

Introduction

I. INTRODUCTORY REMARKS

T RANSNATIONAL TERRORISM POSES increasingly difficult challenges for international law, along with the enforcement and elaboration of international legal norms. Several studies have attempted to elucidate the relationship between international law and terrorism, while drawing on the benefits that can be derived from the former to combat the latter.¹ However, contrary to terrorists of the 1960s, 70s, and 80s, modern terrorists wield a considerably expanded scope of reach and influence.² Modern technology not only provides them unparalleled access to new and devastating weaponry, but also allows them to broadcast their messages of intimidation and intolerance in unprecedented fashion, on a truly global stage. Indeed, it is with horror that the world watched the events of the Mumbai terrorist attacks unfold on television and over the Internet in real-time. These types of private actors egregiously subvert legal rules and obfuscate the requisite nexuses between States and individuals upon which the traditional application of international legal norms is painstakingly dependent. Oftentimes remaining indistinguishable from the civilian populations in which they seek solace, private terrorist entities may operate in State-like fashion and inflict broad-reaching transnational violence across borders and cultures, whilst eluding State-like responsibility.³ As a corollary, the more diffused and highly de-hierarchised model of terrorism engendering massive and large-scale attacks is of relatively recent vintage.⁴

¹ See, eg: A Bianchi (ed), *Enforcing International Law Norms against Terrorism* (Oxford, Hart Publishing, 2004); J-C Martin, *Les Règles internationales relatives à la lutte contre le terrorisme* (Brussels, Bruylants, 2006); P Klein, ‘Le Droit international à l’épreuve du terrorisme’ (2006) 321 *Recueil des Cours* 203; PA Fernández-Sánchez (ed), *International Legal Dimension of Terrorism* (Leiden, Nijhoff, 2009). The emergence of transnational terrorism also generated international legal scholarship prior to 9/11: see R Higgins and M Flory (eds), *Terrorism and International Law* (London, Routledge, 1997).

² For instance, the ‘war’ on terror has arguably enhanced the status of transnational terrorists on the international plane. See M-E O’Connell, ‘Enhancing the Status of Non-State Actors through a Global War on Terror?’ (2005) 43 *Columbia Journal of Transnational Law* 435.

³ See, eg: T Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Oxford, Hart Publishing, 2006) 1. See also generally: K Mulaj (ed), *Violent Non-State Actors in World Politics* (New York, Columbia University Press, 2010).

⁴ See, eg: R Gunaratna, *Inside Al Qaeda: Global Network of Terror* (London, Hurst, 2002).

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Decidedly, transnational terrorism poses a new and singular problem for international law. Emerging from the vestiges of the antiquated ‘foreign office’ model of public international law, and borne out from the now-prevalent phenomenon of the disaggregated State, the repression of privately inflicted transnational violence falls outside of the ambit of traditional international legal protection, at least at the State level. Historically, international law was far more concerned with potential usurpation of sovereign powers and privileges, breaches of territorial integrity and inter-State violence than with internationally wrongful acts carried out by non-State actors. In addition, norms governing the use of force consistently responded to a unitary typology, whilst the recourses offered rested on predominantly bilateral conceptions of legal relationships. Human rights protections sought to extend to populations suffering under domination and mistreatment carried out by their own governments. In such scenarios, international law had a clear frame of reference in assigning blame and striving towards deterrence and reciprocity: such exercise invariably pointed to the nation-State.⁵ However, from a *lex ferenda* perspective, the debate surrounding State responsibility increasingly takes stock of contemporary developments pertaining to the involvement of private actors and individuals on the international scene. Eminent scholars lament the fact that the International Law Commission (ILC) has excised the role of non-State actors from the purview of State responsibility by focusing exceedingly on ‘bilateral’, ‘individualistic’ and ‘privatistic’ conceptions of that body of law.⁶ Granted, in some sectors private actors seek to elude regulation by self-regulating, through the adoption of corporate codes of conduct for example, or by reference to soft law regimes.⁷ As certain facets of international law shift away from a State-centric paradigm to an increasingly transnational reality, non-State actors now challenge the rules of State responsibility, at least by their actions. They also propel to the fore the need to revisit legal frameworks so as to bolster and identify potential deterrence models in order to prevent and suppress terrorism.⁸ Responding after the

⁵ See, eg: Becker, above n 3 at 1.

⁶ See generally: RP Mazzeschi, ‘The Marginal Role of the Individual in the ILC’s Articles on State Responsibility’ (2004) 15 *Italian Yearbook of International Law* 39.

⁷ For instance, the Montreux Document is predicated on a transnational impetus towards self-regulation by the private military and security companies industry. See The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict (17 September 2008), UN Doc A/63/467-S/2008/636. Conversely, States cannot hide behind private military firms to elude official involvement in conflict settings: ‘if the acts of PMFs are attributed to States, the States will lose their claim to neutrality and non-involvement’. See OR Jones, ‘Implausible Deniability: State Responsibility for the Actions of Private Military Firms’ (2009) 24 *Connecticut Journal of International Law* 239, 258. Soft law is typically perceived as embodying imprecise legal norms or non-legally binding obligations. See, eg: KW Abbott and D Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54 *International Organization* 421, 422; K Raustiala, ‘Form and Substance in International Agreements’ (2005) 99 *AJIL* 581 (2005).

⁸ This concern shifts the focus of the inquiry squarely on the relationship between State responsibility and terrorism. See, eg: KN Trapp, *State Responsibility for International Terrorism* (Oxford, OUP, 2011); RP Barnidge, Jr, *Non-State Actors and Terrorism: Applying the Law of State Responsibility and the Due Diligence Principle* (The Hague, TMC Asser Press, 2008).

fact is important in terms of allocating blame, but a sharp focus should nonetheless be placed on prevention; international legal rules should be harnessed with an equal view to allocating risk *and* to stamping out the roots of transnational terrorism.⁹

Transnational terrorism is a polymorphic threat – its very practice in various permutations, whether translating in large-scale attacks, more subtle, isolated strikes or Internet-based intimidation, obfuscates traditional law enforcement. Preventing terrorism has become a pressing social phenomenon: its authors often do not possess a fixed address; they often blend indiscriminately within the civilian populations that host them; they may operate autonomously and without much State support; and, in most cases, they flout international law, the principle of reciprocity and the punishment/deterrence dichotomy.¹⁰ International criminal law has a role to play in repressing terrorism and it partially attains this objective through the channel of *ad hoc* international criminal tribunals, namely under the Statute of the International Criminal Tribunal for Rwanda, which subsumes the crime of ‘terrorism’ under the Tribunal’s expertise. Other international instruments similarly focus on holding the perpetrators of terrorism legally accountable. Yet, international criminal law is, by no means, the default regime for repressing and preventing terrorism. The implementation of the Guantánamo Bay detention centre, the Annex to the Rome Statute of the International Criminal Court (ICC) and the criminalisation under domestic law of behaviours that, historically, solely amounted to evidentiary elements in criminal cases (eg: registration in private pilot schools, procurement of sources on explosive-making, dissemination of certain types of speech, membership in certain groups etc), clearly point in the direction of domestic criminal law as the preferred regime for holding individuals accountable. The international criminal model, therefore, is an interesting exception to the default regime that is undoubtedly acquiring traction, but that remains nonetheless limited and constrained by jurisdictional, conceptual and political impediments.

Whilst international initiatives aiming to bolster individual accountability are laudable, they fall short in ensuring the accountability of those States that harbour terrorists or in better circumscribing the role(s) that States play in supporting or in failing to prevent terrorism. Of vital importance are the conclusions formulated by the United Nations-mandated High-level Panel on Threats, Challenges and Change in its report, titled *A More Secure World*. The Panel proclaimed that ‘States are still the front-line responders to today’s threats’ and that fruitful international actions to ‘reduce terrorism and halt the spread of dangerous materials all require capable, responsible States as partners. It

⁹ See, eg: M Bennouna, ‘Réflexions sur la régulation internationale du risque à propos du concept de prévention’ in R Hostiou et al (eds), *Terres du droit: Mélanges en l’honneur d’Yves Jégouzo* (Paris, Dalloz, 2009) 371 at 382.

¹⁰ On the non-applicability of reciprocity to terrorists, see R Provost, ‘Asymmetrical Reciprocity and Compliance with the Laws of War’, Unpublished Manuscript (14 January 2010), available at <http://ssrn.com/abstract=1427437> at 3 n13; MJ Osiel, *The End of Reciprocity: Terror, Torture, and the Law of War* (New York, CUP, 2009).

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follows that greater effort must be made to enhance the capacity of States to exercise their sovereignty responsibly'.¹¹

States have a duty to protect their own citizens against terrorist attacks in light of international counterterrorism obligations and other relevant developments in international law, such as the Responsibility to Protect Doctrine (R2P). For example, the conceptual tenets of the R2P Doctrine have been brandished in order to substantiate more acute government intervention into the affairs of the Liberation Tigers of Tamil Eelam (LTTE) secessionist organisation in Sri Lanka.¹² Whilst international terrorism is at times becoming a highly de-territorialised and decentralised phenomenon, prompting policy-makers to focus their energies on ungoverned spaces and safe havens for terrorists, this study will demonstrate that terrorists are nonetheless highly dependent on sanctuary or toleration within State borders in order to plan and carry out their actions.¹³ Surely, States may not wield as much control or influence over private terrorist activities taking place on their territory in all cases, thereby inheriting a more passive role in the violation of primary international legal rules.¹⁴ Yet, States still have an important – sometimes determinant – place in the chain of events leading up to the perpetration of transnational terrorist attacks, as their authors often rely on governmental inaction, toleration, acquiescence, wilful blindness or ineffective counterterrorism infrastructures as propitious incubators for their agendas.¹⁵ Consequently, 'When terrorists attack, their victims may not know where to find them, but there is an address for their grievances and their fears. It is the State'.¹⁶

The major challenges for international law reside not at the semantic level, but rather in the efforts to better circumscribe *legal* definitions and frameworks. A particularly challenging objective is that of integrating all relevant actors under a normative framework with a view to bolstering prevention and promoting State compliance with counterterrorism obligations. In that regard, this study strives to subscribe to what Judge Mohamed Bennouna has described as the ethos of contemporary international law, 'dont la signification ultime réside dans son apport à l'amélioration du sort des personnes humaines, quelles qu'elles soient, dans tous les secteurs d'activités, et par delà l'écran étatique'.¹⁷ But how, exactly, can international law, a discipline traditionally

¹¹ Report of the High-level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility', UN Doc A/59/565 (2004), 2 December 2004 at 18. See also: *ibid* at 1, 9.

¹² See, eg: P Gunewardene, 'There's No Unwinnable War: Only a Mission to Crush Terrorism', *Daily News*, 24 March 2008, available at www.dailynews.lk/2008/03/24/fea02.asp.

¹³ See, eg: below ch 2, section IV.A). See also: R Värik, 'State Responsibility for Private Armed Groups in the Context of Terrorism' (2006) 11 *Juridica International* 184, 184.

¹⁴ The duty to prevent terrorism incontrovertibly constitutes a primary obligation under international law. Correspondingly, its violation sets in motion the application of the secondary rules of State responsibility. See, eg: Bennouna, above n 9 at 373; J Barboza, *Liability: Can We Put Humpty-Dumpty Together Again?* (2002) 1 *Chinese Journal of International Law* 499, 500.

¹⁵ See Becker, above n 3 at 2.

¹⁶ *ibid*.

¹⁷ M Bennouna, 'La Protection diplomatique: du standard minimum de traitement des étrangers aux droits de l'Homme' in A Constantinides and N Zaikos (eds), *The Diversity of International Law: Essays in Honour of Professor Kalliope K. Koufa* (Leiden, Nijhoff, 2009) 481 at 486.

concerned with focusing on State action, regulate the acts of private entities and non-State actors? How can it engage Iran's international responsibility for funding and training Hezbollah factions carrying out attacks against civilians? Possible scenarios are as endless as relevant interlocutors are diverse.

Legal scholars are increasingly grappling with these questions and seeking ways to regulate the problem of domestic violence and to crack down on internationally wrongful acts carried out by non-State actors. This question was a central concern in the *Velásquez Rodríguez Case*, with the Inter-American Court of Human Rights (IACtHR) investigating the potential application of State responsibility principles to private acts.¹⁸ We are seeing similar efforts across a broad range of situations where privately inflicted harm is tackled through the screen of the State, be they aimed at ascertaining the legal consequences of the actions of rebel groups in armed conflict settings, delineating State responsibility for the actions of private military contractors,¹⁹ or regulating the activities of transnational corporations.²⁰ After all, if host-States could abdicate their obligation to prevent terrorist attacks emanating from their territory on the basis that the perpetrators are non-State actors, wouldn't that assumption effectively eviscerate the State's sovereign privileges of any significance for the schemes of human security and human rights?²¹ States act as the sole regulators of private conduct within their own borders, as the warrantors of human security in the same setting, and retain an unmatched monopoly over recourse to force in international relations: they should not be able to dissociate those prerogatives from the responsibilities that inherently flow from them and compel State compliance with international obligations, such as counterterrorism undertakings. Those powers should be harnessed with a view to vindicating specific policy goals and fulfilling common interests on a global scale.

Preventing and suppressing transnational terrorism decidedly qualifies as one of those objectives and constitutes the lynchpin of the intellectual inquiry espoused in this project. With this in mind, this volume proposes to weigh different arguments in order to determine whether the law of State responsibility can play a role in the prevention and suppression of terrorism, without casting this body of rules as a cure-all or holistic solution to that problem. After all, State responsibility law has always entertained the possibility of holding States

¹⁸ *Velásquez Rodríguez Case*, Inter-Am Ct HR Decisions and Judgments 91 (ser C) No 4 (1988), especially at paras 161–85.

¹⁹ See, eg: H Tonkin, *State Control over Private Military and Security Companies in Armed Conflict* (Cambridge, CUP, 2011); C Hoppe, 'Passing the Buck: State Responsibility for Private Military Companies' (2008) 19 *EJIL* 989; M-L Tougas, 'La responsabilité internationale d'État pour le fait d'entreprises militaires privées' (2007) 45 *Canadian Yearbook of International Law* 97.

²⁰ See, eg: R McCorquodale and PC Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 *Modern Law Review* 598; J Kuusi, *The Host State and the Transnational Corporation: An Analysis of Legal Relationships* (Farnborough, Saxon House, 1979); SBO Gutto, 'Violation of Human Rights in the Third World: Responsibility of States and TNCs' (1983) 23 *Indian Journal of International Law* 56.

²¹ See Becker, above n 3 at 2.

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accountable for failing to regulate internationally wrongful private conduct. When seeking legal solutions to bolster prevention and enhance multilateral cooperation and compliance with counterterrorism obligations, the importance of State responsibility cannot be sidestepped: its affinity with the global struggle against terror seems almost indisputable given its centrality in public international law. As one commentator remarks, ‘State responsibility is, after all, the sacred cow of international law, and terrorism its *bête noire*’.²² Therefore, the rules of State responsibility must be thoroughly and critically explored in order to ascertain whether they can play a role in this quest, or whether they should be revisited in light of contemporary events and in the face of considerably enhanced terrorist capacity. That is the objective of the present study.

The study will advance an argument to the effect that international law can countenance a shift towards a law of indirect State responsibility for failures to prevent terrorism. Whilst some important aspects of direct responsibility will be canvassed, the thrust of the argument will hinge on the fact that States have a primary duty to control their national territory under international law, which also entails a need to control terrorist factions and activities percolating therein.²³ As a result, we are witnessing a shift in both legal and policy inclinations towards indirect modes of accountability that are concomitantly i) contingent on governmental failures to act or intervene in preventing transnational terrorism and ii) consonant with recent Security Council practice, which almost invariably conflates the obligation to prevent terrorism with the duty of all States to refrain from supporting or harbouring terrorists on their soil. Unlike Tal Becker’s study, which centres on the role of causation in elucidating the role of State responsibility in responding to terrorism,²⁴ this book will rather examine the benefits that may be derived from infusing the law of State responsibility with strict liability logic both from mechanical and substantive perspectives. The present study subscribes to a portion of Becker’s analytical framework in that it does not purport to address the straightforward question of State terrorism, but rather concerns itself with elucidating the role of State responsibility in suppressing and preventing acts of private terrorism, namely where State sponsorship and/or support tends to be far more subtle.²⁵

At the outset, it should be emphasised that endeavouring to define the term ‘terrorism’ extends beyond the scope of this project, a task better left to sea-

²² A Nissel, ‘Tal Becker, Terrorism and the State: Rethinking the Rules of State Responsibility (Oxford: Hart Publishing, 2006)’ (2007) 5 *Journal of International Criminal Justice* 245, 245.

²³ Subject to the context-sensitive policy analysis developed below in Part II, this signals that, once a terrorist strike is orchestrated on, or carried out from, a State’s territory, a presumption of indirect responsibility automatically flows to that State which, in turn, must refute that presumption by reference to due diligence principles and other policy factors, as applied against the specific facts at hand. But see: OD Frouville, ‘Attribution of Conduct to the State: Private Individuals’ in JR Crawford et al (eds), *The Law of International Responsibility* (Oxford, OUP, 2010) 257 at 261–62.

²⁴ See Becker, above n 3. See also: M Straus, ‘Causation as an Element of State Responsibility’ (1984) 16 *Law and Policy in International Business* 893.

²⁵ A more exhaustive discussion of the rapprochements and dissimilarities between Becker’s study and the present account is deployed below in ch 3, section II.

sioned legal scholars and policy-makers. Exceedingly relevant is Rosalyn Higgins' assertion that 'terrorism' amounts to a term 'without legal significance', aiming to create a separate category or infraction to condemn widely-decried acts of a public or private nature that employ illegal tactics and/or strike at protected targets.²⁶ Whilst Higgins also equated 'terrorism' with a 'term of convenience' elsewhere,²⁷ her analysis becomes particularly compelling when she explores the wisdom of developing a separate 'international law of terrorism'. Ultimately, she ponders whether international law has created a distinct subset of substantive principles under the rubric of 'counterterrorism', or whether scholars are simply extending or applying international legal concepts to a present-day concern.²⁸

This project operates on the second proposition and, therefore, does not purport to deliver any expert-level account on terrorist practices or terrorism, more generally. It starts from the assumption that varying degrees of terrorism exist and casts itself, first and foremost, as a study in the law of State responsibility. In so doing, it aims to apply and reformulate some of the underlying tenets of State responsibility in the context of counterterrorism. Bringing Higgins' argument full circle, it follows that the law of State responsibility is sufficiently delineated to encompass acts of terrorism under the rubric of 'internationally wrongful acts', without the need to resort to supplementary definitional contortions.²⁹ At any rate, the definitional debate is inconsequential for the purposes of reforming the law of State responsibility: as one commentator underscores, the lack of consensus on a universally-accepted definition of 'terrorism' 'does not necessarily raise a major issue for identifying the rules of international law applicable for combating terrorism, this including the pertinent secondary rules of State Responsibility'.³⁰

II. OVERVIEW OF RESEARCH

In advocating a model of indirect State responsibility for failing to prevent transnational terrorism, this project is divided into two parts. Part I sets out the impact of the events surrounding 9/11 on international law and State responsibility. In opening up the discussion, chapter one explores the emergence of the

²⁶ See R Higgins, 'The General International Law of Terrorism' in Higgins and Flory, above n 1 at 28. Echoing Higgins' remarks, Richard Baxter similarly declared that 'We have cause to regret that a legal concept of "terrorism" was ever inflicted upon us. The term is imprecise; it is ambiguous; and above all, it serves no operative legal purpose'. See RR Baxter, 'A Skeptical Look at the Concept of Terrorism' (1974) 7 *Akron Law Review* 380, 380.

²⁷ See Higgins, above n 26 at 27. Ben Saul also invokes the term 'political expediency' when discussing Higgins' writings on the matter. See *Defining Terrorism in International Law* (Oxford, OUP, 2006) 177.

²⁸ See Higgins, above n 26 at 13.

²⁹ See, eg: *ibid* at 26. See also: Saul, above n 27 at 177.

³⁰ P-M Dupuy, 'State Sponsors of Terrorism: Issues of International Responsibility' in Bianchi, above n 1 at 5.

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obligation of prevention under international law and acts as a general introduction to the topic by framing the major stakes and problems to be addressed in the inquiry, along with the shortcomings of State responsibility in responding to transnational terrorism. Chapter two maps out these implications more explicitly and delves into the emerging dichotomy of direct and indirect responsibility. The chapter further attempts to elucidate the consecration of indirect State responsibility by examining the emergence of the ‘harbouring’ and ‘supporting’ rule, canvassing specific historical precedents involving the application of that rule and, ultimately, situating the Security Council’s posture in the debate both before and after 9/11.

Part II moves towards a more substantial and ambitious proposal for legal reform, arguing that the concept of attribution should be excised altogether from the equation of State responsibility in the context of transnational terrorism. Chapter three begins by critically exploring the possible importation of causal models in the area under study before investigating the difficulties associated both with generalising terrorism and developing abstract rules of responsibility in the field. Canvassing inadequate scholarly and policy treatments of the topic and surrounding issues, the chapter then undertakes the task of rethinking secondary rules of responsibility from a critical standpoint. It casts State responsibility as a partial politico-legal solution to transnational terrorism, whilst investigating the difficulties associated with self-judging, autoqualification and the quantitative and qualitative exercise of devising legal consequences following the violation of the obligation to prevent terrorism.

Chapter four proceeds to revisit certain secondary norms, particularly attribution, with a view to developing a more efficient model of international responsibility. In so doing, the study draws heavily on domestic legal analogies, with particular emphasis on tort law and strict liability regimes. Alternatively, it takes stock of other potential legal and policy reforms of State responsibility, such as the implementation of automatic attribution mechanisms. Chapter five ultimately proposes the implementation of a two-tiered strict liability-inspired model in assessing the responsibility of sanctuary States. The discussion, which is pervaded by several rationalist accounts, considerations pertaining to the developing world, and a tension between upholding sovereignty and combating terrorism efficiently, ultimately leads to the exploration – and consequent reformulation – of the obligation of prevention.