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STATE RESPONSIBILITY: A CONCERTO FOR COURT, COUNCIL AND COMMITTEE

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I. INTRODUCTION

The judgment in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Genocide Convention case), released by the International Court of Justice (the Court) on 26th February 2007, has thrown up a number of interesting issues to keep scholars of international law entertained for some years.[1] Amongst these are the rules of state responsibility in international law. In the Genocide Convention Case, the Court relied upon the narrow regime of state responsibility that they had introduced in *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua*) over 20 years previously, rejecting a stronger doctrine suggested by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadić* case.[2] The Court's conservative interpretation of state responsibility does not immediately appear to be in harmony with the regimes of state responsibility envisaged by other United Nations institutions, notably, state responsibility for terrorist activities as understood by the Security Council (the Council), and the tertiary scheme of state responsibility for violations of human rights adopted and applied by the United Nations human rights treaty bodies (treaty bodies).[3]

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1. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 46 I.L.M. 188 (Feb. 26, 2007) [hereinafter Genocide Convention case].

2. Military and Paramilitary Activities (Nicar. v. U.S.), Merits, 1986 I.C.J. 14, 110 (June 27) [hereinafter Nicaragua]; Prosecutor v. Tadić, No. IT-94-1-A, Judgment, ¶¶ 131, 137 (July 15, 1999) [hereinafter Tadić].

3. For discussion of the tertiary framework of state responsibility as applied by human rights treaty bodies see, for example, Andrew Byrnes & Jane Connors, *Enforcing the Human Rights of Women: A Complaints Procedure for the Women's Convention?*, 21 BROOK. J. INT'L L. 679, 711 (1996) (identifying the three dimensions of state obligations relating to "any given human right" as the obligation to respect, the obligation to protect, and the obligation to fulfill).

After this short introduction, Part II will discuss the rules of state responsibility applied by the Court in the Genocide Convention case, in light of the International Law Commission (ILC) Articles on State Responsibility, *Nicaragua* and *Tadić*.[4] Part III is devoted to an examination of resolutions of the Council pertaining to terrorism, particularly following the terrorist attacks of September 2001, and the vision of state responsibility implicit therein. In Part IV, the author will examine the adoption of the tertiary scheme of state responsibility for human rights adopted by the treaty bodies which is illustrated in general comments, concluding comments on state reports, and where appropriate, views on communications. To conclude in Part V, the author will argue that the different schemes of state responsibility can all be reconciled with the ILC Articles and that the apparent differences between these three fields are in fact differences of primary rules. The answer to the question "who is the state?" is the same in all three cases.

The focus is exclusively on the institutions of the United Nations and, for that reason, developments in the realm of state responsibility in other institutions, such as the European Court of Human Rights or in broader counter-terrorism literature will not be directly addressed.

II. THE INTERNATIONAL COURT OF JUSTICE AND STATE RESPONSIBILITY FOR GENOCIDE

A. The International Court of Justice

Formally at least, judicial decisions are binding only between the parties to each dispute.[5] They are formally considered only "subsidiary sources" of international law, alongside legal commentaries.[6] Treaties, customary international law, and legal principles of civilized nations are preferred. Nonetheless, the Court's decisions are highly influential both on the academic study of international law and state practice. Indeed Dupuy states: "everyone accepts that its judicial interpretations are for the most part binding on all the subjects of international law."[7] The Statute of the Court does not indicate any hierarchy amongst courts, referring only to "judicial decisions" without indicating any particular fora.[8] Nevertheless, the practice of the Court, perhaps unsurprisingly, has been to cite its own decisions with a degree of gravitas that is perhaps not shared in its discussion of decisions of other international tribunals or domestic courts. In the Genocide Convention case, the Court clearly preferred its own 20 year old *Nicaragua* ruling

4. Int'l L. Comm'n, *Report of the International Law Commission on the Work of its fifty-third session*, art. 6, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) [hereinafter ILC Articles].

5. Statute of the International Court of Justice, art. 59, 59 Stat. 1055, T.S. 993 [hereinafter Statute of the Court].

6. *Id.* art. 38(1)(d).

7. Pierre-Marie Dupuy, *A Doctrinal Debate in the Globalisation Era: On the "Fragmentation" of International Law*, EUR. J. LEGAL STUD., Apr. 2007, at 1, 5, http://www.ejls.eu/index.php?mode=present&displayissue=2007-04 (follow hyperlink to Dupuy's article).

8. Statute of the Court, *supra* note 5, art. 38(1)(d).

to the more recent *Tadić* decision of the ICTY.[9] It makes no reference to the jurisprudence of the Iran-United States Claims Tribunal despite its influence on the development of the law of state responsibility.[10]

B. The Genocide Convention Case

Ultimately, in the Genocide Convention case, Serbia (formerly the Federal Republic of Yugoslavia) was not found to have any responsibility for the commission of genocide, conspiracy or incitement to commit genocide, or complicity in genocide.[11] It was, however, considered responsible for violating the Genocide Convention to the extent that Serbia failed to prevent the genocide and failed to cooperate adequately with the prosecution of individuals suspected of involvement.[12] It was also held to have failed to comply with the provisional measures of the Court, issued in 1993, which required it specifically to "take all measures within its power to prevent genocide."[13]

Before approaching questions of state responsibility, it is important to note that the *only* question before the Court was responsibility for genocide, not for any other international wrongs, such as acts of aggression or violation of the duty not to intervene in the internal affairs of a sovereign state.[14] The only matter for which the Court determined that genocide had been proven to have been committed was the massacre at Srebrenica.[15] Therefore, the question of state responsibility in the case pivots on that sequence of events. A state can only commit genocide, or be complicit in the commission of genocide, to the extent that genocide actually takes place.[16] Serbian responsibility for any other atrocity during the conflict was not assessed by the Court.

On the other hand, responsibility for conspiracy to commit genocide, incitement to commit genocide, or attempting to commit genocide does not necessarily require that genocide be successfully carried out.[17] Indeed, to the extent

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9. Genocide Convention case, *supra* note 1, ¶¶ 405-07.

10. *See generally* 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 Barstow Magraw eds.,1998) [hereinafter THE IRAN-UNITED STATES CLAIMS TRIBUNAL]. *See also* Jamison Selby Borek, *Other State Responsibility Issues*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL 303, *supra*.

11. Genocide Convention case, *supra* note 1, ¶¶ 471(2)–(4).

12. *Id.* ¶¶ 471(5)-(6).

13. *Id.* ¶ 471(7).

14. In their identification of the actus reus of genocide, a litany of atrocities is recited in the Court's judgment. Although the Court could not rule on whether they constituted war crimes or crimes against humanity, the detail in which they are recited in the judgment indicates that the Court wanted them on public record. Sandesh Sivakumaran argues that: "[a]s jurisdiction was founded solely upon the Genocide Convention, the Court could not characterise these atrocities as war crimes or crimes against humanity, however, in practice, it came close to doing precisely that." Sandesh Sivakumaran, Case Comment, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* 56 INT'L & COMP. L.Q. 695, 698 (2007).

15. Genocide Convention case, *supra* note 1, ¶ 376.

16. *Id.* ¶ 431.

17. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102

that genocide is actually committed, there can be no charge of attempt on the same facts.[18] Nonetheless, even on these points, the Court contained its analysis of attribution largely to the events at Srebrenica.[19]

All kinds of questions can be asked about the standing of the parties,[20] the definition of genocide both in the Convention and in customary international law,[21] imputation from non-disclosure by Serbia,[22] the burden of proof,[23] the degree to which the Court can make inferences from the circumstances when direct evidence is almost impossible to obtain,[24] the limitations on the Court vis á vis fact-finding,[25] and the Court's reluctance to "put the pieces together,"[26] but these questions, interesting as they are, do not bear directly on the issue of attribution of responsibility and so will not be addressed further.

It must be borne in mind that the wrong (i.e. the genocide) was committed not in Serbia but in Bosnia and Herzegovina (Bosnia) against Bosnian victims. Any potential responsibility of Serbia for actions taking place at Srebrenica in 1995 cannot depend on some kind of territorial link, as it might have, had the genocide occurred within the territory of Serbia.[27] In this respect, the case can be distinguished from questions of responsibility for "harboring terrorists" when those terrorists are actually on the soil of the respondent state and from responsibility for human rights violations committed by non-state actors when both the perpetrators and victims are within a state's territory.[28]

C. State responsibility for genocide

Bosnia attempted to pre-empt the need for an investigation on the facts of state responsibility by arguing that Serbia had acknowledged responsibility in a statement by its Council of Ministers.[29] This was rejected by the Court as a "political statement" rather than an admission of liability.[30] The Court was

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Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

18. Genocide Convention case, *supra* note 1, ¶ 380.

19. The Court briefly commented that there was no indication of genocide having been incited elsewhere. *See id.* ¶ 417. Bosnia did not make any claim for "attempt." *See id.* ¶ 416. *See infra* text accompanying note 66.

20. Genocide Convention case, *supra* note 1, ¶¶ 80-141.

21. *Id.* ¶¶ 142-201.

22. *Id.* ¶¶ 204-05.

23. *Id.* ¶¶ 209-210.

24. *Id.* ¶ 207. *See also* Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 18 (Apr. 9) [hereinafter Corfu Channel].

25. Genocide Convention case, *supra* note 1, ¶¶ 211-230.

26. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), ¶¶ 42, 48 (Feb. 26, 2007) (dissenting opinion of Vice-President Al-Khasawneh), *available at* http://www.icj-cij.org/docket/index.php?p1=3&k=f4&case=91&code=bhy&p3=4 [hereinafter Al-Khasawneh dissent].

27. *But see* Corfu Channel, *supra* note 24, at 18.

28. *See infra* Parts III, IV.

29. Ademola Abass, *Proving State Responsibility for Genocide: The ICJ in Bosnia v. Serbia and the International Commission of Inquiry for Darfur*, 31 FORDHAM INT'L L.J. 871, 902-03 (2008).

30. Genocide Convention case, *supra* note 1, ¶¶ 377-78. Al-Khasawneh disagreed. *See* Al-Khasawneh dissent, *supra* note 26, ¶¶ 56-58.

therefore obliged to consider both the law of state responsibility and the application of that law to the facts of the case.[31]

The Court recognized the established principle that states bear responsibility for acts or omissions of their own organs, de jure or de facto, or by non-state actors operating under the "direction or control" of the state.[32] Articles 4 and 8 of the ILC Articles were accepted as "customary international law" without further discussion.[33] They are worth replicating in full:

> Article 4
>
> Conduct of organs of a State
>
> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.
>
> Article 8
>
> Conduct directed or controlled by a State
>
> The conduct of a person or group of persons shall be considered an act of the State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Relying on the "customary international law" of state responsibility, the Court rejected any notion that the rules of state responsibility for genocide were in any way lex specialis.[34] Although the Genocide Convention creates treaty obligations, the (secondary) rules of state responsibility for violating those obligations are the general ones. No special scheme applies.[35]

The principle perpetrators recognized by the Court were not, under Serbia's internal law, its "organs."[36] Straightforward attribution of responsibility according to Article 4 was therefore precluded, notwithstanding Bosnia's protestations to the contrary. Nonetheless, states may not hide behind their internal legal order to evade international responsibility and the Court discussed at length whether or not those involved were de facto agents of Serbia, relying on the *Nicaragua* test of "complete dependence" in light of Article 4 of the ILC Articles.[37]

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31. Genocide Convention case, *supra* note 1, ¶¶ 385-438.
32. *Id.* ¶ 384.
33. *Id.* ¶¶ 385, 398.
34. *Id.* ¶ 401.
35. *Id.*
36. *Id.* ¶¶ 386-89.
37. *Id.* ¶¶ 391-92. *See also* Nicaragua, *supra* note 2, ¶ 109, at 62. Although not cited by the Court, this is also in line with the findings of the Iran-US Claims Tribunal. *See generally* THE IRAN-UNITED STATES CLAIMS TRIBUNAL, *supra* note 10. *See also* ILC Articles, *supra* note 4, cmt. to art. 4, ¶

The Court accepted on the facts that those involved had been recruited prior to the independence of Bosnia and Herzegovina and that the Serbian government had provided military and financial support in the form of weapons and salaries.[38] Close ethnic, political and financial links existed between the perpetrators (de jure organs of the "non-State" entity of Republika Srpska in Bosnia) and the Belgrade Government.[39]

But the Court considered that, in light of *Nicaragua:*

> [T]o equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a particularly great degree of State control over them, a relationship which the Court's Judgment quoted above [Nicaragua] expressly described as "complete dependence". It remains to be determined in the present case whether, at the time in question, the persons or entities that committed the acts of genocide at Srebrenica had such ties with the FRY that they can be deemed to have been completely dependent on it.[40]

The Court went on to interpret "complete dependence" as meaning that the perpetrators were "lacking any real autonomy."[41] Recognizing the Bosnian Serb's "qualified, but real, margin of independence" on the one hand, and their reliance on Serbian support "without which it could not have 'conduct[ed] its crucial or most significant military and paramilitary activities,'" the Court determined that the former factor was the key, and that, since the Bosnian Serb forces had some modicum of autonomy, they were not to be considered organs of Serbia.[42] Therefore, they would not be considered organs and as a result, their actions would not automatically be attributable to Serbia.

The Court then turned to the question of whether, although not organs of Serbia *in general,* the perpetrators were acting under Serbian "direction and control" "in carrying out the conduct" in light of Article 8.[43] The state will be responsible for non-state actors to the extent that "they acted in accordance with that [s]tate's instructions or under its effective control."[44] This responsibility requires direction or control over specific, identifiable events, in this case, the Srebrenican genocide. General control over the direction of operations is inadequate; there must have been specific control over the international wrongful

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11, at 91 (the use of "includes" in art. 4(2) clearly indicates that internal law is not exhaustive). *See also* Paolo Palchetti, *Comportamento di Organi di Fatto e Illecito Internazionale Nel Progetto di Articoli Sulla Responsabilità Internazionale Degli Stati, in* LA CODIFICAZIONE DELLA RESPONSABILITÀ INTERNAZIONALE DEGLI STATI ALLA PROVA DEI FATTI 3, 5-6 (Marina Spinedi et al. eds., 2006).

38. Genocide Convention case, *supra* note 1, ¶¶ 238-39, 388.

39. *Id.* ¶¶ 240, 422.

40. *Id.* ¶ 393.

41. *Id.* ¶ 394.

42. *Id.* ¶ 394 (quoting Nicaragua, *supra* note 2, ¶ 111, at 63).

43. *Id.* ¶ 398.

44. *Id.* ¶ 400.

act.[45] The Court explained that "[i]t must however be shown that this 'effective control' was exercised, or that the [S]tate's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations."[46] Serbia would still be responsible if it could be established that "the physical acts constitutive of genocide that have been committed by organs or persons other than the [S]tate's own agents were carried out, wholly or in part, on the instructions or directions of the [S]tate, or under its effective control."[47]

The Court was forced to acknowledge the *Tadić* ruling of the Appeals Chamber of the ICTY in 1999, which had applied a less strict test of "overall control."[48] The ICTY Appeals Chamber had determined that the test of state responsibility for the actions of combatants was essential to the determination of the character of the Bosnia conflict as "international" and, relying on its own interpretation of the law of state responsibility, held that Serbia had sufficient control over actors in the Bosnian conflict both to engage its own responsibility and to render the conflict international in character.[49] The Appeals Chamber, however, misread *Nicaragua* as introducing a double test of "complete dependence" *and* "effective control" rather than two independent tests of "complete dependence" *or* "effective control."[50] Nevertheless, it rejected the *Nicaragua* test (so understood) as unpersuasive and appealed both to the 1998 draft of ILC Article 8 and judicial and state practice (predominantly jurisprudence from outside of the Court).[51] Instead, the Appeals Chamber held that the appropriate test in military or paramilitary cases should be one of "overall control", rather than "effective control."[52] It further defended this test by distinguishing between state responsibility for individual actors and responsibility for the operations of "organised and hierarchically structured group[s] such as a military unit" where effective control may not be necessary to achieve the desired objectives.[53] Given

45. Giulio Bartolini, *Il Concetto di "Controllo" sulle Attività di Individui Quale Presupposto Della Responsabilità Dello Stato, in* LA CODIFICAZIONE DELLA RESPONSABILITÀ INTERNAZIONALE DEGLI STATI ALLA PROVA DEI FATTI, *supra* note 37, at 25, 28 .

46. Genocide Convention case, *supra* note 1, ¶ 400.

47. *Id.* ¶ 401.

48. Tadić, *supra* note 2, ¶¶ 98-145; Genocide Convention case, *supra* note 1, ¶¶ 402-05. For commentary on the Tadić case as it pertains to state responsibility, *see, e.g.,* André J.J. De Hoogh, *Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the Tadić case and attribution of acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia,* 72 BRIT. Y.B. INT'L L. 255 (2001); Bartolini, *supra* note 45; Leo Van Den Hole, *Towards a Test of the International Character of an Armed Conflict: Nicaragua and Tadić,* 32 SYRACUSE J. INT'L L. & COM. 269, 276-85 (2005); Marko Milanović, *State Responsibility for Genocide,* 17 EUR. J. INT'L L. 553, 576-81(2006); Sivakumaran, *supra* note 14, at 701-03.

49. Tadić, *supra* note 2, ¶¶ 104, 162.

50. *Id.* ¶ 112.

51. *Id.* ¶¶ 116-45. The 1998 draft art. 8 of the ILC Articles is identical to that finalized in the second reading.

52. *Id.* ¶ 145.

53. *Id.* ¶ 120; Bartolini, *supra* note 45, at 30.

this lower threshold of overall control, on the facts, it found that the test of "overall control" by the Yugoslav army (i.e. de jure organ of Serbia) of Bosnian Serb forces had been met.[54]

Nicaragua and *Tadić* could further have been distinguished on the facts, as the links between the state and those violating international law seem considerably closer in the latter case.[55] The Presiding Trial Judge, although outvoted, argued that, on the facts, even the stricter test of effective control had been met.[56] Furthermore, although the Appeals Chamber did not apply the facts to the test of effective control, its discussion of the facts certainly indicates a degree of control considerably greater than that in *Nicaragua*.[57]

The Court chose to "distinguish" the *Tadić* judgment to the extent that it bears on state responsibility, but it did so with barely concealed disdain, suggesting that the ICTY had no business making assertions about "issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it."[58] The *Nicaragua* test was thus confirmed as the correct one and is thus further entrenched in international law.

It should be noted that Article 8 of the ILC Articles requires "direction or control" but is silent as to the degree of control.[59] The commentary describes both the *Nicaragua* tests and *Tadić* tests and does not explicitly indicate a preference.[60] However, it implies that the "overall control" test in *Tadić* may not go to the heart of the law of state responsibility since it was incidental to a finding on international humanitarian law rather than a direct finding on state responsibility per se – something that is in any case outside of its jurisdiction.[61]

D. Conspiracy and incitement to commit genocide

Bosnia did not claim that Serbia had "attempted" to commit genocide but, nonetheless, the question of participation by conspiracy, incitement and complicity still had to be considered by the Court. It dealt with conspiracy and incitement in summary fashion, dedicating only one paragraph to both, to reject the possibility of Serbian responsibility.[62] It considered only events at Srebrenica. The perpetrators had been shown to be neither agents of Serbia, nor under its "effective control" and the massacre is later in the judgment characterized as a somewhat spontaneous action.[63] To the extent that the Court even accepted there had been much of a

54. Tadić, *supra* note 2, ¶ 156.

55. Van Den Hole, *supra* note 48, at 280-85; Bartolini, *supra* note 45, at 28-29.

56. Prosecutor v. Tadić, Case No. IT-94-1-T, McDonald Dissent, ¶ 34 (May 7, 1997).

57. Tadić, *supra* note 2, ¶¶ 146-62.

58. Genocide Convention case, *supra* note 1, ¶ 403. *See also* Tadić, *supra* note 2, ¶¶ 69-71 (argument of the prosecution); Al-Khasawneh dissent, *supra* note 26, ¶¶ 36-39.

59. ILC Articles, *supra* note 4, at 45.

60. *Id.* cmt. to art. 8, ¶¶ 4-5, at 105-06.

61. *Id.* cmt. to art. 8, ¶ 5, at 106. *See also* Bartolini, *supra* note 45, at 30 (suggesting that the ILC distanced itself from Tadić).

62. Genocide Convention case, *supra* note 1, ¶ 417.

63. *Id.*

"conspiracy," rather than a spur of the moment decision, it rejected Serbian involvement in it.[64] Incitement was likewise rejected.[65]

The Court briefly added that there was no "precise and incontrovertible evidence" that Serbia had "incited genocide" on any other occasion.[66] No such general statement is made in the case of conspiracy. Conspiracy has its origins in the common law and does not require that any (other) crime be committed or attempted.[67] It has no direct equivalent in the civil law systems under which responsibility for planning criminal activities requires some "material element" to have been committed.[68] Focusing only on Srebrenica, the Court does not consider the possibility that Serbia may have participated in an overall plan to commit genocide in Bosnia, or to commit genocide on some other occasion. Incitement is an offence at common law even in the absence of actus reus; in fact, if the actus reus is fulfilled, the inciter (counselor) is instead considered as an accessory.[69] In the civil law, responsibility for incitement requires some attempt.[70]

The Court stated that it considered, both for "conspiracy to commit genocide" and "direct and public incitement to commit genocide" "as is appropriate, only the events at Srebrenica."[71] If, indeed, this *is* appropriate, conspiracy and incitement to genocide in international law are (now) *only* crimes to the extent that they are successfully carried out.[72] This will have major ramifications if it is carried over into the realm of international criminal law and individual responsibility, to the extent that conspiracies to commit genocide and incitement to genocide, in the absence of any attempt, will not be considered crimes.

E. Complicity in genocide

Complicity in genocide (or any other crime) requires the crime actually have occurred.[73] The Court necessarily limited its consideration to Srebrenica and found complicity to be synonymous with "aid or assistance."[74] The material element, or actus reus, was established as:

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64. The Court does not directly address the matter of whether there had been a conspiracy to commit genocide at Srebrenica. One would imagine that such events require at least minimal discussion and preparation (i.e. conspiracy); on the other hand, later in the case, the Court indicates that the Srebrenican massacres were somewhat impulsive. Genocide Convention case, *supra* note 1, ¶ 423.

65. *Id.* ¶ 417.

66. *Id.*

67. Criminal Law Act, 1977, c. 45, §1(1) (Eng., Wales, Scot., & N. Ir.).

68. CODE PÈNAL [C. PÈN.], art. 450-1 (Fr.).

69. *See* Accessories and Abettors Act, 1861, 24 & 25 Vict., c. 94, § 8 (Eng., Wales, & N. Ir.).

70. *See* MICHAEL ALLEN, TEXTBOOK ON CRIMINAL LAW 212, 215-16, 219 (9th ed. 2007); CODE PÈNAL [C. PÈN.], art. 121-4 TO 121-7(Fr.); Strafgesetzbuch [StGB] [Penal Code] Nov. 13, 1998, Reichsgesetzblatt [RGBl] 127 § 26, *available at* http://www.legislationline.org/upload/legislations/56/6f/b7295280cbb8cf24d08caa065790.pdf.

71. Genocide Convention case, *supra* note 1, ¶ 417.

72. *Id.* ¶ 180.

73. *Id.*

74. *Id.* ¶ 419..

> [T]he quite substantial aid of a political, military and financial nature provided by the FRY to the Republika Srpska and the VRS [Bosnian Serb], beginning long before the tragic events of Srebrenica, continued during those events. There is thus little doubt that the atrocities in Srebrenica were committed, at least in part, with the resources which the perpetrators of those acts possessed as a result of the general policy of aid and assistance pursued towards them by the FRY.[75]

But the offence also requires a mental element, in this case, at a minimum, "knowledge of the circumstances of the internationally wrongful act" by an organ, de jure or de facto of the Serbian state.[76] "Knowledge of the circumstances" in this case meant knowledge of the *genocidal intention* of the perpetrators.[77] A suspicion would be inadequate; knowledge of mass killings would be inadequate. Only supply of the material support, while "clearly aware" that "not only were massacres about to be carried out or already under way, but that their perpetrators had the specific intent characterizing genocide, namely, the intent to destroy, in whole or in part, a human group, as such" would suffice.[78] This was not proven "beyond any doubt" [*sic*].[79]

F. Preventing and punishing genocide

Under the Court's vision of state responsibility, Serbia was thus found not to be responsible for the genocide, or for assisting with it in any way. Those who were responsible were not to be considered agents of Serbia; the organs of Serbia, to the extent they were involved, were not considered to have the mens rea for genocide, or at least, it was not so proven beyond reasonable doubt.[80]

But the Convention also mandates positive duties on states to prevent genocide and to punish individual perpetrators.[81] The Court decided that both of these duties had been violated by the Serbian authorities.[82]

The Court carefully distinguished the duty to prevent genocide from complicity on both material and mental aspects. The material aspect of complicity requires positive action; whereas responsibility to prevent genocide can be engaged by omission.[83] Further, complicity requires a proven knowledge of the genocidal intentions and actions of the primary perpetrators; the obligation to prevent can be breached if the state knows only of a "serious danger that acts of genocide would be committed."[84]

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75. *Id.* ¶ 422. *See also id.* ¶ 241.
76. *Id.* ¶ 420.
77. *Id.* ¶ 421.
78. *Id.* ¶ 422.
79. *Id.*
80. *Id.*
81. Genocide Convention, *supra* note 17, art. 1.
82. Genocide Convention case, *supra* note 1, ¶¶ 425-50.
83. *Id.* ¶ 432.
84. *Id.*

Positive assistance, in the form of substantial military and financial aid, had already been established;[85] thus, the Court was not required to address in depth the question of what particular positive duties might be entailed by the Convention to prevent genocide. Responsibility pivoted on the degree of knowledge of Serbian organs of the risk of genocide.[86]

The evidence included the two provisional Orders of the Court from 1993 requiring that Serbia ensure that

> military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide.[87]

This is clearly a much wider category than those over whom Serbia exercises "effective control."[88] The Court also recognized Serbia's "position of influence" over the Bosnian Serbs involved at Srebrenica, relying on the Secretary-General's report to the General Assembly *The Fall of Srebrenica* and evidence that lead the ICTY to determine that "it must have been clear that there was a serious risk of genocide in Srebrenica."[89] The failure to intervene, and indeed the continued support offered, given this degree of knowledge, demonstrated a violation of the obligation under the Genocide Convention to prevent genocide.[90]

The Court in so deciding also managed to characterize Serbia as a special case because of its relationship with the Bosnian Serbs, avoiding broader questions of the duty to prevent genocide by other state parties to the Genocide Convention.[91]

The duty to prevent is an obligation of conduct, not an obligation of result (*obligation de comportement et non de résultat*).[92] An obligation of conduct

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85. *Id.* ¶ 422.

86. *Id.* ¶¶ 434-38.

87. *Id.* ¶ 435.

88. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Request for the Indication of Provisional Measures, 1993 I.C.J. 3, 24 (Apr. 8). *See also* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v Serb. & Mont.), Further Requests for Provisional Measures, 1993 I.C.J. 325, 349-50 (Sept. 13); Genocide Convention case, *supra* note 1, ¶ 435. Serbia was found separately to have breached these orders. Genocide Convention case, *supra* note 1, ¶¶ 453-56.

89. Genocide Convention case, *supra* note 1, ¶¶ 434-38. *See* The Secretary-General, *Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica*, ¶¶ 494-97, at 106-07, *delivered to the General Assembly*, U.N. Doc. A/54/549 (Nov. 15, 1999).

90. Genocide Convention case, *supra* note 1, ¶ 438.

91. *See id.* ¶¶ 429-30. On the rights and duties of humanitarian intervention more broadly, *see* International Commission on Intervention and State Sovereignty [ICISS], *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, ¶¶ 3.1-3.41 (2001).

92. Genocide Convention case, *supra* note 1, ¶ 430. The French text is here included to distinguish the French concept of *obligation de moyens*. On the potential for confusion, *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). The distinction was dropped from the text of the second reading but is still important, *see* JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY:

requires the state to take particular steps *regardless* of whether or not they would have been likely to achieve a particular outcome.[93] Ultimately, the Court does not find it proven to a "sufficient degree of certainty" that even had Serbia intervened to attempt to prevent the genocide, it would have been successful.[94] Serbia acted wrongfully, but causation is insufficiently proven to award any material remedy.[95]

The Genocide Convention finally requires states to ensure the punishment of genocide, either through domestic tribunals or at an "international penal tribunal."[96] Since the genocide was committed outside of Serbia, there was no duty to try suspects in its domestic courts.[97] However, given the establishment of the ICTY as a suitable "international penal tribunal" Serbian cooperation was required but lacking.[98]

The positive obligations to prevent and punish genocide are subject to the standard of due diligence.[99] The exact requirements of due diligence vary according to the primary rules at stake, but in all cases it is a standard of international law – the degree of care a state takes in its own domestic affairs is not a relevant factor.[100] The degree of care to be exercised also varies depending on the primary obligation. Pisillo-Mazzeschi explains that in some cases, the standard will be that of a "civilised" or "well-organized" state but in others, performance must be excellent, such as in the care of foreign dignitaries.[101]

Responsibility for breach of positive obligations does not depend on fault attributable to any particular state organ, but is rather an objective standard, which must be based on the actions and omissions of the state taken as a whole.[102] To the extent that positive obligations are breached, there is no need to identify a state organ or agent of the state to be held accountable.[103] The point is not that some organ or agent has *acted* in such a way as to violate international law, but rather that *no* organ or agent has acted, when one ought to have done so. It need not be the case that some particular organ can be considered at fault; the fault might even be that there is no appropriate organ when there ought to be.[104] Pisillo-Mazzeschi explains:

INTRODUCTION, TEXT AND COMMENTARIES 21 (2002).

93. Genocide Convention case, *supra* note 1, ¶ 430.

94. *Id.* ¶ 462.

95. *Id.* ¶¶ 460-62.

96. Genocide Convention, *supra* note 17, art. 6.

97. Genocide Convention case, *supra* note 1, ¶ 442.

98. *Id.* ¶¶ 445-49.

99. *Id.* ¶ 430.

100. *Id.* ¶ 429; *see also* Riccardo Pisillo-Mazzeschi, *The Due Diligence Rule and the Nature of the International Responsibility of States,* 35 GERMAN YB INT'L L. 9, 41-42 (1992).

101. Pisillo-Mazzeschi, *supra* note 100, at 44-45; *see also* Genocide Convention case, *supra* note 1, ¶¶ 429-30.

102. Genocide Convention case, *supra* note 1, ¶ 179.

103. *Id.* ¶ 182.

104. Pisillo-Mazzeschi, *supra* note 100, at 26.

> The practice, in fact, clearly indicates that it is enough to have, for purposes of responsibility, a general insufficiency of "governmental action" or a general lack of diligence on the part of the State authorities considered as a whole, as regards the international standard; and that it is not necessary instead to carry out an investigation to establish each time the subjective fault of the single individuals acting as State organs.[105]

G. Who is the State? Entrenching Nicaragua

The Court has thus given the *Nicaragua* test of state responsibility fresh impetus 20 years after it originally formulated the same. States bear responsibility only for the actions of their de jure organs, de facto organs by virtue of complete dependence or agents by virtue of effective control in individual operations. A veneer of independence will continue to shield states from responsibility for the actions of those who do not display governmental insignia.[106]

Positive obligations to prevent and punish genocide are recognized, subject to the due diligence standard. It is an obligation that falls on the state machinery. However, even where due diligence is manifestly lacking, such as in the present case, in the absence of a clear causal link to any resulting harm (*dommage*), i.e. absence of undisputable evidence that intervention would have successfully prevented the harm, there will be no remedy beyond the metaphorical slap on the wrist.[107]

III. THE UNITED NATIONS SECURITY COUNCIL AND STATE RESPONSIBILITY FOR TERRORISM

A. Terrorism in International Law

The attacks on 11th September 2001 on the United States created an international shockwave by virtue of the scale of destruction and death, the lack of prior warning and the targeting of civilians of the professional classes. The response of the international community was unprecedented as United Nations organs and states, including states with which the United States had antagonistic relations, immediately expressed their sympathies.[108] The Security Council, on the

105. *Id.* at 43. On fault and its role in some, but not all primary rules, *see* CRAWFORD, *supra* note 92, at 13.

106. In the context of the Iran-U.S. Claims Tribunal, David Caron has suggested that this creates a kind of "fortuity of proof" as responsibility depends on being able to establish that, inter alia, he "wore a Revolutionary Guards' armband." Caron, *supra* note 10, at 109, 151.

107. Genocide Convention case, *supra* note 1, ¶ 463.

108. G.A. Res. 56/1, ¶ 2, U.N. GAOR, 56th Sess., U.N. Doc. A/Res/56/1 (Sept. 12, 2001); S.C. Res. 1368, ¶¶ 1-6, U.N. Doc. S/RES/1368 (Sept. 12, 2001). As well as predictable allies such as Israel and the United Kingdom, the leaders of states that had perhaps less than friendly relations with the United States, such as Cuba, Iran, Syria and the Taleban in Afghanistan also expressed their disapproval and sympathies. Only the Iraqi administration openly celebrated. U.N. GAOR, 56th Sess., 13th plen. mtg. at 14, U.N. Doc. A/56/PV.13 (Oct. 1, 2001); U.N. GAOR, 56th Sess., 15th plen. mtg., at 5, U.N. Doc. A/56/PV.15 (Oct. 2, 2001); U.N. GAOR, 56th Sess., 16th plen. mtg. at 17, U.N. Doc. A/56/PV.16 (Oct. 3, 2001); Susan Hall, Suzanne Goldenberg & John Hooper, *Palestinian Joy, Global Condemnation,* THE GUARDIAN, Sept. 12, 2001; Suzanne Goldenberg, Rory McCarthy & Brian

suggestion of the French President, forewent the conventional show of hands to pass their resolution in favor of voting "by standing, in a show of unity in the face of the scourge of terrorism."[109]

To the rest of the world and the Council, indeed even to the United States, terrorism was not a new threat, even if the attacks on September the 11th demonstrated a degree of organization and destruction that seemed to reach a new level. Beginning with the Convention on Offences and Certain Other Acts Committed on Board Aircraft in 1963 there are now no less than thirteen United Nations Conventions and Protocols on terrorism, twelve of which preceded 2001.[110]

Despite this glut of treaty law, terrorism has yet to be unequivocally defined, and as long as the conventions each focus on distinct manifestations, such as hijacking,[111] bombings,[112] hostage taking,[113] proliferation and use of nuclear

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Whitaker, *Iraq stands alone as Arab world offers sympathy and regrets,* THE GUARDIAN, Sept. 13, 2001.

109. U.N. SCOR, 56th Sess., 4370th mtg. at 8, U.N. Doc. S/PV.4370 (Sept. 12, 2001).

110. Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219 [hereinafter Aircraft Convention 1963]; Convention for the Suppression of Unlawful Seizures of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 [hereinafter Seizures of Aircraft Convention 1970]; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177 [hereinafter Civil Aviation Convention 1971]; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167 [hereinafter Diplomatic Agents Convention 1973]; International Convention Against the Taking of Hostages, Dec. 17, 1979, 18 I.L.M. 1456, 1316 U.N.T.S. 205 [hereinafter Hostages Convention 1979]; Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, T.I.A.S. No. 11,080, 1456 U.N.T.S. 101 [hereinafter Protection of Nuclear Material Convention 1980]; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, 27 I.L.M. 627 [hereinafter Unlawful Acts of Violence Protocol 1988]; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 27 I.L.M. 668, 1678 U.N.T.S. 221 [hereinafter Maritime Navigation Convention 1988]; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 27 I.L.M. 685, 1678 U.N.T.S. 304 [hereinafter Continental Shelf Protocol 1988]; Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, 30 I.L.M. 721 (1991) [hereinafter Plastic Explosives Convention 1991]; International Convention for the Suppression of Terrorist Bombings, Dec. 17, 1997, 37 I.L.M. 249, 2149 U.N.T.S. 256 (1998) [hereinafter Terrorist Bombings Convention 1988]; International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270 (2000) [hereinafter Terrorism Financing Convention 1999]; International Convention for the Suppression of Acts of Nuclear Terrorism, Apr. 13, 2005, 44 I.L.M. 815 (2005) [hereinafter Nuclear Terrorism Convention 2005].

111. Aircraft Convention 1963, *supra* note 110; Seizures of Aircraft Convention 1970, *supra* note 110; Maritime Navigation Convention 1988, *supra* note 110; Continental Shelf Protocol 1988, *supra* note 110.

112. Civil Aviation Convention 1971, *supra* note 110; Terrorist Bombings Convention 1997, *supra* note 110; Continental Shelf Protocol 1988, *supra* note 110; Plastic Explosives Convention 1991, *supra* note 110; Unlawful Acts of Violence Protocol 1988, *supra* note 110; Maritime Navigation Convention 1988, *supra* note 110.

113. Diplomatic Agents Convention 1973, *supra* note 110; Hostages Convention 1979, *supra* note 110.

material,[114] and financing,[115] states can avoid the thorny matter of affirming a comprehensive definition that might tie their hands at a later stage. The closest defintion is found in Article 2 of the International Convention for the Suppression of the Financing of Terrorism, which suggests that terrorism is defined as (a) anything covered by 9 other conventions and protocols[116] or

> (b) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.[117]

Notwithstanding copious resolutions on terrorism, the Security Council has never promulgated a definition, instead referring to the same "international conventions and protocols relating to terrorism."[118] Ambassador Greenstock, as Chair of the Council Counter-Terrorism Committee (CTC) solved the problem of definition as follows: "[f]or the Committee, terrorism is what the members of the Committee decide unanimously is terrorism."[119] To crudely paraphrase: "terrorism is what we say it is."

Fortunately, it is not crucial for the purposes of this paper that the present author provide the definition that every state can agree upon; one that has to date eluded 192 members of the United Nations and tens of thousands of scholars of international law. Since the rules of state responsibility are, according to the ILC, matters of secondary rules, it should not be necessary, for their examination, to provide a precise and conclusive definition of the primary rules to which they attach.[120]

B. The Council's Counter-Terrorism Resolutions and State Responsibility

The authority of the Council and the status of its resolutions vis á vis other sources of international law has been extensively debated, with a particular flurry

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114. Protection of Nuclear Material Convention 1980, *supra* note 110; Nuclear Terrorism Convention 2005, *supra* note 110.

115. Terrorism Financing Convention 1999, *supra* note 110.

116. *Id.* art. 2, annex. Excluded are the Aircraft Convention 1963, *supra* note 110; Plastic Explosives Convention 1991, *supra* note 110; Nuclear Terrorism Convention 2005, *supra* note 110.

117. Terrorism Financing Convention 1999, *supra* note 110, art 2. For a review of various definitions to be found in international instruments and their strengths and weaknesses, see HELEN DUFFY, THE "WAR ON TERROR" AND THE FRAMEWORK OF INTERNATIONAL LAW 20-29 (2005); *see also* Antonio Cassese, *Terrorism as an International Crime, in* ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 213, 214, 219 (Andrea Bianchi ed., 2004).

118. *E.g.*, S.C. Res. 1566, ¶ 3, U.N. Doc. S/RES/1566 (Oct. 8, 1982).

119. Andrew Clapham, *Terrorism, National Measures and International Supervision, in* ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM, *supra* note 117, at 283, 296-97.

120. On the distinction between primary and secondary rules, see Robert Ago, *Second Report on State Responsibility: The Origin of International Responsibility*, ¶ 7, *delivered to the International Law Commission*, U.N. Doc. A/CN.4/233, *reprinted in* [1970] 2 Y.B. Int'l L. Comm'n 177, 178, U.N. Doc. A/CN.4/SER.A/1970/Add.1 [hereinafter Ago: Second Report 1970]; *see also infra* text accompanying notes 384-90.

of literature discussing the anti-terrorism resolutions that followed the attacks of 2001.[121] The debate need not detain us here and for the purposes of this article, it shall be assumed that the Council's counter-terrorism resolutions, taken under Chapter VII, are binding on all United Nations member states.[122] The delicate matter of respect for customary international law and the principles and purposes of the Charter need not be further discussed as it is not necessary in order to evaluate the Council's vision of state responsibility per se.[123] Indeed this must be one of few articles to examine Council anti-terrorism measures and international human rights law without investigating the potential for tensions between the two.[124]

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121. *See generally* Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901 (2002) (discussing Resolution 1370 as a possible harbinger of the Security Council's willingness to take on a more commanding legislative role); José E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873 (2003) (focusing on the negative aspects of the Security Council's recent legislative actions in three areas of international law); Matthew Happold, *Security Council Resolution 1373 and the Constitution of the United Nations*, 16 LEIDEN J. INT'L L. 593 (2003) (positing that the Security Council, in passing Resolution 1373, acted beyond the scope of its designated authority); Roberto Lavalle, *A Novel, if Awkward, Exercise in International Law-Making: Security Council Resolution 1540*, 51 NETH. INT'L L. REV. 411 (2004) (comparing the legislative qualities of Resolution 1540 against its legislative predecessor, Resolution 1373); Gilbert Guillaume, *Terrorism and International Law*, 53 INT'L & COMP. L.Q. 537 (2004) (discussing the impact of the Council's Resolutions on the role of states as the major source of protection against terrorism); Eric Rosand, *The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative?*, 28 FORDHAM INT'L L.J. 542 (2005) (arguing that the Council's legislative resolutions are innovative, within the ambit of the U.N. Charter's grant of power to the Security Council, and they are necessary tools to combat modern terrorism); TARCISIO GAZZINI, THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW 7-14 (2005) (discussing broadly the legal bases for Security Council resolutions and the extent of their authority); Andrea Bianchi, *Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion*, 17 EUR. J. INT'L L. 881 (2006) (evaluating the correlation between the perceived legitimacy of the measures and the extent to which states have implemented them). For a pre-2001 review of the "law-making" authority of the Council, see Gaetano Arangio-Ruiz, *On the Security Council's "Law-Making"*, 83 RIVISTA DI DIRITTO INTERNAZIONALE 609 (2000).

122. On the legal force of the resolutions, see U.N. Charter arts. 24-25, 103; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16, 53-54 (June 21) [hereinafter Namibia Advisory Opinion]; Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), Request for the Indication of Provisional Measures, 1992 I.C.J. 114, 126 (Apr. 14); Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.), Request for the Indication of Provisional Measures, 1992 I.C.J. 3, 14-15 (Apr. 14); GAZZINI, *supra* note 121, at 14; PETER J. VAN KRIEKEN, TERRORISM AND THE INTERNATIONAL LEGAL ORDER 111-12 (2002); Happold, *supra* note 121, at 597; Rosand, *supra* note 121, at 574. For arguments that the legal force of the Resolutions has been improperly expanded, see Namibia Advisory Opinion, *supra*, at 291-95, 339-40 (dissenting opinions of Judge Fitzmaurice and Judge Gros); Arangio-Ruiz, *supra* note 121, at 708-11.

123. *See* U.N. Charter, art. 24, ¶ 2; E.J. Flynn, *The Security Council's Counter-Terrorism Committee and Human Rights*, 7 HUM. RTS. L. REV. 371, 374-76 (2007) (referencing adherence to human rights norms as one of the principles and purposes of the Charter that reinforces the strength of anti-terrorism resolutions). *See generally* Rosemary Foot, *The United Nations, Counter Terrorism, and Human Rights: Institutional Adaptation and Embedded Ideas*, 29 HUM. RTS. Q. 489 (2007).

124. For a recent examination of this topic, *see generally* SECURITY AND HUMAN RIGHTS

The distinct issues of state responsibility for terrorist attacks and the right to use self-defense against such attacks ought not to be conflated.[125] The legality of intervention in Afghanistan following the attacks of September 11th should not be confused with the matter of whether Afghanistan is "responsible" for those attacks.[126]

One can envisage circumstances were state responsibility is not in question (for example, de jure state agents have committed a "terrorist-like" attack), but the right to use of force in self-defense does not automatically follow. There is no right to resort to force, for example, if the gravity of the attack is not sufficiently serious to reach the threshold of an "armed attack."[127] Further, there will be no legitimate self-defense in the absence of an ongoing imminent threat of further attacks.[128] Further, even in simple cases of self-defense against an armed attack by one state against another, the limitations of proportionality and necessity remain crucial.[129] A no-holds-barred saturation bombing campaign would be unlikely to meet the tests of necessity and proportionality and thus be illegal. Simply put, a "terrorist" attack, *even by a state,* does not provide carte blanche for all and any measures of self-defense.

On the other hand, there is considerable debate about whether state responsibility is a pre-requisite for the legality of self-defense measures against purported terrorists residing in another state's territory (a host state). There is no textual reason to suggest that an "armed attack" in the sense of Article 51 must be by a state. On the other hand, state practice and opinio juris, particularly prior to the September 11th attacks, point to the opinion that state responsibility is a pre-requisite for the legality of any incursion on the territory of the sovereign host state. The arguments for and against each view will not be repeated here.[130]

(Benjamin J. Goold & Liora Lazarus eds., 2007) (containing a collection of essays scrutinizing the relationship between security and human rights from a multidisciplinary perspective). *See also* Bianchi, *supra* note 121, at 885-87, 905-14.

125. *See* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 375 (1963).

126. *See* Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law,* 12 EUR. J. INT'L L. 993, 999 (2001).

127. Nicaragua, *supra* note 2, at 103-04.

128. Armed "reprisals" are precluded; *see* Declaration on the 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, para. 6 (1st princ.), U.N. GAOR, 25th Sess., Supp. No. 18, U.N. Doc. A/8018 (Oct. 24, 1970) [hereinafter Friendly Relations Declaration]. Gazzini provides examples of measures that appear like reprisals in the counter-terrorism context. However, in these cases, the states all claim some other legal justification for their action, and thus there is no opinio juris to support a change in customary international law. *See* GAZZINI, *supra* note 121, at 203-04; *see also* CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 163-64 (2d ed. 2004).

129. Carsten Stahn, *Security Council Resolution 1368 (2001) and 1373 (2001): What They Say and What They Do Not Say,* EUR. J. INT'L L. DISCUSSION FORUM: THE ATTACK ON THE WORLD TRADE CENTER: LEGAL RESPONSES 13-16 (Oct. 12, 2001), http://66.102.1.104/scholar?hl=en&lr=&q=cache:GEsWRgr99D4J:www.ejil.org/forum_WTC/ny-stahn.pdf+Carsten+Stahn+AND+Security+Council+Resolution+1368+(2001)+and+1373+(2001):+What+They+Say+and+What+They+Do+Not+Say (last visited Sept. 21, 2008). *See also* GAZZINI, *supra* note 121, at 192-94; GRAY, *supra* note 128, at 167.

130. For an excellent and concise discussion of the competing arguments with evidence of customary international law and commentators in support of each, see TAL BECKER, TERRORISM AND

The Council did nothing to help clarify the matter in its hastily agreed Resolution 1368 of September 12th 2001.[131] Whilst in the preamble "recognizing the inherent right of individual or collective self-defense in accordance with the Charter," nowhere do they use the term "armed attack" which, "in accordance with the Charter," is an essential prerequisite to self-defense.[132] The terrorist attacks of September 11th are instead "regard[ed]...like any act of international terrorism, as a threat to international peace and security."[133] Threats to international peace and security, of course, justify invocation of Chapter VII powers, even to the extent of using force in the absence of any actual or purported violation of international *law* by the target state.[134] They do not automatically authorize the use of force absent Security Council approval; under the Charter, only an "armed attack" can.[135]

THE STATE: RETHINKING THE RULES OF STATE RESPONSIBILITY 158-62 (2006). Those maintaining the view that state responsibility is a sine qua non for the legality of the use of force in self-defense include Cassese, *supra* note 126, at 996-97; Giorgio Gaja, *In What Sense was There an "Armed Attack"?* EUR. J. INT'L L. DISCUSSION FORUM: THE ATTACK ON THE WORLD TRADE CENTER: LEGAL RESPONSES, *at* http://www.ejil.org/forum_WTC/ny-gaja.html (visited Aug. 7, 2007); Pierre-Marie Dupuy, *The Law After the Destruction of the Twin Towers,* EUR. J. INT'L L. DISCUSSION FORUM: THE ATTACK ON THE WORLD TRADE CENTER: LEGAL RESPONSES, *at* http://www.ejil.org/forum_WTC/ny-dupuy.html (visited Aug. 23, 2007). *See generally* Greg Travalio & John Altenburg, *Terrorism, State Responsibility and the Use of Military Force*, 4 CHI. J. INT'L L. 97 (2003); Iain Scobbie, *Words my Mother Never Taught Me--"In Defense of the International Court,"* 99 AM. J. INT'L L. 76 (2005). They find support in, inter alia, Nicaragua, *supra* note 2; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9) [hereinafter Palestinian Wall opinion]. Arguing for the right to use force in self-defense against terrorists regardless of state responsibility are BROWNLIE, *supra* note 125, at 375; Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 839, 840 (2001); Ruth Wedgwood, *The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense,* 99 AM. J. INT'L L. 52, 58 (2005). These authors defend their argument with references to, inter alia, recent practice of the Council, the North Atlantic Treaty Organization, the Organization of American States, and opinio juris in support of Israel following the Palestinian Wall opinion. *See also* BECKER, *supra*, at 159-62; GRAY, *supra* note 128, at 159. Gazzini takes the view that prior to September 11th, the former view prevailed. Since then, the real issue has become, not the legality of self-defense against non-state terrorist actors per se, but the restrictions and conditions to be placed on the exercise of self-defense once a state has determined to pursue such a course. *See* GAZZINI, *supra* note 121, at 139, 190-97. Gray agrees that prior to September 11th use of force in self-defense was only justified to the extent that the host state was responsible. However, she does not consider there to be enough evidence to decide that customary international law has since evolved to definitively allow self-defense against actors whose actions are disconnected from the state in which they reside. *See* GRAY, *supra* note 128, at 164-67; *see also* Christine Gray, *The Use of Force and the International Legal Order*, *in* INTERNATIONAL LAW 589, 602-03 (Malcolm D. Evans ed., 2d ed. 2006).

131. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

132. *See id. See also* U.N. Charter art. 51; Derek Jinks, *State Responsibility for the Acts of Private Armed Groups,* 4 CHI. J. INT'L L. 83, 85 n.8 (noting that in previous Resolutions, the Council has explicitly referred to an "armed attack" when invoking the right of self-defense).

133. S. C. Res. 1368, *supra* note 131, ¶ 1.

134. GAZZINI, *supra* note 121, at 7-8; Arangio-Ruiz, *supra* note 121, at 632.

135. U.N. Charter art. 51; *but see* GAZZINI, *supra* note 121, at 123-24 (arguing that there is a new, post-Charter customary law on the use of force with a threshold for self-defense below that of an armed attack).

Acts of terrorism had been recognized as potential threats to international peace and security and triggering Chapter VII powers in previous resolutions on terrorism, with reference to Libya, Sudan and Afghanistan.[136] However, none of these made reference to self-defense. At best, Chapter VI Res. 731 on Libya affirms a state's right "to protect their nationals from acts of international terrorism that constitute threats to international peace and security."[137]

The Council recognized in Resolution 748 the Charter preclusion of the threat or use of force which indicates that: "every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when such acts involve a threat or use of force."[138]

Any state assisting terrorists or "acquiescing" to terrorist activities will hence be in violation of Article 2(4).[139] But in Resolution 1368 the Security Council seems to go further and "[c]alls on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and *stresses* that those responsible for aiding, supporting, or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable."[140]

"Those responsible" appears in the French text as the rather less concise "*ceux que portent la responsabilité*" with "held accountable" appearing as "*rendre des comptes*".[141] There is a hint of tautology in Resolution 1368's insistence that "those responsible [for aiding, supporting or harboring terrorists]...will be held accountable." It is not specified for what exactly harboring states shall be held accountable – whether solely for their actions in harboring the terrorists or whether for any resulting terrorist attacks. The latter would leave them open, should a terrorist attack reach the threshold of an "armed attack," to lawful use of force in self-defense against their own institutions. Furthermore, the use of "those" is broad enough to be interpreted as referring to non-state actors who shall be held accountable by states in domestic judicial process. At the time this Resolution was passed, it should be recalled that it was far from clear who was behind the attacks.

The Council, in the heat of September 12th, also "[e]xpresse[d] its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001,

136. S.C. Res. 748, pmbl., U.N. Doc. S/RES/748 (Mar. 31, 1992); S.C. Res. 1054, pmbl. paras. 8-11, U.N. Doc. S/RES/1054 (Apr. 26, 1996); S.C. Res. 1070, pmbl. paras. 7,10, ¶ 12, U.N. Doc. S/RES/1070 (Aug. 16, 1996); S.C. Res. 1267, pmbl., ¶ 1, U.N. Doc. S/RES/1267 (Oct. 15, 1999); S.C. Res. 1333, pmbl., ¶ 1, U.N. Doc. S/RES/1333 (Dec. 19, 2000); *see also* Chapter VI resolutions including S.C. Res. 731, U.N. Doc. S/RES/731 (Jan. 21, 1992); S.C. Res. 1044, U.N. Doc. S/RES/1044 (Jan. 31, 1996); S.C. Res. 1269, U.N. Doc. S/RES/1269 (Oct. 19, 1999).

137. S.C. Res. 731, *supra* note 136, pmbl. para. 2.

138. S.C. Res. 748, *supra* note 136, pmbl. para. 6. *See also* U.N. Charter art. 2, para. 4; Friendly Relations Declaration, *supra* note 128, para. 6 (1st princ.); Corfu Channel, *supra* note 24, at 22; Nicaragua case, *supra* note 2, ¶ 195, at 104.

139. U.N. Charter art. 2, para. 4.

140. S.C. Res. 1368, *supra* note 131, ¶ 3.

141. Résolution du Conseil de sécurité 1368, ¶ 3, Nations Unies Document S/RES/1368 (12 Septembre 2001), *available at* http://www.un.org/french/ga/search/view_doc.asp?symbol=S/RES/1368 (2001).

and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations."[142]

"All necessary steps" is well known code for the use of force. However, with a little over two weeks to allow the initial shock to subside and during which to bear witness to the US-led coalition's preparations for war in Afghanistan, the Council in Resolution 1373 demonstrates a little less "readiness" to take its own measures.[143] The preamble reaffirms "the need to combat by all means...in accordance with the Charter" international terrorism, but the Council stops short of indicating that *it* is willing to take all necessary steps to that end. It is, however, prepared to take "all necessary steps" to ensure compliance with the Resolution, a quite extraordinary statement given the extensive demands on all United Nations member states contained within.[144]

The "inherent right of individual or collective self-defence" is again alluded to in the preamble of the Resolution, but no explicit authorization is given for the attacks that followed against Afghanistan, even though by this time they were a foregone conclusion.[145] Nowhere does the term "armed attack" appear, as had been the case in other resolutions authorizing the use of force, nor is Afghanistan named as an appropriate target.[146] It certainly does not preclude the use of force by the US and its allies and, of course, such a thing would have been unthinkable given the veto powers of the United States and its loyal ally, the United Kingdom. The ambiguity can be explained in at least two ways: on the one hand, it may be that some states were uncomfortable with the implications for the rules of attribution and state responsibility of giving the terrorist attacks the status of "armed attacks" and indicating Afghan responsibility for the same.[147] On the other hand, and at least as probable, is that the United States and its allies on the Council did not wish to be limited in their response to *only* Afghanistan. Should it transpire that other states were engaged in some way in the attacks or were planning or sheltering the planners of future attacks, the coalition would not have to obtain further Council authorization for action against those states. In any case, the verbatim record is manifestly unhelpful as the meeting lasted an astonishing five minutes, with time only for the unanimous vote and no state remarks.[148] Whatever discussions were held between the Council members were held off-the-record.

Resolution 1373 has been described as "legislative" and indeed, it demonstrates features normally associated with legislation.[149] Most significantly,

142. S.C. Res. 1368, *supra* note 131, ¶ 5.

143. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

144. *Id.* ¶ 8.

145. *Id.* pmbl. para. 4.

146. *See* Jinks, *supra* note 132, at 85 n.8.

147. *See* Stahn, *supra* note 129, at 4-8.

148. U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/PV.4385 (Sept. 28, 2001).

149. *E.g.*, Szasz, *supra* note 121, at 905; Alvarez, *supra* note 121, at 874; Happold, *supra* note 121, at 595; Lavalle, *supra* note 121, at 414-15; Rosand, *supra* note 121, at 552. *See also* Eric Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism*, 97 AM. J. INT'L L. 333, 334 (2003).

it is addressed to every member state of the United Nations and concerns itself with a whole genre of behavior, rather than a specifically identified threat. It is thus a general prescription of conduct to all member states, rather than a specifically targeted executive order directed to a particularly mischievous state that is thought to pose a threat to international peace and security. Further, it is without limit of time.

In its generality it thus differs significantly from the pre-September 2001 efforts to deter the Taliban, the purported but largely unrecognized Government of Afghanistan, from "sheltering and training" terrorists.[150] The Council had instituted sanctions against the regime, monitored by a dedicated committee (commonly known as the 1267 committee), to try to bring pressure on the Taliban to extradite Usama Bin Laden.[151] Resolution 1267 and its follow-ups place obligations on all member states to respect the sanctions, but they are aimed at a specific threat, a specific manifestation of terrorism, not terrorism in general.[152] By contrast, Resolution 1269 is directed against terrorism more generally, but, taken under Chapter VI, it contains only recommendations, not binding obligations.[153]

The operative paragraphs of Resolution 1373 introduce a number of obligations for states and create the Counter-Terrorism Committee (CTC) consisting of one representative of each Council member to monitor compliance.[154] The Council "[d]*ecides* that states shall" prevent the funding of terrorism by criminalizing provision or collection of funds, freezing existing funds and prohibiting the donation of funds.[155] Further, "all states shall" refrain from giving any support, "active or passive," to terrorist groups; suppress recruitment and arms transfers to terrorists;[156] share information, including giving "early warnings" to other states; "[d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens"; prevent the same from operating in their territories; ensure adequate criminal law and its application against terrorists, their financiers and supporters; cooperate in exchange of intelligence to this end; and prevent their free movement.[157]

States are requested ("call[ed] upon") to exchange pertinent information, to cooperate in matters of criminal justice, to ensure that asylum systems are not abused by participants in terrorism and to ratify pertinent Conventions, in particular, the Terrorism Financing Convention.[158] The Council "[n]*otes* with concern" connections between international terrorism and other international

150. S.C. Res. 1267, *supra* note 136, pmbl. para. 6.

151. *Id.* ¶ 6.

152. S.C. Res. 1333, *supra* note 136, pmbl. paras. 10-14; S.C. Res. 1377, pmbl., U.N. Doc. S/RES/1377 (Nov. 12, 2001).

153. S.C. Res. 1269, *supra* note 136.

154. S.C. Res. 1373, *supra* note 143, ¶ 6.

155. *Id.* ¶ 1.

156. *Compare* Friendly Relations Declaration, *supra* note 128, para. 6 (1st princ.).

157. S.C. Res. 1373, *supra* note 143, ¶ 2.

158. *Id.* ¶ 3; *see* Terrorism Financing Convention 1999, *supra* note 110.

crimes, such as illegal trafficking in drugs, arms and nuclear material (though not persons), and money laundering, and although emphasizing the need for cooperation, does not actually mandate it.[159]

The subject matter does not differ radically from Resolution 1269 of October 1999, and Peter J. Van Krieken has argued that Resolution 1373 is a natural progression from the earlier resolution, rather than indicative of a change in direction by the Council.[160] However, Resolution 1269 is a non-binding Chapter VI resolution which "calls upon" states to "consider" ratification of anti-terrorism conventions, as well as applying fully those to which they are party.[161] They are asked to take "appropriate steps" to: cooperate with one another to prevent and suppress terrorism, including by limiting preparation and financing of activities; deny "safe haven" and ensure prosecution and extradition of those involved; take "appropriate measures" to limit asylum to terrorists; and exchange information that can help prevent terrorist acts being committed.[162] This is considerably milder than Chapter VII Resolution 1373 by virtue of which the Council "decides" that states "shall" take a number of measures. The suggested measures are given much less detail in the former resolution, allowing states a broader discretion in their implementation as well as a choice as to whether they will implement the recommendations at all.

Resolution 1373's focus on financing of terrorism might have appeared strange had it not been for the earlier International Convention for the Suppression of the Financing of Terrorism.[163] This meant that the Council members had some ready-prepared provisions that could be easily adopted, enabling the Council to act quickly.[164] Nevertheless, in September 2001, that Convention was far from being in force, having as parties only Botswana, Sri Lanka, the United Kingdom and Uzbekistan.[165] Moreover, whilst introducing, indeed mandating, the counter-terrorism provisions of this treaty for *all* member states, despite the fact that only one Council member had ratified it, they also neglected to include the safety-net provisions in the Convention for the benefit of suspects.[166] The "alleged offender" of the Convention loses the presumption, or at least possibility, of innocence to become simply the "person[] involved in terrorist acts" in the Council Resolution.[167]

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159. S.C. Res. 1373, *supra* note 143, ¶ 4.

160. S.C. Res. 1269, *supra* note 136; VAN KRIEKEN, *supra* note 122, at 144.

161. S.C. Res. 1269, *supra* note 136, ¶ 2.

162. *Id.* ¶ 4.

163. Terrorism Financing Convention 1999, *supra* note 110.

164. *Compare id.* art. 2(1), *with* S.C. Res. 1373, *supra* note 143, ¶ 1(b). *Compare id.* art. 8(1), *with* S.C. Res. 1373, *supra* note 143, ¶ 1(c). *Compare id.* art. 14, *with* S.C. Res. 1373, *supra* note 143, ¶ 3(g).

165. James Martin Center for Nonproliferation Studies, *Appendix XII: U. N. Conventions on Terrorism*, INVENTORY OF INTERNATIONAL NONPROLIFERATION ORGANIZATIONS AND REGIMES 2002, at 358-63 (Nov. 19, 2007), http://cns.miis.edu/inventory/pdfs/apmunter.pdf.

166. Terrorism Financing Convention 1999, *supra* note 110, arts. 9(3)-(6), 17; *see also* Bianchi, *supra* note 121, at 914-15; Alvarez, *supra* note 121, at 875-78.

167. *Compare* Terrorism Financing Convention 1999, *supra* note 110, art. 3, *with* S.C. Res. 1373,

Lavalle reminds us that whatever the contents and authority of the norms of Council 1373, it is not a treaty and, therefore, the customary law of treaty interpretation, including the Vienna Convention, does not apply.[168]

The overwhelming majority of states, perhaps apprehensive from events earlier that month, silently accepted the Resolution. Compliance, at least formally, has since been extraordinary, with every United Nations member state submitting the requisite initial report (an achievement that must be greatly envied by the human rights treaty bodies) and scrambling to ratify the relevant treaties.[169] Cuba was a rare voice at the General Assembly expressing concern about the constitutional implications of the Council's "lawmaking:"

> The Security Council has been pushed to give its legal support to the hegemonic and arbitrary decisions of the dominant Power. Those decisions violate the Charter and international law and encroach upon the sovereignty of all States. In this, the Council is once again usurping the functions of the General Assembly, which is the only organ whose universal membership and democratic format could legitimize such far-reaching decisions. The Council uses the unusual method of imposing on all States some of the provisions found in the conventions against terrorism, to which individual States have the right to decide whether or not they wish to be signatories.[170]

Resolution 1373 introduces for all states obligations of conduct rather than obligations of result.[171] States are required to take certain, quite specific measures. If they fail to do so, they will be responsible for their failure; to the extent that the Council even threatens to take "all necessary steps" against them.[172] If a state should take these measures and some funds still reach terrorists within its jurisdiction, the state will have satisfied the requirements of due diligence and will not engage responsibility as it will not have committed any "wrongful act."[173] On

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supra note 143, ¶ 2(a). The CTC, having early on declared that human rights concerns were outside its mandate, later proved more cooperative, and the Council introduced requirements that counter-terrorism measures be respectful of human rights and humanitarian law in later resolutions. *E.g.*, S.C. Res. 1456, ¶ 6, U.N. Doc. S/RES/1456 (Jan. 20, 2003); S.C. Res. 1624, ¶ 4, U.N. Doc. S/RES/1624 (Sept. 14, 2005). At the end of 2006, a system was introduced for delisting innocent persons from the sanctions regime of the 1267 Committee. S.C. Res. 1735, ¶¶ 13-14, U.N. Doc. S/RES/1735 (Dec. 22, 2006). *See also* BECKER, *supra* note 130, at 127-29. For a review of the CTC's engagement with human rights, *see* Flynn, *supra* note 123.

168. Lavalle, *supra* note 121, at 418.

169. David Cortright, A Critical Evaluation of the U.N. Counter-Terrorism Program: Accomplishments and Challenges 5-6, http://www.tni.org/crime-docs/cortright.pdf (last visited Sept. 20, 2008); *see* U.N. Secretariat, Office of the High Comm'r for Human Rights, *Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body*, at 19, U.N. Doc. HRI/MC/2006/2 (Mar. 22, 2006).

170. U.N. GAOR, 56th Sess., 13th plen. mtg. at 16, U.N. Doc. A/56/PV.13 (Oct. 1, 2001) (speech by Mr. Rodríguez Parrilla of Cuba).

171. *See supra* text accompanying note 92.

172. S.C. Res. 1373, *supra* note 143, ¶ 8.

173. *See, e.g.*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 46 I.L.M. 188, ¶ 430, at 294-95 (Feb. 26, 2007)

the other hand, if a state fails to take these measures, even if no terrorist funding occurs, it will still technically be in breach of the obligation. Responsibility does not depend on actual terrorist financing, let alone any act of terrorism.[174]

The ministerial level meeting of the 12th of November 2001, resulting in Resolution 1377, reinforced the obligations of Resolution 1373.[175] It also empowered the CTC to consider ways to assist states in complying with the earlier resolution.[176] A number of resolutions follow relating to the 1267 sanctions regime, variously extending the sanctions to be applied, reporting requirements to the 1267 committee, and improving cooperation with the CTC.[177] Sanctions are modestly eased in Resolution 1452 with regard to basic necessities and to pay debts.[178] In January 2003, states, whilst reminded of their obligations, including reporting obligations, are also advised to ensure compliance with international law, including human rights.[179] Under pressure from some European states, a system for "delisting" innocent persons from the sanctions regime of 1267 was finally introduced in December 2006.[180]

The Madrid bombings in 2004 were followed by the disastrous Resolution 1530 which, under pressure from the Spanish Government, explicitly attributed blame to ETA, despite a paucity of evidence indicating their involvement.[181] The mistake was not repeated after the London bombings 16 months later.[182]

The CTC was restructured and strengthened by Resolution 1535 and this move was followed by another "legislative" effort of the Council in Resolution 1540, this time introducing obligations on states to deny assistance to any non-state actors attempting to develop or otherwise obtain biological, chemical or nuclear weapons.[183] States are also required to review and, if necessary, amend or enforce their domestic laws to prevent non-state actors handling such weapons.[184] Non-proliferation measures must be increased (also, it would appear, in respect of states) regardless of member states' ratification of or accession to relevant non-

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[hereinafter Genocide Convention case].

174. *See* Ago: Second Report 1970, *supra* note 120, at 194-95. Damage will be relevant to the availability of remedies, in particular, in identifying an "injured state" in light of ILC Articles 42 and 48. ILC Articles, *supra* note 4, arts. 42, 48, at 54, 56.

175. S.C. Res. 1377, *supra* note 152.

176. *Id.* annex paras. 13-15.

177. S.C. Res. 1390, ¶¶ 1 to 2(a)-(c), U.N. Doc. S/RES/1390 (Jan. 16, 2002); S.C. Res. 1455, ¶¶ 1, 3-4, U.N. Doc. S/RES/1455 (Jan. 17, 2003); S.C. Res. 1526, ¶¶ 1-3, 10, 14-15, U.N. Doc. S/RES/1526 (Jan. 30, 2004); S.C. Res. 1617, ¶¶ 1, 15, U.N. Doc. S/RES/1617 (July 29, 2005); S.C. Res. 1735, *supra* note 167, ¶¶ 1, 29.

178. S.C. Res. 1452, ¶¶ 1-2, U.N. Doc. S/RES/1452 (Dec. 20, 2002).

179. S.C. Res. 1456, *supra* note 167, ¶ 6.

180. S.C. Res. 1735, *supra* note 167, ¶¶ 13-14.

181. S.C. Res. 1530, ¶ 1, U.N. Doc. S/RES/1530 (Mar. 11, 2004); *see also* Therese O'Donnell, *Naming and Shaming: The Sorry Tale of Security Council Resolution 1530 (2004)*, 17 EUR. J. INT'L L. 945, 946 (2007).

182. S.C. Res. 1611, U.N. Doc. S/RES/1611 (July 7, 2005).

183. S.C. Res. 1535, ¶¶ 1-3, U.N. Doc. S/RES/1535 (Mar. 26, 2004); S.C. Res. 1540, ¶ 1, U.N. Doc. S/RES/1540 (Apr. 28, 2004); *see also* Lavalle, *supra* note 121, at 416.

184. S.C. Res. 1540, *supra* note 183, ¶ 2.

proliferation treaties.[185] Another committee was established, which will receive mandatory reports from states on compliance.[186] The Council has become a little less belligerent since Resolution 1373 and, rather than "express[ing] its determination to take all necessary steps," this time more modestly "expresses its intention to monitor closely the implementation of this resolution and, at the appropriate level, to take further decisions which may be required to this end."[187]

This time, the constitutional issues did not go unremarked and a number of states expressed concerns about the propriety of the Council taking this kind of action.[188] Nevertheless, after the fact, they complied.[189]

The CTC is authorized to make state visits, with state consent, in Resolution 1566.[190] This Resolution is also worth considering for its reiteration of the Council's interpretation of state obligations vis à vis terrorism, as it:

> Calls upon States to cooperate fully in the fight against terrorism, especially with those States where or against whose citizens terrorist acts are committed, in accordance with their obligations under international law, in order to find, deny safe haven and bring to justice, on the basis of the principle to extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens.[191]

September 2005 witnessed Resolution 1624's expansion of the counter-terrorism mission to preventing the "glorification of terrorist acts" and, albeit with a nod to human rights, in particular the right of free speech, calls upon states to prohibit and prevent "incitement" to terrorism.[192] States are also called upon to improve passenger screening in international transport.[193] The Council again seeks to establish an international norm for the entire international community, although, by "calling upon" rather than "deciding...that States shall," there is not the same legislative air – the Council is "asking nicely" rather than demanding compliance from states.

C. Who is the State? Counter-terrorism Obligations and Responsibility of States

The Council's counter-terrorism resolutions do not provide an unambiguous view of state responsibility. Not for the first time, precision is a casualty of the veto power. There are, however, at least three possible interpretations that can be drawn from the post-2001 resolutions. The first is uncontroversial; the second, in

185. *Id.* ¶ 3; *but see* U.N. SCOR, 59th Sess., 4956th mtg. at 2-5, U.N. Doc. S/PV.4956 (Apr. 28, 2004) (speech by Mr. Akram of Pakistan regarding the adoption of Security Council Resolution 1540).

186. S.C. Res. 1540, *supra* note 183, ¶ 4.

187. S.C. Res. 1373, *supra* note 143, ¶ 8; S.C. Res. 1540, *supra* note 183, ¶ 11.

188. Lavalle, *supra* note 121, at 426-28.

189. *Id.* at 428.

190. S.C. Res. 1566, *supra* note 118, ¶ 8.

191. *Id.* ¶ 2.

192. S.C. Res. 1624, *supra* note 167, pmbl. paras. 5, 7, ¶ 1.

193. *Id.* ¶ 2.

this author's opinion, engages little controversy; the third is sufficiently controversial to remain unproven.

1. States must refrain from interference with the sovereign affairs of other states, including by supporting, inter alia, terrorist actors

The obligation of states to respect the sovereignty, independence and territorial integrity of one another is a central pillar of international law. This principle can be found in the Charter[194] and in the Friendly Relations Declaration:

> Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.
>
> Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.[195]

Today, widely accepted as a description of customary international law, the second of these paragraphs was replicated with approval in the Preambles to Council Resolutions 748 and 1373.[196]

According to the classical understanding, the state is thus responsible for providing any assistance or support to terrorists, but not for any resulting terrorists attacks themselves. Responsibility depends on the dependence and control tests of ILC Articles 4 & 8, *Nicaragua,* and now the Genocide Convention case. The international wrong is the positive action of the state in providing support; this may, depending on the circumstances, reach the threshold of "indirect aggression", but it will not constitute an "armed attack." As a negative obligation, i.e. a duty to abstain, due diligence is irrelevant; it is nonsense to talk about doing one's best *not* to do something. States must simply not do it.[197] The question of whether the Council has instigated a stronger doctrine of responsibility, that is, responsibility for the terrorist acts themselves, will be addressed shortly.

2. States must exercise due diligence to prevent terrorism and protect others

Breaches of positive obligations are recognized as giving rise to responsibility in ILC Article 12.[198] According to this, it is irrelevant whether the obligation emanates from treaty, customary international law, or even Council resolution. In the commentary to this article, Council resolutions are not amidst the examples proffered by the ILC.[199] However, the ILC did not purport to provide an exhaustive list.[200]

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194. U.N. Charter art. 2, para. 4.
195. Friendly Relations Declaration, *supra* note 128, paras. 8-9 (1st princ.).
196. S.C. Res. 748, *supra* note 136; S.C. Res. 1373, *supra* note 143.
197. Pisillo-Mazzeschi, *supra* note 100, at 31-33.
198. ILC Articles, *supra* note 4, art. 12, at 46.
199. *Id.* cmt. to art. 12 ¶ 3, at 126.
200. *Id.*

Long recognized is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States," as held in the first judgment of the post-Charter Court.[201] Therefore, the state has a positive obligation to prevent terrorist activities being organized within its territory. This obligation is subject to the requirements of due diligence.[202] Ago explains that where the state does not act with due diligence:

> the Government of that State will be accused of having failed to fulfil its international obligations with respect to vigilance, protection and control, of having failed in its specific duty not to tolerate the preparation in its territory of actions which are directed against a foreign Government or which might endanger the latter's security, and so on.[203]

As already noted, the degree of diligence due, or the standard of care, expected of a state varies depending on the primary rule in play.[204]

The Council's resolutions, in particular 1373, 1540, and 1566 would indicate that the standards of care, that is, the degree of diligence due, are higher for terrorism today than prior to 2001.[205] There has, therefore, been a change in the *primary rules*, without necessarily indicating a change in the secondary rules of attributability. The state (still identified per *Nicaragua*) remains responsible for failing to take adequate measures to prevent terrorist acts, but the measures expected of the state are more stringent than before. A failure to meet these (higher) standards would constitute a separate delict and it is for this delict, rather than the terrorist attack itself, that the state is responsible. Furthermore, by introducing obligations of (diligent) *conduct,* state responsibility depends solely on the state's action or inaction and does not require any actual terrorist attack.[206]

Ago's 1970 report explains that:

> There have been innumerable cases in which States have been held responsible for damage caused by individuals. As will be shown later, these alleged cases of State responsibility for the acts of individuals are really cases of responsibility of the State for omissions by its organs: the State is responsible for having failed to take appropriate measures to prevent or punish the individual's act.[207]

This is to say that the state has not been held responsible for the actions of the individuals as though they were the state's own; the non-state behavior is not attributed to the state. The state instead is only responsible for its separate delict

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201. Corfu Channel, *supra* note 24, at 22.

202. Pisillo-Mazzeschi, *supra* note 100, at 34-36.

203. Roberto Ago, *Fourth Report on State Responsibility*, [1972] 2 Y.B. Int'l L. Comm'n 70, 120 ¶ 135, U.N. Doc. A/CN.4/264.

204. *See supra* text accompanying notes 100-05.

205. *Compare* S.C. Res. 1373, *supra* note 143, ¶ 3, *and* S.C. Res. 1540, *supra* note 183, ¶ 1-3, *and* S.C. Res. 1566, *supra* note 118, ¶ 2, *with* S.C. Res. 748, *supra* note 136, ¶ 4-6.

206. *See supra* text accompanying notes 171-73.

207. Ago: Second Report 1970, *supra* note 120, ¶ 35, at 188.

(the omission of its organs). As in genocide, where omission is the basis for responsibility, there is no need to identify a state organ or agent according to *Nicaragua* or any other standard.[208]

Pisillo-Mazzeschi confirmed this interpretation in 1992. "[T]he conduct of tolerance is not an act of aggression but only a breach of the autonomous rule of customary law, which binds the State to prevent, in its territory, the organization of acts of force against foreign States."[209]

State responsibility in *Corfu Channel* hinged on such a separate delict,[210] specifically, the failure to warn shippers of the dangers of which Albania was deemed to have been aware.[211]

It thus appears that the primary rules determining the degree of due diligence to prevent terrorism have changed. But it remains possible that the secondary rules of attribution have also changed and that Ago's and Pisillo-Mazzeschi's views have been superceded. This latter possibility will now be considered.

3. States bear responsibility for injuries caused by non-state terrorist actors

Some recent scholarship has argued both descriptively and prescriptively that states should be held accountable, i.e. engage full international responsibility, for the acts of terrorists whom they support or harbor without the need to establish a connection meeting the *Nicaragua* test, but depending on a causation test or even strict liability.[212] Savarese has argued more modestly that the failure of due diligence in the context of terrorism, when followed by a specific terrorist attack, could be characterized as "complicity" albeit in a non-technical sense ("*complicità; sia pure solo in senso atecnico*").[213] However, this would not square with the Court's reading of complicity, which it considered equivalent to "aid or assistance in the commission of an internationally wrongful act" and requiring some positive action on the part of state organs or agents.[214] The arguments in support of these positions are not based solely on the Council resolutions that have been the focus of this paper, but also engage with other evidence of usus and opinio juris, in particular, the invasion of Afghanistan in the fall of 2001. It should thus be recalled that the Council has been considerably less forthright than the hegemonic power in its exposition of the rules of attribution. The President of the United States of America, immediately following the terrorist attacks on that country, but

208. *See supra* text accompanying notes 104-05.

209. Pisillo-Mazzeschi, *supra* note 100, at 36.

210. "Separate delict" is equivalent to "different wrongful act" as used by Pisillo-Mazzeschi, *id.* at 26.

211. Corfu Channel, *supra* note 24, at 22.

212. *E.g.*, BECKER, *supra* note 130, chs. 8-9; Alvarez, *supra* note 121, at 879; Vincent-Joël Proulx, *Babysitting Terrorists: Should States be Strictly Liable for Failing to Prevent Transborder Attacks?*, 23 BERKELEY J. INT'L L. 615 (2005).

213. Eduardo Savarese, *Fatti di Privati e Responsabilità dello Stato tra Organo di Fatto e "complicità" alla luce di Recenti Tendenze della Prassi Internazionale, in* LA CODIFICAZIONE DELLA RESPONSABILITÀ INTERNAZIONALE DEGLI STATI ALLA PROVA DEI FATTI., *supra* note 37, at 53, 66.

214. Genocide Convention case, *supra* note 1, ¶¶ 419-21; *see also* ILC Articles, *supra* note 4, art. 16, at 47.

before the identification of any likely perpetrators, insisted that the country would make "no distinction between the terrorists who committed the attacks and those who harbor them."[215] The paucity of international responses to this incredible statement must at least in part be attributed to the political atmosphere of the moment and a reluctance to appear in any way apologetic for the thousands killed.

It would be dangerous, in this author's view, to read too much into one example of intervention in Afghanistan by a group of strong states against a very weak state at an emotionally and politically charged moment in World history.[216] It might also prove short-sighted to depend too heavily on any opinio juris of states in that now notorious second week of September 2001. The Council resolutions, on the other hand, particularly 1373 and 1540 creating, as they do, obligations on states without limit of time, create a more lasting legacy. These resolutions might be interpreted to support a theory of state responsibility for acts of terrorism by non-state actors; at least they do not exclude such an interpretation. However, such an interpretation is by no means the only reasonable one.

Resolution 1368 can certainly be reasonably interpreted as indicating an explicit assertion of state responsibility for harboring terrorists.[217] But it is inadequate to determine whether responsibility is engaged for the terrorist acts themselves or for some lesser wrong of wrongful interference. Invocation of the collective right to self-defense, in Resolutions 1368 and 1373 can also be understood as implicitly indicating state responsibility, at least if one takes the view that only a state can commit an "armed attack" and that the invasion of Afghanistan in 2001 was accordingly lawful.

On the other hand, the preamble to Resolution 1373 repeats only the customary norm that states must "refrain from organizing, instigating, assisting or participating in terrorist acts...or acquiescing" in such in its territory. Operative paragraph 2, which details examples of what this means in practice, does not go any further in indicating direct state responsibility for the results of failure.[218] Even the Council's threat of "all necessary steps" to ensure compliance does not logically require state responsibility of any particular form, since the Council's considerable powers to take measures to ensure international peace and security do not depend on any actual violation of international law.[219]

Resolution 1540 indicates a number of positive obligations upon states, but all of these can be considered within the context of a duty to take measures to prevent injuries caused by terrorism to the standards of due diligence.[220] State responsibility would thus be based on a separate delict – taking inadequate

215. President George W. Bush, Statement by the President in his Address to the Nation, (Sept. 11, 2001), http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html; *see also* U.N. SCOR, 56th Sess., 4370th mtg. at 7-8, U.N. Doc. S/PV.4370 (Sept. 12, 2001).

216. *C.f* Nicaragua, *supra* note 2, ¶ 186 (noting that customary international law has room for exceptions).

217. S.C. Res. 1368, *supra* note 131, ¶ 3.

218. S.C. Res. 1373, *supra* note 143, ¶ 2.

219. *See supra* text accompanying notes 134-35.

220. S.C. Res. 1540, *supra* note 183, ¶ 3.

measures – rather than for any terrorist attack. Therefore, the identity of the actors as organs or agents is irrelevant.

The Resolutions, taken together, are insufficient to determine a change in the secondary rules of state responsibility. It is one possible interpretation, but the more plausible interpretation is that they do not.

D. The Impact of the Council on State Responsibility for Terrorism

The Council is clearly purporting to change the norms of international law, whether it be primary or secondary rules. If it is authorized to change either, it is authorized to change both. There is no reason why the "rules of change" in international law should differ depending on whether primary or secondary rules are at stake.

If we agree only that states permitting terrorists to operate in their territory violate a separate (positive) obligation, then there is no change to the secondary rules of international law; instead, only the standard of due diligence has been strengthened, that is, the content of the primary rules. On the other hand, if it is to be accepted that states harboring terrorists are to be considered responsible for the results of terrorist activities, even in the absence of a de jure connection, complete dependence, or effective control, then we must accept that the secondary rules of international law have been amended as far as responsibility for terrorism is concerned. This would indicate that responsibility for terrorism is lex specialis, as facilitated by Article 55 of the ILC Articles.

In this latter case we are then lead back to the broader question of whether the Council has the authority to create such a derogation in the pursuit of international peace and security. If the Council can, should, and does create international law binding on every member state, what are the implications of this for the consensual basis of international law? These questions have been addressed elsewhere and views range across the spectrum. Eric Rosand claims that the Council certainly does have this authority and, moreover, there is no contradiction with the consensual theory of international law as member states have consented to this power by virtue of the Charter.[221] By contrast, Happold argues that legislative behavior in the Council is both ultra vires and most undesirable, undermining as it does "sovereign equality" of states and the Charter principles.[222]

The Charter is both treaty and constitution of the United Nations. As the latter, it is a living document and its norms may be subject to modification by customary international law.[223] In this context, it is possible that the broad acceptance by states of the Council's "legislative" behavior indicates a shift in customary international law. The evidence is inconclusive. At best, compliance with the legislative features of Resolutions 1373 and 1540 indicate adequate state

221. Rosand, *supra* note 121, at 574; *see* U.N. Charter arts. 24, 25, 48, 103; *see also* Bianchi, *supra* note 121, at 888-92 (arguing in favor of the Council's "legislative" actions on the basis of a kind of international state of emergency); Szasz, *supra* note 121, at 901.

222. Happold, *supra* note 121, at 607-10; *see also* Arangio-Ruiz, *supra* note 121, at 690.

223. Thomas M. Franck, *What Happens Now? The United Nations after Iraq*, 97 AM. J. INT'L L. 607, 614-15 (2003); Arangio-Ruiz, *supra* note 121, 689-91.

practice and opinio juris, albeit with Cuba as persistent objector.[224] However, this is probably too bold a claim, given the concerns raised by other states, including examples from Africa, Asia, Europe and Latin America, prior to the acceptance of Resolution 1540.[225] Certainly, it is too early to suggest that such a customary international norm has yet crystallized, and further examples of both Council's "legislation" and state acceptance of the same will be necessary before such a determination can confidently be made.

On the other hand, the overwhelming acceptance of the primary norms on counter-terrorism, originating in the Council's resolutions, indicate that customary international law pertaining to state obligations regarding terrorism has now changed, notwithstanding doubts over the authority of the Council to promulgate such norms. In this latter case, it is not the authority of the Council that creates the binding norm, but rather its later endorsement by states, in the form of usus and opinio juris that creates the norm. This would imply not that the Council has the power to make law, but only that it is has a strong influence on the development of customary international law; its ultimate formation will depend on states' behavior.[226]

IV. THE UNITED NATIONS HUMAN RIGHTS TREATY BODIES AND STATE RESPONSIBILITY TO RESPECT, PROTECT AND FULFILL HUMAN RIGHTS

A. The Treaty Bodies

The seven human rights treaty bodies are as follows: the Human Rights Committee (HRC), monitoring the International Covenant on Civil and Political Rights (ICCPR);[227] the Committee on Economic, Social and Cultural Rights (CESCR), monitoring the International Covenant on Economic, Social and Cultural Rights (ICESCR);[228] the Committee on the Elimination of Racial Discrimination (Race Committee), monitoring the Convention for the Elimination of Racial Discrimination (CERD);[229] the Committee on the Elimination of Discrimination Against Women (Women's Committee), monitoring the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW);[230] the Committee Against Torture (Torture Committee), monitoring the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

224. *See supra* text accompanying note 170; *see also* U.N. GAOR, 56th Sess., 13th plen. mtg. at 14-16, U.N. Doc. A/56/PV.13 (Oct. 1, 2001) (speech by Mr. Rodríguez Parrilla of Cuba).

225. *See supra* notes 188-89; *see generally* Lavalle, *supra* note 121.

226. *See* Arangio-Ruiz, *supra* note 121, at 693.

227. International Covenant on Civil and Political Rights, Dec. 16, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171 [hereinafter ICCPR].

228. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]. The monitoring Committee is not an original part of the Covenant, but was established later by ECOSOC Res. 1985/17. U.N. Econ. & Soc. Council [ECOSOC] Res. 1985/17, ¶¶ 7-8, 18, U.N. Doc. E/RES/1985/17 (May 28, 1985).

229. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 5 I.L.M. 352, 660 U.N.T.S. 195 [hereinafter CERD].

230. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

Punishment (CAT);[231] the Committee on the Rights of the Child (Children's Committee), monitoring the Convention on the Rights of the Child (CRC) and its Optional Protocols[232] and the Committee on Migrant Workers (Migrant Workers' Committee), monitoring the International Convention on the Rights of All Migrant Workers and Members of Their Families (MWC).[233] Each of these receives and considers reports of state parties and gives concluding comments or observations following discussion with state representatives. They also make general comments or general recommendations addressed to all states, with some committees being considerably more prolific than others.[234] The HRC, Race Committee, Women's Committee and Torture Committee permit, subject to state consent, individual communications, with the HRC receiving by far the bulk of these.[235] The Migrant Workers' Committee will also be able to hear communications once 10 states accede to the procedure; as of September 2007, of 37 state parties, none had made the requisite declaration.[236]

CAT contains provisions for state focused inquiries[237] and the recently established Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment will be authorized to make regular visits to state parties to monitor conditions in detention of consenting state parties.[238] The CEDAW Committee can also now undertake inquiries under its Optional Protocol.[239] The Race Committee is not explicitly authorized by treaty to undertake inquiries, but does have an early warning and urgent procedure, whereby

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231. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027, 1465 U.N.T.S. 85 [hereinafter CAT].

232. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, Annex II, U.N. Doc. A/54/49 (May 25, 2000); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, G.A. Res. 54/263, Annex I, U.N. Doc. A/54/49 (May 25, 2000).

233. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, May 2, 1991, 30 I.L.M. 1517 [hereinafter MWC]. One new body has be en established by its convention, the Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 46 I.L.M. 443, and another new body will be created once its convention comes into force, the International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61/177, Annex, U.N. Doc. A/RES/61/177 (Dec. 20, 2006).

234. *See* U.N. Secretariat, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.8 (May 8, 2006) [hereinafter Compilation of General Comments].

235. Optional Protocol to the International Covenant for Civil and Political Rights, art. 1, Dec. 16, 1966, 999 U.N.T.S. 302 [hereinafter OP-ICCPR]; CAT, *supra* note 231, art. 13; CERD, *supra* note 229, art. 14; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, art. 2, Dec. 10, 1999, 2131 U.N.T.S. 83 [hereinafter OP-CEDAW].

236. MWC, *supra* note 233, art. 77.

237. CAT, *supra* note 231, art. 20. At the time of writing this procedure had been used on five occasions.

238. Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 11, Dec. 18, 2002, 42 I.L.M. 26.

239. *See* OP-CEDAW, *supra* note 235, arts. 8-10.

they make decisions and send letters to states when they have immediate concerns that cannot wait until the timetabling of the next state report.[240]

CAT, the MWC, CERD and the ICCPR provide the opportunity for state parties to complain to the respective monitoring treaty bodies about the poor compliance of another state party.[241] In the former two cases, the treaty body considers the complaint; in the latter two, it should create an ad hoc Conciliation Commission.[242] CAT, CEDAW and the MWC also explicitly provide for negotiation, followed by arbitration, to resolve disputes as to "interpretation or application" of the Conventions and, failing to reach agreement, states can bring a case before the International Court of Justice.[243] These inter-state complaint procedures had never, as of November 2007, been exercised by state parties.[244]

The treaty bodies are in a peculiar position. They are created principally to receive the state reports on which they are authorized to make "suggestions", "general comments" or "general recommendations" in their annual reports to the General Assembly and, in later treaties, also directly to state parties.[245] They are authorized to interpret the conventions and to identify violations.[246] Even in the individual communications procedures, they are authorized only to transmit "views," not "opinions" or "judgments".[247] Nevertheless, the interpretations of the committees have had considerable influence on the understanding and application of the conventions.[248]

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240. Office of the U.N. High Commissioner for Human Rights, Committee on the Elimination of Racial Discrimination, Early-Warning Measures and Urgent Procedures, http://www2.ohchr.org/english/bodies/cerd/early-warning.htm#about (last visited Sept. 19, 2008) (stating that the mechanism was adopted in 1993).

241. CAT, *supra* note 231, art. 21; MWC, *supra* note 233, art. 76; CERD, *supra* note 229, art. 11; ICCPR, *supra* note 227, art. 41.

242. CAT, *supra* note 231, art. 21; MWC, *supra* note 233, art. 76; CERD, *supra* note 229, art. 12; ICCPR, *supra* note 227, arts. 42-43.

243. CAT, *supra* note 231, art. 30; CEDAW, *supra* note 230, art. 29; MWC, *supra* note 233, art. 92. It should also be noted that under the Statute of the Court, any question of treaty interpretation or purported failure of implementation can be brought before the Court, subject to general provisions on state consent to its jurisdiction. Statute of the Court, *supra* note 5, art. 36.

244. Felice D. Gaer, *A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System*, 7 HUM. RTS. L. REV. 109, 118 n.43 (2007); *see also* Office of the United Nations High Commissioner for Human Rights, Human Rights Bodies Complaints Procedures, http://www2.ohchr.org/english/bodies/petitions/index.htm#interstate (last visited Oct. 2, 2008).

245. ICCPR, *supra* note 227, art. 40(4); CERD, *supra* note 229, art. 9(2); CEDAW, *supra* note 230, art. 21; CAT, *supra* note 231, art. 19; CRC, *supra* note 241, art. 45(d); MWC, *supra* note 233, art. 74(1).

246. *See* United Nations Office of the High Commissioner for Human Rights, Human Rights Bodies, http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx (last visited Oct. 6, 2008).

247. CAT, *supra* note 231, art. 22(7); MWC, *supra* note 233, art. 77(7); OP-ICCPR, *supra* note 235, art. 5(3); OP-CEDAW, *supra* note 235, art. 7(3). The Race Committee is authorized to give "suggestions and recommendations." CERD, *supra* note 229, art. 14(7)(b). The HRC now issues "views" and CEDAW has taken to issuing "decisions," the latter suggesting a more legal process.

248. *See* Int'l L. Assoc., Comm. on Int'l Human Rights L. & Practice, *Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies, Berlin Conference 2004*, ¶¶ 175-182 (2004), http://web.abo.fi/instut/imr/research/seminars/ILA/Report.pdf.

With reference to state responsibility regimes under these treaties the first thing that must be noted is that they are, in fact, treaties. As such, to the extent that the treaties themselves contain provisions that indicate particular modes of state responsibility, they are lex specialis.[249]

Nevertheless, international human rights law, to which the treaty bodies are major contributors, and the general rules of state responsibility in international law do not exist in parallel universes. Article 50(1)(b) of the ILC Articles requires that counter-measures do not compromise "obligations for the protection of fundamental human rights," and the commentary to this Article cites both the ICCPR and the ICESCR as examples of "elements of general international law" as well as making reference to the CESCR's General Comment No. 8.[250] The ILC refers also to the ICCPR, with reference to articles 14, 15, 20 and 30, as well as citing communications of the HRC in its commentary.[251] The HRC responded to the ILC Articles with a general comment dedicated to explaining their relevance and application to the ICCPR.[252] The treaty bodies' regimes are not self-contained regimes in all respects.[253]

B. State Responsibility in the Eyes of the Treaty Bodies

It serves to examine some of the recent work of the treaty bodies to consider the predominant visions of state responsibility that they have applied. What has become apparent is an increasing reliance on the tertiary model of state responsibility for human rights, that is, responsibility to respect human rights (do no harm), to protect human rights (prevent harm by non-state actors) and to fulfill human rights (guarantee minimums of wellbeing).[254]

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249. ILC Articles, *supra* note 4, art. 55 at 58.

250. ILC Articles, *supra* note 4, cmt. to art. 50, ¶ 7, at 335; ECOSOC, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 8, U.N. Doc. E/1998/22, (Dec. 4, 1997), *reprinted in* Compilation of General Comments, *supra* note 234, at 51. *See also* Malcolm D. Evans, *State Responsibility and the European Convention on Human Rights: Role and Realm*, *in* ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 139, 142 (Malgosia Fitzmaurice & Dan Sarooshi eds., 2004).

251. ILC Articles, *supra* note 4, cmt. to arts. 14, ¶ 11; 15, ¶ 6 n.276; 20, ¶ 10 n.349, 30 ¶ 13 n.476.

252. U.N. Hum. Rights Comm., General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21Rev.1/Add.13 (May 29, 2004), *reprinted in* Compilation of General Comments, *supra* note 234, at 233 [hereinafter HRC General Comment No. 31].

253. *See* ILC Articles, *supra* note 4, cmt. to art. 55, ¶ 5, at 358; Int'l L. Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission*, ¶¶ 174-93, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (finalized by Martti Koskenniemi); Dominic McGoldrick, *State Responsibility and the International Covenant on Civil and Political Rights*, *in* ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 161, 165, *supra* note 250; *but see* Evans, *supra* note 250, at 160 (arguing that state responsibility in human rights, per the European Court of Human Rights and state responsibility in the ILC Articles are best considered "as operating in altogether different realm[s]"). The arguments relating to the European regime are not, as will be argued, equally applicable to the U.N. treaty bodies.

254. *See* Byrnes & Connors, *supra* note 3.

This model traces its origins to Henry Shue and Asbjørn Eide in the mid 1980s.[255] The extent to which each of the seven bodies engages with it varies and can be seen most explicitly in the operation of the CESCR. The Torture Committee, no doubt feeling the constraints of its text which clearly prioritizes "state" torture, traditionally confined its concerns to the duty to respect. However, in recent years, it has expanded its gaze to the duty to protect but has not seen scope to consider duties to fulfill.[256] The reasons for this shall be explored below.[257]

Given the enormous volume of work of the treaty bodies, a workload with which even they struggle to keep up, a select review of the treaty bodies' work shall be provided to demonstrate their engagement with the tertiary model.[258]

The CESCR explicitly relied upon this scheme in 1999 to frame General Comment No. 12 and it has appeared in every general comment issued by that committee since.[259] Moreover, the concluding comments on state reports clearly

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255. Special Rapporteur, *Report on the Right to Adequate Food as a Human Right*, ¶¶ 34–36, 112–15, 167–81, *delivered to the Commission on Human Rights*, U.N. Doc. E/CN.4/Sub.2/1987/23 (July 7, 1987). This tertiary system is followed by the African Comm'n on Human and Peoples' Rights. *See, e.g.*, Soc. & Econ. Rights Action Ctr. [SERAC] v. Nig., African Comm'n on Human & Peoples' Rights, Commc'n. No. 155/96 (2001), *available at* http://www.escr-net.org/usr_doc/serac.pdf. The European Court of Human Rights and the Inter-American Court of Human Rights recognize positive duties principally at the level of protection. *See, e.g.*, X & Y v. Netherlands, App. No. 8978/80, 8 Eur. H.R. Rep. 235, 239-40 (1985); A v. UK, App. No. 25599/94, 27 Eur. H.R. Rep. 611 (1998); Fernandes v. Brazil, Case 12.051, Inter-Am. C.H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20 rev. ¶ 56 (2001); Morales v. Guatemala, 1999 Inter-Am. C.H.R. Series C, No. 63, ¶¶ 144, 191 (Nov. 19, 1999), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_63_ing.pdf. In this latter case, the court bordered on recognizing a duty to fulfill the right to life to ensure one would "not be prevented from having access to the conditions that guarantee a dignified existence."

256. *See* Catharine A. MacKinnon, *On Torture: A Feminist Perspective on Human Rights, in* HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE 21 (Kathleen E. Mahoney & Paul Mahoney eds., 1993); Kathleen Mahoney, *Theoretical Perspectives on Women's Human Rights and Strategies for their Implementation,* 21 BROOK J. INT'L L. 799, 847-48 (1996); *see also* Christine Chinkin, *A Critique of the Public/Private Dimension*, 10 EUR. J. INT'L L. 387, 390 (1999).

257. *See infra* text accompanying notes 327-29.

258. On volume of work, *see* Rachael Lorna Johnstone, *Cynical Savings or Reasonable Reform? Reflections on a Single Unified U.N. Human Rights Treaty Body,* 7 HUM. RTS. L. REV. 173, 178-81 (2007). A more thorough examination of the tertiary scheme in practice can be found in Rachael Lorna Johnstone, *Feminist Influences on the United Nations Human Rights Treaty Bodies,* 28 HUM. RTS. Q. 148, 154-80 (2006) [hereinafter Johnstone: Feminist Influences].

259. ECOSOC, *General Comment No. 12: The right to adequate food (art. 11)*, ¶ 14, U.N. Doc. E/C.12/1999/5 (May 12, 1999), *reprinted in* Compilation of General Comments, *supra* note 234, at 63, 66. *See also* ECOSOC, *General Comment No. 13: The right to education (art. 13)*, ¶ 46, U.N. Doc. E/C.12/1999/10 (Aug. 12, 1999), *reprinted in* Compilation of General Comments, *supra* note 234, at 71, 80; ECOSOC, *General Comment No. 14: The right to the highest attainable standard of health (art. 12)*, ¶ 33, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999), *reprinted in* Compilation of General Comments, *supra* note 234, at 86, 94; ECOSOC, *General Comment No. 15: The right to water (arts. 11 and 12 of the Covenant)*, ¶ 25, U.N. Doc. 3/C.12/2002/11 (Jan. 20, 2003), *reprinted in* Compilation of General Comments, *supra* note 234, at 105, 111; ECOSOC, *General Comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3)*, ¶¶ 17-21, U.N. Doc. E/C.12/2005/4 (Aug. 11, 2005), *reprinted in* Compilation of General Comments, *supra* note 2344, at 122, 125-26; ECOSOC, *General Comment No. 17: The right of everyone to benefit from the*

indicate that state parties are obliged to ensure human rights on all three levels.[260] To give recent examples, concerns have been expressed about: the level of the minimum wage, the impact of privatization on workers' rights, and discrimination between families of war victims,[261] which can be considered pertinent to duties to respect human rights; gender stereotypes, domestic violence, human trafficking and racial prejudice,[262] all of which can be seen as matters of protecting human rights; and finally unemployment, poverty, malnutrition, consumption of illegal drugs, HIV/AIDS, housing and the education of Romani children,[263] which envisage state duties to fulfill human rights, even where neither state nor private delict can be said to be the cause of the human rights failure.

The duty to respect, protect and fulfill economic, social and cultural rights was entrenched in the Maastricht guidelines on violations of economic, social and cultural rights.[264] Although these guidelines are not strictly limited to the ICESCR, they are clearly influenced by the work of the CESCR and are intended to provide further clarification of what is required of states to fulfill their treaty obligations under the Covenant. The tertiary framework is explicitly introduced with the comment that "[l]ike civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfill."[265] It is significant that the tertiary framework is not considered some special characteristic of economic, social and cultural rights, but in fact pervades the whole range of international human rights.[266]

Obligations of conduct and result are distinguished in the Maastricht Guidelines, although more in line with the French understanding of *obligation de moyens* (obligation to act to a professional standard) and *obligation de résultat*

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protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (art. 15), ¶¶ 28-34, 44-46, U.N. Doc. E/C.12/GC/17 (Jan. 12, 2006), *reprinted in* Compilation of General Comments, *supra* note 234, at 131, 137-39, 142-43; ECOSOC, *General Comment No. 18: The right to work (art. 6)*, ¶¶ 22-28, 33-36, U.N. Doc. E/C.12/GC/18 (Feb. 6, 2006), *reprinted in* Compilation of General Comments, *supra* note 234, at 148, 153-54, 156-57.

260. *See, e.g.*, *infra* notes 262-64.

261. ECOSOC, *Concluding Observations of the Committee on Economic, Social and Cultural Rights, Uzbekistan*, ¶¶ 15, 19, U.N. Doc. E/C.12/UZB/CO/1 (Nov. 25, 2005) [hereinafter CESCR Uzbekistan 2005]; ECOSOC, *Concluding Observations of the Committee on Economic, Social and Cultural Rights, Bosnia and Herzegovina*, ¶¶ 15, 18, U.N. Doc. E/C.12/BIH/CO/1 (Nov. 25, 2005) [hereinafter CESCR Bosnia 2005].

262. CESCR Uzbekistan 2005, *supra* note 261, ¶¶ 24-25; CESCR Bosnia 2005, *supra* note 261, ¶¶ 21-22; ECOSOC, *Concluding Observations of the Committee on Economic, Social and Cultural Rights, Libyan Arab Jamahiriya*, ¶¶ 12, 14, U.N. Doc. E/C.12/LYB/CO/2 (Nov. 25, 2005) [hereinafter CESCR Libya 2005].

263. CESCR Uzbekistan 2005, *supra* note 261, ¶¶ 17, 27, 31-33; CESCR Bosnia 2005, *supra* note 261, ¶¶ 13, 23, 24, 29; CESCR Libya 2005, *supra* note 262, ¶¶ 15, 17, 19.

264. *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 20 HUM. RTS. Q. 691 (1998) [hereinafter *Maastricht Guidelines*].

265. *Id.* at 693.

266. *See, e.g.*, ECOSOC, *General Comment No. 12*, *supra* note 259, ¶ 15, at 66; ECOSOC, *General Comment No. 15*, *supra* note 259, ¶ 20, at 110 (applying the tertiary framework "like [for] any other human right.").

(obligation to achieve a particular end), rather than the distinction introduced by Ago in the first reading of the ILC Articles between obligations of conduct (obligations to do something specific) and obligations of result (obligations to achieve a particular end, with discretion as to means).[267] The Maastricht guidelines indicate a degree of discretion for obligations of conduct in determining which particular measures should be taken ("measures reasonably calculated", or "all appropriate means") that does not fit with Ago's understanding.[268]

A chapter on state responsibility for violations (whether from failure to respect, protect or fulfill, from action or omission) is contained in the Maastricht guidelines.[269] It is based on territorial control, prima facie jurisdiction, but in the case of alien domination or occupation, also "effective control."[270] In this context, "effective control" is intended to mean effective control of a physical location or over individual potential victims, not control over perpetrators in the *Nicaragua* sense.[271] The intention is to ensure that where states operate outside of their own territory (such as in situations of military occupation or peacekeeping), state actors must respect the human rights of all those over whom they exercise authority and also exercise due diligence to protect the human rights of those persons.[272] The duty of due diligence in control of private entities, "including transnational corporations over which they exercise jurisdiction" to guarantee ICESCR rights is specified.[273] States are also reminded of their responsibility for acts of international organizations of which they are members and should ensure they too conform to the Covenant.[274]

Violations of the ICESCR "are in principle imputable to the State within whose jurisdiction they occur."[275] However, from the examples given, it is quite clear violations are violations by state organs or agents, or omissions where the state had a duty to act.[276] To the extent private violations of human rights occur, state responsibility, under the Maastricht guidelines, depends on due diligence.[277]

State responsibility, therefore, is not engaged every time someone's rights are apparently infringed; responsibility of the state will depend on a separate delict, most commonly in the form of an omission, but also possibly in the form of tolerance or a cover-up on the part of the state, e.g. in disappearances or domestic violence cases. Responsibility is not for the injury, but for the state's tolerance or attempt to cover-up. As long as minimum core obligations are satisfied, such as access to basic food and healthcare, the state will have a defense of having taking

267. *Maastricht Guidelines*, *supra* note 264, at 694; on possible confusion arising from the terminology, see *supra* note 92.

268. *Maastricht Guidelines*, *supra* note 264, at 694; ICESCR, *supra* note 228, art. 2(1).

269. *Id.* at 698.

270. *Id.*

271. *Id.*; *see* Nicaragua, *supra* note 2, , ¶ 115 at 65.

272. *See Maastricht Guidelines*, *supra* note 264, at 698.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.* at 696-97.

277. *Id.*

"all appropriate means" within the context of its own condition of economic development to prevent or redress the private wrong or to ensure that the rights under the ICESCR have been fulfilled.[278]

In case it be thought that the ICESCR is a special case of mandating positive rights, the work of the HRC should also be examined. Again, the concluding comments on state reports demonstrate that the HRC considers state parties responsible for respecting, protecting and fulfilling the human rights contained in the ICCPR.[279] Their work demonstrates an emphatic rejection of the purported division of positive and negative rights between the two covenants, this distinction having long been rubbished in academic commentary.[280]

As early as 1981, the HRC expressed the view that it was inadequate for state parties to "respect" human rights, but that they must also take positive measures to guarantee their full enjoyment for all inhabitants:

> The Committee considers it necessary to draw the attention of States parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction...in principle this undertaking relates to all rights set forth in the Covenant.[281]

This comment was superseded in 2004 by General Comment No. 31, issued in response to the ILC Articles.[282] Like its predecessor, it emphasizes the positive duties that state parties to the ICCPR have accepted and specifically explains that although there is no direct horizontal effect (i.e. individuals do not have obligations under the Convention), states must "exercise due diligence to prevent, punish, investigate or redress" violations by private persons or entities.[283] The beneficiaries of the obligations are human beings, but not only citizens; instead, all persons within the "effective control" of the state must be protected.[284] Although the HRC could not have been unaware of the meaning of "effective control" in *Nicaragua,* in the General Comment it does not refer to "effective control" of the actors, but

278. *Id.* at 695.

279. *See, e.g.,* U.N. Human Rights Comm. [HRC], *Report of the Human Rights Committee on the Eighty-fifth, Eighty-sixth & Eighty-seventh Sessions Vol. 1*, ¶ 67, U.N. GAOR, 61st Sess., Supp. No. 40, U.N. Doc. A/61/40, (2006) [hereinafter HRC 2006 Report].

280. Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution,* 141 U. PA. L. REV. 1, 46, 71 (1992); Cécile Fabre, *Constitutionalising Social Rights,* 6 J. POL. PHIL. 263, 268-70 (1998); HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 180-86 (2d ed. 2000).

281. HRC, *General Comment No. 3: Article 2 (Implementation at the national level)*, ¶ 1, *reprinted in* Compilation of General Comments, *supra* note 234, at 164.

282. HRC, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, *supra* note 252, ¶ 1.

283. *Id.* ¶ 8, at 235.

284. *Id.* ¶ 10, at 236.

rather "effective control" of "territory and jurisdiction."[285] This use is comparable to that found in the Maastricht guidelines.[286]

Although not following the terminology of duties to respect, to protect and to fulfill, recognition of state responsibility at all three levels is implicit in the HRC's output as can be seen from the example of General Comment No. 28 on gender equality.[287] Duties to respect human rights in this Comment include review of domestic law to ensure women do not face direct discrimination, for example, with regard to regulations on women's clothing, women's freedom to travel, access to judicial process, marriage and its dissolution, and social security law.[288] States should also report on conditions for women in prison.[289] However, the need for "positive measures in all areas so as to achieve the effective and equal empowerment of women" makes it quite clear that the duty to respect is not the beginning and end of state responsibility.[290] State parties must protect women and girls from murder and infanticide within the family, domestic violence and other violence including rape and female genital mutilation, trafficking and forced prostitution, and discrimination in employment.[291] Furthermore, states should report on their efforts to fulfill women's rights to the same degree as those of men by providing information on maternal and infant mortality, poverty and deprivation amongst women, and "must...take effective and positive measure" to promote women's equal participation in public life, "including appropriate affirmative action."[292]

Concluding observations from recent state reports also demonstrate obligations to respect, protect and fulfill human rights.[293] Examples of concerns about respect of human rights include the conduct of law enforcement personnel, conditions of suspects in the "war on terror," deportation to face the risk of torture, women in prison, especially mothers, and de jure discrimination against native women and their children.[294] Duties to protect human rights are evident in the HRC's interest in domestic violence, the high rate of violent death amongst native women, slavery and human trafficking, hate speech, violence and hate crime against gays and lesbians, and gender discrimination in employment.[295] Responsibility to fulfill human rights is apparent where the HRC considers the

285. *Id.*; *Cf.* ICCPR, *supra* note 227, art. 2(1) (requiring states to "respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant").

286. *See supra* text accompanying note 270; *see also* HRC 2006 Report, *supra* note 279, ¶ 84(10). *But see* Banković v. Belgium, (Admissibility) (No. 52207/99), 2001-XII Eur. Ct. H.R. 335; Evans, *supra* note 250, at 152 (indicating a different approach in the European Court of Human Rights).

287. HRC, *General Comment No. 28: Article 3 (The equality of rights between men and women), reprinted in* Compilation of General Comments, *supra* note 234, at 218.

288. *Id.* ¶¶ 13, 16, 18, 25-26, 31, at 220-24.

289. *Id.* ¶ 15, at 220-21.

290. *Id.* ¶ 3, at 218.

291. *Id.* ¶¶ 10-12, 31, at 220, 224.

292. *Id.* ¶¶ 10, 29 at 220, 224.

293. *See, e.g.*, HRC 2006 Report, *supra* note 279, ¶¶ 76(15), 78(12), 79(10)-(11), 81(16), 84.

294. *Id.*

295. *Id.*¶¶ 76(23), 78, 79(9), 81(12), 84(28).

conditions of life for street children, Roma, and the unequal racial impact of homelessness and natural disasters.[296]

The majority of communications considered by the HRC pertain to purported violations by state organs, i.e. violations of the duty to respect human rights which would engage liability within the *Nicaragua* paradigm.[297]

State responsibility for a failure to respect human rights will depend on attribution to a state organ or agent identified per *Nicaragua*. As under the ICESCR, state responsibility is not automatic for every private delict but will always depend on evidence of a separate delict on the part of the state, as will responsibility for failure to fulfill human rights.[298] Responsibility for failing to protect or fulfill the rights of the ICCPR will depend on evidence that the state has not taken the (positive) measures that it should have, i.e. it has not acted with due diligence.[299]

The texts of CEDAW, the CRC and MWC all indicate an explicit acceptance by state parties of positive obligations and, unsurprisingly, their respective treaty bodies support the tertiary model of state responsibility.[300] With reference to

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296. *Id.* ¶¶ 78, 79(22), 84(26).

297. *See id.* ¶¶ 107-226 (summarizing cases by issue, including procedural matters from 107-43, substantive matters from 144-202, and remedies from 203-26).

298. *See* Nicaragua, *supra* note 2, 269.

299. ICCPR, *supra* note 227, art. 2(2).

300. CEDAW, *supra* note 230, arts. 2, 3, 5, 6, 10, 11, 12, 14; CRC, *supra* note 232, arts. 11, 19, 20, 23, 24, 26, 27, 28, 32-36, 39; MWC, *supra* note 233, arts. 25, 28, 30, 31, 43, 45, 68. Duties at all three levels are ubiquitous in the concluding comments of the Women's Committee and the Children's Committee. *See, e.g.*, U.N. Comm. on the Elimination of Discrimination Against Women, *Report of the Committee on the Elimination of Discrimination Against Women*, U.N. GAOR, 61st Sess., Supp. No. 38, U.N. Doc. A/61/38 (2006); U.N. Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Kazakhstan*, U.N. Doc. CRC/C/KAZ/CO/3 (June 19, 2007); U.N. Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Uruguay*, 45th Sess., U.N. Doc. CRC/C/URY/CO/2 (July 5, 2007); U.N. Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Maldives,* 45th Sess., U.N. Doc. CRC/C/MDV/CO/3 (July 13, 2007); U.N. Comm. on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Slovakia*, 45th Sess., U.N. Doc. CRC/C/SVK/CO/2 (July 19, 2007). At the time of writing, the Migrant Workers' Committee had reviewed only three state reports, but, as well as duties on state actors to respect human rights, duties to protect and fulfill are also illustrated. For example, duties to protect are illustrated in concerns about discrimination against migrant workers, human trafficking, violence and exploitation facing migrant workers, especially domestic workers, and the vulnerability of unaccompanied minors to abuse and exploitation. Additionally, duties to fulfill are illustrated in concerns about access to school for migrant workers' children and access to medical care. *See, e.g.*, U.N. Comm. on the Prot. of the Rights of All Migrant Workers and Members of their Families, *Concluding Observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families: Mali*, ¶¶ 22-23, U.N. Doc. CMW/C/MLI/CO/1 (May 31, 2006); U.N. Comm. on the Prot. of the Rights of All Migrant Workers and Members of their Families, *Concluding Observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families: Mexico*, ¶¶ 24, 27, 29, 33, 39, 41, U.N. Doc. CMW/C/MEX/CO/1 (Dec. 20, 2006); U.N. Comm. on the Prot. of the Rights of All Migrant Workers and Members of their Families, *Concluding Observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families: Egypt*, ¶¶ 20, 36, 38, 50, U.N. Doc. CMW/C/EGY/CO/1 (Dec. 20, 2006).

broader norms of state responsibility, the Women's Committee reminds state parties in General Recommendation No. 19 on violence against women: "[u]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation."[301] The tertiary model is employed in later general comments.[302]

Of the few communications to date considered by the Women's Committee, three stand out as "classic" examples of state failure to protect human rights, each being concerned with domestic violence. The first, *A.T. v Hungary,* is perhaps a paradigm of the discourse between treaty body and state party envisaged by the drafters of the Protocol.[303] In this case, the communications system brings a problem to the attention of a state party, the state acknowledges that its legal system and institutions are inadequate, promises to take measures to improve protection even before the inevitable finding of a violation of CEDAW, and further, at least according to the state party, these measures have largely now been introduced.[304] The other two communications, *Goekce v Austria*[305] and *Yildirim v Austria*[306], warrant less optimism, not the least of which because by the time of the communication, the victims had already been murdered by violent partners, but also because of the adversarial and defensive response of the state party which insisted that its institutions had not failed either victim and that, in the former case at least, the victim herself bore responsibility for having failed to leave, implying

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301. U.N. Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 19: Violence against women*, ¶ 9, U.N. Doc. A/47/38, *reprinted in* Compilation of General Comments, *supra* note 234, at 303.

302. U.N. Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 24: Article 12 of the convention (women and health)*, ¶¶ 13-17, A/54/38Rev.1, *reprinted in* Compilation of General Comments, *supra* note 234, at 332-33; U.N. Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 25: Article 4, paragraph 1, of the Convention (temporary special measures)*, ¶ 4, A/54/38Rev.1, *reprinted in* Compilation of General Comments, *supra* note 234, at 337.

303. U.N. Comm. on the Elimination of Discrimination Against Women, *Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3 of the Optional Protocol to the Convention on the elimination of All Forms of Discrimination against Women, Communication No. 2/2003, Ms. A. T. v. Hungary, in Report of the Committee on the Elimination of Discrimination Against Women*, U.N. Doc. A/60/38(Part I) Annex III ¶¶ 9.3-9.7 [hereinafter *A.T. v Hungary*].

304. *Id.* ¶¶ 5.6-5.10. *See also* U.N. Comm. on the Elimination of Discrimination Against Women, *Sixth Periodic Report of the Republic of Hungary to the United Nations on the Elimination of All Forms of Discrimination Against Women*, arts. 1-4, 16, U.N. Doc. CEDAW/C/HUN/6 (June 15, 2006).

305. U.N. Comm. on the Elimination of Discrimination Against Women, *Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Communication No. 5/2005, Goekce v. Austria*, Annex, U.N. Doc. CEDAW/C/39/D/5/2005 (Aug. 6, 2007) [hereinafter *Goekce v. Austria*].

306. U.N. Comm. on the Elimination of Discrimination Against Women, *Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Communication No. 6/2005, Yildirim v. Austria*, U.N. Doc. CEDAW/C/39/D/6/2005 (Oct. 1, 2007) [hereinafter *Yildirim v. Austria*].

that the violence that marred the relationship was attributable equally to the victim and even playing a cultural relativism card, suggesting that the perpetrator's "background" (Turkish) explains and justifies his "harsh statements" (i.e. death-threats).[307]

The Women's Committee's approach in all three cases is to recognize the duty of "due diligence," with particular reference to General Recommendation 19.[308] This has been violated by both state parties, but in subtly different manner. In the Austrian cases, there are laws and institutions in place which should provide protection to the standard required by CEDAW. However, there has been a manifest failure by the state organs to apply them to the necessary extent. This is the separate delict. By contrast, Hungary simply lacked the necessary mechanisms altogether. There was no single state organ that could be said to have failed to exercise due diligence because no single state organ had the power to take the requisite action to protect A.T. Instead, the fault, the separate delict, attaches to the "state authorities considered as a whole" for not ensuring a system of protection to meet its primary obligations.[309]

Where the Women's Committee's analysis departs from that of the Court in the Genocide Convention case is in the former's lack of concern with the matter of causation.[310] In cases of non-state perpetrators of human rights violations, it can perhaps never be conclusively established that even had the state taken all appropriate measures, the violation would have been prevented. This is especially so with regard to cases of domestic violence; in the most progressive states with extensive legal and social protection for victims of domestic violence and dedicated efforts to change cultural norms that perpetuate the acceptability of such violence, domestic violence still occurs, even to the extent of homicide.

It must also be recalled that the principles for reparation *to an injured state* for failing to prevent genocide as considered by the Court need not be equivalent to the principles for reparation to *injured human persons* under human rights treaties. Causation is briefly mentioned as necessary to establish a right to reparation in the second reading of the ILC Articles, but is drafted in view of injuries to other states, not injuries to human persons.[311] It is also made clear in the commentary that the principles of causation are an aspect of primary, not secondary, rules and hence, there is no standard of causation common to all primary rules.[312]

The Women's Committee, furthermore, has not hindered itself to the same extent as the Court in the Genocide Convention case with an insurmountable

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307. *Goekce v. Austria*, *supra* note 305, ¶ 8.8. *See also id.* ¶¶ 4.2-4.5, 8.4-8.6, 8.14.

308. *A.T. v. Hungary*, *supra* note 303, ¶ 9.2; *Goekce v. Austria*, *supra* note 305, ¶¶ 12.1.1, 12.3; *Yildirim v. Austria*, *supra* note 306, ¶ 12.1.1.

309. *See supra* text accompanying notes 104-05.

310. *See supra* text accompanying note 94.

311. *See* ILC Articles, *supra* note 4, art. 31, at 223; *see also* Benedetto Conforti, *Exploring the Strasbourg Case-Law: Reflections on State Responsibility for the Breach of Positive Obligations*, *in* ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS, *supra* note 250, at 129, 135-36.

312. ILC Articles, *supra* note 4, cmt. to art. 31, ¶ 10, at 227-28.

burden of proof;[313] instead, to the extent that the communications process can be considered a kind of legal proceeding, it is of a civil nature and therefore a balance of probabilities/preponderance of evidence test is adequate.[314] The Women's Committee does not belabor the point, and the parties do not argue it, but it can be assumed that if these two violent men had been in prison, they could not have committed murder; if one man were not permitted access to the family home, he would find it considerably harder to beat his ex-partner. Furthermore, the vast majority of the remedies suggested by the Women's Committee are "forward-looking." Only with regard to A.T. is compensation indicated (it being of little comfort to the two deceased or their survivors in the Austrian cases) and the other case-specific remedies are concrete suggestions as to how the state can meet the requirements of due diligence in the particular case, namely by providing a home, child support and legal assistance to enable A.T. to live free from violence.[315] In all three cases, systemic changes are recommended which, if implemented, would satisfy the positive obligations of the states under CEDAW with regard to eliminating, or at least reducing, domestic violence.[316] If these are implemented and, notwithstanding such efforts, domestic violence continues to occur, the states will not be easily said to bear responsibility as there will be no separate delict.

The Race Committee was ambivalent through the 1990s concerning the extent of state obligations to protect and fulfill the rights under CERD. However, a change of direction occurred in 1999 and was brought to the fore the following year in General Recommendation No. XXV: Gender Related Dimensions of Racial Discrimination.[317] The later General Recommendation pertaining to non-citizens also indicates the need for respect, protection and fulfillment of human rights.[318] For example, state parties should eliminate discrimination in legislation and immigration policy, and ensure law enforcement agents do not ill-treat or discriminate against non-citizens in order to respect human rights.[319] They must also protect persons from hate speech and racial violence and discrimination in employment.[320] Rights must also be fulfilled to ensure "equal enjoyment of the right to adequate housing" and adequate physical and mental health.[321]

313. *See supra* note 65; *see also supra* text accompanying note 76.

314. *See A.T. v Hungary*, *supra* note 303, at ¶¶ 9.3-9.6.

315. *Id.* ¶ 9.6(I).

316. *Id.* ¶ 9.6(II); *Goekce v. Austria, supra* note 305, ¶ 12.3; *Yildirim v. Austria*, *supra* note 306, ¶12.3.

317. U.N. Comm. on the Elimination of Racial Discrimination, *General Recommendation XXV on gender-related dimensions of racial discrimination*, ¶¶ 1-6, A/55/18, Annex V at 152 (2000), *reprinted in* Compilation of General Comments, *supra* note 234, at 258-59; *see also* Johnstone: Feminist Influences, *supra* note 258, at 171.

318. U.N. Comm. on the Elimination of Racial Discrimination, *General Recommendation XXX on discrimination against non-citizens*, CERD/C/59/Misc.16/Rev.3 (2001), *reprinted in* Compilation of General Comments, *supra* note 234, at 276-77.

319. *Id.* ¶¶ 6, 9, 13-17, 21, at 274-76.

320. *Id.* ¶¶ 11-12, 18, 22-24 & 33-34, at 276-77.

321. *Id.* ¶¶ 32, 36, at 277.

As for the Covenants, states are responsible for actions by their organs that fail to respect human rights.[322] Responsibility for failing to protect and fulfill rights will depend on a separate delict, usually an omission.

The Torture Committee, as referred to previously, is bound to a definition of torture that presupposes fairly direct attributability to the state. Torture is

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[323]

However, the state party also undertakes to prevent

> other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[324]

This can conceivably apply to punishment at the hands of actors who cannot, in the *Nicaragua* sense, be considered state actors to the extent that the state does not take adequate measures to protect, i.e. it effectively acquiesces in the treatment. This still requires a separate delict on the part of some state actor, i.e. by virtue of instigation, consent or acquiescence.

The Torture Committee in its early work focused predominantly on the duty of states to refrain from torture or inhuman, cruel or degrading punishment, i.e. the duty of state parties to respect human rights. However, in recent years, they have taken a greater interest in state responsibility to protect.

The majority of communications to the Torture Committee protest threatened or actual refoulement to face the risk of torture, which is prohibited by Article 3.[325] The second most common type of complaint concerns purported failures to investigate allegations of torture, in violation of Article 12.[326] Article 3 prohibits only refoulement "to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Refoulement to lesser forms of cruel, inhuman or degrading treatment or punishment is not

322. *See, e.g., CAT, supra* note 231, arts. 1, 5, 16.

323. *Id.* art. 1(1).

324. *Id.* art. 16; *see also* Andrew Byrnes, *The Convention Against Torture, in* 2 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 183, 187 (Kelly D. Askin & Dorean M. Koenig, eds., 2000).

325. *See* U.N. Comm. Against Torture, *Report of the Committee Against Torture, Thirty-fifth & Thirty-sixth Sessions*, U.N. GAOR, 61st Sess., Supp. No. 44, ¶ 79, tbl. at 88-123, U.N. Doc. A/61/44 (May 19, 2006) [hereinafter Torture Committee 2006 Report].

326. *Id.*

explicitly precluded. Refoulement cases where the threat of mistreatment is not directly attributable to the state are more likely to reach the HRC, since the ICCPR also excludes torture, inhuman or degrading treatment or punishment.[327]

Any application of the responsibility to fulfill is difficult to reconcile with the subject matter of the treaty: how can one be "tortured" or subject to "punishment" without any culpability either at the hands of a state or private actor? One could theoretically conceive of certain chronic and painful health conditions which lead to extensive suffering in the absence of palliative care, but to define these as torture or as treatment or punishment would be to stretch the text, not to mention the object and purpose, of CAT. Article 1 requires that torture be inflicted "intentionally." Article 16 refers to other "acts" which are "committed" and amount to cruel, inhuman or degrading treatment or punishment. Inertia on the part of the state in the face of suffering which has no human cause is not covered by CAT. Thus, we must be content to witness the Torture Committee engage in twin duties to respect and protect human rights.

Concern about the behavior of state organs has constituted the bulk of the Torture Committee's work until recently. Examples include violence against prisoners, the conduct of police officers, investigation and remedies for alleged victims of torture, the use of evidence obtained from torture, and intimidation and harassment of human rights activists and legal professionals.[328] More, recently, however, CAT has expressed considerable interest in states' duties to protect their inhabitants, querying, inter alia, caste discrimination, violence and discrimination against Roma and foreigners, domestic violence and sexual violence against women, trafficking in persons, protection of domestic workers, violence against abandoned children, child abduction by non-state armed groups, and inter-prisoner violence.[329] State responsibility for these private wrongs exists by virtue of, and

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327. ICCPR, *supra* note 227, art. 7; *see, e.g.*, HRC, *Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights, Communication 1234/2003, P.K. v. Canada*, U.N. Doc. CCPR/C/89/D/1234/2003, ¶¶ 4.3, 4.7 (April 3, 2007). The Canadian response in this communication indicated that in that state's view, there must be a separate delict on the part of the receiving state, i.e. inadequate due diligence in providing protection. As the communication was determined inadmissible, the HRC did not comment on this argument.

328. U.N. Comm. Against Torture, *Report of the Committee Against Torture, Nineteenth & Twentieth Sessions*, U.N. GAOR, 53rd Sess., Supp. No. 44, ¶¶ 49, 60-61, 64-65, 90, 116, 133, 143, 163, 176, 186, U.N. Doc. A/53/44 (Sept. 16, 1998) (considering reports issued by Cyprus, Arg., Switz., Cuba, Spain, Fr., Guat., N.Z., and F.R.G.); U.N. Comm. Against Torture, *Report of the Committee Against Torture, Twenty-first & Twenty-second Sessions*, U.N. GAOR, 54th Sess., Supp. No. 44, ¶ 45, U.N. Doc. A/54/44 (1999); U.N. Comm. Against Torture, *Report of the Committee Against Torture, Twenty-third & Twenty-fourth Session*, U.N. GAOR, 55th Sess., Supp. No. 44, ¶ 179, U.N. Doc. A/55/44 (2000).

329. U.N. Comm. Against Torture, *Report of the Committee Against Torture, Thirty-third Session & Thirty-fourth Session*, ¶¶ 39(g), 46(a), 46(a)(v), 47(c), 47(j), 47(k), 48(l), 83(o), 84(o), 93(h), 97(o), 108(m), 109(k), U.N. Doc. A/60/44 (2005) (considering reports issued by Arg., Greece, Alb., Uganda, and Bahr.); Torture Committee 2006 Report, *supra* note 325, ¶¶ 26(12), 26(14), 27(17), 29(26), 29(32) (considering reports from Dem. Rep. Congo, Ecuador, and Nepal); U.N. Comm. Against Torture, *Consideration of Reports Submitted by State Parties under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture, Italy*, ¶¶ 21-23, U.N. Doc. CAT/C/ITA/CO/4 (July 16, 2007); U.N. Comm. Against Torture, *Consideration of Reports Submitted by State Parties*

only in the event of, inadequate efforts by the state to prevent, investigate and punish, i.e. a separate delict of failing to satisfy its positive obligations.[330]

C. Who is the State?

The various human rights treaties may award rights to individuals, but the obligations to guarantee those rights fall solely on states. The treaties, and their treaty bodies, do not inform us about the direct accountability of non-state actors.[331] Similarly, the ILC Articles are focused on state responsibility, to the exclusion of individual responsibility or, for that matter, responsibility of international organizations.[332] From the other side, in the event of a breach of a primary rule of international law (by a state), the ILC Articles advise us only of the remedies that other states may have.[333] Although the mandate of the ILC did not explicitly preclude the possibility of considering state responsibility *to* individuals or international organizations, it decided to concentrate only on state responsibility vis à vis other states.[334]

D. Obligations to whom?

Human rights are usually understood as obligations owed by states to individuals. The idea of "state responsibility" for human rights is usually thought of as state responsibility *to* the individuals with whom it interacts. Malcolm Evans argues that this is not really state responsibility at all, at least not in the proper international law sense.[335] Instead it is state responsibility "in the layman's sense" and as such "has little – if anything – to do with state responsibility as an aspect of international law and as now reflected in the ILC's Articles on State Responsibility."[336] This, he argues, is hardly surprising, since the whole notion of human rights is an anomaly in the Westphalian model on which the principles of state responsibility are founded.[337] Evans goes so far as to argue that human rights might be more "aspirational" or "ethical" as opposed to "legal" claims in international law and that this (in part) explains the modest mechanisms designed to monitor their implementation–centering on assisting and encouraging compliance rather than enforcing or penalizing non-compliance.[338]

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under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture, Japan, ¶ 24, U.N. Doc. CAT/C/JPN/CO/1 (Aug. 3, 2007).

330. Evans, *supra* note 250, at 150-51.

331. *See* ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 32 (2006) (discussing objections to the concept that non-state actors have duties under human rights laws).

332. *See* ILC Articles, *supra* note 4.

333. *Id.* art. 42, at 54.

334. *Id.* art. 33(2), at 51; *see* Ago: Second Report 1970, *supra* note 120, ¶¶ 5, 22, 23, at 178, 184. *See generally* Daniel Bodansky, John R. Crook & Edith Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96 AM. J. INT'L L. 798, 809-11 (2002) (questioning the wisdom of the scope of the ILC Articles); Daniel Bodansky, John R. Crook & James Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 AM. J. INT'L L. 874, 886-88 (2002) (reply by the authors).

335. Evans, *supra* note 250, at 139.

336. *Id.*

337. *Id.* at 140.

338. *Id.* at 146-49; *but see* Theodor Meron, *State Responsibility for Violations of Human Rights*, 83

State responsibility to individuals is undoubtedly a central element of human rights law, but it is one which is quite outside the ILC Articles, which indicates only that the Articles are "without prejudice" to such responsibility.[339] Similarly, the Articles only advise us as to the recourse that might be had by other states to human rights violations.[340]

What is immediately apparent with regard to the human rights treaties is that it will be very rare indeed for another state to be "injured" by a violation. Thus the rules of recourse for injured states under the ILC Articles will seldom be relevant.[341] Unfortunately, although recognizing the interests of third states (non-injured states), the ILC Articles were left deliberately vague with regard to what circumstances they might invoke responsibility and what they might do about it. Article 48 of the ILC Articles advises us that "[a]ny State other than an injured State" can invoke responsibility if: "(a) The obligation breached is owed to a group of States including that State and is established for the protection of a collective interest of the group; or (b) The obligation breached is owed to the international community as a whole."[342]

The two subsections indicate the difference between (a) obligations *erga omnes partes* and (b) obligations *erga omnes*. In the former case, one would have to argue that human rights are the "collective interest" of all parties to the human rights treaty concerned, i.e. each state party has a relevant interest in compliance by every other state.[343] The latter indicates an *erga omnes* obligation, an obligation owed to the entire international community. The deliberate use by the ILC of "international community" rather than "international community of states" should be noted. But an obligation *erga omnes* (as opposed to *erga omnes partes*) is a matter of customary international law.[344] Some human rights obligations may well be customary international law, even *erga omnes*, and these may have their origins in the human rights treaties. However, if a state wishes to rely on the *erga omnes* character of a norm, then it is in fact relying on the customary international law nature of that norm, not the treaty from which that norm originally emanated. State invocation of the responsibility of another state *for violation of a treaty norm* must depend on the obligation being characterized as *erga omnes partes*.[345]

AM. SOC'Y INT'L L. PROC. 372, 372-73 (1989).

339. ILC Articles, *supra* note 4, art. 33(2), at 51.

340. *Id.* art. 48, at 56.

341. *Id.* art. 42, at 54.

342. *Id.* art. 48, at 56; *see also id.* art. 54, at 58. *See generally* Bodansky, Crook & Weiss, *supra* note 334, at 799-805 (discussing the differences between ILC Articles 42 and 48).

343. ILC Articles, *supra* note 4, cmt. to art. 48 ¶ 7, at 320-21. A "common interest" is sufficient; there need not be a direct benefit for the invoking state; regional human rights treaties are provided by way of example.

344. *Id.* cmt. to art. 48 ¶ 6, at 320. Obligations *erga omnes partes* can also arise from customary international law, but are possible from treaty.

345. *See* Nicaragua, *supra* note 2, ¶ 178, at 95.

General Comment No. 31 of the HRC is unclear about this:

> While article 2 is couched in terms of the obligations of State parties towards individuals as the right-holders under the Covenant, every State party has a legal interest in the performance by every other State party of its obligations. This follows from the fact that the "rules concerning the basic rights of the human person" are *erga omnes* obligations and that, as indicated in the fourth preambular paragraph of the Covenant, there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms.

The Committee immediately adds: "Furthermore, the contractual dimension of the treaty involves any State party to a treaty being obligated to every other State party to comply with its undertakings under the treaty."[346]

In the first extract, the HRC must be referring to customary international law and, of course, the Charter. To this extent, it is not actually a matter for the HRC at all because it is not a question of supervision of the treaty. The second extract indicates that the HRC views the ICCPR as creating obligations *erga omnes partes*. Article 41, which allows for states to raise concerns regarding the (non-) performance by other state parties, must only apply to the latter.

Under ILC Article 48, states can seek limited remedies, namely, (a) cessation of the breach and assurances of non-repetition; and (b) reparation in the interests of the injured state or other beneficiary (*e.g.* individual whose human rights have been violated). They cannot seek compensation as they have not suffered loss.[347]

The section on counter-measures in the ILC Articles was one of the most controversial and the vagueness to be found therein is evidently the result of trying to reach a text that the maximum number of experts – and states – could agree upon. The rights of non-injured states to take countermeasures are not explained. Only states' rights to take "lawful measures" are explained, although the content of "lawful measures" is not otherwise defined.[348] Practice is described by the ILC as "limited and rather embryonic."[349]

Nevertheless, the answer to the question: "has state X breached its obligation under Treaty Y?" does not depend upon to whom the obligation is owed. The obligation (a primary rule) has either been breached or it has not. The person, injured state, or non-injured state seeking redress will be relevant to the available remedies, but does not change the answer to the question of whether the primary rule has been respected or not.

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346. HRC, *General Comment No. 31*, *supra* note 252, ¶ 2 at 233.

347. ILC Articles, *supra* note 4, art. 48, at 56 (a state suffering loss is instead an "injured state").

348. *Id.* art. 54, at 58. *See* CRAWFORD, *supra* note 92, at 49, 56. *See generally* Bodansky, Crook & Crawford, *supra* note 334, at 884-85. On the use of the term "measures" rather than "counter-measures", *see* Linos-Alexander Sicilianos, *The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility*, 13 EUR. J. INT'L L. 1127, 1143; Xue Hanqin, *The State of State Responsibility*, 96 AM. SOC'Y INT'L L. PROC., 172, 172-76 (2002) (remarks by the author discussing the danger of vagueness).

349. ILC Articles, *supra* note 4, cmt. to art. 54, ¶ 3, at 351.

However, the identification of the state remains a matter of secondary rules; for whose conduct (or omissions) is the state responsible? The answer to this question, according to the treaty bodies, is compatible with the ILC Articles 4 and 8, and the findings of the Court in *Nicaragua* and the Genocide Convention case.

E. Who is the State that must "respect, protect and fulfill"?

The obligation to respect, protect and fulfill human rights falls, according to the treaty bodies, on states and not on private actors. State responsibility to respect human rights is engaged where a state actor – identifiable in accordance with *Nicaragua* has behaved in such a way as to violate an enumerated human right. Responsibility to protect and fulfill human rights may be triggered by the actions of some non-state actors, but the responsibility of the state depends always on a separate delict – i.e. something done or, more commonly, not done by the state, as classically defined.[350]

The treaties impose positive obligations on states; refraining from action is inadequate for their implementation. Those positive obligations are subject to the standards of due diligence.[351] The actual requirements on states, that is, the degree of diligence due, is a matter of the primary rules, not the secondary rules of state responsibility which only come into play once it can be established that the primary rules have been breached. That is to say, the rules of state responsibility are relevant once it can be said that the state has *not* acted with due diligence.

Related, and also pertaining to the primary rules, is the matter of fault.[352] In some cases, particularly cases of negative obligations (such as obligations to respect human rights), a state actor must be identified as having been at fault.[353] On the other hand, in cases of positive obligations (such as obligations to protect and to fulfill), responsibility does not depend on identifying any particular state organ or agent that acted or failed to act in a particular way (i.e. subjective fault), but depends on an overall failure (i.e. objective fault).[354]

In all cases, it is not enough that an individual not enjoy their human rights for the state to be held responsible under the treaties. A woman may be beaten by her partner, but the state only bears responsibility if it has an inadequate police and criminal justice response or if it tolerates and makes no effort to reform a cultural environment that considers spousal abuse a right of men. She may die in childbirth but the state is only in violation of her right to life or right to health if it has not, in light of its degree of economic development, provided adequate antenatal, birth and post-partum services.

Theodor Meron has described the law of state responsibility as terra incognita for human rights lawyers, a theme that Dominic McGoldrick adopts to review

350. Evans, *supra* note 250, at 150-51.

351. *See* Pisillo-Mazzeschi, *supra* note 100, at 44-45.

352. ILC Articles, *supra* note 4, cmt. to art. 2, ¶¶ 3, 10, at 69-70, 73; *see* CRAWFORD, *supra* note 92, at 13.

353. *See* Pisillo-Mazzeschi, *supra* note 100, at 26.

354. *See supra* text accompanying notes 101-05.

whether or not the HRC applies state responsibility in the classical sense.[355] McGoldrick's conclusion is that "[i]nternational human rights lawyers...have really been operationalising the principles of State responsibility all of the time."[356] The application by the treaty bodies, some wittingly, some impliedly, of the tertiary model is in harmony with the classical doctrine.

The content of the obligations whether to respect or whether to protect or fulfill, and if so, to what extent – is a matter of the primary rules; but the act or omission which gives rise to responsibility of the state is an act or omission of a state organ as traditionally understood. There is no implied guarantee of the conduct of non-state actors;[357] instead there is only an explicit guarantee that the state will take particular steps, the content of which is defined and refined by the work of the treaty bodies.

The treaty bodies could perhaps assist clarity in this matter with a more concerted focus on what they mean by "responsibility" so as to reduce confusion. It must be recalled that membership of the treaty bodies is not restricted to those with a legal education, and less still, specialists in international law. Nor is it even desirable that membership be so restricted: legal fluency should not be prioritized over, for example, experience of children's welfare, psychology and development in the Children's Committee; nor should experts in the psychology and physiology of torture victims be precluded from the Torture Committee in favor of more lawyers. Nevertheless, lawyers are on the treaty bodies, and they might encourage a more legalistic use of the language of responsibility.[358]

V. CHORALE OR CACOPHONY

This paper is specifically about *state* responsibility, so the author has not inquired about the direct international responsibility of non-state actors, such as *génocidaires*, terrorists or private violators of human rights. Rules of personal accountability in international law do not alter the question of state responsibility, as both can exist together.

A. Who is the State?

The Court, the Council and the treaty bodies all operate relatively autonomously of one another in the broader institutional framework of the United Nations. Nevertheless, state responsibility in all three cases depends on the identification of the organs and agents of the state for whose actions and omissions the state can be held accountable.

Under the Genocide Convention, state parties have mostly negative duties: duties to refrain from committing genocide, conspiring to commit genocide, inciting genocide, attempting to commit genocide and being complicit in

355. Meron, *supra* note 338, at 372; McGoldrick, *supra* note 253, at 162.

356. McGoldrick, *supra* note 253, at 199.

357. *See* Caron, *supra* note 10, at 127; *see also infra* text accompanying note 392.

358. Lawyers, around half of whom are specialists in international law, make up the vast majority of the HRC, but do not enjoy the same dominance in the other treaty bodies. All the treaty bodies, however, have some experts in international law.

genocide.[359] State responsibility for any of these actions will depend upon evidence of them having been undertaken by an agent of the state; either a de jure organ or an organ de facto, by virtue of complete dependence; or a person or group considered an agent by virtue of effective control over the relevant operation.[360]

States also have positive obligations under the Genocide Convention to prevent and punish genocide.[361] For the state to be considered in breach of these obligations it is not necessary to show that any particular state organ or agent has failed, but just that there has been an overall failure.[362] The relevant point is that *no* state organ or agent has taken the required steps. They have not exercised due diligence. The state will not be held responsible for any genocide or attempted genocide that follows their inaction or ineptitude, but only for the separate delict of their failure to intervene.[363]

Counter-terrorism obligations on states likewise have positive and negative aspects. A state must refrain from "organizing, instigating, assisting or participating" in terrorism outside of its own borders.[364] State responsibility will once more depend upon the attribution of any of these behaviors to the state identified per *Nicaragua* as de jure organs, de facto organs or agents by virtue of effective control over specific operations.[365] The state is responsible for any attack it undertakes itself. Its responsibility for organizing, instigating or assisting is, however, responsibility for its participation, *not* for the terrorist attacks that may result. This responsibility is engaged even if no terrorist attack follows.

States also have positive duties to prevent terrorism and, following the 2001 attacks, these are stricter and more precise.[366] Responsibility, similarly to the duty to prevent and punish genocide, hinges upon a separate delict – the inadequacy of the state's efforts, or efforts below the threshold of due diligence. No state organ has taken adequate measures. The state is responsible for its failure, for its separate delict, but not for the terrorist attacks that follow and will be responsible even in the absence of an actual terrorist attack.

There is an argument that can be made that states taking inadequate measures, i.e. not meeting the requirements of due diligence, should be held directly responsible for any resulting terrorist attacks. This would indicate a dramatic shift in the secondary rules of state responsibility and whilst it may be reflected in some recent opinio juris, it cannot be established from the Council resolutions.[367]

International human rights law imposes both positive and negative obligations on states. They have negative duties to refrain from certain behaviors to ensure

359. Genocide Convention, *supra* note 17, art. 3.

360. *See supra* text accompanying notes 30-79.

361. Genocide Convention, *supra* note 17, art. 1.

362. Genocide Convention case, *supra* note 1, ¶¶ 430-31, at 294-95.

363. *See supra* text accompanying notes 80-104.

364. Friendly Relations Declaration, *supra* note 128, paras. 8-9 (1st princ.).

365. *See supra* text accompanying note 196-97; *see also supra* text accompanying notes 32-34; *see also* Genocide Convention case, *supra* note 1, ¶¶ 385-93.

366. *See supra* text accompanying notes 201-11.

367. *See supra* text accompanying notes 212-19.

respect for human rights. State parties to the relevant treaties may not, for example, torture, detain indefinitely without trial, forbid women from paid employment or execute minors.[368] State responsibility for violation of these obligations requires the involvement of a person or organ considered an organ of the state per *Nicaragua*.[369]

State responsibility for violation of positive duties, on the other hand, does not require the identification of a particular state organ at fault; it is the fact that no state organ has taken the requisite steps that is pertinent.[370] These are obligations of due diligence. Infringement may depend on the actions of a non-state actor, such as the duty to prevent violence within the family or trafficking.[371] On the other hand, for some violations it will not be necessary to demonstrate any individual wrongdoer. The state can be responsible for high rates of maternal mortality, extensive unemployment, low rates of formal education, and even anorexia.[372] State responsibility is not for the injury itself, but for its failure to exercise due care and attention in its prevention, and/or inquiry and punishment into its violation. In the case of anorexia, it is not the illness itself for which the state is responsible but for its separate delict in not taking adequate measures to reduce its incidence, for example, by educating young persons and monitoring media and cultural influence.[373]

In all three examples of positive measures, pertaining to genocide, counter-terrorism and human rights, state responsibility depends upon a separate delict and that separate delict can be most simply understood as "not trying hard enough." The determination of what constitutes "trying hard enough" is a matter of the primary rules.

One further point to note is that positive obligations can be contracted out. The state need not do everything itself. It is important that they are fulfilled; it is less important by whom. In each example considered here, with admittedly greater and lesser probability, the state could engage a private contractor to undertake the duties. A state could hire a private force to arrest persons suspected of involvement in genocide; it might pay a for-profit company to create and enforce rules for financial institutions to reduce the likelihood of funds reaching terrorists; it can similarly pay corporations to provide healthcare services. If these private contractors fail, responsibility will fall back upon the state for not having obtained

368. CAT, *supra* note 231, arts. 1, 2; ICCPR, *supra* note 227, arts. 6(5), 7, 9; ICESCR, *supra* note 228, arts. 3, 6-7; CEDAW, *supra* note 230, art. 11; CRC, *supra* note 232, art. 37.

369. *See supra* text accompanying note 350.

370. *See supra* text accompanying note 102; *see also* Genocide Convention case, *supra* note 1, ¶ 429.

371. ICCPR, *supra* note 227, arts. 8, 12, 23; ICESCR, *supra* note 228, art. 12; CAT, *supra* note 231, art. 16; CRC, *supra* note 232, arts. 11, 19, 32, 34-35; MWC, *supra* note 233, arts. 11, 16.

372. ICESCR, *supra* note 228, arts. 6, 12-14; CRC, *supra* note 232, arts. 24, 28-29; MWC, *supra* note 233, art. 30; *see also* U.N. Comm. on the Rights of the Child, *Report of the Committee on the Rights of the Child, Twenty-seventh Session*, ¶ 68, U.N. Doc. CRC/C/108 (July 23, 2001); U.N. Comm. on the Rights of the Child, *Report of the Committee on the Rights of the Child, Twenty-fourth Session*, ¶ 245, U.N. Doc. CRC/C/97 (July 17, 2000).

373. CRC, *supra* note 232, art. 17.

more able contractors or not undertaking the tasks itself; the state's positive obligations have not been fulfilled. On the other hand, should the contractors violate negative obligations (such as the duty to respect human rights or to refrain from violating the sovereignty of another state), states will bear responsibility, even in the absence of effective control, if the contractors exercise "elements of governmental authority." The ILC acknowledges the imprecision of this latter term and considers it a somewhat contextual standard which will vary between states.[374]

B. What Does This Mean for State Responsibility?

This has assumed so far that the positive or negative aspect of states' duties can be easily identified. In practice, however, as has long been recognized in the realm of human rights law, the distinction between positive and negative obligations is not straightforward.[375] This can be illustrated by the example of the right to life. The ICCPR informs us that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[376] Textual, contextual or object and purpose interpretations of this article all yield the same conclusion: state parties have both negative and positive obligations under this article. The negative duties include refraining from arbitrary execution or reckless killing by state organs or agents and restraint in the use of the death penalty within the criminal justice system.[377] The positive duties (to protect) include operating a functional legal system to prevent private killing[378] and duties to fulfill the right to life for vulnerable members.[379] In this latter context, the HRC considers it "desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy...."[380] Responsibility will be engaged in the event of failure by the appropriate institutions.[381] This might include tolerance of domestic murders displayed by poor investigation and lower sentencing of offenders; or a refusal to investigate fully allegations of murder and disappearances of political activists which have taken place without proven links to state organs.[382] Responsibility can also be engaged if the state simply does not maintain the necessary institutions, such as police services, prosecutors and court officials to provide the requisite level of

374. *See* ILC Articles, *supra* note 4, art. 5, cmt. to art. 5 ¶¶ 5-6, at 92, 94; *see also* Marina Spinedi, *La Responsabilità dello Stato per Comportamenti di Private Contractors*, in LA CODIFICAZIONE DELLA RESPONSABILITÀ INTERNAZIONALE DEGLI STATI ALLA PROVA DEI FATTI, *supra* note 37, at 67, 99-103.

375. *See supra* text accompanying note 280.

376. ICCPR, *supra* note 227, art. 6.

377. *Id.*; *see also* HRC, *General Comment No. 6: Article 6 (Right to life)* ¶¶ 3, 6-7, *reprinted in* Compilation of General Comments, *supra* note 234, at 167.

378. ICCPR, *supra* note 227, art. 6.

379. *See, e.g.*, MWC, *supra* note 233, pmbl., arts. 9-10; *see also* CRC, *supra* note 232, pmbl., arts. 2, 6.

380. HRC, *General Comment No. 6*, *supra* note 377, ¶ 5, at 167.

381. *See* ECOSOC, *General Comment No. 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant)* ¶¶ 1-6, 10, *reprinted in* Compilation of General Comments, *supra* note 234, at 15-17.

382. HRC, *General Comment No. 6*, *supra* note 377, ¶ 4, at 167.

protection, or inadequate or non-existent health services and guarantees of nutrition for the poorest members of the state.[383]

The character of an obligation as positive or negative is part of the primary rules and thus not part of the law of state responsibility. However, as the discussion above demonstrates, the characterization of an obligation as positive or negative has a crucial impact on the rules of state responsibility, in particular, whether an organ or agent of the state needs to be identified at all.

These three distinct areas of international law examined, and the institutions that have worked with them, contain very different primary rules, in particular, very different expectations about the positive obligations of states. The standards required, or the degree of diligence due, depend on primary rules. However, ultimately, the secondary rules of state responsibility are the same.

The distinction between primary and secondary rules was introduced by Ago and is defended by Crawford, the rapporteur who saw the conclusion of the ILC Articles as "provid[ing] the key to their completion as well as their scope. It may be supported by a number of reasons, principled as well as pragmatic."[384] He describes this distinction as "indispensable" to the conclusion of the ILC's project because primary rules, including rules about the content of obligations and requirements of fault, are in a constant state of flux and negotiation.[385] The pace at which the primary obligations of states pertaining to counter-terrorism have changed bears out this concern. The ILC's concentration on state responsibility is an exposition of the "underlying structures," which are "less fluid, more durable."[386] Indeed, the ILC would have come in for considerable criticism if, after decades of laborious negotiations, they had concluded a draft which would become obsolete in a few years. The distinction between primary and secondary rules was also recognized by the Court, even before the conclusion of the ILC's second reading.[387]

Nevertheless, the distinction between primary and secondary rules has not been without its critics. For example, Bodansky and Crook argue that the distinction is artificial and potentially misleading.[388] David Caron laments the resulting abstract nature of secondary rules which makes it "quite complex to translate these articles to the real world of dispute resolution."[389] Crawford acknowledges that it is a rare dispute that concerns only secondary rules in which

383. For further discussion of this and other examples, see Scott & Macklem, *supra* note 280, 48-71.

384. Bodansky, Crook & Crawford, *supra* note 334, at 877.

385. CRAWFORD, *supra* note 92, at 15.

386. *Id.*

387. *See* Gabčíkovo-Nagymaros Project (Hung. v. Slovk.) 1997 I.C.J. 7, ¶ 47, at 38 (Sept. 25); Daniel Bodansky & John R. Crook, *The ILC's State Responsibility Articles: Introduction and Overview*, 96 AM. J. INT'L L. 773, 773-74 (2002).

388. Bodansky & Crook, *supra* note 387, at 780-81.

389. David D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority*, 96 AM. J. INT'L L. 857, 870-72 (2002).

breach of the primary rules is acknowledged; instead, real world disputes contain elements of both.[390]

The three examples considered do seem to suggest that whilst state responsibility can be understood in the abstract as an academic concept, its application (and hence, perhaps, its usefulness) will require an extensive examination of the primary rules in every case. This becomes even more problematic when the difficulties of distinguishing positive and negative obligations are taken into account.

Crawford explains the status quo thus:

> Whatever the range of state obligation in international law, the ways of identifying the state for the purposes of determining breach appear to be common...Rarely (and never, as far as I am aware, by implication) is the state taken to have guaranteed the conduct of its nationals or of other persons on its territory, even when it has entered into obligations in completely general terms. The rules of attribution are thus an implicit basis of all international obligations so far as the state is concerned.[391]

David Caron warns against extending the responsibility of the state to make it a guarantor for all operations within its territory:

> If the State were responsible [for all wrongful acts within its jurisdiction], then it would assume the position of insurer of the victim in a myriad of cases. If the State were responsible, the rule would encourage greater control by the State of persons and entities within its jurisdiction – a possibility we should consider with care.[392]

In fact, despite Derek Jinks' concerns to the contrary, it appears that the secondary rules of international have held fast.[393] The state does not "insure" potential victims against the behavior of the persons, natural and legal, operating within its jurisdiction. Even where primary rules change, by slow evolution in the case of human rights or by a sudden jolt in the case of counter-terrorism, the rules of state responsibility remain the same. States may accept positive duties, by virtue of treaty, through acquiescence to developments in customary international law, or, more controversially, by acceptance of Council resolutions. The coming years may bear witness to further stresses on these norms, particularly in the area of counter-terrorism, but for now, the ILC Articles accurately describe the applicable framework. Ultimately, these three institutions, the Court, the Council and the committees, connected to one another by the loosest of threads, are performing in the same key.

390. CRAWFORD, *supra* note 92, at 9.

391. Bodansky, Crook & Crawford, *supra* note 334, at 878-79.

392. Caron, *supra* note 10, at 127.

393. Jinks, *supra* note 132, at 83-84.