Attribution of Forcible Acts to States:
Connections Between the Law on the Use of Force and the Law of State Responsibility

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ATTRIBUTION OF FORCIBLE ACTS TO STATES: CONNECTIONS BETWEEN THE LAW ON THE USE OF FORCE AND THE LAW OF STATE RESPONSIBILITY

Andre Nollkaemper

1 INTRODUCTION

This chapter discusses a rather narrow but nonetheless fundamental question relating to the use of force: what is the relevance of principles of attribution of the law of state responsibility for assessing whether a state that has supported or failed to prevent forcible acts by private persons can be subjected to self-defence by the state that was a victim of these forcible acts?

The chapter is inspired by several recent instances in which states used force, or considered using force, in response to forcible acts of non-state actors carried out from another state. The prime, though in many ways exceptional, example is the use of force by the United States and the United Kingdom in Afghanistan in and after October 2001 in response to acts of Al Qaeda. The common opinion was that Al Qaeda was not an organ of Afghanistan. Yet, its acts were generally thought to justify an attack that was not only directed at Al Qaeda, but that was intended to topple the de facto government of Afghanistan. The United States made 'no distinction between the terrorists who committed these acts

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and those who harbor them' – the latter term appeared to refer also to states.\(^1\) The question thus arose of what, if any, connection between Al Qaeda and Afghanistan could justify the use of force against Afghanistan and its de facto government. Does international law require some form of agency, support, harbouring, toleration, or some other connection as a justification for use of force against the state?

Similar questions have arisen in other cases. They are at the heart of the dispute between the Democratic Republic of Congo and Uganda, in which both sides accused each other of some form of involvement with rebel groups directed against the other state.\(^2\) Likewise, during the past years, Rwanda allegedly contemplated (or undertook) the use of force on the territory of the Democratic Republic of Congo in response to acts of former FAR/Interahamwe forces that, so it was said, acted with the acquiescence of the Democratic Republic of Congo.\(^3\) Furthermore, Israel has repeatedly used force in Lebanon in response to violent acts of Palestinian groups and Hezbollah that, so it was

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said, were connected to Lebanon and maybe other states. States that have made somewhat comparable claims, and that sometimes have acted upon such claims, include Senegal, Thailand, and Tajikistan.

The factual scenarios with which the chapter is concerned should be distinguished from uses of force that are not directed against the state as such, but against private parties. Examples of these latter cases are forcible attempts to rescue nationals in a foreign state, armed attacks on insurgents that cross borders into neighbouring states, or uses of force that seek to avert a (perceived) threat or use of force against themselves. The Caroline incident illustrates the latter type of situation. Some scholars have argued that international law would allow a state to use force in response to acts of private persons that, apart from the link of territoriality, are unconnected to the state. This argument has received new input and new strength after 11 September 2001. However, significantly for the purposes of this chapter, such force then would have to be strictly limited to acts against the private persons and should not extend to the state itself.

The distinction between these two categories is not unproblematic, but appears to correspond to two separate sets of criteria for justifying the use of force.

This chapter confines itself to cases where, according to the state exercising self-defence, the state from which the forcible acts were carried out itself was implicated in the acts, and itself is a legitimate target of the self-defence. It might be said that this delineation would beg the question, since much of the

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8 See, e.g., Murphy, supra note 5. See also Oil Platforms (Iran v. US), Judgment, 2003 ICJ Rep. 161, para. 35 (6 Nov.), separate opinion of Judge Kooijmans (referring to the generally accepted interpretation of Article 51 before 11 September 2001 that only allowed for self-defence against state action, and the more liberal position that has emerged after 11 September 2001 due to Security Council Resolutions 1368 and 1373) [hereinafter Oil Platforms].
10 In both cases, the state using force commits a breach of the principle contained in Article 2(4) of the UN Charter against the territorial state.
recent debate on self-defence is focused precisely on the lawfulness of self-defence against private parties, rather than states. However, that critique would underestimate the links between private parties and states. Christine Gray notes that before 11 September 2001, few states were willing to openly support a right to use force against a state where the terrorists operated, in the absence of complicity of that state in the terrorist acts. In the discussion that has emerged on the topic after 11 September 2001, it has been said that no state suggested that force would be lawful in states in which terrorists may act but which, despite bona fide law enforcement, are unable to prevent or punish those acts. A stronger form of involvement than territorial connection would be required. The question then is what form of involvement would justify the use of force against the state.

The state of international law on this point is unclear. It is doubtful whether international law as it stood on 11 September 2001 allowed for self-defence against a state that harboured private groups. Harbouring or tolerating terrorists may have been unlawful, but it neither appeared to be part of the definition of threat or use of force in Article 2(4) of the UN Charter, nor formed a separate principle of attribution under the law of state responsibility that might have provided a connection to the state and thereby a basis for self-defence. Whether the practice referred to above and the international law responses to 9/11 in general change this situation remains to be seen. Though a substantial number of states and scholars have spoken in favour of a general principle to the

11 Gray, supra note 7, at 165.
13 The term lacks a precise legal definition, but the act of harbouring by a state would in any case appear to cover tolerance of the presence of non-state actors on its territory.
14 The US claim that no distinction should be made between terrorists and the states that harbour them was widely supported by many states and international organizations, verbally as well as by sending troops or other forms of material support. For an overview of the reactions, see S.D. Murphy, 'Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter', (2002) 43 Harvard Journal of International Law 41, at 48-49.
15 C. Gray, 'The Use of Force and the International Legal Order', in: Evans (ed.), International Law (2003), p. 589 at 604 (noting that state support for the US invasion could constitute instant custom and a radical re-interpretation of the UN Charter). See also M. Byers, 'Terrorism, the Use of Force and International Law after 11 September', (2002) 51 International and Comparative Law Quarterly 401, at 409-10. Randelzhofer considers use of force lawful against a state that provides weapons and logistical support, even if such acts may not be attributable under the law of state responsibility. A. Randelzhofer, 'Article 51', in: Simma et al. (eds.), The Charter of the United Nations:
effect that, in particular circumstances, states that harbour or support terrorists could be subjected to self-defence, the practice is heterogeneous, and there is ample reason for being cautious in drawing such a general conclusion.

The political organs of the United Nations play a critical role in the development and application of international law pertaining to the use of force against states that support or harbour private actors that may engage in forcible acts. The Security Council's responsibility for the maintenance of peace and security requires that it assesses in appropriate cases whether or not a particular claim of self-defence against a state that responds to acts of non-state actors was allowed under international law. Clarity on the conditions of self-defence, including criteria of attribution, is then essential. In case there is an insufficiently clear connection between the forcible acts and the state, but the maintenance


16 For a nuanced discussion of the practice of the UN political organs, see T. Franck, Recourse to Force: State Action Against Threats and Armed Attacks (2002), pp. 66-68 (noting that much depends on available evidence, the seriousness of each claim of necessity, and the proportionality of the reactions).

17 Wouters and Naert rightly note that it remains to be seen whether this support signifies a change in the law rather than an exceptional reaction to exceptional events. J. Wouters, F. Naert, ‘The European Union and “September 11”’, (2003) 13 Indiana International and Comparative Law Review 719, at 773. See also J. Paust, ‘Use of Armed Force Against Terrorists in Afghanistan, Iraq and Beyond’, (2002) 35 Cornell International Law Journal 533, at 540 (noting that, ‘[a]bsent U.N. Security Council or regional organization authorization to use military force against a state that merely harbors terrorists or is unable to control misuse of its territory, and absent direct involvement by such a state in a process of armed attack that triggers the right of self-defense against the state, the use of military force against such a state would be impermissible under the Charter’); O. Corten, F. Dubbesoin, ‘Opération “Liberté Immuable”: une extension abusive du concept de légitime défense’, (2002) 106 Revue Générale de Droit International Public 51; Byers, supra note 15, at 408 (referring to the ‘widely held view that terrorist attacks, in and of themselves, do not constitute “armed attacks” justifying military responses against sovereign States. Even today, most States would not support a rule that opened them up to attack whenever terrorists were thought to operate within their territory’); G.M. Travialo, ‘Terrorism, International Law and the Use of Military Force’, (2000) 18 Wisconsin International Law Journal 145.
of peace and security nonetheless requires action against the state, use of force against the state can arguably only be authorized by the Council and not be taken unilaterally. It is noteworthy that the Report of the High-level Panel on Threats, Challenges and Change referred to the use of force in response to acts of non-state actors that are harboured or supported by states in its discussion of the Security Council, and not in connection to the use of self-defence.\(^1\) This may suggest that the Panel thought that any exercise of force against a state that has not committed an armed attack, yet has failed to address threats or acts by private persons, be made dependent on the authority of the Security Council.

In determining whether forcible acts by non-state actors are sufficiently linked to a state to justify the use of force against that state, a number of criteria are relevant. In part these belong to the primary rules of the law on the use of force, including notions of necessity and proportionality. In part also, the principles of the law of state responsibility can be relevant to that determination. The relevance of the law of state responsibility for the use of force finds support in the work of the International Law Commission (ILC). In its codification and development of the law of state responsibility, the ILC took the position that international law would only allow a state to resort to self-defence if the self-defence was directed against a state that had committed a prior wrongful act by using force in violation of Article 2(4) of the UN Charter.\(^2\) The ILC thus assumed a direct connection between the law on the use of force and the law of state responsibility and states, so it seemed, generally accepted the ILC’s position.\(^3\) A connection between state responsibility and self-defence also seems to rest on good policy grounds. It would be odd if a state that is not responsible for a forcible act, that thus would not be obliged to stop the wrongful act and provide reparation, and that could not be subjected to non-forcible countermeasures, could nonetheless be subjected to a use of force that could even result in the toppling of its government.\(^4\) Somewhat surprisingly, though,


\(^2\) See infra Section 3.

\(^3\) This conclusion can be drawn, at least, from the absence of comments by states on this point in respect of the ILC Articles as adopted at first reading.

\(^4\) Cf. Ratner, supra note 12, at 908-09 (stating that ‘normally states would not hold another state responsible per se for the actions of nonstate actors on its territory absent proof of a connection closer than harboring, and certainly not to justify the use of force against that state in self-defense’) (emphasis added).
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the question of the relevance of the principles of attribution of the law of state responsibility, for the legality of the use of force against another state, has received only limited examination in recent literature.²²

It is the objective of this chapter to contribute to our understanding of the relevance of the principles of attribution of the law of state responsibility for the legality of the use of force. The chapter does not seek to determine exactly the state of international law by making an accurate assessment of state practice, but rather seeks to clarify the main types of arguments that can be used to provide necessary links between non-state actors and states. The chapter starts with a discussion of the preliminary question of the role of attribution in the law of self-defence (Section 2). It then examines in general terms the connection between the law on the use of force and the law of state responsibility (Section 3). Section 4 considers the main approaches by which the law of state responsibility may link acts of private parties to states, and examines their relevance for the law on the use of force. Section 5 discusses the implications for the role of the Security Council. The main argument that leads through the chapter is that principles of state responsibility indeed are relevant to a determination of the legality of self-defence, as they can underlie, exist parallel to, and sometimes supplant the criteria contained in the primary rules on self-defence; that attempts to disconnect the principles of attribution in the law of state responsibility and the law on the use of force are generally based of weak legal authority and are generally undesirable; and that the Security Council plays a key role in grey areas where the applicability of principles of attribution is unclear.

² THE ROLE OF ATTRIBUTION IN THE LAW ON THE USE OF FORCE

States are organized entities that can only act by human beings or groups of human beings.²³ In determining whether a particular act of a human being


²³ As the Permanent Court of International Justice stated, ‘States can act only by and through their agents and representatives’. Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland, Advisory Opinion, 1923 PCIJ (ser. B) No. 6, p. 22 (10 Sept.).
or group of human beings is also an act of a state, it needs to be determined whether the act can be attributed to that state. The concept of attribution is critical in international law. It serves to make a state answer for, or face the consequences of, deeds of persons or entities that belong to its organization or function under its control. The mirror image is that attribution protects the rights of states by limiting the claims, countermeasures, and forcible actions that can lawfully be directed at that state to responses to acts that were attributable to that state. In principle, a state cannot be confronted with consequences of acts of human beings that were not attributable to it.

Attribution plays an essential function in the definition and application of mutual obligations of states in a variety of fields of international law, including the law of state responsibility, the law of treaties, the formation of customary law, the law of diplomatic representation and, as discussed below, the law of self-defence.24 The fact that the principle of attribution is used in several parts of international law does not necessarily mean that its contents in each of these fields is identical.25 Moreover, the term sometimes is used in a loose manner that can refer to a variety of meanings. In some cases attribution seems to refer to a form of factual causality (as in the statement that a particular effect was attributable to an act of a state), whereas in other cases (in particular in the

24 It is unclear whether, if one accepts that acts of non-state actors can constitute an armed attack in the sense of Article 51, that would somehow presume attribution of acts of individuals to 'terrorist groups' or other organizations. It seems doubtful that individuals, unconnected to a group, would be able to conduct an armed attack, but the notion of attribution in such a context is undeveloped. For the comparable problem of attribution to armed opposition groups, see L. Zegveld, *The Accountability of Armed Opposition Groups in International Law* (2002), pp. 152-54.

25 For instance, there is no necessary connection between attribution in the law of treaties, the law on diplomatic representation, and the law of state responsibility. See (1973) 2 Yearbook of the International Law Commission, para. 5. Also relevant on this point is the discussion of the application of the principles of attribution of state responsibility in the context of the determination of the (inter)national nature of a conflict in an international criminal trial. Several scholars have critiqued the reliance by the ICTY on the state responsibility criteria in the *Tadic* case, arguing that different principles of attribution should have been applied there. See, e.g., T. Meron, 'Classification of Armed Conflict in the Former Yugoslavia: Nicaragua’s Fallout', (1998) 92 American Journal of International Law 236. However, the Appeals Chamber rightly rejected that argument; although principles of attribution may differ between fields, there is no reason for applying different tests to the question (that may arise in several fields) under what conditions of international law an individual may be held to act as a de facto organ of a State. See Prosecutor v. Tadic, Judgment, Case No. IT-94-1, App. Ch., 15 July 1999, para. 104 [hereinafter *Tadic*]. See also infra, Section 3.
law of state responsibility) it is a strictly normative operation under international law. Caution thus is required in transposing notions of attribution from one field to the other.

Though the relevance of attribution in the law on the use of force has been contested with respect to acts of non-state actors, in a classical interstate situation where one state is attacked by another state, the role of attribution seems beyond dispute. In such a case, it must be determined that that act indeed is attributable to the other state before the victim state can lawfully resort to self-defence against that state. The applicability of the principle of attribution in the use of force can be illustrated by the *Oil Platforms* case. In its examination of the question of whether the United States was allowed to resort to self-defence against Iran, the Court stated:

in order to establish that [the United States] was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States has to show that attacks had been made upon it for which Iran was responsible; and that those attacks were of such a nature as to be qualified as ‘armed attacks’ within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force.  

The Court thus separated the qualification of acts as armed attacks from the question of responsibility or attribution. After reviewing the evidence and arguments presented by both states, the Court found

that the evidence indicative of Iranian responsibility for the attack on the Sea Isle City is not sufficient to support the contentions of the United States. The conclusion to which the Court has come on this aspect of the case is thus that the burden of proof of the existence of an armed attack by Iran on the United States, in the form of the missile attack on the Sea Isle City, has not been discharged.

The absence of conclusive evidence for attribution of the attack to Iran thus precluded a finding that Iran had committed an armed attack and that the United

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28 *Oil Platforms*, supra note 8, para. 61 (emphasis added). See also *ibid.*, para. 71.
States had a right of self-defence.\(^{29}\) Of course, even if the act could be attributed to Iran, that would not have determined whether there was an armed attack\(^{30}\) and, even if there would have been attribution and if the attack would have risen to the level of an armed attack, this would not have prejudged the legality of use of force, as that also will depend on necessity and proportionality of the response.\(^{31}\) However, the Court treated attribution as a necessary condition for both conclusions.

The role of attribution in the law of self-defence was also alluded to in the Court’s advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. Israel had claimed that ‘the fence is a measure wholly consistent with the right of States to self-defence enshrined in Article 51 of the Charter’.\(^{32}\) The Court, after citing Article 51, stated that this article ‘thus’ recognizes ‘the existence of an inherent right of self-defence in the case of armed attack by one State against another State’. It noted that Israel did not claim that the attacks against it were imputable to a foreign State\(^{33}\) and rejected the argument based on self-defence.

\(^{29}\) This can be interpreted both in the sense that there was no armed attack, or that there was an armed attack, but not one committed by Iran. Compare paragraph 72, where the Court noted that it did ‘not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the “inherent right of self-defence”’, but that ‘in view of all the circumstances, including the inconclusiveness of the evidence of Iran’s responsibility for the mining of the USS Samuel B. Roberts’, it was unable to hold that the attacks on the Salman and Nasr platforms have been shown to have been justifiably made in response to an ‘armed attack’ on the United States by Iran. *Oil Platforms*, *supra* note 8, para. 72 (emphasis added).


\(^{31}\) *Oil Platforms*, *supra* note 8, paras. 56-57, separate opinion of Judge Kooijmans (Judge Kooijmans noting that even though he was satisfied ‘that the United States has provided sufficient evidence to justify the conclusion that the *Samuel B. Roberts* was hit by an Iranian mine and that this can be attributed to Iran’, ‘the question must be answered whether the fact that the United States could with good reason assume that Iran was responsible for the mining of the *Samuel B. Roberts* entitled it to take military action against the Salman and Nasr platforms’).

\(^{32}\) *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, 2004 ICJ Rep. 36, para. 138 (9 July) [hereinafter *Wall case*].

\(^{33}\) *Ibid.*, para. 139.
This part of the advisory opinion has been critiqued for leaving insufficient room for self-defence against non-state actors.\textsuperscript{34} This may be said to be particularly troublesome in that it may fail to respond to the need of states to protect themselves against such developments as the spread of terrorist threats and state failure. As noted above, some scholars have argued that international law would allow the use of force in response to acts of private persons, even if such acts could not be attributed to a state, and thus would not generate the responsibility of that state.\textsuperscript{35} Such acts could be justified either on the basis of an extended application of self-defence or on the basis of necessity.\textsuperscript{36} All this remains contested,\textsuperscript{37} but need not be further explored here. Suffice it to say that even

\textsuperscript{34} See, e.g., the critical view of Judge Higgins in her separate opinion. Judge Higgins nevertheless accepts 'that this is to be regarded as a statement of the law as it now stands'. \textit{Ibid.}, para. 33, separate opinion of Judge Higgins. See also R. Wedgwood, 'The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense', (2005) 99 \textit{American Journal of International Law} 52, at 58.

\textsuperscript{35} See supra text accompanying notes 8-9.

\textsuperscript{36} O. Schachter, 'The Lawful Use of Force by a State Against Terrorists in Another Country', (1989) 19 \textit{Israel Yearbook on Human Rights} 209, at 229. See also J. Raby, 'The State of Necessity and the Use of Force to Protect Nationals', (1988) \textit{Canadian Yearbook of International Law} 253, at 258-59. Note, however, that this option is largely unsupported by state practice. Paragraph 26 of the Commentary to Article 33 of the Draft Articles adopted on first reading noted that, in almost every case, '[t]he concept of state of necessity has been neither mentioned nor taken into consideration, even in cases where the existence of consent or a state of self-defence has been contested, and even if some of the facts alleged might relate more to a state of necessity than to self-defence.' One would moreover have to solve the problem that the Articles on State Responsibility do not allow a necessity defence for violations of \textit{jus cogens}. See O. Spiermann, 'Humanitarian Intervention as a Necessity and the Threat or Use of \textit{jus cogens}', (2002) 71 \textit{Nordic Journal of International Law} 473; \textit{see also} Raby, supra, at 268. Roberto Ago wrote that not all conduct infringing the territorial sovereignty of a state need necessarily be considered an act of aggression, or otherwise as a breach of a peremptory norm; Ago thus left open armed measures not violating \textit{jus cogens}. Addendum to the Eighth Report on State Responsibility, para. 59, UN Doc. A/CN.4/318/Add.5-7 (1970) [hereinafter Ago].

\textsuperscript{37} Many authors take the position that use of force is only lawful in cases where a connection to the state exists. Kress notes that the armed attack need not be attributable to a state, but that there 'needs to be a connection between unlawful acts of the state and the private armed attack'. Kress, \textit{supra} note 22, at 149-53, 206-49. See \textit{also} G. Travalio, J. Altenburg, 'Terrorism, State Responsibility, and the Use of Military Force', (2003) 4 \textit{Chicago Journal of International Law} 97, at 102 ('[b]ecause an attack against the terrorists violates the territorial integrity of the host state, the "armed attack" of the terrorists must be attributable to that state. Only then can force be used against the terrorists in that state or against the forces of that state itself').
if one takes the position that international law does allow for forcible responses against non-state actors, irrespective of attribution to a state – whether on the basis of self-defence, necessity, or some other basis – that does not mean that in cases where self-defence is directed against a state attribution would no longer be required. The relevance of attribution in such a scenario is, as indicated above, clear from the *Oil Platforms* case.

The requirement that self-defence that is directed against a state presupposes attribution is in the first instance a matter for the primary rules of the law of force; that is distinct from the operation of rules of attribution of the law of state responsibility. This conforms to the separate identities and functions of the law on the use of force and the law of state responsibility. The former consists of primary rules, in particular laid down in the UN Charter, which detail the obligations of states to refrain from the use of force, and defines the corresponding rights of states to be protected from force.38 The law of state responsibility, if we apply it to the use of force, governs the conditions under which a forcible act constitutes a wrongful act, and determines the rights and duties that result from that wrongful act. The functions of the primary and secondary rules are thus different in principle. The law on the use of force does not determine responsibility for the wrongful use of force, and the law of state responsibility does not determine conditions for the (un)lawful use of force.39

38 Note that the ILC does not appear to have considered self-defence purely as a primary rule, for that would have made it redundant to consider self-defence as a circumstance precluding wrongfulness. An act of self-defence is per definition lawful, does not constitute a wrong, and no matter of state responsibility arises. The ILC nonetheless thought it desirable to include self-defence as a circumstance precluding wrongfulness in Article 21. This may in part be explained by the fact that the lawful resort to self-defence may have effects on obligations other than Article 2(4) of the UN Charter. J. Crawford, Second Report on State Responsibility, UN Doc. A/CN.4/498 (1999), paras. 296-97. However, the purport of Article 21 appears to be broad and to preclude the wrongfulness of the act of force under Article 2(4) of the Charter, and not only to regulate the legal effects on rules of international law other than Article 2(4).

39 In view of Article 103 of the UN Charter, the law of state responsibility could not do so, as the UN Charter would trump any principle on self-defence in the law of state responsibility that would deviate from Article 51. Crawford, *supra* note 38, para. 301. Note that the inclusion of self-defence as a circumstance precluding wrongfulness does not mean that the law of state responsibility would determine or even influence the conditions under which a state can lawfully resort to force under Article 51 of the UN Charter. Article 21 of the Articles on State Responsibility defers to the UN Charter as decisive authority for the determination of the lawfulness of the use of force. Self-defence is only a circumstance precluding wrongfulness under the law of state responsibility if it is lawful under the UN Charter. Articles on Responsibility of States for International-
Treating attribution as a matter of primary rules is not uncommon. For instance, the WTO agreement and the Energy Charter Treaty contain rules on attribution of acts of sub-federal states that exist relatively independently from the principles of attribution laid down in the Articles on State Responsibility. Acts of sub-federal or other entities not belonging to the central government need not be separately attributed under the law of state responsibility because they are already covered by a primary rule.

The law on the use of force can incorporate the principle of attribution in its primary rules in two main ways. First, it can be part of the definition of use of force that is prohibited under Article 2(4) and/or of the definition of armed attack. An attack is an armed attack by a state if that attack can be attributed to a state. In the Oil Platforms scenario, it could be said that since the mine-laying could not be attributed to Iran, there was no armed attack on the United States, and the United States was not entitled to resort to self-defence. This construction finds support in the Nicaragua case. In discussing the US claim of self-defence, the Court seemed to restrict the right self-defence to responses to a forcible act that could be attributed to the state against which the force was directed. The Court considered that a participation in the use of force
by armed bands or ‘irregulars’ could constitute an armed attack by the state, a position that was inspired by the definition of aggression.\(^{46}\)

In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack... There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also ‘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\(^{47}\) (inter alia) an actual armed attack conducted by regular forces, ‘or its substantial involvement therein’.\(^{47}\)

Second, the law on the use of force can incorporate the notion of attribution in the principle of necessity or proportionality. It might be said that self-defence against a state is only necessary or proportionate if or to the extent that it responds to an act that can be attributed to that state.\(^{48}\) Though in principle attribution, on the one hand, and necessity and proportionality, on the other, refer to different phases in a legal argument,\(^{49}\) it seems that in practice – for instance in the debates in the Security Council – states tend to phrase much of the discussion on the legality of the use of force in terms of necessity and proportionality, rather than in terms of a particular interpretation of the right of self-defence.\(^{50}\) Treating attribution as part of the test of necessity and

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46 GA Res. 3314, UN Doc. A/9631 (1974), art. 3(g).
48 See Oil Platforms, supra note 8, para. 54, separate opinion of Judge Kooijmans (Judge Kooijmans noting that the United States had not been able to submit convincing evidence that the missile attack on the Sea Isle City can be attributed to Iran, that the United States could and should have taken recourse to other means to protect its security interests, and that ‘[t]he destruction of the Reshadat and Resalat platforms therefore does not qualify as measures necessary to protect the essential interests of the United States’) (emphasis in original). He added that since ‘none of [the] incidents can with certainty be attributed to Iran, a retaliatory measure involving the use of force against the State cannot by any legal standards be called a measure that is necessary.’ Ibid., para. 55. Cf. R. Higgins, Problems and Process: International Law and How We Use It (1994), p. 251 (suggesting that the question of whether the level of violence by regular forces is sufficient to trigger an armed response is a matter of proportionality rather than a question of determining whether the violence is an armed attack).
50 Gray, supra note 7, at 124-25.
proportionality also makes it part of a primary rule, as these standards are to be considered as part of the principle contained in Article 51 of the UN Charter.

The question then is whether the liberal practice indicated in the introduction of this chapter, in which states have claimed the right of self-defence against states that have harboured non-state entities engaging in forcible acts, is covered by these primary rules. It seems that particular cases of involvement of states with private actors may well be brought within the scope of primary rules. The ICJ's acceptance in the *Nicaragua* case that 'substantial involvement' in the acts of armed bands may lead to the qualification of these acts as an armed attack by the state lends itself to a wide interpretation that could be applied to some of the factual scenarios with which this chapter is concerned.\(^{51}\) It thus has been said that if a state would enable a private group (by placing its territory at its disposal, training, providing a safe haven, and additionally providing them with weapons and logistical support) to commit acts of military force which, if committed by a state, would be qualified as an armed attack, that would have to be considered as an armed attack by the state.\(^{52}\) The question whether indeed the interpretation of the primary rules can be bent in such a way to encompass claims based on harbouring need not be explored in detail here. Suffice it to say that, as indicated above, support is ambiguous and it is likely that particular harbouring scenarios are not covered by the primary rules.\(^{53}\) It is against that background that it is explored what the added relevance of the principles of attribution of the law of state responsibility can be.

\(^{51}\) *See Nicaragua*, *supra* note 47, paras. 162-71, separate opinion of Judge Schwebel. *See also* Brownlie, *supra* note 49, at 278-79 (noting that 'it is conceivable that a coordinated and general campaign by powerful bands of irregulars, with obvious or easily proven complicity of the government of a state from which they operate, would constitute an “armed attack”'). Recall that the Court considered that the provision of weapons and logistical support did not qualify as an armed attack, and thus also did not qualify as 'substantial involvement'. However, Randelzhofer observes that, in the light of 'modern practice of international terrorism', this interpretation is 'much too sweeping', as it would 'lead to the result that States were not sufficiently protected against force committed by other States in an indirect manner, thus eroding the very purpose of this rule'. Randelzhofer, *supra* note 15, at 801 nr. 32. *See also* Higgins, *supra* note 48, at 250-51 (noting that the gap left open by the Court could be an encouragement for a state to engage in 'low-grade terrorism because the state at whom it is directed cannot use force in self-defence against it').

\(^{52}\) Randelzhofer, *supra* note 15, at 801, nr. 32.

\(^{53}\) *See supra* text accompanying note 17.
3 CONNECTIONS BETWEEN THE LAW OF STATE RESPONSIBILITY AND THE LAW ON THE USE OF FORCE

There is a close connection between the rules of attribution under the law of state responsibility and the contents and interpretation of the primary rule on self-defence. Three aspects are worth noting. First of all, the distinction between attribution principles as part of the primary rules and as part of the law of state responsibility is not as watertight as sometimes is contended. Theoretically any principle of attribution can be reformulated in terms of primary rules. The contents of Articles 4 through 11 of the Articles on State Responsibility may well be incorporated in any primary obligation. That would make these primary rules extremely complex, but would not cause any change of substance. What counts is the contents of the principle, not its classification as primary or secondary. Applied to the types of cases with which this chapter is concerned, one might say that harbouring of terrorists could be construed alternatively as an act that violates Article 2(4) of the Charter\textsuperscript{54} (the act of harbouring is then a part of the primary rule), or as a separate rule of attribution as part of the law of state responsibility that would link the terrorists to the state.

Secondly, there is also a more substantive reason why the primary rules of self-defence cannot be insulated from the secondary rules of state responsibility. The law of state responsibility and the law on the use of force share an important function, in that they both allow a state that is injured by a breach of international law to seek to terminate that breach and to undo its consequences. The law of state responsibility serves that function by providing for obligations of continued performance, cessation, and reparation, as well as by giving the right to the injured state to take countermeasures aimed at terminating the breach.\textsuperscript{55} In pre-Charter international law, use of force had a similarly broad function: international law allowed injured states to use force to seek

\textsuperscript{54} See B.A. Feinstein, 'A Paradigm for the Analysis of the Legality of the Use of Armed Force Against Terrorists and States that Aid and Abet Them', (2004) 17 Transnational Lawyer 51, at 57, 68; see also A. Sofaer, 'Terrorism, the Law and the National Self-Defence', (1989) 126 Military Law Review 89, at 104. But see Gray, supra note 7, at 111 (noting that the ICJ in the Nicaragua case implicitly indicated that the concept of armed attack is narrower than, for instance, acquiescence in acts of armed bands; the Court stopped at 'sending by or on behalf of a State').

\textsuperscript{55} Articles on State Responsibility, supra note 39, arts. 29-31. For a discussion of the connection between countermeasures and self-defence, see P. Malanczuk, 'Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the Inter-
to protect their rights and to terminate a wrongful act. The UN Charter has confined the lawful use of force to responses to breaches of Article 2(4) that rise to the level of an armed attack in terms of Article 51. However, though its scope now is narrow, the function of self-defence is not dissimilar to that of the law of state responsibility, since it responds to and seeks to terminate a wrongful act. It thus may be said that the right of self-defence fulfils a comparable role to the right to take countermeasures that generally (though not uncontroversially) is treated as a part of the law of state responsibility.

While – as noted above – in practice and in doctrine there is little support for regarding the right of self-defence as a secondary rule or as somehow being part of the law of state responsibility (apart from its recognition as a circumstance precluding wrongfulness), this fact cannot hide the overlap in functions of self-defence and state responsibility. Rather, it illustrates that in particular circumstances the distinction between primary and secondary rules can be somewhat arbitrary. Self-defence and reparation may coexist and overlap as consequences to a wrongful act. A single violation of Article 2(4) of the UN
Charter can, under the law of state responsibility, lead to the obligations of cessation and reparation and to the right of an injured state to take countermeasures; under the law on the use of force, it can lead to the right of the injured state to resort to self-defence.

Indeed, the consequences are complementary. Self-defence is but a narrow response to a violation of Article 2(4). International law provides at the same time for a right of a victim state to repel the unlawful use of force, and provides for obligations of continued performance, cessation, and reparation. The termination of the breach of Article 2(4) is not only a matter of a war legalized under Article 51 of the UN Charter, but is also the result of the operation of the law of state responsibility. That operation of the law is not dependent on acts by the victim state. In the law of state responsibility as written down in the Articles on State Responsibility, the consequences of state responsibility are of an objective nature and not contingent on an exercise of the rights of injured states. The connection between the law on self-defence and that of state responsibility is supported by the work of the ILC in the Articles on State Responsibility. Special Rapporteur Ago explained this connection with a three-fold argument. First, he took the position that self-defence applies only between states. Second, self-defence was seen as a reaction to a wrongful act of another state. This feature distinguishes self-defence from necessity, which allows a state to justify (or excuse) an otherwise wrongful act, even when the

62 It might be said that continued performance and cessation are in part a function of the primary rules (if these are still applicable). However, as pointed out in the Commentary to the Articles on State Responsibility, cessation is closely connected to reparation and should therefore be considered in the context of the consequences of wrongful acts. Articles on State Responsibility, supra note 39, at 218-19, paras. 6-8 (Commentary to Article 30).

63 Articles on State Responsibility, supra note 39, at 224, para. 4 (Commentary to Article 31) ("the general obligation of reparation arises automatically upon commission of an internationally wrongful act and is not, as such, contingent upon a demand or protest by any State, even if the form which reparation should take in the circumstances may depend on the response of the injured State or States").

64 Ago, supra note 36, para. 88. See also A. Cassese, ‘Terrorism is Also Disrupting Some Crucial Legal Categories of International Law’, (2001) 12 European Journal of International Law 993, at 997; Randelzhofer, supra note 15, at 802, nr. 34 (noting that acts of terrorism of private groups can only be an armed attack in the sense of Article 51 if they are attributable to a State).

65 Ago, supra note 36, paras. 4, 87. The ILC’s position was in line with dominant legal scholarship of that period. For instance, Bowett, noted: 'The essence of self-defence is a wrong done, a breach of a legal duty owed to the state acting in self-defence'. D.W. Bowett, Self-Defence In International Law (1958), p. 9.
state against whom that act is directed has not itself committed a wrongful act. Third, self-defence is necessarily a reaction to a wrongful act of a special type: the wrongful use of force. Not any wrongful act triggers the right of self-defence, but only an act that is wrongful under Article 2(4) of the UN Charter. In the systems of the law on the use of force and the law of state responsibility as interpreted by the ILC, a state acting in self-defence can justify the (otherwise illegal) use of force only by pointing to the illegal use of force of the other state.

The third and most fundamental reason why the principles of attribution of the law of state responsibility are relevant to the law of self-defence is that it seems implausible to use a different conception of what acts of state are (and what constitutes the state) in international law. As noted above, it may well be that international law uses different criteria for attribution in different fields of law. For instance, the fact that a mayor of a municipality can engage the responsibility of the state does not mean that he can conclude a treaty that binds the state. However, in the cases of self-defence and state responsibility the question is the same: in both cases it needs to be determined whether a particular act is indeed an act of a state. It would be illogical if that determination would use totally different criteria than the law of state responsibility and, for instance, if an act of a quasi-governmental agency would be an act of state for the purposes of self-defence, but not an act of state for purposes of state responsibility, or vice versa. In the international legal order, there is only one state. Linking attribution in self-defence with attribution in state responsibility, then, is not so much a question of transposing concepts of one field to the other, but of deriving similar concepts and principles of the overarching concept of the state. It is only because of the fact that these principles and concepts have been relatively developed in the law of state responsibility that it may often be helpful to look at the law of state responsibility for guidance on what constitutes an act of state.

66 Ago, supra note 36, paras. 4-5, 87 The ILC stated that ‘the test for deciding that a case comes within the scope of state of necessity and not within the scope of self-defence is that the cause of the grave and imminent peril must not be an act attributable to the state and constituting non-performance by that State of an international obligation towards the State which reacts out of “necessity”’. Report of the International Law Commission on the Work of Its Thirty-second Session, (1980) 2 Yearbook of the International Law Commission pt. 2, at 26, para. 3 n.17, UN Doc. A/CN.4/SER.A/1980/Add.1 (Part 2).
67 Ibid., para. 3.
68 This reasoning is similar to the reasoning of the Appeals Chamber of the ICTY in Prosecutor v Tadic. See Tadic, supra note 25.
The conclusion that self-defence presumes or implies responsibility of the state against which the self-defence is directed finds some, though not unambiguous, support in the case law of the ICJ. In the *Nicaragua* case, while the Court did not unequivocally confront the connection between the law on the use of force and the law of state responsibility, some authors have noted that the interpretation by the Court of the definition of armed attack is based on or at least paralleled by attribution under the law of state responsibility. In the *Oil Platforms* case the Court, as noted above, expressly made the legality of self-defence by the United States contingent upon a determination that Iran was responsible for the attack on the United States. The absence of conclusive evidence of Iran's responsibility for the attack precluded the right of the United States to self-defence. It is not clear, though, whether the Court used the term 'responsibility' in the technical meaning it has in the law of state responsibility; the Court may have referred more to a factual causation test than to the normative concept of attribution and responsibility. Also, the Court's reference to imputation as a condition for self-defence in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case is not entirely unambiguous, as it could both refer to an element in the definition of armed attack or to an external criterion of attribution derived from the law of state responsibility.

Though ICJ practice is ambiguous, in view of the position of the ILC (a position that has not been fundamentally contested by states), there is solid support for the proposition that resort to self-defence presumes a forcible act that can be attributed to a state and that entails the responsibility of that state. This conclusion finds much support in scholarship, both before and after

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69 While the state that invoked responsibility (Nicaragua) did not claim the right of self-defence against the United States, the state that claimed the right of self-defence (the United States) did not invoke state responsibility against Nicaragua. The Court therefore engaged in separate analyses of these two claims.

70 See infra text accompanying note 74.

71 See supra text accompanying notes 27-29.

72 See supra text accompanying notes 32-33.

73 See, e.g., J. Barboza, 'Necessity (Revisited) in International Law', in: Makarczyk (ed.), *Essays in International Law in Honour of Judge Manfred Lachs* (1984), p. 27 at 35; Schachter, *supra* note 36, at 225; Schachter, *supra* note 45, at 172 (noting that after *Nicaragua* and *Ago*, no state suggested that this was wrong and that it was unlikely that the self-defence limitation would be reserved or ignored).
11 September. 74 States and commentators, in seeking to justify or explain self-defence, often expressly refer to the responsibility of the target state. Thus, it is not uncommon to find statements to the effect that 'the legal justification for Operation Enduring Freedom was predicated on the claim that the Taliban regime in Afghanistan was, as a formal matter, responsible for the acts of al Qaeda', 75 or that the harbouring theory of the United States 'effectively imputes responsibility based on the toleration of such acts by the government'. 76

There is thus solid support for a connection between the law on the use of force and the law of state responsibility, as well as for considering the principles of attribution in the law of state responsibility as relevant for determining whether acts of non-state actors are sufficiently related to a state to justify self-defence. 77 It seems that principles of attribution in the law of state responsibility can play three distinct roles in this respect.

First, it might be said that the principles of attribution function as an alternative approach to linking a state to acts of private actors, and that such principles exist alongside the criteria of the primary rules. This can be illustrated

74 See, e.g., A.-M. Slaughter, W. Burke-White, 'An International Constitutional Moment, (2002) 41 Harvard International Law Journal 1, at 19-20 (raising the question '[w]hen should states be held accountable for allowing global criminals from their territory to target civilians?', and noting that '[t]he answer to this question is crucial to the determination of when and if military force can be used against a state to bring international criminals to justice'). See also J.A. Hesbrouch, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law', (2004) 36 New York University Journal of International Law & Politics 265, at 305 (noting that the fact that the international community has accepted the legality of the US military action against Al-Qaeda and the Taliban 'implies that the Afghan de facto regime was held responsible for the acts of the non-state actor').


76 Ratner, supra note 12, at p. 908. See also Slaughter, Burke-White, supra note 74, at 19-20 (noting that that the answer to the question of when states are responsible for allowing global criminals to target civilians from their territory 'is crucial to the determination of when and if military force can be used against a state to bring international criminals to justice. The traditional "effective control" test for attributing an act to a state seems insufficient to address the threats posed by global criminals and the states that harbor them').

77 Franck, supra note 16, at 54 (noting that the Articles on State Responsibility are 'very relevant', 'but not dispositive in assessing the legality of a state's resort to force'). See also Bowett, supra note 65, at 265-66 (noting that although there need not be an exact correlation, 'in the main' the correlation between state responsibility and self-defence will exist).
by the *Nicaragua* case. As noted above, the ICJ did not phrase the requirement that self-defence had to respond to an act of the state in terms of attribution, but in its definition of ‘armed attack’; moreover, the ICJ did not consider whether the acts of armed bands that were sent by a state would have been attributable under the principles of attribution of the law of state responsibility as defined by the Court itself. Nevertheless, some authors have suggested that there is a parallel between the definition of armed attack and the attribution of acts of non-state actors to a state. Randelzhofer, for instance, notes that if a state sends armed bands abroad, ‘a sufficiently close link exists between the State and the private groups, so that the latter’s position is nearly that of *de facto* State organs’ and that, moreover, it seems perfectly justifiable to hold the sending State responsible for the armed attack.\(^{78}\) The link between the armed bands and the state thus would not only be a matter of definition of a primary rule, but also of attribution under the law of state responsibility. This suggests that the qualification of attribution as part of the primary rules and as part of the secondary rules can provide alternative avenues to connecting an act of a private actor to the state.

Second, the principles of attribution can be relevant for the underpinning or interpretation of the primary rule. Thus, it has been said that an attack is an armed attack by a state if the attack can be attributed to that state.\(^{79}\) The criteria for attribution then seem to be derived from the law of state responsibility.\(^{80}\) Indeed, it could well be argued that the principles of attribution of the law of state responsibility provide a minimum condition for lawful self-defence, even if technically that may be determined by primary rules. It would be odd if a state that is not responsible for a forcible act, that thus would not be obliged to stop the wrongful act and provide reparation, and that could not be subjected

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78 Randelzhofer, *supra* note 15, at 800-01 nr. 32.
79 *See also* P.L. Zanardi, ‘Indirect Military Aggression’, in: Cassese (ed.), *The Current Legal Regulation of Force* (1986), p. 112 (noting that ‘[t]he notion itself of “sending” presupposes a very close link between the sending State and the armed groups, in view of which it must be held that as a general rule the latter act in practice as *de facto* organs of the sending State, to which their acts must therefore be attributed’). *See also* Dinistein, *supra* note 9, at 182; L. Condorelli, ‘The Imputability to States of Acts of International Terrorism’, (1989) 19 *International Yearbook of Human Rights* 233; Brownlie, *supra* note 49, at 370 (noting that, in cases when no agency can be established, ‘it is very doubtful if it is correct to describe the responsibility of [the] government in terms of a use of force or armed attack’).
80 *See, e.g.*, Randelzhofer, *supra* note 15, at 801-02 nr. 32 (expressly referring to Article 8 of the Articles on State Responsibility).
to non-forcible countermeasures, could nonetheless be subjected to a use of force that could even result in the toppling of its government. It would also be odd if one and the same act by a person would be an act of state for the purposes of state responsibility and not for self-defence, and vice versa.

Third, the principles of attribution that are part of the primary norms do not appear to be exhaustive. In the Nicaragua case, the Court could consider the connection of the armed bands to Nicaragua in terms of the definition of aggression. However, in other scenarios where it will have to be considered whether particular military forces are part of the state (e.g., private militias hired by a state, compare Article 5 of the Articles on State Responsibility) or whether acts of militias operating in an area outside governmental control can be attributed to the state (compare Article 9 of the Articles on State Responsibility), the definitions of aggression or armed attack do not provide all the relevant clues. Resort to an external set of rules may be necessary to determine whether these acts can be attributed to a state. In fact, it may even be conceivable—and result in a complex and not quite satisfactory situation—that a use of force that the Court considered to fall outside the scope of an armed attack as a matter of a primary rule (e.g., financing or training) under the law of state responsibility might be attributable to that state.81

It might be thought that the possibility of the law of state responsibility supplementing the law on the use of force is limited, since by virtue of Article 103 the UN Charter would trump any principle on self-defence in the law of state responsibility that would deviate from Article 51.82 If the UN Charter would provide that self-defence is only lawful against particular forcible acts covered by Articles 2(4) and 51, the law of state responsibility could not extend the act that gave rise to a right of self-defence. It is to be recalled that, in considering self-defence in the context of the circumstances precluding wrongfulness, the ILC did not, through the law of state responsibility, rewrite the conditions for lawful resort to self-defence. In view of Article 103 of the UN Charter it could not have done so. Rather, the ILC interpreted the law on the use of force to the extent relevant for its codification and development of the law of state responsibility.83 However, this does not mean that the principles

81 Cf. Higgins, supra note 48, at 251 (raising the question of whether the Court in Nicaragua has indeed cast doubt on the normal rule that any use of force by a foreign army is entitled to be met by sufficient force). Compare the situation under the European Energy Charter. See Wälde, supra note 41, at 408-09.
82 See Crawford, supra note 38, para. 301.
83 See Ago, supra note 36, paras. 85 et seq.
of attribution cannot be applied to determine in which cases self-defence is lawful. In applying principles of attribution to the law of self-defence, one does not change the conditions of self-defence; these remain formulated in Article 51. Rather, it sheds more light on the category of acts that are to be considered as an ‘act of the state’ and as such covered by Articles 2(4) and 51.

These considerations thus suggest that attribution could be a normative operation external to the definition of armed attack, either parallel to the contents of the primary rules, as a basis of the primary rule, or as a supplement to the primary rules. Against this background the next section explores the principles of attribution of the law of state responsibility that can be relevant to linking forcible acts of non-state actors to a state.

4 PRINCIPLES OF THE LAW OF STATE RESPONSIBILITY THAT MAY LINK ACTS OF PRIVATE PARTIES TO A STATE

4.1 Attribution of Forcible Acts

The principles attribution of the law of state responsibility provide ample opportunities to link a forcible act of a private person to a state. Several authors have argued that even the wide claims that underlie self-defence after 11 September 2001 could be brought under existing principles of attribution in the law of state responsibility. Travalio and Altenburg, for instance, note that

[to the extent that imputing state responsibility to those who harbor and support terrorist groups is necessary for effective self-defense against international terrorism ... the Draft Articles are not inconsistent with the evolving standard recognized by the current acts and expressions of states.]

Authors have used different principles of attribution to show that harbouring or toleration is well within the ambit of the principles of attribution under the law of state responsibility. Gaja, for instance, even suggested that Al Qaeda may have been regarded as a state organ under Article 4 of the Articles on State Responsibility. Although the domestic law of Afghanistan/the Taliban would not have identified Al Qaeda as such, the Articles on State Responsibility recognize that the status and functions of entities need not be determined by

84 Travalio, Altenburg, supra note 37, at 110-11.
law, but can also be determined by practice.\textsuperscript{85} Also, a formally independent terrorist group that fought insurrectional movements or foreign governments could be part of the organization of a state.\textsuperscript{86} Other authors have argued that acts of Al Qaeda may have been attributable to the Taliban because the de facto Taliban government by default allowed Al Qaeda to exercise governmental functions in projecting force abroad. These acts then could be attributed under Article 9 of the Articles on State Responsibility. As another alternative it has been argued that, because after the 11 September incidents the de facto government declined to extradite Al Qaeda operatives, it in effect adopted Al Qaeda’s conduct as its own. This would allow attribution under the precedent of the \textit{Tehran Hostages} case,\textsuperscript{87} codified in Article 11 of the Articles on State Responsibility.\textsuperscript{88}

Still other authors have argued that a flexible interpretation of the criterion of responsibility based on control under Article 8 of the Articles on State Responsibility would allow attribution of acts of private groups.\textsuperscript{89} Reference has been made in this context to the criterion of overall control formulated by the International Criminal Tribunal for the former Yugoslavia in the \textit{Tadic} case\textsuperscript{90} as sufficing to attribute the acts to Taliban Afghanistan.\textsuperscript{91} In some cases, it seems that the argument that the law of state responsibility would be

\textsuperscript{85} Articles on State Responsibility, \textit{supra} note 39, at 90, para. 4 (Commentary to Article 4).


\textsuperscript{89} See Randelzhofer, \textit{supra} note 15, at 801-02 nr. 32. Presumably referring to Article 8, Randelzhofer suggests that a state’s encouragement, direct support, or planning of forcible acts of private groups would make the acts of these groups attributable to the state. See \textit{ibid.}, n.118.


\textsuperscript{91} M.E. O’Connell, ‘Evidence of Terror’, (2002) 7 \textit{Journal of Conflict and Security Law} 19, at 30-32; Hessbruegge, \textit{supra} note 74, at 305 (noting that international law assumes that a state has effective control over non-state actors operating from its territory; that
capable of linking a state to a non-state actor is in fact explained by developments in the law on the use of force. It has been argued that, since the effective control test formulated in the Nicaragua judgment (and Article 8 of the Articles on State Responsibility) could not justify the attack on the Taliban and could not explain the broad support for that attack, international law would have eased the required nexus between states and non-state actors – not only in the law on self-defence, but also in the law of state responsibility.\textsuperscript{92} For the wrongful use of force, Article 8 of the Articles on State Responsibility would be supplemented and ‘harbouring’ or ‘toleration’ would have become an independent attribution criterion in the law on state responsibility. This approach generally is in line with the position advocated in Section 3 that there is a presumption of conformity between attribution in the law of self-defence and in the law of state responsibility.

If one accepts that, under the influence of developments in the law on the use of force, the principles of attribution in the law of state responsibility would change, the remaining question for the law of state responsibility is whether such a flexible standard applies only to responsibility for use of force (or terrorism, or another comparable though undefined category), or whether it would influence the entire field of state responsibility. For the latter option there appears to be no support whatsoever. It seems highly unlikely that a state that ‘harbours’ private individuals who produce chemical substances that cause transboundary water pollution would be responsible for that act because the acts could be attributed to it. If the law of state responsibility would change under the influence of the practice of self-defence – a controversial principle in itself – that influence would be confined to this particular field that would form a \textit{lex specialis} within the law of state responsibility.\textsuperscript{93}

Whether any or several of these scenarios are applicable in any particular situation will depend on the facts of the situation. It may well be possible that principle makes it possible to hold the Taliban responsible for actions of the Al Qaeda organization.

\textsuperscript{92} See Jinks, \textit{supra} note 75, at 83, 89; Stahn, \textit{supra} note 90, at 864; Randelzhofer, \textit{supra} note 15, at 901 no. 33; Travato, Altenburg, \textit{supra} note 37, at 105 (arguing that the traditional criteria for attribution are inadequate in the context of transnational terrorism and that ‘there is compelling evidence that the world community has moved beyond these cases; in the past decade and a half, the community of nations has recognized that the limiting principles of these two cases should be confined to their facts and are not applicable to transnational terrorist groups who threaten previously unimagined destruction. Stated simply, the accepted and customary practices of states have changed’).

\textsuperscript{93} Articles on State Responsibility, \textit{supra} note 39, art. 55.
existing principles of attribution in the law of state responsibility are capable of connecting to a state acts of groups like Al Qaeda that at first sight appear to act relatively remotely from a state. The consequence will be that acts of such groups are acts of state for the purposes of state responsibility. Arguably, they thereby could also be acts that violated the states’ obligation under Article 2(4) of the UN Charter and constitute an armed attack in the sense of Article 51 of the Charter.

However, such extensive interpretations and application of principles of attribution in the law of state responsibility must be considered with some caution. Support for such liberal theories appears to be limited. Indeed, wide claims of self-defence, such as those proffered in the cases of the US attack on Sudan and Afghanistan in 1998, Rwanda, and Israel, have not been generally accepted; such claims’ rejection may be explained precisely by the fact that those cases might have fallen both outside the definition of ‘armed attack’ and outside the reach of the recognized principles of attribution. Indeed, several authors have taken the position that justifications of self-defence of the type invoked by the United States would go beyond the established principles of attribution and remain to be explained as a unique, possibly one-time-only event that justified use of force. Attribution may thus serve to provide links between acts of private parties to a state beyond what is provided

94 Letter Dated 20 August 1998 from the Permanent Representative of the United States of America to the United Nations, UN Doc. S/1998/780 (1998); discussed in W.M. Reisman, ‘International Legal Responses to Terrorism’, (1999) 22 Houston Journal of International Law 3, at 46-47. The attack was, according to one interpretation, based on the unwillingness of these states to act with regard to terrorist attacks on their territory. However, many states critiqued the attacks or remained silent. See J. Lobe, ‘The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afganistan’, (1999) 24 Yale Journal of International Law 537, at 557 (explaining that this silence cannot be interpreted as acquiescence that supports the formation of a new international norm beyond Article 51 of the UN Charter).

95 See infra text accompanying notes 127-28.

96 See infra text accompanying notes 125-26.

97 Cf. Zanardi, supra note 79, at 112 (noting that ‘when a State does no more than assist or tolerate groups of individuals which as private citizens prepare or carry out military operations against another State, it is unlikely that the material elements of an armed attack as defined by Art. 51 will be present’).

98 Ratner seems to formulate a broadly shared consensus when he writes that if one accepts that the US view of self-defence against Al Qaeda is consonant with the Charter, ‘it seems clear, on the issue of state responsibility, that none of the tests [of the ICI, the ICTY, or the ILCA] supports the harboring theory of the United States’. Ratner, supra note 12, at 908.
for by a primary rule, and at the same time serve to define the outer link of justifications of self-defence.

4.2 State Responsibility Based on Wrongful Acts Other than the Use of Force

Even if a forcible act by private parties cannot be attributed to the state from which an attack is launched, that state nonetheless can be responsible for the armed attack. The state can commit a wrongful act distinct from Article 2(4) of the UN Charter by tolerating, harbouring, supporting, or otherwise being connected to the acts of the private persons. Depending on the circumstances, such acts may breach the obligation to protect the rights of other states or more specific obligations pertaining to terrorist acts under customary law, treaties, or Security Council resolutions.

The wrongful act of the state from which the acts are carried out is sometimes expressed in terms of complicity. For instance, Israel repeatedly wrote to the UN Secretary-General that terrorist attacks from the territory of Lebanon against Israelis were "enabled by the complicity of the Government of Lebanon". Complicity as used in this manner is an independent wrong.

99 Corfu Channel (UK v. Albania), 1949 ICJ Rep. 4, 22 (9 Apr.) [hereinafter Corfu Channel].
100 Schachter, supra note 36, at 211-12. Of some relevance in this context is the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, which provides that '[e]very 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.' GA Res. 2625, UN GAOR, 25th Sess., Supp. No. 28, at 121, 122, UN Doc. A/8028 (1970).
102 Kress, supra note 22, at 240 et seq.
103 Letter Dated 11 January 2005 from the Permanent Representative of Israel to the United Nations, UN Doc. A/59/667 (2005). See also Gray, supra note 7, at 172-73 (noting that, by stressing that Lebanon and Syria were colluding with Hezbollah, Israel did 'not claim a right to act against non-state actors in the absence of territorial state involvement').
Chapter 8 – Attribution of Forcible Acts to States

The wrong would consist of aiding or supporting a wrong by a private entity. This would presume that, first, international law would make the act of the private entity a wrong and that, second, international law would recognize complicity with such an act as a wrong. If we apply the principles of complicity in the Articles on State Responsibility by analogy, this second step would require knowledge of the wrongful act, material assistance, and, possibly, that the state is bound by the same obligation. There is no theoretical reason why complicity could not be construed in this manner and it is not precluded by the Articles on State Responsibility. Practice supporting such an extension seems limited, though, to formulate it as a general principle.

Mere inability to act against non-state actors that use force against another state in principle will not be qualified as a breach of international law. However, arguably a state that is unable to act in the face of such forcible acts or threats should, in order to comply with its obligations to prevent such acts, cooperate with other states and possibility consent to allow affected or threatened states to act. Failure to do so might lead to a wrongful act after all.

In principle, a state that commits a wrongful act by harbouring or supporting non-state actors whose acts cannot be attributed to the state is not responsible for all acts of these actors. However, in particular circumstances this may be different. If conditions of knowledge, foreseeability, and possibly intent that another state will be injured are satisfied along with causation, the wrongful

104 In the law of state responsibility, complicity functions as a separate basis for responsibility that straddles the distinction between primary and secondary rules. Crawford, supra note 38, para. 164.
105 Schmitt, supra note 15, at 538 (noting that the conclusion that Article 51 of the UN Charter ‘applies regardless of the source of the armed attack’, ‘makes sense in light of the fact that violent acts committed by non-State actors are already universally criminalized in domestic and international penal law; prohibition within the Charter framework would have been duplicative’).
106 Jinks, supra note 75, at 90 (noting that international law would establish a lower standard for attribution on the basis of complicity with acts of states than for complicity with acts of private parties).
107 This may depend on an assessment of whether, if the private party itself cannot provide redress, it would be fair to leave the injured entity with the loss. Compare the principle formulated in Article 18 of the Articles on State Responsibility on coercion. Articles on State Responsibility, supra note 39, at 167, para. 6 (Commentary to Article 18).
108 Though it must be noted that, in contrast to several other aspects, the Articles on State Responsibility do not contain a savings clause on this point.
109 Compare the obligation to cooperate to prevent terrorist attacks formulated in SC Res. 1373, supra note 101, para. 3(c).
110 Nicaragua, supra note 47, paras. 115-16.
act can result in responsibility, not only for the attack but also for its consequences. Thus, when the delinquent state has failed to take measures to prevent the attack (e.g., by denying funding, training, or use of territory) and has failed to disclose to other states what it knows about the objectives, targets, and methods of the terrorists, when the terrorist attack actually occurs it would be reasonable to suppose that it could not have been carried out but for the financial support or training from the state that provided it. Responsibility of a state based on knowledge, foreseeability, intent, and causation may come close to attribution for purposes of state responsibility. This line of argument is supported by the fact that acts of omission often are not simply the result of impotence or lack of awareness of the threats to which a state should respond, but can equally be active forms of policy. As Gordon Christenson notes,

"[T]hough obligatory concerted action may be demanded by an international norm or directive, benign neglect of State may serve many subjective political purposes. Indeed, through loose reins government inaction can function as easily as a conscious part of the prudent exercise of power."


112 Brown, supra note 111, at 16-17.

113 Note, however, that important differences exist in the required proof for a wrongful act: responsibility is based on some form of fault rather than on objective responsibility. Christenson, supra note 111, at 321-322 and, in particular, 362. See also Sefaer, supra note 54, at 102-04.

114 Christenson, supra note 111, at 316-17. See also M.J. Glennon, 'The Fog of War: Self-Defence, Inherence and Incoherence in Article 51 of the United Nations Charter', (2002) 25 Harvard Journal of Law and Public Policy 539, at 550. Glennon notes as follows: '[I]t does not make sense to permit defensive force against the wrongdoer but not against the wrongdoer’s host if the wrongdoer’s capability to inflict harm depends upon the indifference of a host government that can curtail that harm simply by withdrawing its hospitality. Acts of omission in such circumstances shade into acts of commission, and aggrieved states should not be faulted for treating them the same. Ibid.
Some authors have even held that failure to exercise due diligence in respect of terrorists would make the acts of the private persons attributable. This position comes close to the generally discarded theory of vicarious responsibility. For instance, it has been noted that, since the Taliban regime provided Al Qaeda with shelter and training facilities and allowed the organization to use Afghanistan as a base from which to sponsor international terrorist operations, the proximate result of that conduct would be an armed attack on the United States. 115

This construction of state responsibility can also be relevant for providing a connection that is required for self-defence. Arguably, the combination of a breach of an obligation to control non-state actors and causation can result not only in state responsibility for the act of the non-state actors, but also provide a basis for self-defence. States repeatedly have sought to justify self-defence by reference to a breach of international law other than Article 2(4). 116 For instance, Israel justified attacks on Lebanon by stating that,

[w]ere it not for the terrorism and its support infrastructure that operates with impunity from, and with the blessing and direct support of, these regimes, in violation of the most basic legal norms and explicit Security Council resolutions, Israeli measures of defence would be unnecessary. 117

Some authors have argued that the aid given by a state to terrorists, for instance, by allowing terrorist groups to use its territory, renders that state complicit and subject to an attack under the principle of self-defence. 118 Likewise, authors who employ the argument of vicarious responsibility not only argue that a state can be responsible for acts of non-state actors, but also that they may be subjected to self-defence. Thus, it has been said that

115 Brown, supra note 111, at 2. On the historical background of the theory of vicarious responsibility, see Hessbruegge, supra note 74, at 295. Note that the United States claimed, presumably on this basis, that the Taliban would be held directly responsible. 9/11 Report, supra note 1, at 205.
116 In this construction, the second factor of Ago (i.e., wrongful act) is present, but the third (i.e., wrongful act consisting of a breach of Article 2(4) of the UN Charter) is absent. See supra text accompanying notes 64-65.
118 Gill, supra note 15, at 29 (noting that the complicit state will incur direct responsibility in its own right for the actions of the organization, and ‘correspondingly become a legitimate target for action undertaken in self-defense’). See also Brownlie, supra note 49, at 368-69, 375.
Afghanistan was vicariously responsible for the attack and ... the use of force to drive the Taliban regime from power, as well as the military operation to destroy the Taliban and capture its leaders, is both lawful and appropriate.\textsuperscript{119}

However, in such cases the establishment of a link between the state and the acts of the non-state actors will only be a first step in the analysis, as it remains to be determined whether an armed response against the state, and not only against the non-state actor, is necessary and proportionate.\textsuperscript{120}

In cases where a state would act in conformity with international law and take action against terrorist threats in its territory, but terrorists would nonetheless succeed in striking another state, the state would in principle not be responsible. Correspondingly, in such case there would in principle be no basis for the exercise of self-defence against that state.\textsuperscript{121} In between these scenarios, there is a grey zone where a state may act wrongfully by not doing enough to avert the threat, yet the connection with the eventual attack may be remote, for instance because it was not foreseeable. Also, cases where a state is incapable of impeding acts of terrorism committed by making use of its territory (the ‘failed states’ scenario) fall into this grey zone. Arguably, in such cases the victim state is not precluded from using force, as otherwise the failed state would turn out to be a safe haven for terrorists.\textsuperscript{122} However, such cases arguably are not instances of use of force against the state in the sense discussed in this article, and the armed response would have to be confined to actions against the terrorist.\textsuperscript{123} Such cases will have to be examined on a case-by-case basis. But the general position seems to be that responsibility is a wider category than self-defence and that, while a state may be responsible, it does not necessarily follow that the victim state is entitled to engage in self-defence against that state. The consequence is that there still remains a gap that in the past has been seen as an encouragement for a state to engage in ‘low-grade terrorism because the state at whom it is directed cannot use force in self-defence against it’.\textsuperscript{124}

\textsuperscript{119} Brown, supra note 111, at 2. See also Lietzau, supra note 57, at 413-15 (suggesting that a state that is ‘vicariously responsible’ in fact can be subjected to an armed response).

\textsuperscript{120} Brownlie, supra note 49, at 279; Murphy, supra note 5, at 66.

\textsuperscript{121} Gill, supra note 15, at 29.

\textsuperscript{122} Randelzhofer, supra note 15, at 802 nr. 32.

\textsuperscript{123} See supra text accompanying notes 6-12.

\textsuperscript{124} Higgins, supra note 48, at 250-51.
4.3 Conclusion

In conclusion, the law of state responsibility provides ample grounds for linking a forcible act of non-state actors to a state, thereby simultaneously leading to state responsibility and a basis for self-defence. These principles to some extent exist independently next to the primary rules of self-defence, without much practical effect. They also may underlie and influence particular interpretations and developments of the primary rules. In particular cases they also may result in a connection between non-state actors and states beyond what can be achieved by the primary rules. At the same time, the principles of the law of state responsibility can be said to indicate an outer limit of lawful self-defence. Acts of non-state actors that cannot be attributed to a state in principle cannot justify self-defence. In some cases a state nonetheless has committed a wrongful act by failing to act against these non-state actors, and because of factors such as knowledge and foreseeability both will be fully responsible for the consequences of their acts and may, if the other conditions are satisfied, be subjected to self-defence. Beyond these criteria, the law of state responsibility cannot offer justifications for the use of force.

5 THE ROLE OF THE SECURITY COUNCIL

The Security Council has an important role in protecting the normative system that justifies particular uses of force while invalidating others. In exercising its mandate to maintain peace and security, the Council can determine that particular acts of non-state actors are insufficiently related to a state to justify self-defence against that state, or can find that the hand of the state in others is sufficiently visible to justify the use of force.

For the problems discussed in this chapter, the practice of the Council seems particularly relevant in three respects. First, the Security Council has protected states from forcible acts in response to acts over which they had no control, and thereby the Council has enforced international law against states which make unsustainable claims of self-defence. The position taken by the Council in regard, for instance, to the claims of Israel and Rwanda makes clear that the Council will not be inclined to accept, condone, and let alone authorize force against a state that was not responsible for an armed attack. In justifying its repeated use of force in Lebanon, Israel complained to the Security Council that Lebanon effectively allowed Hezbollah to use its territory as a base for
terrorist attacks. However, the Council neither supported the attacks nor the underlying principle. On the contrary, many states on the Council expressly condemned the Israeli attack on Syria in 2003, an attack that Israel had justified by arguing that Syria allowed its territory to be used as a base for an attack on Israel. Also Rwanda, claiming that it had the right to use force in respect of ex-FAR/Interahamwe forces that operated from the territory of the DRC, and emphasizing that these forces could not act without the knowledge of the President of the DRC, found no support. The Security Council recognized the problem that the ex-FAR/Interahamwe forces posed for Rwanda, but rather than supporting Rwanda’s right to self-defence, the Council called for withdrawal of all troops and disarmament, and condemned any attempt to undermine the territorial integrity of DRC.

Second, the Security Council can play an important role in assessing the legality of situations in which the attributability of acts of non-state actors is unclear. The fact that, in regard to the use of force in Afghanistan, states attached much weight to the resolutions of the Security Council suggests a desire on the part of states to bring their actions under the authority of the United Nations, rather than leave them to unilateral assessment. It is illustrative that an Extraordinary European Council expressly linked the support for the force against states that abetted, supported, or harboured terrorists to Security Council Resolution 1368.

This may suggest that precisely because of the

125 Israel Letters, supra note 4.
127 Rwanda Letter, supra note 3.
128 Statement by the President of the Security Council, UN Doc. S/PRST/2004/45 (2004). Note, however, that Franck argues convincingly that the reaction of the Council is often dictated by political considerations, and is not necessarily coherent. See Franck, supra note 16.
130 Franck, supra note 16, at 67 (noting that a right to self-defence exists against states harbouring terrorists, but that the judgment as to whether the conditions are satisfied is not only up to the victim state, but to the ‘quasi-jury’ consisting of the principal political organs of the UN and the ICJ).
unclear legal basis, additional justification was thought desirable.\textsuperscript{132} The ICJ, in its advisory opinion on the \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory}, also suggested – or at least left room for the interpretation – that Security Council resolutions would be relevant for determining the legality of self-defence against non-state actors.\textsuperscript{133} As the case before it was confined to events within territory controlled by Israel, the Court concluded that the situation was different from the one contemplated in these resolutions and that Israel 'could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence'.\textsuperscript{134}

The question remains whether in such cases self-defence against a state is lawful because it was accepted by the Council (i.e., whether the pertinent resolution would have constitutive value), or whether self-defence would instead be lawful because of a general principle recognized in the resolution (in such a case the resolution would have only declaratory value). Security Council Resolution 1368, in which the Council reaffirmed the 'inherent right of individual or collective self-defence in accordance with the Charter', seems too ambiguous to support a general principle. Although it has been said that since

to the UN Secretary-General following the start of the US military action, the EU presidency stated, with apparent approval for the justification for the attack,

\begin{quote}
All the information points clearly and convincingly to the responsibility of Osama bin Laden and the al-Qaeda network for the 11 September attacks. A month later, and despite repeated pressure, the Taliban regime has refused to take responsibility for handing over those suspected so that they could be brought to justice. The al-Qaeda network and the regime that supports and harbours it are now facing the consequences of their action.
\end{quote}

UN Doc. S/2001/967 (2001) (emphasis added). Though some EU states expressed the view that the attack was not directed against Afghanistan but against the Taliban, the above quote makes clear that the EU intended to postulate a more general principle that extends to self-defence against \textit{states}, and not just to the particular situation of a de facto government with a somewhat ambiguous position as the government of the state. In any case, in the situation of Afghanistan a distinction between an attack on the state and on the de facto government was hard, if at all possible, to make. Compare also the statement by the government of the Netherlands that the military actions were targeting Afghanistan because the Taliban harboured Al Qaeda. See \textit{K. II}, 2001-2002, 27 925, nr. 28, p. 1. On these types of situations with a de facto government controlling part of the territory of a state, see generally C. De Visscher, \textit{Theory and Reality in Public International Law} (rev. ed. 1968), p. 287.

\textsuperscript{132} On the trend to support self-defence by reference to the Security Council, see generally White, \textit{supra} note 129, at 656; \textit{see also} Gray, \textit{supra} note 15, at 604.

\textsuperscript{133} \textit{Wall case, supra} note 32, para. 139.

\textsuperscript{134} \textit{Ibid.}
at the time 'no one was seriously suggesting that the attacks had been the work of any State, or even an agent of a State', \textsuperscript{135} and that the Security Council thus acted as if Article 51 applied to attacks by terrorists, \textsuperscript{136} this interpretation is questionable since the Council did not expressly pronounce on the question of attribution of the attack; moreover, at that stage it was not clear at all who was behind the attack. \textsuperscript{137} The relevance of the Resolution may not so much lie in its pronouncement of a general principle that can operate independently in future cases, since the Council in this specific instance appeared to give its blessing to an action against a state from which non-state actors operated. \textsuperscript{138} This thus suggests that, in grey zones, much comes down to the judgment of the political organs of the United Nations, a proposition underlined by the High-level Panel, which proposed that the Security Council should take the responsibility to take action to reduce the inclination of states to resort to unilateral acts. \textsuperscript{139}

Third, the Council could authorize force under Article 42 against states that harbour or support terrorists or other private persons engaged in forcible acts against other states. If and to the extent that Article 51 in a particular case does not provide a basis for the use of force against such states, this will in fact be the only option for addressing the problems by using force.

In principle, in none of these three roles will the Security Council make formal determinations of responsibility, and it will not formally attribute acts of non-state actors to states. The Council focuses on the protection of peace and security, rather than on the allocation of attribution and responsibility. \textsuperscript{140} Also, it is clear that the Council is reluctant to formulate doctrinal matters of principle on these issues; rather, it seeks to resolve the specific issues before it on a case-by-case basis. \textsuperscript{141} However, if one looks beyond this formal

\textsuperscript{135} Schmitt, \textit{supra} note 15, at 537.

\textsuperscript{136} See, e.g., Franck, \textit{supra} note 16, at 54.

\textsuperscript{137} Wouters, Naert, \textit{supra} note 17, at 772-73.

\textsuperscript{138} It also has been argued that the right to self-defence against non-state actors involved in terrorism, when there is no armed attack by a state, may exist only where the right has been asserted by the Security Council, which is what happened in Resolutions 1368 and 1373. Gray, \textit{supra} note 15, at 604.

\textsuperscript{139} \textit{A More Secure World, supra} note 18, paras. 193-94. \textit{See also In Larger Freedom: Towards Development, Security and Human Rights for All, Report of the Secretary-General, UN Doc. A/59/2005 (2005), paras. 122-26.}

\textsuperscript{140} Gray, \textit{supra} note 7, at 96-97 (noting that, in modern practice, it is rare for the Security Council to enter into the determination of responsibility). \textit{See also} Bowett, \textit{supra} note 65, at 263-65.

\textsuperscript{141} Gray, \textit{supra} note 7, p. 95-101; Franck, \textit{supra} note 16, ch. 4.
characterization, it may well be argued that the nature and function of the acts of the Security Council are closely related to the function of the law of state responsibility. After all, in many cases the Council will respond to an act that is in violation of international law. In some cases the Council has even made express determinations of wrongfulness and responsibility, but even if it does not do so, the Council should not completely disregard principles of international law that connect acts of non-state actors and states. It would seem desirable that in such cases the Council should stay as close as possible to the normative principles underlying responsibility, including the principles of attribution. In that respect, the principles examined in Sections 4 and 5 would seem relevant to, and provide guidance for, the practice of the Security Council in responding to acts of non-state actors operating in some form of connection to states.

6 Conclusion

On the basis of the above analysis it can be concluded that, in certain narrow respects, the law of state responsibility can help clarify the legal foundation of the right of self-defence against a state that has supported, tolerated, harboured, or given some other form of assistance to non-state actors who carry out forcible acts. The principles of attribution of the law of state responsibility can help provide a foundation for the scope of application of the primary obligation to refrain from the threat or use of force as well as the notion of ‘armed attack’; moreover, these principles may provide a link between non-state actors and states even where such a link seems to go beyond the primary rule. In the case of forcible acts that cannot be linked to a state by either the primary


rules or Articles 2(4) and 51 on the one hand, or the principles of state responsibility on the other (to the extent that these principles would differ), in principle no forcible response against the state is allowed. In such cases international law has no other principles for providing the necessary link between the forcible act and the state. Whether and under what circumstances a victim state in such cases may nonetheless use force against these non-state actors on the territory of the other state lies beyond the scope of this chapter.

Applied to the contested principles pertaining to the harbouring of private groups, the situation would thus be as follows. Under the Nicaragua test, the harbouring of terrorists would probably not be equated with ‘sending’, and would thus fall outside the scope of the primary rule. Arguably, in particular in the face of international terrorism, the term ‘substantial involvement’ would have to be interpreted flexibly, and could cover particular forms of harbouring. Under the primary rules such an interpretation would link the acts of non-state actors to the state and thus justify self-defence against that state under Article 51 of the UN Charter. However, this latter step remains contested, and the principles of state responsibility then provide an alternative avenue. It seems that the criteria for attribution as they stood on 10 September 2001 and the test of ‘effective control’ from the Nicaragua case, as well as the other principles of attribution, were incapable of attributing acts of non-state actors to a harbouring state. It would seem that the practice after 11 September has led to a widening of the attribution principles and thus could link forcible acts of non-state actors to a harbouring state. It would seem that the practice after 11 September has led to a widening of the attribution principles and thus could link forcible acts of non-state actors to a harbouring state; this argument too, however, remains contested. Finally, it could be argued that if a state fails to comply with its obligations to control such groups and prevent them from engaging in forcible acts, and that failure can be directly linked to an eventual attack, the state is responsible and thereby sufficiently linked to the attack to be subjected to self-defence. Such self-defence, however, would always have to be subjected to the tests of necessity and proportionality, and it would have to be determined under these tests whether the forcible response should not only be targeted at the non-state actors but also extend to the state itself.

While the alternative legal constructions thus have been clarified, the question remains whether practice has actually been sufficient to cause these changes in the law. The support in state practice for any of these arguments is still limited. Shortly after the 11 September attacks, Cassese wrote that it was too early to determine whether we are faced with an unsettling precedent
or with a conspicuous change in legal rules.\textsuperscript{144} Almost four years later, and despite a great deal of literature, evidence for the latter position that can be separated from the unique events surrounding 11 September 2001 has certainly not become much stronger.

In grey zones (where attribution and responsibility are doubtful), it will be up to the political organs to make a judgment call and to legitimize the use of force, thus preserving the coherence between the use of force and responsibility. The state-responsibility principles of attribution and causation, while certainly not decisive, may help the political organs in making a determination whether a particular act is sufficiently connected to a state to justify the victim state’s resort to self-defence or, alternatively, to authorize states to use force in respect of the state from which the forcible act originated.

\textsuperscript{144} Cassese, \textit{supra} note 64, at 997. \textit{See also} Corten, Dubbesoin, \textit{supra} note 17.