



René Värk

*LL.M., Lecturer of International Law,  
Institute of Law, University of Tartu*

# State Responsibility for Private Armed Groups in the Context of Terrorism

## 1. Introduction

In today's world, there are hundreds of informal private groups that are involved in armed activities against local and foreign governments.<sup>1</sup> Such terrorist groups use, as a rule, means and methods incompatible with international humanitarian law, and their activities can potentially endanger both domestic and international peace and security. As more than a few recent examples have shown, some terrorist groups can even perpetrate attacks comparable, in scale and gravity, to those of regular armed forces.<sup>2</sup> Therefore it is completely understandable that states, especially injured states but also potential target states, want to react decisively and to make sure that such attacks do not happen again. The fight against private armed groups — the so-called 'war on terrorism' — involves many practical and legal difficulties. However, there is one aspect of it that has a fundamental impact on such a fight as a whole: private armed groups do not exist in stateless enclaves but always operate from the territory of states.<sup>3</sup> This means, essentially, that if the injured state wants to use armed force, as a matter of self-defence, against the terrorist group responsible for its attack, it automatically acts also against the state from which that particular group operates. But in order to use force lawfully against the host state<sup>4</sup>, the injured state must first demonstrate that the terrorist attack, in at least its

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<sup>1</sup> For a list of international terrorist groups, consider, for example, the Web site of the United States Department of State; see <http://www.state.gov/s/ct/rls/fs/37191.htm> (1.06.2006).

<sup>2</sup> The most famous is Osama bin Laden, whose terrorist network designated 'al-Qaeda' has carried out several grave attacks against the United States, such as demolishing its embassies in Kenya and Tanzania (301 killed) (1998), damaging the navy warship USS Cole on the coast of Yemen (17 killed) (2000), and destroying the World Trade Center in New York (more than 3,000 killed) (2001). See F. A. Biggio. *Neutralizing the Threat: Reconsidering Existing Doctrines in the Emerging War on Terrorism*. – *Case Western Reserve Journal of International Law* 2002 (34), pp. 1–4 for detailed information.

<sup>3</sup> There is one, unlikely exception to this general statement. A private armed group would be outside the territory and jurisdiction of all states if it were to operate entirely on and from the high seas. Article 89 of the United Nations Convention on the Law of the Sea, Montego Bay, 10.12.1982, which entered into force on 16.11.1994 (1833 United Nations Treaty Series 3), declares that the high seas are not subject to, and may not validly be subjected to, the sovereignty of any state.

<sup>4</sup> The notion of 'host state' should be understood in this article to include also other non-territorial states that provide substantial support to the private armed group such as is essentially necessary for carrying out its activities.

consequences, is attributable to the former under customary or conventional international law. If this is not duly done, the injured state instead commits an internationally wrongful act and is itself liable before the host state. Although the law of state responsibility includes a number of rules that aid in determining whether a particular act is attributable to a state, their application is, unfortunately, neither uniform nor consistent. States tend to broaden the scope of these rules if and when doing so offers better protection for their national security interests or simply serves to further their political goals to a greater extent. This article analyses both actual and hypothetical situations in which a private armed group has acted forcibly against a foreign state, and it attempts to establish under which circumstances the host state can be held legally responsible for such acts.

## 2. General remarks on state responsibility

### 2.1. Principles of state responsibility

All sovereign states are equal in rights as well as in corresponding duties to respect the rights of other states. When a state violates the rights of another state and causes injury to the latter as a result, it is responsible for said injury and has to compensate fully for all damages. As the Permanent Court of International Justice has appropriately found, “it is a principle of international law, and even a greater conception of law, that any breach of an engagement involves an obligation to make reparation”.<sup>5</sup> In simpler words, the state is responsible for the breaches of its international obligations and becomes subject to whatever remedial action is legally permissible in the circumstances.

The rules covering state responsibility were recently codified into the Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001)<sup>6</sup>, which reflect customary international law binding upon all states.<sup>7</sup> These provide that “every internationally wrongful act of a State entails the international responsibility of that State”.<sup>8</sup> The responsibility arises from conduct, an action, or an omission that (1) is attributable to that state under international law and (2) constitutes a breach of an international obligation of the state.<sup>9</sup> Article 12 explains that such a breach occurs when an act of a state is not in conformity with what is required of that state by the particular obligation in question, regardless of its origin or character. For the sake of objectiveness, it is exclusively for international law to determine what constitutes an internationally wrongful act, irrespective of municipal law.<sup>10</sup> If any of these requirements is not duly satisfied, there is no internationally wrongful act and the state cannot be held legally responsible for the action in question.

The law of state responsibility is based on the concept of agency. States are political abstractions and act not as such but through persons. So, the key question is whether a person has acted as an agent of a particular state and his acts qualify as action of that state. This is particularly true in cases involving formal state organs, especially their officials, that have been authorised to exercise public functions and, as a result, represent the state in question. If it is established that an act is indeed attributable to a state, the latter is considered to have itself committed that act, without further regard to the identity of the person who actually carried it out.

The traditional rule is that the conduct of private actors, both persons and entities, is not normally attributable to the state under international law.<sup>11</sup> However, it is equally well settled that the acts of *de facto* state agents are attributable to the state; i.e., the conduct of apparently private actors may in fact be sufficiently connected with the exercise of public functions that otherwise private acts may be deemed state action instead. The rules of state responsibility have gradually developed to hold a state answerable for its own wrongdoings also in relation to private violence. Where the state has a duty to prevent private harm or to abstain from any support for it, its responsibility is engaged when it violates these obligations.<sup>12</sup> In these cases, it is often difficult to make a determination. It is, however, less likely that it is going to be possible to demonstrate that a state is responsible for the private acts itself (direct responsibility) than it is to prove that the state is responsible for its own related wrong — i.e., its inadequate efforts to prevent the private action in

<sup>5</sup> Judgement, *The Factory at Chorzów (Germany v. Poland)*. – Permanent Court of International Justice Series A, No. 17 (1928) 4, p. 29.

<sup>6</sup> General Assembly Resolution 56/83, 28.01.2002, Annex (Draft Articles).

<sup>7</sup> R. Wolfrum. *State responsibility for private actors: An old problem of renewed relevance*. – M. Ragazzi (ed.). *International Responsibility Today*. Leiden: Brill 2005, p. 424.

<sup>8</sup> Draft Articles, article 1.

<sup>9</sup> *Ibid.*, article 2.

<sup>10</sup> *Ibid.*, article 3.

<sup>11</sup> R. Jennings, A. Watts (eds.). *Oppenheim’s International Law*. 9<sup>th</sup> ed. Vol. 1. Harlow: Longman 1996, pp. 502–503.

<sup>12</sup> T. Becker. *Terrorism and the State: Rethinking the Rules of State Responsibility*. Oxford: Hart Publishing 2006, p. 3.

question (indirect responsibility). The fact of whether the state bears direct or indirect responsibility usually determines also what kind of countermeasures may be appropriate and lawful in the case in question.

## 2.2. Changing nature of state responsibility?

The legal response to the terrorist attacks of 11 September 2001 in the United States and other recent developments strongly suggest that the scope of state responsibility for private conduct has expanded. Quite a few states have indicated that they are prepared to hold other states responsible for international terrorism where there is less incriminating evidence.<sup>\*13</sup> Most famously, President Bush declared that the United States would “make no distinction between the terrorists who committed these acts and those who harbor them”.<sup>\*14</sup> This shift hints that states may hold other states directly responsible for private acts that were previously held to confer indirect responsibility and led to the possibility of taking countermeasures only of lesser degree than military operations. The United States held the Taliban regime of Afghanistan directly responsible for the 11 September 2001 terrorist attacks because it **allowed** al-Qaeda to operate in its territory, not because it **directed or controlled** the entity’s action.

Does such expansion of responsibility have the positive effect for which states are hoping? The results are most likely going to be mixed.<sup>\*15</sup> Although states have acknowledged the significant changes in circumstances that have been dominating and influencing international affairs since 11 September 2001, there has been very little progress in refashioning the ‘primary rules’ specifying the content of state obligations in the context of terrorism; states have instead relaxed the ‘secondary rules’ defining state responsibility for breaches of any such obligations.<sup>\*16</sup> States should formulate support for terror as a clear breach of primary legal obligations, which leads to liability under the traditional rules of state responsibility. Unfortunately, states cannot agree on a workable and universally accepted general definition of terrorism.<sup>\*17</sup> The last four decades have seen a number of efforts, some less serious than others, to formulate such a definition, but there is still no legally binding solution concerning the matter, except 13 special conventions on specific offences commonly described as terrorist acts.<sup>\*18</sup> Perhaps the most persistent obstacle is summed up in the infamous maxim that one man’s terrorist is another man’s freedom fighter. Geoffrey Levitt has very aptly described the situation by saying that “the search for a legal definition of terrorism in some ways resembles the quest for the Holy Grail: periodically, eager souls set out, full of purpose, energy and self-confidence, to succeed where so many others before have tried and failed”.<sup>\*19</sup> The Holy Grail remains undiscovered. Even the 11 September 2001 events, which caused unprecedented solidarity in the world, could not lead to formulation of a general definition of terrorism as was optimistically hoped. The amendments to the ‘secondary rules’ remain, so far, the lone workable solution to the problem of state responsibility for private forcible acts, although commentators have correctly expressed concern that such an “approach is unsound, because it risks a range of perverse, trans-substantive implications that could undermine the struggle against terrorism”.<sup>\*20</sup> Furthermore, there are limits to how much one can stretch the ‘secondary rules’.

<sup>13</sup> See M. E. O’Connell. Evidence of Terror. – *Journal of Conflict and Security Law* 2002 (7), pp. 19–36 for discussion of what evidence is sufficient for linking terrorist attacks to states and for supporting a case of self-defence against such states.

<sup>14</sup> Statement by the President in his Address to the Nation, 11.09.2001. Available at <http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html> (1.06.2006).

<sup>15</sup> See D. Jinks. State Responsibility for the Acts of Private Armed Groups. – *Chicago Journal of International Law* 2003 (4), pp. 91–94 for detailed discussion.

<sup>16</sup> The primary rules specify the content of legal obligations, and the secondary rules set forth the conditions under which states are considered to be responsible for breaches of these obligations. See J. Crawford. *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries*. Cambridge University Press 2002, pp. 14–16 for further information.

<sup>17</sup> See, for example, A. R. Perera. Reviewing the UN Conventions on Terrorism: Towards a Comprehensive Terrorism Convention. – C. Fijnaut, H. Wouters, F. Naert (eds.). *Legal Instruments in the Fight against International Terrorism: A Transatlantic Dialogue*. Leiden: Martinus Nijhoff 2004, pp. 567–587; H. Duffy. *The ‘War on Terror’ and the Framework of International Law*. – Cambridge University Press 2005, pp. 18–31; M. Halberstam. *The Evolution of the United Nations Position on Terrorism: From Exempting National Liberation Movements to Criminalizing Terrorism Wherever and by Whomever Committed*. – *Columbia Journal of Transnational Law* 2003 (41), pp. 573–584 for more information on the question of defining terrorism.

<sup>18</sup> See P. J. van Krieken. *Terrorism and the International Legal Order: With Special Reference to the UN, the EU and Cross-Border Aspects*. The Hague: T. M. C. Asser Press 2002, pp. 22–27 for definitions adopted in these conventions.

<sup>19</sup> G. Levitt. Is ‘Terrorism’ Worth Defining? – *Ohio Northern University Law Review* 1986 (13), p. 97.

<sup>20</sup> D. Jinks (Note 15), p. 95.

### 3. State responsibility for private actors

What is the effect of the state being responsible for the forcible acts of a terrorist group? All states have an overriding obligation to refrain from the threat or use of armed force against other states.<sup>\*21</sup> If one state attacks another state, the latter has a natural and inalienable right to self-defence.<sup>\*22</sup> Terrorism is, essentially, use of violence and therefore comparable, in effect, to armed attacks by states. If the forcible acts of a private armed group are appropriately attributable to a state, it follows that the host state has violated its duty not to use armed force in its relations with other states and the injured state may have a legitimate justification to use armed force as self-defence both against the terrorist group and against its host state. It is true that self-defence has generally been associated with inter-state relations, but there is no reason that the right of states to defend themselves should be confined solely to response to attacks launched originally by states.<sup>\*23</sup> As mentioned above, the violent acts of private armed groups may be of comparable scale and gravity to those of states.

#### 3.1. Level of state involvement

The decision to use armed force as a response against another state must not be taken lightly, because such a step has potentially very serious consequences. The injured state has to take into account the level of involvement of the host state in the action of the private armed group when choosing the means and methods of retaliation.

Four general levels of state involvement can be identified<sup>\*24</sup>:

- **Direction** — the state actively controls or directs the terrorist activities. For example, there is substantial evidence that Libya directed the terrorists who bombed the Berlin discotheque (1986) and killed an American serviceman;
- **Support** — the state does not control the terrorists but does encourage their activities and provides active support such as training, equipment, money, and transport. For example, both Iran and Syria give substantial amounts of financial assistance, training, weapons, explosives, and other support to the Palestinian terrorist group Hezbollah;
- **Toleration** — the state does not actively support or direct terrorists, but it makes no effort either to arrest or suppress them. For example, the Taliban regime consistently permitted international terrorists to use Afghanistan as a training ground and base of operations and refused to co-operate in the capture of Osama bin Laden; and
- **Inaction** — the state is simply unable to deal effectively with terrorists, due to political factors or inherent weakness. For example, Lebanon lacked control over a large portion of its southern territory, where terrorists operated against Israel (although there have been many positive developments, the operation of terrorists there continues even today to some extent).

A state cannot be held responsible in an equal manner for all of the situations described. Most importantly, not every situation automatically calls for or justifies military intervention: the remedial action has to be proportionate to the threat or consequences of the terrorist attack.<sup>\*25</sup> While direction by the state of terrorist activities may indeed justify or even demand military response as self-defence, mere inaction by the state due to genuine inability to deal with the private armed groups located in its territory does not necessarily make the host state a target of lawful military operations.

<sup>21</sup> Article 2 (4) of the United Nations Charter declares that “all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”.

<sup>22</sup> This is also reaffirmed in the United Nations Charter, which otherwise prohibits the use of armed force. Article 51 states that “nothing in the [...] Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations”.

<sup>23</sup> See C. Greenwood. *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*. – San Diego International Law Journal 2003 (4), pp. 16–18 for detailed discussion.

<sup>24</sup> See also R. J. Erickson. *Legitimate Use of Military Force against State-Sponsored International Terrorism*. Maxwell Air Force Base, AL: Air University Press 1989, pp. 32–34; G. M. Travalio. *Terrorism, International Law, and the Use of Military Force*. – Wisconsin International Law Journal 2000 (18), pp. 150–151 and accompanying footnotes.

<sup>25</sup> The Webster formula, which has long been regarded as a definitive statement of the conditions for exercising the right to self-defence in customary international law, prescribes that the injured state may not do anything “unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it” (British Foreign and State Papers 1840–1841 (29), p. 1138).

## 3.2. Grounds for state responsibility

International law foresees certain situations where the state is responsible either for private conduct itself or for consequences arising therefrom. It can be said, in advance, that legal attribution of different terrorist acts to states is not usually as easy as political condemnation. But to the extent that imputing state responsibility to those who harbour and support terrorist groups is necessary for effective self-defence, the Draft Articles are not generally inconsistent with the evolving standard recognised by the recent expressions and acts of states; although innovative interpretation is still necessary.

### 3.2.1. Conduct of *de facto* state agents or organs

States are ever more commonly using private persons or entities for performing public functions. As the state has employed these private actors to exercise, in its place, elements of the governmental authority, the former must bear responsibility for such actors.<sup>\*26</sup> When the relationship between the state and private actors is formal — for example, there is a contract or legislative act in place — no dispute concerning responsibility usually arises, provided that the person or entity acted in an official capacity in the instance in question. So, if a state hires a private armed group to carry out forcible acts against other states, the hiring state is responsible for the action of that group. However, state responsibility becomes complicated when a state is using private actors who are neither employees nor organs of that state but are still acting informally as its agents. In fact, this should not change the position of the state. It would be imprudent to deny state responsibility for private conduct in circumstances where it is clear that the state is using the private actors as its *de facto* agents.<sup>\*27</sup> To deny state responsibility merely on grounds that it is a private actor involved when, in fact, it is clear that the latter is acting on the instructions of the state would be to encourage state use of private agents to circumvent legal obligations.

The imputability to a state of the use of armed force by its agents has been established in the Definition of Aggression, which defines an act of aggression, *inter alia*, as “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to [an actual armed attack conducted by regular forces] or its substantial involvement therein”.<sup>\*28</sup> The International Court of Justice (ICJ) accepted this provision as being an expression of customary international law.<sup>\*29</sup> Therefore a non-state violent attack can trigger the right of self-defence, provided that said attack is sufficient in gravity and the involvement of a state is sufficient in degree. The terrorist attack can be referred to as a constructive armed attack or a situation equivalent to an armed attack.

The Draft Articles declare that the conduct of a private actor is [considered an act of a state if that actor is, in fact, acting on the instructions of, or under the **direction** or **control** of, that state.<sup>\*30</sup> The major difficulty involves the link that must be established in order to transform acts of private actors into the acts of *de facto* state agents. The starting point for the examination of such a link is the legendary *Nicaragua* case<sup>\*31</sup>, where the ICJ had to decide whether the United States was responsible for the paramilitary *contras* operating in Nicaragua.<sup>\*32</sup> It was clear from the evidence that the *contras* were a proxy army for the United States and could not have existed without its financing and support, but the ICJ still concluded that their acts were not attributable to the United States. In this case, the ICJ formulated what has now become the classic ‘effective control’ test for determining the link between states and private actors. The ICJ took the view that

United States participation, **even if preponderant or decisive**, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of [...] targets, and the planning of the whole of its operation, is still insufficient in itself [...] for the purpose of attributing to the United States the acts committed by the *contras* [...]. For this conduct to give rise to legal personality of the United States, it would in principle have to be proved that that State had **effective control** of the military or paramilitary operations in the course of which the alleged violations were committed.<sup>\*33</sup>

<sup>26</sup> Draft Articles, article 5.

<sup>27</sup> T. Becker (Note 12), p. 66.

<sup>28</sup> General Assembly Resolution 3314 (XXIX), 14.12.1974, Annex, article 3 (g).

<sup>29</sup> Merits. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States). – ICJ Reports (1986) 14, paragraph 195. The “merits” refers to the phase of proceedings, not an author. So no “J.”. The phase of proceedings (“provisional measures”, “jurisdiction and admissibility”, “merits”) or the nature of the ruling (“judgment”, “advisory opinion”) is traditionally shown after the title of the case (it was so also in the original manuscript), but it seems to be the style of *Juridica International* to show them as the first thing in the reference. See also Notes 54 and 66.

<sup>30</sup> Draft Articles, article 8.

<sup>31</sup> Military and Paramilitary Activities in and against Nicaragua (Note 29).

<sup>32</sup> See G. Townsend. State Responsibility for Acts of *de facto* Agents. – Arizona Journal of International and Comparative Law 1997 (14), pp. 643–644 for a summary of the court’s ruling on the matter of responsibility.

<sup>33</sup> Military and Paramilitary Activities in and against Nicaragua (Note 29), paragraph 115 (emphasis added).

If proven that the agents of a state “participated in the planning, direction, support and execution” of violent acts, the imputability to the state of such action is established.<sup>\*34</sup> In other words, terrorist groups who are not state organs but who are supported and directed by a state become *de facto* agents of that state. The ICJ envisioned the kind of support to which such responsibility would be attached as “the provision of weapons or logistical or other support”.<sup>\*35</sup>

The ‘effective control’ test has several limitations. To begin with, it imposes for the injured state a quite unrealistic obligation to provide evidence of specific instructions or directions of the host state relating to the terrorist attack. Some commentators have expressed concern that “the traditional ‘effective control’ test [...] seems insufficient to address the threats posed by global criminals and the states that harbor them”.<sup>\*36</sup> There are reasons to believe that the position of those holding to such a strict approach has weakened since the 11 September 2001 events and the international community has approved a more liberal approach. The Appeal Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) has offered another approach to the control issue, in the *Tadić* case.<sup>\*37</sup> The ICTY believed that “the **degree of control** may, however, vary according to the factual circumstances of each case” and failed “to see why in each and every circumstance international law should require a high threshold for the test of control”.<sup>\*38</sup> International law does not require that the “control should extend to the issuance of specific orders or instructions relating to single military actions” and therefore it is enough if the state has “overall control” over the private actors in question.<sup>\*39</sup> The law of state responsibility should, after all, be based on a “realistic concept of responsibility”.<sup>\*40</sup> If the state is exercising overall control over a private armed group — i.e., the state finances, arms, and trains the group as well as generally participating in planning and supervision of the group’s activities — it would be too much and unnecessary to ask the injured state to prove that the host state actually demanded or directed that specific military operation. Nevertheless, the overall control test is neither a magic solution<sup>\*41</sup> to nor a revolutionary change in the question of attribution. The essential difference between the *Nicaragua* and *Tadić* case lies merely in the degree of control, not in the kind of control. The ICTY still asserted that the state should have control “going beyond the **mere financing and equipping** of such forces and involving also participation in the planning and supervision of military operations”.<sup>\*42</sup>

Let us apply these principles to the al-Qaeda and Taliban relationship in Afghanistan before and after 11 September 2001. The situation is far from clear. It is quite difficult to argue that the Taliban regime actually directed or controlled specific acts of al-Qaeda, especially the attacks on the World Trade Center. Nor did the United States prove the existence of such a relationship before commencing Operation Freedom in October 2001. But it was certain, at the same time, that al-Qaeda had operated in the territory of Afghanistan for some time already and had established a close and mutually beneficial relationship with the Taliban regime.<sup>\*43</sup> Although the Taliban regime did not have effective control, it did, most likely, have overall control over al-Qaeda, to say the least.

There is one additional, although uncertain and more difficult in the proof, way of linking a private armed group to a state. A terrorist group could be considered to be a *de facto* state **organ** (not an **agent** as discussed above). The Draft Articles provide that the conduct of any state organ is considered an act of that state.<sup>\*44</sup> This concerns first and foremost official state organs, but it is further explained that “an organ includes any person or entity which has that status in accordance with the internal law of the state”.<sup>\*45</sup> The usual condition for such a status is a due reference in domestic law. However, in some states the status of various entities is determined not only by law but also by practice; reference exclusively to internal law would be misleading.<sup>\*46</sup> The International Law Commission (ILC) has not given any specific examples of such *de facto* organs,

<sup>34</sup> *Ibid.*, paragraph 86.

<sup>35</sup> *Ibid.*, paragraph 195.

<sup>36</sup> A.-M. Slaughter, W. Burke-White. An International Constitutional Moment. – Harvard International Law Journal 2002 (43), p. 20.

<sup>37</sup> Judgement, Prosecutor v. Duško Tadić, Case No. IT-94-I-A, International Criminal Tribunal of the Former Yugoslavia, Appeals Chamber, 15.07.1999. See G. Townsend (Note 32), pp. 640–642 for a summary of the court’s ruling on the matter of responsibility.

<sup>38</sup> Prosecutor v. Duško Tadić (Note 37), paragraph 117 (emphasis in original).

<sup>39</sup> *Ibid.*, paragraph 145.

<sup>40</sup> *Ibid.*, paragraph 121.

<sup>41</sup> On the contrary, the ‘overall control’ test may open the way for abuses, as it raises difficult issues with respect to the permissible scope of self-defence. See C. Stahn. Terrorist Acts as ‘Armed Attack’: The Right to Self-defense, Article 51 (1/2) of the UN Charter, and International Terrorism. – Fletcher Forum of World Affairs Journal 2003 (27) 2, pp. 35–54 for detailed discussion.

<sup>42</sup> *Ibid.*, paragraph 145 (emphasis added).

<sup>43</sup> British Government. Responsibility for the Terrorist Atrocities in the United States, 11.09.2001— An Updated Account. Available at <http://www.number-10.gov.uk/output/page3682.asp> (1.06.2006), paragraph 4.

<sup>44</sup> Draft Articles, article 4 (1).

<sup>45</sup> Draft Articles, article 4 (2).

<sup>46</sup> Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts. – International Law Commission, UN Doc. A/56/10 (2001), p. 90.

but there should be no reason that a private armed group exercising some functions similar to those of the government could not, in principle, be one such organ. In considering al-Qaeda again, it is difficult, but not entirely implausible, to assert that that terrorist group was, in fact, a *de facto* organ of Afghanistan. For instance, the forces under the control of Osama bin Laden fought alongside the Taliban soldiers in the Afghan civil war.<sup>\*47</sup> If fighting a war is not an exercise of state functions, then what is?

The Draft Articles speak also of the possibility of the conduct of a private actor being considered an act of a state if the actor is, in fact, exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as call for the exercise of those elements of authority.<sup>\*48</sup> This ground for state responsibility is usable in very exceptional cases, where the regular authorities have disintegrated, have been suppressed, or are simply inoperative for the time being.<sup>\*49</sup> Failed states would be the most probable examples in the context of terrorism.<sup>\*50</sup> In such a scenario, the state system has collapsed because of a revolution or similar events and the government is not able to exercise its functions in certain parts of the territory. A terrorist organisation then takes over the ‘management’ of that area and starts to organise cross-border violent attacks (possibly even in the belief that it is organising defensive operations). Although the central government is temporarily incapacitated, it is still responsible for the action of that private actor. The government is the organ that guards the territorial sovereignty and should ensure that there is no illegal rival to its monopolistic right to exercise public power. The Taliban regime allowed al-Qaeda to act quite independently and even somewhat like a government in connection with certain matters, but the known facts contain very little evidence to support the contention of the Taliban’s responsibility on the present ground.

### 3.2.2. Conduct adopted by the state

It has been established above that the conduct of a private actor not acting, in one way or another, on behalf of the state is not considered to be an action of that state. Liability for truly private acts should remain with those who committed them. But even such conduct can “nevertheless be considered an act of that state under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own”.<sup>\*51</sup> This exception is concerned not with implied state complicity arising out of the failure to prevent or prosecute the private offender but with explicit ratification and adoption of the private conduct by the state.<sup>\*52</sup> The conduct is not attributable to a state when the state merely acknowledges the factual existence of conduct or expresses its verbal approval of it. In their international controversies, states often take positions that amount to ‘approval’ or ‘endorsement’ of conduct in some general sense but do not involve any assumption of responsibility. The language of ‘adoption’, however, carries with it the idea that the conduct is acknowledged by the state as, in effect, its own conduct. The act of acknowledgement and adoption, whether it takes the form of words or conduct, must be clear and unequivocal.<sup>\*53</sup>

The essence of this principle is well illustrated by the *Teheran Hostages* case<sup>\*54</sup>, where the ICJ had to decide whether Iran was responsible for the capture by the student group Muslim Student Followers of the Imam’s Policy, not having any official status within the Iranian government, of the United States Embassy and Consulate and the continued detention of their staff.<sup>\*55</sup> The ICJ was not able, despite Iran’s failure to fulfil its international obligations<sup>\*56</sup>, to impute the attack itself to the Iranian state, because the students were neither agents nor organs of the Iranian government. However, in the days after the attack, numerous Iranian authorities expressed very clear endorsement and ratification of what the students had done. The minister for foreign affairs declared that the occupation of the United States Embassy had been “done by [Iranian] nation”, and Ayatollah Khomeini not only expressed, in a series of public statements, approval for the attack but treated it as a series of actions that the state was directing.<sup>\*57</sup> The Iranian government endorsed the situation also in its action: when the Iraqi Consulate, which had been similarly occupied, was evacuated on the orders of Ayatollah Khomeini, the latter issued different instructions from those used in relation to the United States

<sup>47</sup> British Government (Note 43), paragraph 12.

<sup>48</sup> Draft Articles, article 9.

<sup>49</sup> Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts (Note 46), p. 109.

<sup>50</sup> See B. N. Dunlap, *State Failure and the Use of Force in the Age of Global Terror*. Boston College. – *International and Comparative Law Review* 2004 (27), pp. 453–475 for more information on failed states.

<sup>51</sup> Draft Articles, article 11.

<sup>52</sup> T. Becker (Note 12), p. 72.

<sup>53</sup> Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts (Note 46), pp. 121–122.

<sup>54</sup> *Judgement, United States Diplomatic and Consular Staff in Teheran (United States v. Iran)*. – ICJ Reports (1980) 3.

<sup>55</sup> See G. Townsend (Note 32), pp. 644–647 for a summary of the court’s ruling on the matter of responsibility.

<sup>56</sup> See *United States Diplomatic and Consular Staff in Teheran* (Note 54), paragraphs 14, 17, 20, and 50 for details.

<sup>57</sup> *Ibid.*, paragraph 74.

Embassy.<sup>\*58</sup> The question of whether the attribution was prospective or retroactive remains disputable. Although, in the *Teheran Hostage* case, the ICJ found that the responsibility was merely prospective<sup>\*59</sup>, this is definitely not a desirable approach, as it would leave gaps in responsibility for continuing acts. The ILC has expressed a more reasonable view, that “where the acknowledgement and adoption is unequivocal and unqualified there is good reason to give it retroactive effect”.<sup>\*60</sup> The response to this issue actually has more far-reaching consequences: if the state is responsible from the moment when an act was committed, the state may be responsible for the attack itself, not merely for its consequences, and therefore a lawful subject of armed attack in the form of self-defence.

In application of all of this to the relationship between al-Qaeda and the Taliban, the publicly available facts are insufficient for undeniably attributing the 11 September 2001 terrorist attack to Afghanistan. On the one hand, the fact that the Taliban regime did not condemn the terrorist attacks, declined to extradite Osama bin Laden with other members of al-Qaeda, and refused to stop the operation of al-Qaeda in Afghanistan can be taken as strong evidence of the silent adoption of the action of al-Qaeda as its own. However, on the other hand, this is not enough evidence, as the adoption must be **clear** and **unequivocal**. As it was in case of Iran, any anti-American or Islamic rhetoric on the part of the Taliban regime cannot be construed as a due adoption of the al-Qaeda attack. The Taliban regime actually denied that Osama bin Laden had anything to do with the attack, asserting that he “lacked the capacity to pull off large-scale attacks”<sup>\*61</sup>, and proclaiming their confidence that an investigation would find him innocent.

A state that adopts a terrorist attack as its own shall be responsible to the injured state as if the attack came from the adopting state itself. This has actually never happened in contemporary state practice, nor is it very likely to happen in future, given that treaty-based international law expressly forbids states to engage in terrorism.<sup>\*62</sup> The usability of this ground for responsibility is therefore, legally speaking, rather limited.

### 3.2.3. Harboursing and supporting terrorists?

Now the question is whether state responsibility should end with terrorist attacks that were controlled or adopted by a state or, in contrast, states should be held responsible also for terrorist activities when their involvement is limited to financing, training, or similar support. In other words, should a state be responsible for toleration of or intolerance towards terrorism? Gregory M. Travalio has put it correctly in stating that “this issue becomes more difficult when a state, which has the ability to control terrorist activity, nonetheless tolerates, and even encourages it”.<sup>\*63</sup> This grey area has become increasingly significant and murky in the years following 11 September 2001. The shift was initiated by President Bush with his above-mentioned declaration that the United States would “make no distinction between the terrorists who committed these acts and those who harbor them”.<sup>\*64</sup> The United States case against Afghanistan was based on the conviction that the 11 September 2001 terrorist attacks were “made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation”.<sup>\*65</sup>

This line of argument has a point and definitely should not be cast aside without being given at least some consideration. Depending on the circumstances, harboursing and support of terrorists may breach a number of a state’s international obligations under treaties, customary international law, and Security Council resolutions. To begin with, states should not knowingly allow anyone to use their territory in a way that endangers other states, including as a base for attacks.<sup>\*66</sup> The Friendly Relations Declaration proclaims that as a matter of basic principles of international law “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 the acts referred to [...] involve a threat or use of force”.<sup>\*67</sup> The Security Council equally demanded that all states “deny safe haven to those

<sup>58</sup> *Ibid.*, paragraph 71.

<sup>59</sup> *Ibid.*, paragraph 74.

<sup>60</sup> Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts (Note 46), p. 120.

<sup>61</sup> D. Brown. Use of Force against Terrorism after September 11<sup>th</sup>: State Responsibility, Self-defense and Other Responses. – *Cardozo Journal of International and Comparative Law* 2004 (11), p. 11.

<sup>62</sup> *Ibid.*, p. 12.

<sup>63</sup> G. M. Travalio (Note 24), p. 154.

<sup>64</sup> Statement by the President in his Address to the Nation (Note 14).

<sup>65</sup> Letter dated 7.10.2001 from the permanent representative of the United States of America to the United Nations, addressed to the president of the Security Council, United Nations Document S/2001/946 (2001).

<sup>66</sup> *Merits. The Corfu Channel (United Kingdom v. Albania)*. – ICJ Reports (1949) 4, p. 22.

<sup>67</sup> Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, General Assembly Resolution 2625 (XXV), 24.10.1970, Annex. The provisions of this declaration are restatements of customary international law and therefore legally binding upon all states.



who finance, plan, support, or commit terrorist acts".<sup>\*68</sup> All of this can be read as a new attempt to revive the theory of vicarious responsibility that attaches to a state that knowingly acquiesces to the injurious acts of private actors within its territory.<sup>\*69</sup> As a result, a state that is, or should be, aware of a terrorist attack against another state; that is able to prevent the attack but neglects to do so; and that fails to warn said other state is responsible to that other state for the attack.<sup>\*70</sup> This line of reasoning would make the Taliban regime liable for al-Qaeda activities because it harboured and supported the latter despite international obligations and demands from the Security Council to cease doing so.<sup>\*71</sup>

There are also other explanations for how a state harbouring and supporting the activities of private armed groups could be held responsible for the activities of these groups. Firstly, state responsibility should be expressed in terms of complicity. Israel has repeatedly proclaimed that terrorist attacks against it from the territory of Lebanon and Syria were possible due to the complicity of the respective governments.<sup>\*72</sup> Although this relationship is not inconceivable, it is incompatible with the present rules of state responsibility covering complicity.<sup>\*73</sup> The latter becomes relevant only when **one state** is aiding or assisting **another state** in the commission of an internationally wrongful act. The structure of this rule suggests that the lower threshold suffices for imputing the conduct of another state because the public character of any such act is clear; i.e., an act of that other state is surely public, not private.<sup>\*74</sup> Secondly, the Security Council has, on numerous occasions, demanded that states "refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts" and "take the necessary steps to prevent the commission of terrorist acts".<sup>\*75</sup> All member states of the United Nations have a legal obligation to comply with the decisions of the Security Council.<sup>\*76</sup> In speaking about support, training, and similar aid, it would be reasonable to suppose that state involvement of the manner mentioned should be of such a nature and scale that terrorists could not carry out their activities without it. If the state's aid is, instead, of minor or insignificant importance, then the state's responsibility is less likely. Thirdly, tolerance is often not simply the result of impotence or lack of awareness of the threats to which the state should respond; it can equally be an active form of policy.<sup>\*77</sup> If a state tolerates the presence of a private armed group and takes advantage of its activities abroad — i.e., the terrorist group is 'doing the job' instead of the state — that state should bear some responsibility for such activities.

If a state has taken all appropriate actions against terrorist threats emanating from its territory but terrorists there still succeed in attacking another state, the former state should not be deemed responsible. But what if a state is, for objective reasons, incapable of acting against terrorist groups? Can the state be held responsible for inability to exercise due diligence? It would be reasonable to argue that a state only bears responsibility for activities emanating from its border if it is culpable for its acts, including omissions.<sup>\*78</sup> But for the 'privilege' of such an exemption there has to be a balancing counter-obligation — namely, a duty to cooperate with the injured state on the scale, and in a manner, that is necessary for the removal of the terrorist group in question. In other words, if a state is not itself capable of protecting the rights of other states and eliminating threats to them, the former may not passively allow the private armed group to benefit from the shield of its sovereignty and territorial inviolability.

## 4. Conclusions

The last decade has seen various violent attacks by private armed groups of a scale and gravity that was unheard of before. States directly affected by these attacks are willing and eager to act in order to prevent future attacks on them or their allies. Any operation against a private armed actor is complicated by the factor of the actor being located in the territory of some state. As possible operations are inevitably directed also against the host state, the latter's responsibility for the acts of the private armed group in question must

<sup>68</sup> Security Council Resolution 1373, 28.09.2001, paragraph 2 (c).

<sup>69</sup> See D. Brown (Note 61), pp. 13–15 for more information on vicarious responsibility.

<sup>70</sup> Cf. The Corfu Channel (Note 66), pp. 22–23.

<sup>71</sup> See Security Council Resolution 1214, 8.12.1998, paragraph 13; Security Council Resolution 1267, 15.10.1999, paragraphs 1–2; Security Council Resolution 1333, 19.12.2000, paragraphs 1–3.

<sup>72</sup> See C. Gray. *International Law and the Use of Force*. 2<sup>nd</sup> ed. Oxford University Press 2004, pp. 172–173 for details.

<sup>73</sup> Draft Articles, article 16.

<sup>74</sup> D. Jinks (Note 15), p. 90.

<sup>75</sup> See, for example, Security Council Resolution 1373, 28.09.2001, paragraphs 2 (a)–(b).

<sup>76</sup> Article 25 of the United Nations Charter.

<sup>77</sup> See G. A. Christenson. *Attributing Acts of Omission to the State*. – Michigan Journal of International Law 1991 (12), pp. 316–317.

<sup>78</sup> See R. J. Erickson (Note 24), pp. 100–103.

be established first. A clear dividing line has to be drawn between political-rhetorical and legal responsibility, as only the latter can maintain objectiveness and predictability in inter-state relations. Before taking any action, the injured state must show that the host state has either effective or overall control that goes beyond the mere financing and equipping of such forces and involves also participation in the planning and supervision of military operations carried out by the private armed group. An alternative way of establishing responsibility is to demonstrate that the host state has explicitly ratified the private conduct and adopted it as its own. State responsibility for 'harbouring and supporting' terrorist groups remains unsettled, although it is not precluded. A state that knowingly and intentionally allows anyone to use its territory in a way that endangers any other state bears some responsibility before that state and makes itself a potential target of armed intervention in the form of self-defence. If a state is not able to eliminate the threat emanating from a private armed group in its territory, it has a duty to co-operate with the injured state according to the scale and manner that is necessary for the removal of that terrorist group. The guiding principle in relation to matters of state responsibility should be that all states have an equal right to sovereignty and security and that injured states must have a right to act proportionally against terrorist attacks and those states that have participated in making such attacks possible.