereby strengthening the will of the international community to recognize an affirmative obligation to prevent acts of terror. For an exhaustive list of multilateral treaties and UN resolutions, see Proulx, *supra* note 27, at n.91.

222. The obligation of preventing terrorist acts has also been affirmed through judiciaries. *See supra* notes 61-66 and accompanying text.

223. *See, e.g.*, Feinstein & Slaughter, *supra* note 203, at 2 (citing a report of the Evans-Sahnoun Commission to argue that sovereignty implies responsibilities, such as the protection of citizens and their welfare, as well as rights, and that national leaders are responsible for their actions to international tribunals). On the mutual respect of sovereignty, see CLAUDE EMANUELLI, DROIT INTERNATIONAL PUBLIC: CONTRIBUTION À L'ÉTUDE DU DROIT INTERNATIONAL SELON UNE PERSPECTIVE CANADIENNE 411 (1998).

224. *See, e.g.*, Declaration on Friendly Relations, *supra* note 73; I OPPENHEIM'S INTERNATIONAL LAW, *supra* note 4, at 385; EMANUELLI, *supra* note 223, at 216-18, 411.

Charter, which reflects customary law in expressly prohibiting states from using or threatening to use force against another state.²²⁵ Based on that logic, a host-state that has the capability to prevent a terrorist attack but fails to do so will inherently fail to fulfill its duty under Article 2(4) since terrorism amounts to force by definition. This proposition is reinforced when the host-state openly supports or endorses the terrorist attack on another state's territory.²²⁶

B. *The Meaning of the Obligation of Prevention*

The second tier of my strict liability approach centers on a host-state's attempt to refute or, at least, dissipate the *prima facie* finding of indirect responsibility against it. Most of the usual considerations surrounding the failure to prevent a terrorist attack—be they the level of knowledge of the host-state, the size of the territory and its police/military capacity, the nature of the circumstances and history of terrorism within the country, and so forth—should be invoked during this second step.

Although the distinction between obligations of conduct and result has been instrumental at times in the context of the *Draft Articles*,²²⁷ obligations of prevention “are usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur.”²²⁸ This distinction remains somewhat relevant for the application of the *Draft Articles*, in that it “may assist in ascertaining when a breach has occurred,”²²⁹ but it does not constitute the pivotal point. In terms of enforcing an obligation of result via the judiciary, courts will be more inclined to proceed on a case-by-case basis,²³⁰ rather than try to fit all similar obligations into a single legal matrix. In addition, the abovementioned distinction has not been a determinative factor in guiding courts when adjudicating breaches of international obligations.²³¹

The controversy over the distinction between obligations of conduct and result, along with their scope and content, is far from resolved.²³² Nevertheless,

225. See Brown, *supra* note 15, at 4.

226. See, e.g., Baker, *supra* note 29, at 42 (“Terrorist acts carried out by armed bands with the support or encouragement of a foreign state is, in a literal sense, an armed attack.”); see also *id.* at 48 (“Terrorism may be the functional equivalent of an armed attack for which the perpetrators and their sanctuary states are absolutely liable.”).

227. The transplantation of these civil law concepts into international law has also engendered significant difficulties. See CRAWFORD, *supra* note 29, at 21.

228. *Id.* at 140.

229. *Id.* at 129.

230. Cf. *Colozza and Rubinat v. Italy*, 85 Eur. Ct. H.R., Ser. A (1985) with *Iran v. U.S.A.* (Cases A15 (IV) and A24), 32 Iran-U.S. Cl. Trib. Rep. 115 (1996).

231. See CRAWFORD, *supra* note 29, at 130.

232. Certain commentators have taken issue with Ago and Crawford's respective characterizations of obligations to prevent and obligations of result. See *supra* note 201. For the distinction between obligations of means and obligations of result, see Jean Combacau, *Obligations de résultat et obligations de comportement: quelques questions et pas de réponse*, in MÉLANGES OFFERTS À PAUL REUTER: LE DROIT INTERNATIONAL: UNITÉ ET DIVERSITÉ 181-204 (Daniel Bardonnnet et al. eds., Pedone 1981); Pierre-Marie Dupuy, *Le fait générateur de la responsabilité internationale des*

the incorporation of this distinction in international law is sound and desirable. As a general rule, it is fair to say that an obligation of result in preventing terrorist activities will not be reasonable, let alone realistic. The dispositive factor will lie, rather, in the conduct of the host-state itself in addressing the potential threat and in attaining a realistic result in light of the factual circumstances.

The best way to conceptualize the obligation of prevention is to visualize a sliding element on a vertical bipolar axis representing the conduct of the host-state. At one end of the spectrum lies the expected (and specific) result dictated by the obligation to prevent terrorist attacks, namely, to thwart the attack completely. At the other extremity of the axis rests the utmost negligent and careless conduct a state can adopt in preventing terrorism. All along the way, various degrees of state efficiency in preventing attacks are delimited, increment-by-increment. This scale covers an exhaustive set of possibilities, ranging from the near prevention of a given attack to inaction.²³³ The sliding element represents the host-state's conduct and is positioned at the angle that better represents that state's action to prevent the given attack. The circumstances of the particular attack will affect the sliding element: should they be favorable to the host-state, the element will slide up, closer to the expected result. However, if they are construed against the host-state, they will burden the element and bring it down towards negligent or careless conduct.

For example, if a State had the logistical capacity to crack down on terrorist cells that perpetrated an attack but failed to do so, for example, by not acting on intelligence reports or failing to properly manage them,²³⁴ the element will descend. The same is true if the host-state failed to freeze terrorist assets within its jurisdiction; if it endorsed or promoted the terrorists' cause;²³⁵ or if it knowingly harbored or supported members of a terrorist organization within its territory²³⁶ when the organization overtly perpetrates egregious violations of inter-

Etats, 188 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 9, 44 (1984); and Pauwelyn, *supra* note 132, at 415.

233. Some scholars hint at the idea of a variable model of state responsibility, albeit through the lens of armed reprisals. However, since much of the literature was written before 9/11, most of the relevant considerations hinge on *Nicaragua*-and-*Tadic*-inspired notions of control or knowledge. See, e.g., Baker, *supra* note 29, at 36-37 (noting that a state's right of self-defense against a terrorist sanctuary state increases the more the sanctuary state is involved with, or has leverage over, the terrorists).

234. The proposed model of strict liability has, up to now, precluded the application of *Corfu Channel* to host-states. The issue of constructive knowledge becomes paramount in the second tier of the strict liability approach and, given the importance of combating international terrorism, a host-state will no longer be able to hide behind "willful blindness" to avoid responsibility. See CRAWFORD, *supra* note 29, at 82 ("For example in the *Corfu Channel* case, the International Court of Justice held that it was a sufficient basis for Albanian responsibility that it knew, or must have known, of the presence of the mines in its territorial waters and did nothing to warn third States of their presence."). This finding is directly transferable to the current framework, as the amount of information a host-state had or *ought* to have had is directly proportional to its level of responsibility.

235. See *supra* note 39 and accompanying text.

236. This element was also explored by Bowett when he assessed the reasonableness of reprisals against a host-state for terrorist activity emanating from its territory. Bowett, *supra* note 7, at

national law.²³⁷

Conversely, if a host-state does not completely fulfill its obligation, or does not attain its potential in preventing the attack because doing so would generate more social unrest and terror,²³⁸ the element will slide up the axis; if there is a significant disparity or disproportion between the size of the host-state's territory and its military capacity relative to the expanse of terrorist activity within the territory, the onus of the state will decrease and the element will ascend. Similarly, the element will rise if a portion of the territory of the host-state has been taken over, so that the legitimate government does not wield any kind of tangible control over the region²³⁹ or if the host-state is logistically incapable of preventing an attack but considers the panoply of options offered to it, including allowing foreign forces into its territory to combat the threat,²⁴⁰ its burden will be lowered considerably, as it will have sacrificed sovereignty in favor of combating terrorism in a multilateral setting.²⁴¹ In short, the analysis turns on an *ex*

27 (noting "[t]hat the appraisal of the retaliatory use of force [must] take account of the *duration and quality of support*, if any, that the target government has *given to terroristic enterprises*") (emphasis added).

237. This would be the case of the Taliban, which ignored several pleas by the Security Council to cease harboring members of al Qaeda. See *supra* notes 127-130 and accompanying text.

238. It is important to recall that the whole campaign against terrorism is an exercise in risk assessment. In this particular case, although the host-state failed to prevent one terrorist attack, it should not exacerbate passions and, through an overactive zeal, instigate further terrorist attacks. Proportionality and reasonableness should govern this analysis. In fact, Bowett raised this problematic aspect of state responsibility through the lens of reprisals aimed at enticing host-states to prevent terrorist activities. Bowett, *supra* note 7, at 20 ("No Arab Government, given the enormous popular support for the guerrilla activities amongst its own population, appeared able to risk an intensive campaign to stamp out these activities . . . Reprisals are not likely to affect the toleration shown by a government to guerilla activities when a show of intolerance would bring the downfall of the government."). Although not directly on point, consider T.S. Rama Rao, *State Terror As a Response to Terrorism and Vice Versa: National and International Dimensions*, 27 *IND. J. INT'L L.* 183-93 (1987).

239. It is imperative to recall that the Taliban was, in fact, the *de facto* government in most of Afghanistan and, at the least, provided sanctuary to Al Qaeda. See George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 *AM. J. INT'L L.* 891, 893 (2002); Antonio Cassese, *Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law*, 12 *EUR. J. INT'L L.* 993, 999 (2001); RICHARD FALK, *THE GREAT TERROR WAR* 101 (2003); Christopher Greenwood, *International Law and the "War Against Terrorism"*, 78 *INT'L AFF.* 301, 314 (2002); Mary Ellen O'Connell, *To Kill or Capture Suspects in the Global War on Terror*, 35 *CASE W. RES. J. INT'L L.* 325 (2003); Mofidi & Eckert, *supra* note 113, at 81-85. *But see* John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 *VA. J. INT'L L.* 207, 218-20 (2003) (arguing that the Taliban was not a state actor). It is probably fair to assume that the United States' refusal to recognize the Taliban as the legitimate government of Afghanistan is attributable to its disapproval of the Taliban's oppressive regime. See, e.g., Azubuike, *supra* note 27, at 131-34.

240. See Byers, *supra* note 3 (arguing, under the heading "Exceptional Illegality," that "[t]he right to intervene by invitation is based on the undisputed fact that a state can freely consent to having foreign armed forces on its territory.").

241. This phenomenon also implies that economically weaker states might be called upon to sacrifice their sovereignty more readily. On the value of combating terrorism through multilateral channels, see John W. Head, *Essay: What Has Not Changed Since September 11—The Benefits of Multilateralism*, 12 *KAN. J.L. & PUB. POL'Y* 1-12 (2002); Fred C. Pedersen, *Controlling International Terrorism: An Analysis of Unilateral Force and Proposals for Multilateral Cooperation: Comment*, 8 *TOL. L. REV.* 209-50 (1976); Eric Remacle, *Vers un multilatéralisme en réseau comme*

post facto analysis of whether the state could have put more effort into preventing the terrorist attack.²⁴²

Now visualize a second sliding element mounted on another bipolar axis representing the obligation of prevention, placed in a parallel and proximate position to the first polar axis. At the top of this axis, and facing the expected (and specific) result pole on the other spectrum, one can find *jus cogens* obligations.²⁴³ At the other end of the axis rests the minimal standard of conduct prescribed by international law, this time sitting across from the pole of the utmost negligent conduct. As with the other axis, various degrees of international obligations are scattered between both poles, ranging from obligations to endeavor to obligations *erga omnes*. The gap between obligations of conduct and result, albeit a sliding concept as well, is dissimulated somewhere in the continuum of international obligations. On the second axis, the element represents the formal characterization by the international community of the specific obligation under study.

Consider that both elements are connected by an elastic band and that the ideal objective is to maintain the elastic in a horizontal position, such that the elements are aligned. As soon as a slight increase is felt in either axis, the elastic will stretch, thereby creating a gap between the elements. In order for the host-state to demonstrate that it used all "necessary means" to prevent the terrorist attack, there should be as small a gap as possible between the expected obligation and the conduct in question. Should such a cavity widen, it will undoubtedly inform the analysis of state responsibility: the liability of the host-state should be proportional to that gap.

instrument de la lutte contre le terrorisme?, in LE DROIT INTERNATIONAL FACE AU TERRORISME: APRÈS LE 11 SEPTEMBRE 2001 331-44 (K. Bannelier, O. Corten, T. Christakis & B. Delcourt eds., Pedone 2002); Volker Röben, *The Role of International Conventions and General International Law in the Fight Against International Terrorism*, in TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS LIBERTY? 789-821 (Christian Walter et al. eds., Springer 2004).

242. This is consistent with the logic of *Colozza and Rubinat*, *supra* note 230. See CRAWFORD, *supra* note 29, at 129 (noting that the European Court of Human Rights not only examined Italy's failure to afford an accused the right to a trial, but also "what more Italy could have done to make the applicant's right 'effective.'").

243. It is interesting to note that international law has generally recognized the *jus cogens* character of the prohibition of the use of force in Article 2(4) of the UN Charter. See *Nicaragua*, *supra* note 8, at 100 ("[T]he law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*."); JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 106 (1979); Alfred Vendross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT'L L. 55 (1966); Michel Virally, *Réflexions sur le Jus Cogens*, 12 ANNUAIRE FRANÇAIS DE DROIT INT'L 28 (1966). This would seem to put the whole debate surrounding direct responsibility to rest. In sum, if a host-state directly participates in a terrorist attack, it fails to fulfill its *jus cogens* obligation pertaining to the prohibition of the use of force. As I discuss below, *jus cogens* obligations usually attract a stricter regime of state responsibility. In such cases, the responsibility of the host-state would be easily established. For a background discussion on the role of Article 2(4) of the UN Charter in international relations, see Thomas Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809 (1970); and Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620 (1984).

In theory, the distinction between obligations of conduct and result will slide along the second axis and adapt to the circumstances of the case, namely, the conduct of the host-state represented by the position of the element on the first axis. In other words, reasonableness will exert an influence in guiding the elements as to what constitutes an acceptable threshold for the host-state. Should the circumstances indicate that, within reason, more could have been done by the host-state, the element will ineluctably fall lower on the first axis, in which case the gap between elements will widen and, as a result, the elastic will elongate.

To complicate the equation, the formal characterization of the obligation to prevent by the international community will also interact with the elements. For instance, should the obligation of preventing terrorist attacks be characterized as an obligation *erga omnes*, it will correspondingly attract a stricter regime of responsibility. Consequently, there will be a significant upward movement of the second element, along with the gap between obligations of conduct and result; should the actual conduct of the host-state on the first axis fall below what is required by the obligation *erga omnes*; this will engender a considerable gap between the elements.

The most ostentatious upward thrust would result from the characterization, by the international community, of the obligation of prevention as a *jus cogens* obligation.²⁴⁴ This conclusion would inexorably turn on the development of a legal duty of prevention of terrorist attacks—whether through a more confined or regional radius of operation, or through a generalized and universally accepted rule—as mirrored by customary international law.²⁴⁵ The higher the obligation to prevent, the more onerous and incumbent the burden of refuting indirect responsibility will be on the host-state. Irrespective of where the elements may fall, there will often be a constant sliding gap not only between the characterization of the obligation and the actual conduct of the state, but also between the obligation of conduct/result dichotomy and all the inter-polar degrees on both axes.

This area of the law is far from settled. Although largely fact-driven, these dimensions of state responsibility require further systematic development by the

244. As with obligations *erga omnes*, *jus cogens* obligations attract a stricter regime of state responsibility. See, e.g., CRAWFORD, *supra* note 29, at 132 (“State responsibility can extend to acts of the utmost seriousness, and the regime of responsibility in such cases will be correspondingly stringent. But even when a new peremptory norm of general international law comes into existence . . . this does not entail any retrospective assumption of responsibility.”). However, it has sometimes been asserted that *jus cogens* rules are, in fact, narrower than *erga omnes* obligations. See, e.g., Ronald St. J. Macdonald, *Fundamental Norms in Contemporary International Law*, 25 CAN. Y.B. INT’L L. 138 (1987); THEODOR MERON, *HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS* 187 (1986). Other scholars expound that *jus cogens* and *erga omnes* rules are essentially equivalent because both deal with different facets of the same norms. See, e.g., Michael Byers, *The Relationship Between Jus Cogens and Erga Omnes Rules*, 66 NORDIC J. INT’L L. 211, 230 (1997).

245. See Byers, *supra* note 244, at 228 (“The principal source of *jus cogens* rules may thus be identified as the process of customary international law.”).

international community.²⁴⁶ However, to require that all obligations of prevention be categorized into a single legal matrix is unrealistic. One inference becomes self-apparent: regardless of the approach adopted by the international community, this area of indirect state responsibility should be governed by a variable threshold model. To impose an obligation of result to prevent terrorist attacks in all cases would prove unreasonable and inefficient. However, this does not preclude the application of an obligation of result when the facts of the case warrant it, such as when the host-state holds all the information and means to prevent a given attack but decides not to thwart the excursion. In such exceptional cases, namely where the misalignment between both axes is so astronomical, and the regime of responsibility is akin to a bright-line rule, breaches of international obligations are easily cognizable. Finally, it seems that the international community must redefine some primary rules of international law after all, as the obligation itself is clear: a state has an affirmative duty to forestall transborder excursions emanating from its territory and injurious to other states.²⁴⁷ Defining the contours of that rule, namely whether it should impose a specific result on states or belong to the realm of *jus cogens*, could send the international community back to the drawing board for quite some time.

V.

CONCLUSION

The world now faces new threats and needs to rethink international mechanisms. 9/11 is perhaps the most pivotal point in recent memory with regard to international law. It changed the way states protect their borders, the way immigration flows in most Western countries, the way modern states conceive terrorism and counter-terrorism, and so forth. The importance of the response to 9/11 cannot be over-emphasized, as it marked a clear departure from prior practice in several areas of international law, state responsibility being central. Not only did the response to 9/11 considerably alter the application of *jus ad bellum*, it also initiated an important shift in the law of indirect state responsibility. With the advent of important milestones in the field of state responsibility, such as the *Tehran* decision and the *Draft Articles*, the transition from a model of attribution and direct responsibility to a model of indirect responsibility was natural and logical. From this perspective, and also considering the Security Council's resolve to eradicate terrorism, the move toward a mechanism of strict liability does not seem so improbable, provided it is endowed with significant

246. Baker warns about the inherent dangers of attempting to mount a military response against a terrorist attack, a caveat that is rightly concerned with potential harm to civilians. Baker, *supra* note 29, at 47 ("The problem is that the form of response to a terrorist attack often appears to be disproportionate to the actions which prompted it Such action is typically large scale and overt when compared to the small, covert actions of the terrorists.").

247. It is interesting to note that this obligation had also been recognized prior to 9/11. See, e.g., *id.* at 40 ("A state has a categorical legal obligation to prevent its territory from being used to support or harbor terrorist groups.").

safeguards for host-states. The objective here is to instill life and rigor into a truly global counter-terrorism campaign.

The strict liability model has great propensity for change, progress, and efficiency at the international level. Not only does it promote fairness among host-states but it also provides governments with the right incentives: combating terrorism can only be successfully accomplished on a multilateral level, through the mutual exchange of information and policies. The pursuit of egregious and blind self-interests will harmfully affect the efficacy of the regime of international responsibility. Although certain archetypal social elements such as crime and violence will never be completely obliterated, the objective remains to design a scheme of state responsibility that is the most conducive to international peace and security. On the other hand, this model also poses problems and is potentially ripe for abuse by economically stronger states. Efficient international state responsibility can be encapsulated in one word: compromise. This notion has pervaded my discussion. Situations like the 1982 Israel-Lebanon incident illustrate the inherent tensions in establishing the parameters of indirect responsibility. Throughout most episodes of transborder aggression, the principles of sovereignty and territorial integrity have been opposed by the crucial and often time-sensitive need to prevent terrorist attacks. If members of the international community hope to empower the global counter-terrorism campaign, they will have to relinquish or, at least, concede some parts of the fundamental values found in the modern system of nation-states. In all likelihood, the choice will ultimately require some sacrifice of state sovereignty and dignity.

The international community is now seriously concerned with preventing attacks and deterring terrorist organizations. To forestall the proliferation of terrorist activity through the channel of host-states can be a judicious strategy, if well orchestrated. However, logistical considerations abound and we must take stock of the realities facing developing countries and ineffective states. For example, it is unrealistic to ask a small country like Lebanon to effectively thwart PLO terrorists when it has already surrendered a considerable region of its own territory to them.

The “harboring and supporting” principle has essentially taken over as the linchpin of modern state responsibility *vis-à-vis* terrorism. Based on the new paradigm, host-states can be found responsible for wrongful acts, as would the babysitter who fails to prevent the children under his or her guard from burning down the neighbor’s house. The debates pertaining to attribution seem somewhat distant and the question of direct state involvement does not hold the same relevance it once did. However, this new paradigm of indirect responsibility carries with it new and sometimes nebulous legal challenges, such as the difference between obligations of conduct and result, the definition of the obligation of prevention, and the applicable legal standard to ineffective states in combating terrorist activity. Given the current legal climate and lack of consensus on these issues, it is difficult to clearly establish a legal regime governing these politically volatile situations. In the meantime, we can only hope that our extant scheme of state responsibility, paired with vigilant law enforcement, will be able

to contain the most serious threats. Indeed, the simple days are long over.