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**TAL BECKER, *TERRORISM AND THE STATE*;
RETHINKING THE RULES OF STATE RESPONSIBILITY
(PORTLAND: HART PUBLISHING, 2006)**

*Par Kimberley N. Trapp**

Terrorism and the State; Rethinking the Rules of State Responsibility by Dr. Tal Becker¹ is an ambitious project. Dr. Becker goes ‘head to head’ with the agency paradigm of direct State responsibility for private conduct, as consecrated by the International Law Commission (‘ILC’),² and proposes a causality based approach of State responsibility for private acts of international terrorism. Dr. Becker holds a masters degree from the Hebrew University and received his doctorate from Columbia University. *Terrorism and the State* began as Dr. Becker’s doctoral dissertation, but was completed while he served as legal counsel to the Permanent Mission of Israel to the United Nations from 2001-2005. Dr. Becker also served as Vice-Chairman of the Legal Committee of the UN General Assembly. While the book is written in his personal capacity, Dr. Becker’s experience at the United Nations undoubtedly shaped his thinking and research on terrorism related issues. Indeed, his analysis is occasioned by the increasing threat posed by non-State terrorist actors, for whose conduct the State will rarely be directly responsible, and what he perceives to be the inadequacies of the international legal system in responding thereto. Dr. Becker’s project is driven primarily by his conviction that indirect State responsibility for private acts of terrorism³ is too blunt a tool in the ‘war on terror’ and that direct responsibility would better serve the interests of peace and security. While there may certainly be cause to question his underlying assumptions, Dr. Becker’s conclusion that principles of causation offer a more effective and attractive framework for regulating State responsibility for private acts of terrorism is carefully argued and certainly thought provoking. The paradigm shift Dr. Becker offers is intended to stimulate debate on the nature and framework of State responsibility in international law – and is not entirely limited by his focus on international terrorism. As such, his study is of interest to international lawyers generally, in addition to being of particular use to scholars who focus on terrorism.

In his second and third chapters, Dr. Becker traces the emergence of the ‘separate delict theory’ in State responsibility, pursuant to which the State is only held directly responsible for its own wrongful conduct in reference to private acts, and not for the private acts themselves. He distinguishes the separate delict theory from its

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¹ Tal Becker, *Terrorism and the State; Rethinking the Rules of State Responsibility* (Portland: Hart Publishing, 2006).

² “Responsibility of States for Internationally Wrongful Acts”, GA Res. 56/83, UN GAOR, 56th Sess., Supp. No 49, UN Doc. A/RES/56/83 (2001), Annex [Articles on State Responsibility].

³ Indirect State responsibility is occasioned by the State’s own wrongdoing in reference to the private terrorist conduct. The State is not held responsible for the act of terrorism itself, but rather for its failure to prevent and/or punish such acts, or for its active support for or acquiescence in terrorism.

19th and early 20th century predecessors of complicity and condonation, under which a State could be held directly responsible for the conduct of private actors on the basis of its support for or approval of their wrongful acts. He accounts for this evolution in legal theory through the entrenchment of a fundamental separation between the sovereign State and the individual private citizen which emerged in the 20th century. In chapter 3, Dr. Becker examines the principle exception to the strict division between State and private domains occasioned by the separate delict theory – by way of which a State can be held directly responsible for the conduct of private actors *if* that conduct is attributable to the State. He reviews the bases for attributing the conduct of private actors to a State; as in cases where the State has used those private actors as its *de facto* agents, adopted their conduct as its own, or the private actors act as agents of necessity on behalf of the State in circumstances calling for the exercise of governmental authority. Dr. Becker argues that the rules of attribution, codified in the ILC's Articles on State Responsibility, are based on an agency paradigm which defines the limits of a State's direct responsibility under international law. His review of the doctrine, international jurisprudence (including in the human rights and environmental protection contexts), codification efforts and State practice – which for the most part support the separate delict theory of State responsibility – is dense but comprehensive and serves as an excellent reference tool for novices and State responsibility scholars alike.

In the fourth chapter of the book, Dr. Becker provides a clear and concise account of States' counter-terrorism obligations. By way of introduction, he maps the contours of the emerging international consensus on a definition of terrorism, however imperfect, and offers his own definition of terrorism for the purposes of examining State responsibility for private acts. Of particular interest and originality is Dr. Becker's analysis of the long-time debate regarding the need to distinguish terrorism from struggles for self-determination. Through an examination of the regional terrorism suppression conventions adopted by countries which support the need for such a distinction, Dr. Becker concludes that even the proponents thereof accept that violence which does not conform to the requirements of international (in particular humanitarian) law can be characterised as terrorist. The second part of Chapter 4 summarises the basic components of the obligations to prevent and punish international terrorism, as set forth in general international law, the series of terrorism suppression conventions adopted in relation to particular terrorist crimes, and most recently Security Council resolutions adopted under Chapter VII.⁴ In his examination of the Security Council's resolutions, and the Counter Terrorism Committee's approach to capacity building pursuant thereto, Dr. Becker notes the inadequacies of focusing on prevention and States' legislative and administrative capabilities given the role that States play in fostering and facilitating terrorism. In that critique, which highlights the distinction between capacity to fight terrorism on paper and the political will necessary to do so on the ground, Dr. Becker's preference for direct

⁴ Dr. Becker focuses on the first of the Security Council's counter-terrorism resolutions, SC Res. 1373 (2001), mentioning briefly the subsequently adopted resolutions 1540 (2003), 1566 (2004) and 1624 (2005).

responsibility (over the indirect responsibility occasioned by a failure to prevent private acts of terrorism) begins to emerge.

The final part of chapter 4 provides an insightful analysis of the standard of care and burden of proof used to measure a State's compliance with its obligations to prevent private acts of terrorism and to abstain from supporting or acquiescing therein. In particular, Dr. Becker examines the role of knowledge and fault in engaging a States' indirect responsibility for private acts of terrorism, and considers the difficult issues raised by failed or weak States in the context of determining whether such States have exercised due diligence in carrying out their counter-terrorism obligations. He draws attention to the complicated balance that needs to be struck between appreciating a State's capacity (or rather incapacity) to prevent terrorism in assessing its compliance, and the security interests of the international community. Dr. Becker's contribution to the literature in this regard is his thoughtful analysis of the two separate components of the due diligence obligation in the counter-terrorism context; the State's duty to pursue and acquire the requisite territorial control, as well as the legal, security and administrative apparatus, to meet its due diligence obligation; and to employ those capabilities with due diligence in order to prevent and suppress private terrorist activity. Finally, Dr. Becker examines the burden of proof applicable to establishing that a State has failed to comply with its counter-terrorism obligations. Burden of proof questions as they relate to terrorism are rarely discussed in the literature, and Dr. Becker's approach to evidentiary issues reflects a sophisticated understanding of the difficulties involved in substantiating a State's clandestine involvement in terrorism.

Chapters 5 and 6 lay the foundation for the central thesis of the book, measuring the rules of State responsibility as applied in the counter-terrorism context against State practice. In Chapter 5, Dr. Becker argues that the means of assessing a State's responsibility, which conditions whether the State is held directly or indirectly responsible for private acts of terrorism, have important consequences for the permissibility of a use of force in self-defence against non-State terrorist attacks and informs the legitimate scope and targets of defensive measures.⁵ He reviews the theories pursuant to which a State's direct responsibility for an armed attack is assessed and gives a comprehensive overview of the pre-September 11th State practice in responding to private acts of terrorism with defensive force. His frank assessment of the legal value of State practice, and attempt to identify threads of legal reasoning in political statements justifying a defensive use of force, inform his conclusion that such justifications are never accepted or rejected on the basis of the host State's direct responsibility for the terrorist attack under the agency paradigm. Nevertheless, he identifies reluctance on the part of the international community to treat the host State as the author of a private terrorist attack, and acknowledges that

the international community has preferred to treat States as responsible only for violating the duty to prevent and to abstain, while limiting the

⁵ Dr. Becker emphasizes throughout the book that the legitimacy of defensive measures against non-State terrorist actors or the States which harbour them will still always be subject to the *jus ad bellum* requirements of necessity and proportionality.

appellation of perpetrator to the immediate private offenders... The parallels to the agency paradigm of responsibility are therefore evident.⁶

This is far from a ringing endorsement of the need to reconceptualise the rules of State responsibility, in particular the agency paradigm, in order to respond to the particularities of the terrorism context. Dr. Becker's project is therefore conditioned on his assessment of September 11th and the international response thereto as a turning point for the law of State responsibility – in that the particular circumstances of Taliban support for and acquiescence in Al Qaeda's activities provide an opportunity to isolate the question of direct State responsibility for private terrorist activity and to test it against prevailing perspectives. In Chapter 6, Dr. Becker provides an excellent summary of the ink spilled on questions related to State responsibility prompted by September 11th and the response thereto, but finds little satisfaction in the theories advanced to explain the legality (or illegality) of the U.S. operations in Afghanistan ('Operation Enduring Freedom'). In this regard, one of Dr. Becker's principal claims is that "Operation Enduring Freedom was explicitly justified on the contentious claim that the act of harbouring terrorists is *legally* indistinguishable from the actual perpetration of the terrorist acts"⁷ and that the "United States and its supporters were [...] alleging that [...] Taliban wrongdoing – in the form of harbouring and failure to prevent – was a sufficient basis for triggering direct responsibility."⁸ Dr. Becker appears to glean these *legal* claims from statements like those made by President Bush to the effect that that the United States would make "no distinction between the terrorists who committed the attacks and those who harbour them" and "[b]y aiding and abetting murder, the Taliban regime is committing murder." But there is certainly something to be said for the argument that this language did not amount to a legal characterisation of the Taliban's role in the September 11th attacks. Indeed, in describing the Taliban's role in the attacks to the Security Council, the U.S. limited itself to highlighting Taliban support for Al Qaeda.⁹ Nevertheless, Dr. Becker's critique of the agency paradigm is based primarily on his characterisation of the justification offered for the U.S. use of defensive force against Taliban targets as a *legal* justification. As the Taliban's direct responsibility for the September 11th attacks is not triggered pursuant to an agency analysis, Dr. Becker sees in the targeting decisions of Operation Enduring Freedom an opportunity to explore a causality based approach to State responsibility.¹⁰

Dr. Becker's critique of the agency paradigm in the terrorism context is also driven by his assessment of the role that the language of State responsibility should

⁶ Becker, *supra* note 1 at 208.

⁷ Becker, *supra* note 1 at 218, emphasis added.

⁸ *Ibid.* at 229.

⁹ *Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council*, Doc. S/2001/946 (2001). See also Christine Gray, *International Law and the Use of Force*, 2nd ed. (Oxford: Oxford University Press, 2004) at 166.

¹⁰ Dr. Becker concludes chapter six by asserting that "if legal considerations about State responsibility dictated the scope of the response [...], it is necessary to try and identify what those considerations might have been." Becker, *supra* note 1 at 237.

play in describing State participation in private acts of terrorism. He argues that the agency paradigm is inadequate for the purposes of describing the actual relationship between private terrorist actors and the States which facilitate their activities – in that these relationships are much more complex than “marionette and puppeteer.”¹¹ Underlying this argument is an assumption that it is the language of responsibility which needs to describe the State’s role in terrorism, rather than a violation of the primary rules to which such responsibility attaches. One might argue that there is ample scope in the concepts of prevention or acquiescence to account properly for the realities of State participation in private acts of terrorism.

Based on his critique of the agency paradigm of State responsibility in the terrorism context, Dr. Becker explores an alternative approach – one which relies on a causal analysis of responsibility. In Chapter 8, he sets forth a common sense approach to causation, drawing heavily on HLA Hart and Tony Honore’s seminal work entitled *Causation in the Law*. He considers principles of causation to represent “the archetypal ‘general principles of law’ recognized by the Statute of the International Court of Justice as a potential source of international law,”¹² and argues that the usual caution against drawing analogies from private law is unwarranted in this context. Having briefly sketched the causality framework (which designates something as a ‘cause’ if it is both necessary to produce the event and constitutes an abnormal intervention in the existing or expected State of affairs), Dr. Becker then examines whether principles of causation can account for both State action and omission in determining responsibility for terrorism. He offers a careful analysis of the international jurisprudence, codification efforts (including the ILC’s Articles on State Responsibility) and opinions of jurists which draw on causality in determining the scope of a State’s responsibility for private conduct, in an effort to establish that causality is not entirely alien to the international law of State responsibility. While Dr. Becker acknowledges that the typical cases in which State responsibility is traced through causality involve the payment of damages, he rejects limiting the relevance of causality to questions of compensation because of the role direct responsibility might play in determining the legitimacy of counter-measures or the use of force in self-defence.

In his final Chapter, Dr. Becker operationalises his causality based approach to State responsibility for private terrorist conduct. He sets out a four step test for determining responsibility: a factual test as to whether an act or omission can be regarded as State conduct by operation of the principles of attribution; a legal test as to whether the attributed act or omission is an internationally wrongful act; a causal test to determine the scope of responsibility that arises from the State’s wrongful act; and a policy test to determine whether non-causal considerations justify enhancing or diminishing the responsibility of the State.¹³ Dr. Becker’s framework for determining responsibility does not do away with the rules of attribution, and indeed strongly

¹¹ *Ibid.* at 258.

¹² *Ibid.* at 288.

¹³ *Ibid.* at 332.

affirms their relevance in defining State conduct. Instead, he emphasizes that the principal benefit of the causality based approach is that it

avoids the automatic rejection of direct State responsibility merely because of the absence of an agency relationship. As a result, it potentially exposes the Wrongdoing State to a greater range and intensity of remedies, as well as a higher degree of international attention and opprobrium for its contribution to the private terrorist activity.¹⁴

Dr. Becker then tests his causality approach against the international community's response to September 11th and concludes, unsurprisingly, that it explains the targeting decisions of Operation Enduring Freedom in a way that the agency paradigm – without being stretched beyond its limits – cannot.

Dr. Becker's thesis is best summarised as follows:

[T]he separate delict theory goes too far if it is taken to mean that responsibility is, as a matter of principle, restricted by an agency paradigm to those acts attributable to the State. By suppressing, or at least concealing, the role of causation in the calculus of responsibility, the separate delict theory has lowered a protective veil over the State, shielding it from the full measure of accountability for the consequences of its own wrongdoing.¹⁵

In order to be drawn into Dr. Becker's causality based world of State responsibility, one has to accept his argument that

[i]t is far less likely that a counter-terrorism failure, distinguished from engaging in the harmful conduct itself, will be treated with the same severity. As a result, the capacity to deter States from tolerating or sponsoring acts of terrorism is affected by the willingness to view the State as directly responsible for the private terrorist offence.¹⁶

In so arguing, Dr. Becker assumes that it is the legal characterisation of the fact, rather than the fact itself, which galvanises the international community into action. When a State fails to prevent terrorism, whether or not the law of State responsibility recognises the role that failure plays in facilitating private acts of terrorism by holding the State directly responsible for the private act itself (rather than indirectly responsible for its failure to prevent that act), the fact remains that the State is not the author of the terrorist act. Dr. Becker's critique of the agency paradigm (and the limited circumstances under which a State will be held directly responsible for

¹⁴ Becker, *supra* note 1 at 335.

¹⁵ *Ibid.* at 329.

¹⁶ *Ibid.* at 157. Dr. Becker concludes his study by claiming that "a causal model of State responsibility is superior in terms of its ability to enhance State compliance with counter-terrorism obligations and impose State accountability in event of their violation" (*Ibid.* at 357).

private acts of terrorism) therefore rests on the assumption that it is the language of State responsibility which colours the international community's appreciation of a State's involvement in private acts of terrorism. Given the increased profile of counter-terrorism obligations in the past five years, evidenced in particular by the Security Council's role in legislating with respect thereto, there seems little doubt that the international community is taking counter-terrorism failures very seriously – without there being any need to qualify those failures as anything more than what they are.

The causality based approach to State responsibility for private acts of terrorism also requires one to accept that the rules of State responsibility and the ILC's codification thereof, which Dr. Becker acknowledges are primarily concerned with compensation,¹⁷ need to be reconceptualised in order to respond properly to the realities of State practice under Article 51 of the UN Charter. While jurists' preoccupation with the ever increasing fragmentation of international law, and concomitant concerns about consistency (or rather inconsistency) in the law, certainly suggest the need for a responsibility regime which applies across the board, Dr. Becker does not fully address why a State should be held directly responsible for a private act of terrorism outside the use of defensive force context. Given the role that causality can play in the calculation of compensation¹⁸ – the need to replace the attribution analysis with one that more easily qualifies a State's responsibility for its participation in private terrorism as 'direct responsibility' is only called for to justify a use of force against a harbouring State (in addition to targeting the non-State actors operating from its territory). The real difficulty with such uses of force (and attempts to justify them) is that targeting a harbouring State directly is likely to decrease its counter-terrorism capacity, including its military capacity to effectively assert control over relevant parts of its territory. As a result, where a State's counter-terrorism failures are limited to a failure to prevent (or acquiescence in) terrorism, targeting the territorial State itself will very rarely, if ever, pass the necessity and proportionality thresholds of the *jus ad bellum*. One might therefore legitimately wonder if all the causality approach has given us is a more coherent legal explanation of the international community's response to September 11th. And based on the international community's negative reaction to Israel's use of force against both Hezbollah and Lebanese infrastructure in the summer of 2006, in response to terrorist attacks by Hezbollah,¹⁹ it may well have been premature to reconceptualise the rules of State

¹⁷ Becker, *supra* note 1 at 323.

¹⁸ Dr. Becker acknowledges that the fact that a State is held responsible for its own wrongdoing need not prevent a calculation of damages based on the actual harm caused by private terrorist activities – and indeed Dr. Becker argues that some of the jurisprudence uses the damage caused by the private terrorist act as a yardstick for compensation owed by the State (*Ibid.* at 169). Dr. Becker also argued, however, that “[w]here the State is held responsible only for its own counter-terrorism failures, awards corresponding to the private harm *may* be given but there is no international requirement to do so.... By contrast, where the State is held directly accountable for the private terrorist attack [...] [t]he State will be liable, as a matter of law, to compensate for the harm caused” (*Ibid.* at 169).

¹⁹ See K. N. Trapp, “Back to Basics: Necessity, Proportionality, and the Right of Self-Defence against Non-State Terrorist Actors”, (2007) 56 ICLQ 141 at 153-156.

responsibility and the agency paradigm on which they are based in order to legally justify uses of force against terrorist harbouring States.

Whether or not one agrees with Dr. Becker's project – and the resulting causality based approach to State responsibility - his comprehensive coverage of the difficult legal issues surrounding the question of State responsibility for private acts of terrorism is worth the read. His book represents an impressive research effort, drawing extensively on a wealth of legal sources, including doctrine, international jurisprudence, the negotiating history of relevant terrorism suppression conventions, and countless United Nations documents. For the most part, his research and analysis are uncoloured by the assumptions he makes about the legal justification for the targeting decisions of Operation Enduring Freedom and the role of direct responsibility in the maintenance of international peace and security – and represents the first attempt to systematically apply the rules of State responsibility to the terrorism context. It is therefore a significant contribution to the literature on both State responsibility and terrorism, even if its stated purpose is an effort to reconceptualise the former in order to respond to the particularities of the latter.