

Juxtaposing Military Operations with Terrorist Acts Attributable to A State

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Abstract

To begin with, this paper will outline the concept of military operations and distinguish them from terrorist acts. The circumstances in which terrorist acts emanating from the soil of the State can be attributable to it will be explored as also the possibility of terrorist acts attributable to a State being termed as “military operations” of that state. The paper will also focus on the differences in attributing terrorist acts to a state and in attributing military operations. Throughout the paper, the difference in the treatment of military operations and treatment of acts which are seen to constitute terrorism will be highlighted.

The concepts of Attribution including the principle of the Due Diligence and the Passive Support/ Acquiescence theory will be analyzed along with a consideration of a situation where the State is genuinely unable to counter terrorism emanating from its soil. Furthermore, in case of a genuine inability of a State to contain terrorism, the idea of it being the obligation of the world community at large to intervene will be explored.

Considering the wording in Articles of States Responsibility, the paper will discuss the constitution of an “internationally wrongful act” that is “attributable to the State” in light of the aforementioned scenarios in order to give rise to state responsibility. Reference will also be made to the ‘Effective Control Test’ as evolved in the Nicaragua case of ICJ and the ‘Overall Control Test’ as evolved in the Tadic case of ICTY in order to further examine the concept of attribution.

KEYWORDS: terrorism, military operations, attribution, state responsibilities.

Conceptualizing Military Operations

The term ‘military operations’ is often used very generically and there is no single internationally accepted definition. The definition of a term must be encompassing of its overall meaning and rooted in logic. In terms of logic (particularly in a Venn diagram setting) there is a general lack of clarity on which word connotes the subset and which one the bigger set.

German theoretician General Colmar von der Goltz has defined an ‘operation’ as being as

a group or series of military actions,¹ which suggests that ‘military’ is the bigger set. ‘Operation’ has also been defined as a ‘military or naval action, mission or maneuver including its planning and execution’,² which hints at ‘military’ being the subset.

The word ‘military operation’ was used in the mid-1600s by Austrian General Montecuccoli who wrote about military operations as consisting of march and force deployment.³ ‘Military operation’ has also been defined as consisting in the application of preconcerted measures, secrecy, dispatch, regular movements, occasional encampments, and desultory combats, or pitched battles.⁴ It is apparent that there is no consensus on what the words ‘military operation’ mean, both in conjunction with each other and disjunctively. However, the basic meaning remains centered around an activity carried forth by the military. Looking toward a bigger set, a ‘campaign’ is a set of military operations planned and conducted to achieve strategic objectives within a theatre or operating area.⁵

Objective of research

The objective of this article is to distinguish between military operations and terrorist acts attributable to a State and to explore the conceptual nuances that relate to these terms.

Research Methodology

Given the nature of topic, research methodology consists mainly of doctrinal study using primary as well as secondary sources of data. Primary sources include various legislations of intergovernmental organizations, especially of the United Nations. In terms of the secondary resources different journal articles and related books have been looked at. Relevant case laws of various tribunals/ courts have been used and a host of online resources has also been considered.

Distinguishing Military Operations from Terrorism

‘Terrorism’ is a buzzword that is often found on the news, and in political debate and legal talk.⁶ United Nations Resolutions have time and again deprecated terrorism and in 2008, Security Council reaffirmed that terrorism in all its forms is one of the most serious threats to peace and security and that any terrorist act is criminal and unjustifiable regardless of the motivation behind it.⁷ Article 51 (para 2) of Protocol 1 of the Geneva Conventions⁸ as well as Article 13 (Para 2) of Protocol II to the Geneva Conventions⁹

1 Milan n. Vego, joint operational warfare: theory and practice V-18 (1sted, 2009).

2 Michael Handel, intelligence and military operations, p. 2.(1st ed.1990).

3 Milan n. Vego, joint operational warfare: theory and practice V-11 (1sted, 2009).

4 William Duane, a military dictionary 494 (1810).

5 Army, *Operations*, Army Doctrine Publication

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/33695/ADPOperationsDec10.pdf(last seen August 18, 2016).

6 Ben Golder; Williams George, *What is Terrorism - Problems of Legal Definition*, 27 U.N.S.W.L.J. 270, 295 (2004).

7 S.C. Res. 1822, pmbl., U.N. Doc. S/RES/1822 (June 30, 2008).□

8 International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12*

prohibit such acts whose primary purpose is to spread terror and in particular to civilian population, respectively.

Though it is generally agreed upon that terrorist acts are to be universally condemned,¹⁰ and that terrorist acts are ‘the ultimate abuse of human rights’,¹¹ attempting to define the word is a notoriously difficult task, which is one of the reasons it has become illusive in recent times.¹² It was observed that in spite of various workshops spanned over many years, member states have not reached any commonly acceptable definition of terrorism.¹³ In 2005 too the same story was repeated when neither the UN Summit nor the Euromed Summit could successfully adopt a definition of terrorism due to various conflicting misgivings by States.¹⁴ The closest that an organization has come to a definition is perhaps the Council of Europe in the European Convention on the Suppression of Terrorism¹⁵ which contains a list of terrorist acts as defined by international conventions.¹⁶

The word “terrorist” is often associated with armed groups who gain notoriety for their wanton killing of innocent people. Terrorism has been termed as a ‘manifestation of rebellion and revolution against law-ordered society’.¹⁷ The reason that no formulated definition of terrorism gains universal international consensus is that though several acts may be termed as ‘terrorist acts’ they are so different that they do not have anything in common apart from their name.¹⁸ It has been opined that definitions which restricts terrorism to only private persons or government entities or those who oppose a State will not be objective and will be incomplete.¹⁹ The variation with regard to terrorist acts is in fact so much that many a times, what is termed as a military operation by one state is looked upon as terrorism by another.

August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3.

9International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609.

10 Friedlander, *Terrorism and National Liberation Movements: Can Rights Derive from Wrongs?*, 13 *CA&E W. RES. J. INT'L L.* 281, 288 (1981).

11 Levitt, *International Counterterrorism Cooperation: The Summit Seven and Air Terrorism*, 20 *VAND. J. TRANSNAT'L L.* 259, 259-60 (1987).

12 John Dugard, *Towards the Definition of International Terrorism*, 67 *Am. Soc'y Int'l L' Proc.* 94, 99 (1973).

13 Secretary-General's High-Level Panel on Threats, Challenges and Change, *More Secure World: Our Shared Responsibility, Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change*, 157, U.N. Doc. A/59/565 (Dec. 2, 2004). □

14 Cyrille Begorre-Bret, *Definition of Terrorism and the Challenge of Relativism*, *The*, 27 *Cardozo L. Rev.* 1987, 2004 (2005-2006).

15 Council of Europe, *European Convention on the Suppression of Terrorism*, 27 January 1977, ETS No. 90.

16 Eugenia Dumitriu, *E.U.'s Definition of Terrorism: The Council Framework Decision on Combating Terrorism*, *The*, 5 *German L.J.* 585, 602 (2004).

17 Robert A. Friedlander, *Terrorism*, 2 *Barrister* 10, 71 (1975).

18 Cyrille Begorre-Bret, *Definition of Terrorism and the Challenge of Relativism*, *The*, 27 *Cardozo L. Rev.* 1987, 2004 (2005-2006).

19 Jordan J. Paust, *Terrorism's Proscription and Core Elements of an Objective Definition*, 8 *Santa Clara J. Int'l L.* 51, 68 (2010).

As opposed to terrorism, 'military' connotes some degree of legitimacy as military forces are the official (de jure) forces of a State. However, if it is a failed state or if it is a self-proclaimed state (such as ISIS)²⁰, the so called military itself might do acts that are more heinous and excessive than terrorists. Scale of violence cannot be a test to distinguish terrorism from military operations as many a times, militaries may outdo terrorist organizations in the scale of deaths and destruction. Neither can organization and command hierarchy be taken as differentiating factors as many sophisticated terrorist organizations are known to follow a disciplined structure and a chain of command.

What are perhaps distinguishing features of terrorism from military operations are extremism (to the level of fanaticism) and the wantonness of the acts undertaken. A key example is the September 11 attacks on the World Trade Center in New York, United States of America. Also, while a military is allied to a political organization such a State, terrorists often claim to be linked with religion.

Another significant differentiating factor is the means by which the act is attributed to the State (and whether it is sought to be attributed or not) i.e. what mode of attribution is applied by the international legal community. This is a somewhat artificial differentiating factor because it first depends on the characterization of an act as being either a terrorist act or being a military operation. However, this is still an important factor as ultimately States being key players in the sphere of public international law and being members of the United Nations and ipso facto being member of International Court of Justice (ICJ) as well as International Criminal Court, are sought to be held responsible for the acts of their military and in some cases, the terrorist organizations originating from their soil.

Various modes of attribution will be subsequently explored as well as their suitability to military operation and terrorist acts.

Articles of State Responsibility

The word 'attribution' is an underlying concept of state responsibility²¹ and is generally immediately associated with the Draft Articles of State Responsibility for Internationally Wrongful Acts (hereinafter referred to as 'Articles').²² These Articles aim to emphasize secondary rules of State Responsibility, rather than define content of international obligations.²³ They enjoy international consensus at least to its basic structure and

20 *What is Islamic State*, British Broadcasting Corporation (BBC). Available at: <http://www.bbc.com/news/world-middle-east-29052144> (last accessed August 19, 2016).

21 James R. Crawford, *State Responsibility*, Oxford Public International Law. Available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1093> (last accessed August 19, 2016).

22 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.

23 International Law Commission, *Commentary on Draft Articles of State Responsibility*, International Law Commission. Available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last accessed August 18, 2016).

individual provisions²⁴

Article 2 of these Articles lay down a cardinal rule that:

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) is attributable to the State under international law; and*
- (b) constitutes a breach of an international obligation of the State.*

Therefore, an internationally wrongful act of a State consists of two elements (which were also specified in Morocco Phosphates case)²⁵- attribution and breach of an international obligation. The former is referred to as the subjective element and the latter is referred to as an objective element.²⁶ Regarding the latter, Article 3 sets out that whether an act is ‘internationally wrongful’ is dependent on international law and is independent of internal law. What Article 3 means is that a state cannot plead the rectitude of its actions with reference to its domestic law.²⁷ If a claim has its basis in breach of an international obligation, it cannot be claimed by the State that the obligation is also domestic in nature and hence is to be governed by internal law.²⁸ If there is an international obligation and domestic obligation for the same circumstance, the international obligation has precedence.

Attribution of conduct to a State is dealt with in Chapter II (Articles 4-11). Article 4 stipulates that the conduct of an organ of a State is considered an act of the State. This is irrespective of whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. It also includes a person or entity which has the status of an organ in accordance with the internal law of the State.

Article 5 lays that if an entity is not an organ (hence not covered by Article 4) but nevertheless has power (derived legally) to exercise elements of the governmental authority, the act of that entity can be considered as an act of that State so long as it is acting in its capacity for the given act. Article 6 is regarding conduct of organs placed at the disposal of a state by another state. Article 7 highlights what is known as the ‘vicarious liability principle’ in common law on an international scale. According to

24 International Law Commission, *Commentary on Draft Articles of State Responsibility*, International Law Commission. Available at : http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last accessed August 18, 2016).

25 *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 10

26 International Law Commission, *Commentary on Draft Articles of State Responsibility*, International Law Commission. Available at : http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last accessed August 18, 2016).

27 *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 44*.

28 *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*.

Article 7, if an entity is empowered as is referred to in Article 5, then the State will be responsible even if the entity has exceeded its authority or contravened its instructions.

Article 8 has particular relevance. It holds that if an individual/group is acting on the instruction of or under the direction or control of a State, then that act is the act of that State. It is immaterial whether the person is doing some private work or governmental activity.²⁹ The degree of control was discussed in the *Nicaragua judgment* (discussed in later sections). This Article impliedly distinguishes between military operations and acts by private individuals when either of them surpass the bounds of legality circumscribed by the direction given. If the unlawful act was incidental to the mission, it may not be attributable if it was done by a private person, but is someone under the effective control of a State (such as in a military operation), then conduct may not be attributable.³⁰

Due Diligence as a method of Attribution

In the 18th century, the conceptual basis behind the due diligence obligation was already in place in that it was commonly accepted that a sovereign was under a legal obligation to make good for the harm done (or punish or extradite) by his subjects, to aliens.³¹ Due diligence was also spoken of in relation to criminal acts in the *SS Lotus Case*³² by Justice Moore who stated it to be customary international law. Now due diligence has been broadened to criminal acts and one of its corollaries relates to counteracting terrorism.³³

Attribution to state because of breach of due diligence is indirect in nature.³⁴ The due diligence obligation is based on the simple line of reasoning that States have a duty to conduct due diligence in preventing terrorism, apart from proactively fighting against it. It follows that if terrorist activity occurs in a State because of its failure to conduct due diligence, it can be termed as an internationally wrongful act that is attributable to the State. Breach of due diligence obligation happens when a State is aware of terrorist/illegal activities on its soil and even has the means to put a stop to it, but does not take appropriate action.³⁵

The duty on the State is not so rigid as to hold the State responsible for all or any terrorist act whatsoever occurring within its territory. Due diligence test cannot be put into a

29International Law Commission, *Commentary on Draft Articles of State Responsibility*, International Law Commission. Available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last accessed August 18, 2016).

30International Law Commission, *Commentary on Draft Articles of State Responsibility*, International Law Commission. Available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last accessed August 18, 2016).

31 Duncan French & Tim Stephens, *ILA Study Group on Due Diligence in International Law First Report*, ILA

Available at: www.ila-hq.org/download.cfm/docid/8AC4DFA1-4AB6-4687-A265FF9C0137A699 (last accessed August 18, 2016).

32*SS Lotus case (France v. Turkey)*, PCIJ Series A No. 10.

33Tal Becker, *Terrorism and the state: rethinking the rules of state responsibility* 145 (2006).

34 Jan Arno Hessbruegge, *Historical Development of the Doctrines of Attribution and Due Diligence in International Law*, *The 36 NYU J. INT'L L. POL.* 265, 268–69 (2004).

35*Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*; *Order*, 12 V 81, International Court of Justice (ICJ), 12 May 1981.

straitjacket formula and has to be sufficiently flexible to adapt to the capacity of the State and the graveness of the terrorism threat.³⁶ However, the due diligence threshold requires that the State utilizes its resources and does whatever can be seemed expedient to prevent terrorism and to suppress it.³⁷ In *Alabama State Arbitration Case*,³⁸ it was held that the due diligence standard needs a government that is neutral in order to act in ratio to the risks that the belligerents could be exposed to due to the breach of the obligation to stay neutral.

Though the concept of due diligence is conspicuously absent from the ASR, the International Law Commission has referred to in the Draft Articles on the Prevention of Trans-boundary Harm from Hazardous Activities³⁹ wherein due diligence has been elaborated on as a duty to prevent or minimize activities and the standard of due diligence has to be perceived by juxtaposing it with proportionality.

It is debatable whether due diligence is the very content of the international duty or whether it is an objective component which enhances the international obligation in question.⁴⁰ However, the former seems more expedient as a breach of a due diligence itself can trigger State Responsibility. The inherent reasoning is that a State must carry forth due diligence *before* or *during* the threat of terrorism arises, as due diligence is a measure that is preventative in nature, not remedial. Due diligence may consist of a very strong Intelligence Network and actively curbing terrorism.

Though due diligence is always spoken of in relation to terrorist activities, its basis is any type of illegal activity and it can be stretched to cover illegal acts by military or paramilitary as well.

Responsibility due to Passive Support/Acquiescence

It has been noted that there is a marked difference between failing to conducting due diligence and simply tolerating or acquiescing to terrorism.⁴¹ Due Diligence Obligation means that states have a duty to actively curb and avoid illegal acts. However, if a State is accused of giving passive support, it means that it not only breached its due diligence obligation but it is also responsible for actively facilitating the perpetration in question.

There are many forms of support to terrorism- active internal support, passive external support, active internal support and passive international support.⁴² It has been observed worldwide that terrorism is often carried out with the passive support of the sanctuary

36 R. Pisillo-Mazzeschi, *Due Diligence Rule and Nature of the International Responsibility of States*, *The 35 German Y B Intl L* 17 (1992).

37 Tal Becker, *Terrorism and the state: rethinking the rules of state responsibility* 145 (2006).

38 *Alabama Claims Arbitration* (United States/Great Britain) (1872) 29 RIAA 125, 129. □

39 Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, *Yearbook of the International Law Commission, 2001*, vol. II, Part Two.

40 Vincent Joel-Proulx, *Transnational Terrorism and State Accountability: A New Theory of Prevention* 250 (Hart Publishing 2012).

41 G. Townsend, *State Responsibility for Acts of de Facto Agents*, 14 *Ariz. J. Intl & Comp L* 635, 651 (1997).

42 United States Department of the Army, *U.S. Army Counterinsurgency Handbook*, n.p (2007).

state⁴³ and that terrorism is used as a backhanded strategy by militarily or diplomatically weak States.⁴⁴ There are many reasons for tolerating terrorism including widespread support for the terrorist organization from inside the country and when a state reckons that no direct harm/cost will come to it by allowing the terrorist organization to function in its midst.⁴⁵

UN Declaration on Friendly Relations⁴⁶ requires States to refrain from passively supporting international terrorism in that states are under a duty to not acquiesce in the commission of terrorist acts in other states. Customary International Law envisages that States prevent their territory from being used as a sanctuary for terrorist acts for aliens, whether inside the territory or abroad.⁴⁷ Security Council Resolutions (which are legally binding on all member states)⁴⁸ state that States desist from giving any kind of support to terrorists, including curbing recruitment to such groups and restricting supply of weapons.⁴⁹

Knowledge determines the difference between whether it can be proved that a country is passively supporting terrorism or not. In the Corfu Channel case⁵⁰ which was regarding land mines, the central question was whether Albania had knowledge of the mines and failed to do anything about it. The court said that there is an obligation on each State to not knowingly let its territory be used for the commission of acts that are against the rights of other states. Turning a blind eye to terrorist acts constitute knowledge as that itself will be breach of the due diligence obligation to keep awareness and gain information regarding such activities.

Passive support theory is not usually applied to an (unruly) military action as military being the de jure organ, active support is implied. When the link between the terrorist act and the State is amply evident, a State cannot argue that terrorist organizations do not trigger its responsibility under Article 2(4) of the U.N. Charter.⁵¹ However, when the link between the State and terrorism is clear but it results from a genuine inability of the State to counter terrorism, then predicting the outcome is less simple.

43Proulx, V. J., *Babysitting Terrorists: Should States Be Strictly Liable for Failing to Prevent Transborder Attacks*, 23 Berkeley J. Int'l Law. 615 (2005).

44Cyrille Begorre-Bret, *Definition of Terrorism and the Challenge of Relativism*, The, 27 Cardozo L. Rev. 1987, 2004 (2005-2006).

45William C. Banks, Renée de Nevers, Mitchel B. Wallerstein, *Combating Terrorism: Strategies and Approaches*, n.p. (2008).

46UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, 24 October 1970, A/RES/2625(XXV).

47Jackson Nyamuya Maogoto, *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror* 159 (Routledge 2016) (2005).

48United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Art. 25.

49 SC Resolution 1373 (2001). Available at [http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20\(2001\).pdf](http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20(2001).pdf) (last accessed August 19, 2016).

50 *Corfu Channel Case (United Kingdom v. Albania); Assessment of Compensation*, 15 XII 49, International Court of Justice (ICJ), 15 December 1949.

51 Jack M. Beard, *America's New War on Terror The Case for Self-Defense Under International Law*, 25 Harv J L & Pub Poly 559, 581-82 (2002).

Genuine inability as an excuse

According to Pisillo Mazzeschi, if a State fails to control the growth of terrorism due to its genuine inability to check the same, that too will suffice to trigger its responsibility.⁵² However, this has been criticized as the due diligence obligation also includes having the means to stall terrorism. If a State does not have means to stall terrorism, due diligence obligation cannot be triggered. It has also been suggested that if a State is deemed incapable of curbing illegal activities on its soil, other States cannot be stopped from weeding out the terrorists in the name of sovereignty and territorial inviolability.⁵³

This is analogous to how Osama bin Laden was captured by US Navy Seals at Abbottabad. This line of thought is also in tandem with the evolving theory of 'Responsibility to Protect' which holds that when sovereign states are unable or unwilling to protect their citizens from things such as rape and starvation, the responsibility to avoid the same shifts to the world community at large and entitles them to intervene under some regulated circumstances.⁵⁴

Judicially Evolved Tests for Attribution

The Nicaragua Effective Control Test

In the Nicaragua case,⁵⁵ the entities were not de jure organs of the State but were acting on State's behalf. The United States of America was the country to whom attribution was sought. Two types of state support were outlined-one type which was paid, equipped, supported by, and operating according to the 'planning and direction' of organs of the state and the second type which was financed and equipped by a foreign state but was not wholly dependent on it.⁵⁶ While there is a direct case of attributability for the first type, for the second type it is less clear.

It was held that for attribution to happen with regard to violations of human rights by the entity in question, USA needed to have 'effective control'. Effective control was taken to mean direction or enforcement of commission of those acts that run in contravention to human rights and/or humanitarian law.

52Tal becker, terrorism and the state: rethinking the rules of state responsibility (2006).

53 R. Vark, *State Responsibility for Private Armed Groups in the Context of Terrorism*, Juridica International. Available at: <http://www.juridicainternational.eu/?id=12655> (last accessed August 18, 2016).

54*Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty Available at: <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (last accessed August 19, 2016) p. VIII.

55*Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*; *Merits*, International Court of Justice (ICJ), 27 June 1986.

56Antonio Cassese, *The Nicaragua and Tadic Rests Revisited in the Light of the ICJ Judgment on Genocide in Bosnia*, European Journal of International Law. Available at <http://ejil.oxfordjournals.org/content/18/4/649.full> (last accessed August 17, 2016).

This test is criticized as there are no customary international laws or rules or any other kind of framework that was prevalent at that time.⁵⁷ It has also been noted that the effective control test is incompatible with international law as states cannot be allowed to shirk off responsibility for their acts simply because they used a group of persons who were not their own officials to carry forth the same.⁵⁸

The Tadic Overall Control Test

The Overall Control test evolved in Tadic was not evolved with the intent of delving into the concept of State Responsibility per se. The test had to be created as it was to be proved that in the conflict involving Bosnian Serb military and Bosnian Muslims, the Bosnian Serb units were acting on behalf of the State. The question was whether these units 'belonged to' the State.

The judgment noted that there was no guideline for determining the nature of authority or control that had to be exercised in order for it to be said that an entity 'belonged to' one particular State but the one relevant guideline were the rules which were used to establish state responsibility due to de facto state organs. Two different degrees of control were identified:

1. When a state engages individuals to commit unlawful acts in the territory of another state. For this specific instructions are necessary from the state in question or else subsequent public ratification. This is linked to the Nicaragua case.
2. When military or paramilitary units were involved, specific instructions were not required and overall control was deemed to suffice. This involved equipping, financing/training and operational support. In the absence of the same involvement in coordination or overall planning was also accepted as sufficient.

Though both tests could be used for both, military operation and terrorist acts, the first is more conducive to the latter and the second to the former. The Tadic test is more flexible and leaves less of a loophole for state to avoid responsibility.

Reconsidered in Genocide Judgment

In the *Genocide Judgment*,⁵⁹ one issue before the ICJ was regarding whether the armed forces who had perpetrated in Bosnia had acted on behalf of Yugoslavia. The officers in question were not organs (de jure or otherwise) and hence the Court tried to see if state responsibility could be triggered otherwise. In the judgment it is opined that the Nicaragua test is similar to Article 8 of ASR (which is reflective of customary

57 Antonio Cassese, *The Nicaragua and Tadic Rests Revisited in the Light of the ICJ Judgment on Genocide in Bosnia*, European Journal of International Law. Available at <http://ejil.oxfordjournals.org/content/18/4/649.full> (last accessed August 17, 2016).

58 Antonio Cassese, *The Nicaragua and Tadic Rests Revisited in the Light of the ICJ Judgment on Genocide in Bosnia*, European Journal of International Law. Available at <http://ejil.oxfordjournals.org/content/18/4/649.full> (last accessed August 17, 2016).

59 *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, General List No. 118, International Court of Justice (ICJ), 18 November 2008.

international law). The court held that the three conditions in Article 8 are disjunctive. Test evolved in Tadic was rejected, one of the reasons of which was that it overly broadened state responsibility beyond the contours prescribed by Article 8. But here it can be pointed out that in the wake of growing terrorism and in the view that law (even contemporary international law) is dynamic in nature, the world would be better off having a broader law on state responsibility than an unduly restrictive one.

Conclusion

Though it is apparent that military operations are publicly perceived to be much different to Terrorist acts, in practicality it is difficult not only to define and conceptualize the two terms but also to differentiate between them. Though the words Attribution and State Responsibility are many times used interchangeably, there is a difference in the two because attribution along with an internationally wrongful act triggers State Responsibility.

There are various modes of attribution (and of triggering State Responsibility) and this is also one factor of distinguishing between military operations and terrorist acts. Though it is relatively straightforward to hold a State responsible for its military operations, it is complicated to attribute responsibility for terrorist actions. Articles of State Responsibility for Internationally Wrongful Acts can be applied to both. Breach of due diligence obligation and passive support are arguments that can be used to establish terrorist acts to be attributable to a State. Admittedly, they could also be used for military operations, but a more clear-cut argument using Articles of State Responsibility is to be preferred. The two judicially evolved tests (in the Nicaragua and Tadic cases) are both useful and fill in the gaps left by the theories and Articles of State Responsibility.

The interpretation of all the above must be done purposively to enhance attribution ease to States, not restrict it. However, on the other hand, in light of the fact that many (especially less developed or developing States) do not have the resources to combat terrorism, the Responsibility to Protect Principle can be evoked in order to shift the burden of combating terrorism on the world community at large i.e. states who have the ability and willingness to do so.

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