

UNLIKELY BEDFELLOWS: FEMINIST THEORY AND THE WAR ON TERROR

by Rachael Lorna Johnstone *

ABSTRACT

The contemporary threat of international terrorism has prompted states and scholars to reassess the public/private divide as it manifests in international law with particular regard to the principles of state responsibility. Much of the counter-terrorism debate reflects the feminist literature on international law published over the last two decades. This paper exposes striking similarities between the counter-terrorism arguments and those of feminist scholars. In both cases, the classical dichotomy between public and private spheres is challenged and states are called to be accountable for the unlawful conduct of non-state actors. Nonetheless, the public/private dichotomy remains at the heart of counter-terrorism strategies as well as the broader regimes of international law. Examples discussed in the conclusion include the non-recognition of “enemy combatants” as state organs or agents; privatization of military and non-military operations during the occupations of Afghanistan and Iraq; the privatization of gender discrimination in state (re-)building; and reinforcement of gender stereotypes and women’s private roles in the “War on Terror.” While the proponents of counter-terrorism leverage arguments against the public-private dichotomy in their favor, the similarities between the two positions end where the anti-terrorist position ultimately returns to the dichotomy and reinforces it in order to uphold state interests, effectively turning its back on women’s rights.

* Rachael Lorna Johnstone is Assistant Professor of Law at the University of Akureyri, Iceland where she has been based since 2003. She has studied at the University of Glasgow (LL.B. (Hons), 1999), the European Academy of Legal Theory, Brussels (LL.M., 2000) and the University of Toronto (S.J.D., 2004). She would like to thank Margrét Henreksdóttir, Kenneth Dorter, Garrett Barden and Giorgio Baruchello for comments on earlier drafts of this paper. All errors are the author’s own.

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INTRODUCTION

The contemporary threat of international terrorism has prompted states and scholars to reassess the public/private divide as it manifests in international law with particular regard to the principles of state responsibility. Without acknowledging the intellectual debt, much of the debate mirrors the concerns expressed by feminist theorists of international law in the 1990s. This paper explores similarities between some of the feminist literature and the counter-terrorism arguments in international law. The argument concludes that despite overlapping values in these two bodies of discourse there is no cause for optimism among feminists; the challenge to the public/private divide from the terrorism threat is unlikely to provide any relief to the most vulnerable of the world's women and, to the contrary, the public/private divide remains essential to both counter-terrorism strategies and the wider agendas of Western governments within the international system.

Part One briefly introduces the public/private divide and its place in international law. In Part Two, the feminist critiques of the public/private divide, from the 1990s to the present day, will be explored. Part Three examines post 9/11 challenges to the public/private divide in counter-terrorism literature and practice. Part Four provides examples illustrating that the public/private divide remains alive and well and is essential to the "War on Terror" at the expense of many of the world's women.

PART 1: THE PUBLIC/PRIVATE DIVIDE

The Public/Private Divide in International Law

Neither the dichotomy between public and private nor feminist concerns with the same require introduction to scholars of international law or feminist legal theory. The separation between public and private spheres lies at the heart of the liberal theory of the state and has been adopted into classical international law theory, no more so than in the International Law Commission's Articles on State Responsibility (ILC Articles).¹ Within the domestic realm, the public sphere is associated with political participation, macroeconomics and criminal justice.² The private sphere, by contrast, contains paradigmatically the family, as well as microeconomics, market trade, "private law" and employment.³

In practice, when trying to allocate aspects of daily life to public or private spheres, the dichotomy quickly collapses. Education of children would historically be considered a private matter, something either inside the family or contracted out to a private school system.⁴ In modern liberal democracies, education is provided directly by the state and even where private or home-schooling are options, education remains rigorously monitored.⁵ Private law may apply in

¹ Articles on Responsibility of States for Internationally Wrongful Acts, *in* Report of the International Law Commission on the Work of its Fifty-third Session, U.N. GAOR, 56th Sess., Supp. No. 10, at 43, U.N. Doc. A/56/10 (2001) [hereinafter ILC Articles].

² JOHN STUART MILL, ON LIBERTY, 62-63, 89-90 (David Spitz, ed., W.W. Norton & Co., New York: 1975) (1859).

³ *Id.* at 88 (on micro-economics and market trade), 91-92 (on employment), 94-96 (private law), 97-100 (the family), and 103-04 (micro-economics and market trade).

⁴ *Id.* at 97-100.

⁵ *E.g.*, In England and Wales, it is a criminal offense to operate a school without registering with the state and all schools are subject to regular inspections: Education Act, c. 32 (Eng. & Wal.) §§ 157-171 (2002) (*especially*, § 159).

relationships between private individuals, but it can only exist at all because the state creates the rules and staffs the courts in which those rules are adjudicated.

The assignment of life's experiences to public or private sectors entails an element of choice, but a sphere is public to the extent that the governing authorities of the state are active in its regulation or provision. A sphere remains private if the state remains uninvolved. Malcolm Evans explains: "the private sphere is only the private sphere *because* the State has not yet intruded into it."⁶ For this reason, certain aspects of life, such as healthcare, that are considered public in one state may be considered private in another. Such differences arise even between states that are ostensibly similar in political, economic and social bases.⁷

Despite its fluidity, the separation of the public and private has proven conceptually powerful and has become entrenched in the systems of international law.⁸ This entrenchment manifests itself at two levels. First, the state that is recognized in international law is largely composed of the institutions that the state recognizes as public under its internal order.⁹ The actor in international law, the creator of international legal norms and subject of state responsibility is

Parents opting to teach their children at home must also make formal agreements with their local education authority and meet various requirements: School Standards and Framework Act, c. 31 (Eng. & Wal.) §§ 110-111 (1998).

⁶ Malcolm D. Evans, *State Responsibility and the European Convention on Human Rights: Role and Realm*, in ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 139, 159 (Malgosia Fitzmaurice & Dan Sarooshi, eds., 2004); *see also* Nicola Lacey, *Theory into Practice? Pornography and the Public/Private Dichotomy?* 20 J.L. & SOC'Y 93, 96 (1993) (noting that a decision not to regulate is equally a political decision).

⁷ *E.g.*, Healthcare is publicly funded and operated in the United Kingdom and Canada, with a small private sector. In the United States, a similar common-law, English-speaking developed market economy, healthcare is overwhelmingly a matter of private insurance and private provision with the state taking a minimal supplementary interest in the most needy.

⁸ Doris Buss, *Austerlitz and International Law: A Feminist Reading at the Boundaries*, in INTERNATIONAL LAW: MODERN FEMINIST APPROACHES 87, 94 (Doris Buss & Ambreena Manji, eds., 2005).

⁹ ILC Articles, *supra* note 1, art. 4. It is theoretically possible to have organs or agents that are *not* defined by the internal order under the second paragraph of the article, but as explained by the commentaries to the article and confirmed in the Genocide Convention case, it is rare in practice; *see*, Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), reprinted in 46 I.L.M. 85, para. 393 (2007) (Feb. 26) [hereinafter *Genocide Convention case*].

the state, self-defined. The distinction between state and non-state actors is fundamental to international law; “private actions are not in principle attributable to the state.”¹⁰

Second, international law traditionally has permitted the public/private divide to be reflected in a separation between international and domestic spheres. Wholly internal (private) affairs are matters of domestic jurisdiction and hence of no interest to international law.¹¹ Just as the pater familias closes the door on his private family, shielding it from public scrutiny, so the state closes its gates to international scrutiny of its domestic affairs.¹² Rosa Ehrenreich Brooks describes this idea: “Until quite recently, international law viewed the state as a black box into which international law could not see – and did not wish to see.”¹³

The post-war development of international human rights law has brought challenges to this Westphalian model, bringing domestic affairs into the spotlight of international law.¹⁴ However, even within human rights law, the state reigns supreme. The state is the creator of international human rights law; it must consent to uphold human rights norms by virtue of treaty or acceptance of customary law.¹⁵ Furthermore, the distinction between public and private remains entrenched in human rights law to the extent that only states can be held accountable for violations, and state and non-state breaches of human rights law are treated quite differently within the discipline.¹⁶

¹⁰ ROSALYN HIGGINS, PROBLEMS AND PROCESSES: INTERNATIONAL LAW AND HOW WE USE IT 153 (1994). Higgins goes on to note exceptions which will be discussed *infra* text accompanying notes 16-27.

¹¹ Rosa Ehrenreich Brooks, *Feminist Justice, at Home and Abroad: Feminism and International Law: An Opportunity for Transformation*, 14 YALE J. L. & FEMINISM 345, 348 (2002).

¹² Shelley Wright, *Economic Rights, Social Justice and the State: A Feminist Reappraisal*, in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 117, 128-9 (Dorinda G. Dallmeyer, ed., 1993).

¹³ Rosa Ehrenreich Brooks, *supra* note 11.

¹⁴ *Id.* at 348-49.

¹⁵ ANTONIO CASSESE, INTERNATIONAL LAW, 2nd. Ed., 153-155 (2005).

¹⁶ States may be held accountable for private violations of human rights, but only on the basis of their failure to exercise due diligence to protect; the violation is therefore a separate delict (lack of due diligence) and not responsibility for the private violation *per se*.

State Responsibility in the ILC Articles

The distinction between public and private is reified in the ILC Articles, the second reading of which was finalized in 2001.¹⁷ Responsibility of states depends upon the identification of a state actor; responsibility for non-state violations of international law is regarded as quite exceptional. Articles 4, 5 and 8 identify actors for whom state responsibility is engaged.¹⁸ Article 4 refers to state organs, *de iure* or *de facto*, and article 8 refers to agents-actors who would normally be considered private but for the fact that they are acting under the direct control or following explicit instructions of a state organ identified in article 4.¹⁹ Article 5 allows state responsibility for private actors who are authorized to undertake “governmental” functions on behalf of the state.²⁰ The articles read:

Article 4 ***Conduct of organs of a State***

- 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.*
- 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.²¹*

¹⁷ ILC Articles, *supra* note 1.

¹⁸ *Id.*, arts. 4, 5 & 8.

¹⁹ *Id.*, arts. 4 & 8.

²⁰ *Id.*, art. 5.

²¹ *Id.*, art. 4.

Article 5
**Conduct of persons or entities exercising elements
of governmental authority**

*The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in that particular instance.*²²

Article 8
Conduct directed or controlled by a State

*The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction and control of, that State in carrying out the conduct.*²³

Although, under article 4(2) the internal law's categorization of an entity as "public" or "private" is not definitive, the identification of a state organ *de facto* is highly exceptional and requires a relationship of "complete dependence" or the absence of "any real autonomy."²⁴ Article 5 requires that the state specifically confer upon the entity the "state" (governmental) function and the actions of the para-statal entity are attributable only to the extent that they are indeed taken in the exercise of the governmental function.²⁵ The definition of "governmental" is inconclusive and ILC recognizes in the commentaries that this is a contextual standard. It is, as the ILC concludes, "a narrow category."²⁶ Under article 8, for the state to take responsibility for the conduct of private actors that it "directs or controls" requires a very high degree of control,

²² *Id.*, art. 5.

²³ *Id.*, art. 8.

²⁴ *Genocide Convention case*, 46 I.L.M. 85, para. 393 (2007) (Feb. 26), at paras. 393-94; *see also* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) 1986 I.C.J.14, 110 (June 27) [hereinafter *Nicaragua*].

²⁵ ILC Articles, *supra* note 1, art. 5.

²⁶ ILC Articles, *supra* note 1, commentary to art. 5, paras 6 & 7.

namely “effective control,” which can rarely be established absent explicit instructions, followed precisely, or direct, specific control over each wrongful act.²⁷

PART 2: FEMINIST CRITIQUES

Distinguishing Wife-Beaters and Those Who Harbor Them

The leading, early feminist assault on the public/private divide in international law is found in Charlesworth, Chinkin and Wright’s seminal 1991 article, *Feminist Approaches to International Law*.²⁸ The arguments in this article triggered a wealth of scholarship in which feminists remain actively engaged to the present day.²⁹ Within this body of academia, an ongoing tension arises between the desire to deconstruct the public/private divide altogether by demonstrating its vacuousness and a more pragmatic agenda that entails strategically and perhaps even skeptically accepting the divide, but demanding the inclusion of women’s concerns in public spaces.³⁰

Charlesworth, Chinkin and Wright’s famous article brought a feminist light to a number of areas of international law including colonialism and decolonization; the exclusion of women *de facto* in international organizations and as the creators of international law; the patriarchal

²⁷ *Genocide Convention case*, 46 I.L.M. 85, para. 393 (2007) (Feb. 26), at para. 400. For a more detailed analysis, see Rachael Lorna Johnstone, *State Responsibility: A Concerto for Court, Council & Committee*, 37(1) DENVER J. INT’L L. & POL’Y 63 at 64-75 (2008).

²⁸ Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT’L L. 613 (1991).

²⁹ See, e.g. INTERNATIONAL LAW: MODERN FEMINIST APPROACHES, *supra* note 8; RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW, *supra* note 12; WOMEN’S INTERNATIONAL HUMAN RIGHTS LAW: THE WAY FORWARD (Rebecca Cook, ed., 1994); Brooks, *supra* note 11; Anne Orford, *Feminism, Imperialism and the Mission of International Law*, 71 NORDIC J. INT’L L. 275 (2002).

³⁰ See, Buss, *supra* note 8, especially at 96-99; Karen Engle, *After the Collapse of the Public/Private Distinction: Strategizing Women’s Rights*, in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW, *supra* note 12, at 143-144.

premises behind the concept of the state; the state-centric basis of international law; and the presumed irrelevance of women's lives and experiences.³¹ They pointed to the marginalization of women's rights and weaker enforcement mechanisms for the Convention on the Elimination of All Forms of Discrimination Against Women compared to other human rights treaties and the tolerance of far-reaching reservations to the former Convention.³² They criticized the focus on rights, in particular civil and political rights, sometimes enjoyed at the expense of women, and on criteria of self-determination that ignore the participation or lack of participation by women in the identification of the "self" to be determined.³³ As interesting as these arguments are, this article will focus primarily on the feminist critique of the public/private dichotomy, as this critique is mirrored by counter-terrorism discourses. In counter-terrorism strategies, nonetheless, as this article will show, while the public/private dichotomy breaks down on the one hand with regard to state responsibility, it is simultaneously upheld on the other, with significant and costly repercussions for women.³⁴

Charlesworth et al., recognized that the precise boundaries of what constitutes public and private vary between different cultures.³⁵ Nonetheless, a common feature was that whenever there was a private sphere, women were found there.³⁶ However, in areas considered public, women were missing, invisible, or few in number.³⁷ This division of public and private spheres, emerging from the Western Liberal tradition, was now entrenched in international law.³⁸ Not

³¹ Charlesworth, *et al.*, *supra* note 28, at 621-22.

³² *Id.* at 631-33; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

³³ Charlesworth, *et al.*, *supra* note 28, 621-22, 625 & 634-38; *see also*, Hilary Charlesworth, *Alienating Oscar? Feminist Analysis of International Law*, in *RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW*, *supra* note 12, at 126.

³⁴ Charlesworth, *et al.*, *supra* note 28, at 625-30.

³⁵ *Id.* at 626.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 627.

only are the spheres separate, but the private sphere and the women within it are regarded as less important.³⁹ Moreover, “a universal pattern of identifying women's activities as private, and thus of lesser value, can be detected.”⁴⁰ The classical principles of state responsibility assume that only acts of state give rise to human rights violations. Harms that occur in private might be unwelcome, but they are not matters of human rights or *a fortiori* international law.⁴¹

Charlesworth later expands on the public/private dichotomy in human rights law, arguing that it is implicit in the separation of “generations” of rights and the preference for civil and political rights (liberal rights) to economic, social, cultural, and group rights.⁴² Wright illustrates the extent to which the public and private spheres exist in a symbiotic relationship where one cannot exist without the other and each defines the other.⁴³

Chinkin’s review of the drafting of the ILC articles is critical of the unquestioning assumption of a genuine distinction between public and private conduct.⁴⁴ Attribution of activity to the state depends on the character of the actor, not the character of the action. Although there is scope for exception, the identification of an actor as an organ of state is almost exclusively defined by the state’s internal law.⁴⁵ Chinkin expresses disappointment that expansion of the notion of due diligence, particularly in human rights law, has not been taken into account in the ILC Articles, recognizing that “non-regulation of the market is itself an expression of political preference.”⁴⁶ She suggests parallel policy choices in domestic and family issues.⁴⁷

³⁹ *Id.* at 626-27.

⁴⁰ *Id.* at 626.

⁴¹ *Id.* at 627.

⁴² Hilary Charlesworth, *What are “Women’s International Human Rights?”* in WOMEN’S INTERNATIONAL HUMAN RIGHTS LAW: THE WAY FORWARD, *supra* note 29, at 58, 71-76; *see also* Celina Romany, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, 85.

⁴³ Wright, *supra* note 12, at 120-23. *See also*, Christine Chinkin, *A Critique of the Public/ Private Dimension*, 10 EUR. J. INT’L L. 387, 389 (1999).

⁴⁴ Chinkin, *supra* note 43, at 387-89.

⁴⁵ *Id.* at 388; *see also supra* text accompanying note 24.

⁴⁶ Chinkin, *supra* note 43, at 392.

Competing Strategies

The tensions amongst feminist scholars, even within the programs of each individual feminist scholar, become apparent when they attempt to work with the critique in order to make international law more relevant to women's lives.⁴⁸ The most significant of these, alluded to above, is about whether or not to work within the existing scheme for incremental improvements. In other words, the feminist critique questions whether it is better to accept the public/private dichotomy at face value but demand that women's concerns be included in the public; or whether to decry the dichotomy altogether and dismantle the architecture of liberal theory and international law.⁴⁹

Rebecca Cook takes a pragmatic approach in her work on women's human rights.⁵⁰ Rather than seeking a radical overhaul of the entire international human rights system—because that may risk significant short-term losses in human rights protection for women and men alike—she speaks in a language that international law can hear.⁵¹ She argues that the principles of state responsibility be understood with a greater reflection on women's experiences, in particular, by expanding state responsibility for omissions.⁵²

⁴⁷ *Id.* at 395.

⁴⁸ Christine Chinkin, *Gender Inequality and International Human Rights Law*, in *INEQUALITY, GLOBALIZATION, AND WORLD POLITICS* 95, 121 (Andrew Hurrell & Ngaire Woods, eds., 1999); HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* 59-61 (2000).

⁴⁹ Doris Buss introduces the concept of "architecture" to explain the conceptual separation of public and private spaces in international law: Buss, *supra* note 8.

⁵⁰ Rebecca Cook, *State Accountability Under the Convention on the Elimination of All Forms of Discrimination Against Women*, in *WOMEN'S INTERNATIONAL HUMAN RIGHTS LAW: THE WAY FORWARD*, *supra* note 29, at 228 [hereinafter Cook, *State Accountability*]; Rebecca Cook, *Accountability in International Law for Violations of Women's Rights by Non-State Actors*, in *RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW*, *supra* note 12 at 93 [hereinafter Cook, *Accountability in International Law*].

⁵¹ Cook, *State Accountability*, *supra* note 50, especially at 237.

⁵² *Id.*; see also Cook, *Accountability in International Law*, *supra* note 50. See also, Kenneth Roth, *Domestic Violence as an International Human Rights Issue*, in *WOMEN'S INTERNATIONAL HUMAN RIGHTS LAW: THE WAY*

Cook cites the *Janes Arbitration* case as evidence of the distinction “in principle and in practice” between state responsibility for acts and omissions.⁵³ The case states that “[e]ven if non-punishment of a murderer really amounted to complicity in the murder, still it is not permissible to treat this... as just as serious as if the Government had perpetrated the killing with its own hands.”⁵⁴

Charlesworth and Chinkin contest this assumption at the heart of international law. Charlesworth argues: “if violence against women is understood, not just as aberrant behavior, but as part of the structure of the universal subordination of women, it can never be considered a purely “private” issue.”⁵⁵ Chinkin adds: “Why should the state only be responsible for the internationally wrongful acts of state organs? The state claims jurisdiction over the totality of functions within its territorial control; it might therefore be appropriate to assert its responsibility for all wrongful acts emanating from it, or from nationals subject to its jurisdiction.”⁵⁶ Together, they argue: “There is no reason why the maintenance of a legal and social system in which violence against women is endemic and accepted should not engage state responsibility directly, whether or not women are treated differently from men in this respect.”⁵⁷

Domestic violence is defined according to the liberal tradition by its occurrence in the private sphere because it is “domestic” as opposed to public.⁵⁸ It does not matter whether it occurs literally behind closed doors, in a dark alleyway or in a crowded public bar. The fact that

FORWARD, *supra* note 42, at 326, (arguing that direct state responsibility for private violations of human rights risks destabilizing the whole system of human rights protection and undoing the moral, social and political gains in the field because a number of groups could claim to be systematically oppressed and he fears dilution of the power of human rights language).

⁵³ Cook, *Accountability in International Law*, *supra* note 50, at 98.

⁵⁴ *Janes v United Mexican States*, 4 R.I.A.A. 82 (1951). *See also* TAL BECKER, TERRORISM AND THE STATE: RETHINKING THE RULES OF STATE RESPONSIBILITY, 17-23 (2006).

⁵⁵ Charlesworth, *supra* note 42, at 73.

⁵⁶ Chinkin, *supra* note 43, at 395.

⁵⁷ CHARLESWORTH & CHINKIN, *supra* note 48, at 149.

⁵⁸ Charlesworth, *et al.*, *supra* note 28, at 628-29.

it occurs between two people who are intimately acquainted renders the behavior domestic and thus private.⁵⁹ By contrast, it is not considered “domestic violence,” or even a private matter, when two work colleagues engage in a similar interaction, regardless of the length of time they have worked together and the apparent depth of their personal relationship with one another.⁶⁰ It is not the location of the abuse that defines abuse as public or private rather it is the way that the relationship between the perpetrator and victim are perceived. If it is not a familial relationship, it is not private.⁶¹

Responses and Ongoing Challenges

Feminist Approaches to International Law triggered a number of responses, including those among feminists sympathetic to the broader purpose of women’s inclusion in international law.⁶² These responses led to the more enriched and subtle critique that is prevalent today. There were two principal feminist replies to the public/private dichotomy as outlined in the 1991 article and both of these were swiftly taken into account in the authors’ later work.⁶³ The first was a response of feminists from developing and non-Western countries to a perceived “essentialism” in the early work; women everywhere might be subject to patriarchy, but its manifestations were

⁵⁹ *Id.* at 627.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See, e.g., Chandra Talpade Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourses in THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM* 51 (Chandra Talpade Mohanty, et al., eds., 1991); Radhika Coomaraswamy, *To Bellow Like a Cow: Women, Ethnicity, and the Discourse of Rights, in WOMEN’S INTERNATIONAL HUMAN RIGHTS LAW: THE WAY FORWARD*, *supra* note 29, at 39; Diane Otto, *Rethinking the “Universality” of Human Rights Law*, 29 COLUM. HUM. RTS. L. REV. 1 (1997/98); Engle, *supra* note 30; Lacey, *supra* note 6; Buss, *supra* note 8.

⁶³ CHARLESWORTH & CHINKIN, *supra* note 48; Charlesworth, *supra* note 42; Chinkin, *supra* note 43; Chinkin, *supra* note 48; Christine Chinkin, *Feminist Interventions into International Law*, 19 ADELAIDE L. REV. 13, 20 (1997); Wright, *supra* note 12.

not everywhere the same.⁶⁴ In some cases, first-world women are, if not complicit, at least the beneficiaries of a patriarchal and exploitative relationship between their countries and developing countries, which contributes to human and gender inequality. Further “women in developing countries” are not a homogenous group with shared concerns and interests. It is unhelpful for Western feminists to make sweeping assumptions about what is in their interests. Fundamentally, the rights strategy that fits well in Western liberal democracies as a language that institutions can understand may not fit well in other societies.⁶⁵ The second challenge came from feminists concerned that scholars were by their work reifying the public/private dichotomy.⁶⁶ Moreover, by associating all things “female” with the private, they were trapping women within it.⁶⁷ They were accused of falling into the easy habit of assuming that all women’s interests were by definition in the private sphere.⁶⁸ A related argument is that in some cases, the private sphere provides a refuge, a place of protection and freedom, for women.⁶⁹

In their 2000 text, *The Boundaries of International Law*, Charlesworth and Chinkin demonstrate a more nuanced appreciation of the diversity of women’s experiences.⁷⁰ They recognize that the allocation of human activity to public or private is not universal, but varies between societies.⁷¹ Further, they accept Coomaraswamy’s reflections that the state should not always be considered as a “Scandinavian” protector of its citizens.⁷² They acknowledge the potential of the private sphere as a site of liberation and freedom for women.⁷³ However, the

⁶⁴ Mohanty, *supra* note 62, Coomaraswamy, *supra* note 62, Otto, *supra* note 62.

⁶⁵ Mohanty, *supra* note 62, Coomaraswamy, *supra* note 62, Otto, *supra* note 62.

⁶⁶ Engle, *supra* note 30, at 146-148; Lacey, *supra* note 6, at 100-101; Buss, *supra* note 8.

⁶⁷ *Id.*

⁶⁸ Engle, *supra* note 30, at 146-148; Lacey, *supra* note 6, at 100-101; Buss, *supra* note 8.

⁶⁹ Engle, *supra* note 30, at 148-9; *see also*, Lacey, *supra* note 6, at 100. For a practical example, *see* Peter Beaumont, *Iran’s Young Women Find Private Path to Freedom*, THE OBSERVER (London), Mar. 16, 2008, at 42.

⁷⁰ CHARLESWORTH & CHINKIN, *supra* note 48.

⁷¹ *Id.* at 56-59, especially at 58.

⁷² *Id.* at 165.

⁷³ *Id.* at 57.

basic argument is the same; the public/private dichotomy is still thriving in international legal theory. Despite advances in human rights law with respect to states' positive duties to protect, violations of the rights of women are still not taken as seriously as those of men.⁷⁴ Moreover, the preference for civil and political rights reflects men's experiences of the need for protection against the state. Charlesworth and Chinkin consider the right to life, largely understood as requiring protection against state threats, but not against the risk of being conceived female.⁷⁵

Despite some frustration with the lack of changes and the maintenance of the architecture of international law with its stubborn even if illusory boundaries, the pragmatic approach of working within that architecture has shown some successes. The notion of positive duties has made considerable advancement within human rights law, and the human rights treaty bodies have taken on a more gender balanced perspective.⁷⁶ Chinkin's 1997 concern that there was "greater resistance" to the expansion of state liability for lack of due diligence to prevent private abuses against women has perhaps by now been overcome, at least in the human rights treaty bodies.⁷⁷

Although there remains a need to question artificial constructs that entrench inequality, the individual gains achieved by working within the system should also be celebrated. These

⁷⁴ *E.g.*, the norm against racial discrimination is *ius cogens*; the prohibition of discrimination against women, by contrast, is not. The prohibition of torture is likewise *ius cogens*; but torture is defined so as to encompass only abuse in the public sphere, omitting psychological and physical abuse perpetrated against women within their personal relationships, regardless of the gravity of the abuse. ILC Articles, *supra* note 1, commentary to art. 26, para. 5; CHARLESWORTH & CHINKIN, *id.*, at 16-17, 136-37 & 234-35.

⁷⁵ CHARLESWORTH & CHINKIN, *supra* note 48, at 233-34.

⁷⁶ Rachael Lorna Johnstone, *Feminist Influences on the United Nations Human Rights Treaty Bodies*, 28 HUM. RTS. Q. 148 (2006); *but see* Hilary Charlesworth, *Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations*, 18 HARV. HUM. RTS. J. 1 (2005) (arguing that gender mainstreaming at the United Nations has been largely superficial yet made it harder to address questions about entrenched gender inequality).

⁷⁷ Christine Chinkin, *Feminist Interventions into International Law*, *supra* note 63, at 20.

short-term victories are crucial for the women whose lives are affected and whose lives may even be saved.⁷⁸

PART THREE: THE “WAR ON TERROR”

International Terrorism

The attacks on the United States on September 11, 2001 (9/11), and perhaps even more significantly, the perceived need for a military response, have complicated traditional assumptions about state responsibility for the actions of non-state terrorists in ways reminiscent of the feminist discourse examined in Part Two above. Similar to the feminist scholarship, one can see two main shifts of perspective in the area. One works within the classical framework with a greater focus on the positive obligations of states to prevent terrorism and a higher degree of due diligence.⁷⁹ The other questions the entire basis of the public/private dichotomy, insists that terrorists cannot be distinguished from the states in which they are permitted to operate, and that state responsibility for terrorist activities should be direct.⁸⁰ These positions are not always clearly demarcated.

Despite thirteen treaties with global reach, a number of regional treaties, United Nations Security Council (the Council) resolutions and decades of experience, agreement on a precise

⁷⁸ Ehrenreich Brooks, *supra* note 11, 13, at 355; Chinkin, *Feminist Interventions into International Law*, *supra* note 63, 77, at 20; Chinkin, *supra* note 48, at 121; Martha Minow, *Interpreting Rights: an Essay for Robert Cover*, 96 YALE L.J. 1860, 1920 (1986); CHARLESWORTH & CHINKIN, *supra* note 48, at 212.

⁷⁹ E.g., Vincent Joël Proulx, *Babysitting Terrorists: Should States be Strictly Liable for Failing to Prevent Transborder Attacks?*, 22 BERKELEY J. INT’L L. 615 (2005); Derek Jinks, *State Responsibility for the Acts of Private Armed Groups*, 4 CHI. J. INT’L L. 83 (2003).

⁸⁰ E.g., BECKER, *supra* note 54; Greg Travalio & John Altenburg, *Terrorism, State Responsibility and the Use of Military Force*, 4 CHI. J. INT’L L. 97, especially 100-111 (2003).

definition of terrorism remains elusive.⁸¹ This paper will exclude instances of terrorist-like activities at the hands of state organs or agents (as defined by ILC articles 4 and 8) as these do not raise interesting questions about the public/private dichotomy.⁸² The focus instead will be on what is being said about state responsibility for terrorism when the actors are quite evidently *not* organs or agents within the definitions of the ILC Articles.

The United Nations Security Council

Since 2001, the Council has made a number of resolutions pertaining to terrorism and introduced new duties upon states to take measures to prevent terrorism.⁸³ The Council has done so, however, while maintaining an ambiguous stance as to the form of state responsibility for non-state cross-border terrorist activities.⁸⁴ On September 12, 2001, this ambiguity was almost certainly intentional, as it was not yet known who was behind the previous day's attacks, and further investigation may have uncovered direct links to a state or several states. In Resolution

⁸¹ Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sep. 14, 1963, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Seizures of Aircraft, Dec. 16, 1970, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sep. 23, 1971, 974 U.N.T.S. 177; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 1035 U.N.T.S. 167; International Convention Against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205; Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, 1456 U.N.T.S. 124; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, 1589 U.N.T.S. 474; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 304; Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, 30 I.L.M. 721 (1991); International Convention for the Suppression of Terrorist Bombings, Dec. 17, 1997 37 I.L.M. 249 (1998); International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270 (2000); International Convention for the Suppression of Acts of Nuclear Terrorism, Apr. 13, 2005, 44 I.L.M. 815 (2005).

⁸² ILC Articles, *supra* note 1, arts. 4 & 8.

⁸³ SC Res. 1368 (Sep. 12, 2001); SC Res. 1373 (Sep. 28, 2001); SC Res. 1390 (Jan. 16, 2002); SC Res. 1452 (Dec. 20, 2002); SC Res. 1455 (Jan. 17, 2003); SC Res. 1456 (Jan. 20, 2003); SC Res. 1526 (Jan. 30, 2004); SC Res. 1530 (March 11, 2004); SC Res. 1535 (March 26, 2005); SC Res. 1540 (April 28, 2004); SC Res. 1566 (Oct. 8, 2004); SC Res. 1611 (July 7, 2005); SC Res. 1617 (July 29, 2005); SC Res. 1624 (Sep. 14, 2005); SC Res. 1735 (Dec. 22, 2006).

⁸⁴ For a more detailed analysis of state responsibility in these resolutions, *see* Johnstone, *supra* note 27.

1368, the Council condemns the attacks on the United States and regards them “like any act of international terrorism, as a threat to international peace and security.”⁸⁵

States have long been required to abstain from supporting non-state terrorists. Traditionally, if a state’s links to terrorists are not adequate to establish the terrorists as organs or agents of the state (i.e. they are short of complete dependence or effective control), the attacks will not be attributable to the state and the state will not have committed an “armed attack.”⁸⁶ However, support or encouragement of such action will, at the very least, constitute an unlawful infringement of the sovereignty of the victim state and at most “indirect aggression.”⁸⁷ But the Council in Resolution 1368 suggests the possibility of more direct accountability, stressing that: “those responsible for aiding, supporting, or harboring the perpetrators, organizers and sponsors of these acts will be held accountable.”⁸⁸ It is not clear for what exactly harboring states will be held accountable, whether directly for the terrorist attacks themselves or instead only for the states’ actions (or omissions) in “aiding, supporting or harboring.” In addition, the word “those” is sufficiently vague to refer either to states *or* to non-state actors, intended to be held accountable by states in domestic criminal process. The French text provides no additional insight.⁸⁹

⁸⁵ SC Res. 1368 *supra* note 83, Preamble. This is not the first time that acts of terrorism were considered as threats to international peace and security by the Council; *see* S.C. Res. 748 (Mar. 31, 1992) (Libya); S.C. Res. 1054 (Apr. 26, 1996); S.C. Res. 1070 (Aug. 16, 1996) (Sudan); S.C. Res. 1267 (Oct. 15, 1999); S.C. Res. 1333 (Dec. 19, 2000) (Afghanistan).

⁸⁶ ILC Articles, *supra* note 1, arts. 4 & 8.

⁸⁷ U.N. CHARTER art. 2, para. 4; *see also* S.C. Res. 748, *supra* note 85, at 6th preambular paragraph; Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/8082 (Oct. 24, 1970) 1st principle, para. 6 [hereinafter Friendly Relations Declaration]; *Corfu Channel (U.K. v Albania)* I.C.J. 1949, at 18 [hereinafter *Corfu Channel*]; *Nicaragua*, at para. 195.

⁸⁸ S.C. Res. 1368, *supra* note 83, at operative para. 3.

⁸⁹ “[*Q*]ue ceux qui portent la responsabilité d’aider, soutenir et héberger les auteurs, organisateurs et commanditaires de ces actes devront rendre des comptes.” [ED: “Those who bear responsibility for aiding, supporting, or lodging individuals who carry out, organize, or direct these acts shall be held accountable.”]

In the shadow of the preparation for the invasion of Afghanistan by the United States and its allies, a little over two weeks later the Council passed Resolution 1373.⁹⁰ In the preamble, the “inherent right of individual or collective self-defense” is again recognized, but there is neither direct reference to, nor explicit approval of, the invasion.⁹¹ Afghanistan is not named as responsible for the preceding attacks.⁹² There are at least two possible explanations for the two resolutions’ silence on the matter, and both may contain some truth. The meeting lasted only long enough for the resolution to be passed with all discussions having clearly taken place beforehand; therefore the reasoning behind the members’ agreement must remain the subject of speculation.⁹³ Some Council members may have been wary of an explicit authorization of the invasion because it may, in their view, have necessitated recognition of Afghan responsibility of the attacks. This view would have extended state responsibility well beyond the classical limitations of responsibility only for organs and agents. On the other hand, the coalition partners on the Council may have wished to leave the door open to armed self-defense against other states where they believed terrorists were enjoying shelter without the need for further Council negotiation and agreement.⁹⁴

The main focus of Resolution 1373 has nothing to do with the right of self-defense, but introduces requirements on all member states of the United Nations to take extensive measures to prevent terrorism, in particular, to limit terrorist financing.⁹⁵ The Council’s authority to pass such

⁹⁰ S.C. Res. 1373, *supra* note 83.

⁹¹ *Id.* at 4th preambular paragraph.

⁹² *Id.*

⁹³ U.N. SCOR, 56th Sess., 4385th mtg. U.N. Doc. S/PV.4385 (Sep. 28, 2001).

⁹⁴ This latter is hinted at in *Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, S/2001/946* (notifying the Council of the United States’ invocation of the right of self-defense against Afghanistan at the launch of *Operation Enduring Freedom*).

⁹⁵ S.C. Res. 1373, *supra* note 83.

“legislative” measures has been the subject of some debate.⁹⁶ However, that need will not prevent us from considering the Council’s implicit view of state responsibility for terrorist activities.

States are first instructed to take measures to prevent terrorist funding.⁹⁷ Likewise, “[a]ll states shall” desist from supporting terrorists, suppress terrorist recruitment and transfers of arms.⁹⁸ They should share information with other states that might be targeted for attack and deny refuge to terrorists and those involved in terrorism.⁹⁹ States shall prevent terrorist operations in their territories, have and apply criminal law against terrorists and share intelligence information to enable this, and limit the mobility of terrorists.¹⁰⁰ States are “called upon” (a non-binding form of words) to share information and cooperate in criminal justice, prevent abuse of their asylum and refugee systems by terrorists, and consider ratification of counter-terrorism conventions, in particular, the Terrorism Financing Convention.¹⁰¹ The Council then “[n]otes with concern” links between terrorism and other international crimes, such as trafficking and money laundering and asks that states cooperate to reduce these activities.¹⁰²

⁹⁶ *E.g.*, Paul C Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT’L L. 901 (2002); Jose Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT’L L. 874 (2003); Matthew Happold, *Security Council Resolution 1373 and the Constitution of the United Nations*, 16 LEIDEN J. INT’L L. 593 (2003); Eric Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism*, 97 AM. J. INT’L L. 333, 334 (2003); Roberto Lavalle, *A Novel, if Awkward, Exercise in International Law Making: Security Council Resolution 1540*, 51 NETH. INT’L L. REV. 411 (2004); Gilbert Guillaume, *Terrorism and International Law*, 53 INT’L & COMP. L.Q. 537 (2004); Eric Rosand, *The Security Council as “Global Legislator”: Ultra Vires or Ultra Innovative*, 28(3) FORDHAM INT’L L.J. 542 (2005); TARCISIO GAZZINI, *THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW* 7-14 (2005); Andrea Bianchi, *Assessing the Effectiveness of the UN Security Council’s Anti-terrorism Measures: The Quest for Legitimacy and Cohesion*, 17 EUR. J. INT’L L. 881 (2007); Rachael Lorna Johnstone, *International Martial Law: The Security Council’s “Legislative” Response to Terrorism*, 2 LÖGFRÆÐINGUR 81 (2008). *See also*, Gaetano Arangio-Ruiz, *On the Security Council’s <<law-making>>* 83(3) RIVISTA DI DIRITTO INTERNAZIONALE 609 (2000) (expressing concern about the Council’s law-making prior to 9/11).

⁹⁷ S.C. Res. 1373, *supra* note 90, at operative para. 1.

⁹⁸ *Id.* at operative para. 2(a); *cf.* Friendly Relations Declaration, *supra* note 87, at 1st principle.

⁹⁹ *Id.* at operative para. 2.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at operative para. 3; International Convention for the Suppression of the Financing of Terrorism, *supra* note 81.

¹⁰² S.C. Res. 1373, *supra* note 90, at operative para. 4.

Similar concerns were the subject of Resolution 1269 in 1999.¹⁰³ Therefore Resolution 1373 might be considered a logical extension of the former resolution.¹⁰⁴ However, the earlier resolution is a non-binding Chapter VI resolution which only “calls upon” states to action.¹⁰⁵ Resolution 1373 instead purports to bind states and creates more specific obligations.¹⁰⁶

The obligations introduced by Resolution 1373 are obligations of conduct, not obligations of result.¹⁰⁷ States are required to take a number of steps, some rather specific under the shadow of a thinly veiled threat of forcible measures should they fail to comply.¹⁰⁸ However, according to this resolution, the activities of non-state terrorists in their territories are not to be automatically attributed to the host state. Liability is for failure to comply with the resolution, not for any resulting terrorist activities or terrorist financing. Therefore, if a state fully complies with the resolution, that state will engage no liability, even if a cross-border terrorist attack takes place, as the state will not have committed any “wrongful act.” Similarly, a state will be in breach of the resolution if it fails to take these measures, even if there are no direct consequences for another state. The question of responsibility for compliance or non-compliance with the resolution is quite distinct from the actions of terrorists.¹⁰⁹

¹⁰³ S.C. Res. 1269 (Oct. 19, 1999).

¹⁰⁴ PETER J VAN KRIEKEN, *TERRORISM AND THE INTERNATIONAL LEGAL ORDER* 144 (2002).

¹⁰⁵ *Id.*

¹⁰⁶ S.C. Res. 1373, *supra* note 83.

¹⁰⁷ For a discussion of the distinction and its potential for confusion, see Pierre Marie Dupuy, *Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility*, 10(2) *EUR. J. INT'L L.* 371 (1999); see also James Crawford, *Second Report on State Responsibility*, U.N. Doc. A/CN.4/498 23-39, paras. 52-92, especially paras. 88-92 (providing a similar explanation and arguing (successfully as it later transpired) for the removal from the second reading of the distinction on the basis that the distinction is not binary, but rather a matter of degree (para. 79) and that it is, moreover, a matter of primary rules).

¹⁰⁸ S.C. Res. 1373, *supra* note 90, at operative para. 8.

¹⁰⁹ See Roberto Ago, *Second Report on State Responsibility: The Origins of International Responsibility* (1970) 2 *Y.B. INT'L L. COMMISSION.*, U.N. Doc. A/CN.4/SER.A/1970/Add.1, 177, 194-5 paras. 50-54. Damage will be relevant to the availability of remedies, in particular, in identifying an “injured State” in light of ILC Articles, *supra* note 1, at arts. 42 & 48.

In 2004, the Council passed Resolution 1540 which obliged states to take certain measures to prevent the development or proliferation of biological, chemical or nuclear weapons.¹¹⁰ Unlike Resolution 1373, to which only Cuba openly objected, the Council's authority to pass such broad measures came under greater constitutional scrutiny.¹¹¹

Resolution 1566 provides an interesting account of the Council's view of states' contemporary obligations to prevent terrorism. In it, the Council:

*calls upon States to cooperate fully in the fight against terrorism, especially with those States where or against whose citizens terrorist acts are committed, in accordance with their obligations under international law, in order to find, deny safe haven and bring to justice, on the basis of the principle to extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens.*¹¹²

As indicated above, there is no direct and unambiguous view of state responsibility for terrorism made explicit in these resolutions. The need for unanimity, at least between the permanent members and politically desirable amongst all fifteen, has precluded such elucidation.¹¹³

The duty to desist from terrorism, even indirectly such as through financing or arming terrorists, is a central part of the customary and Charter law that states must not interfere with one another's sovereignty.¹¹⁴ This negative obligation to refrain from action remains unchanged. State responsibility will depend upon the identification of a state organ or agent who has

¹¹⁰ S.C. Res. 1540, *supra* note 83.

¹¹¹ U.N. GAOR 56th Sess., 13th mtg, at 14, 16, U.N. Doc. A/56/PV.13 (Oct. 2, 2001); Laval, *supra* note 96, at 426-28.

¹¹² S.C. Res. 1566, *supra* note 83, para 3.

¹¹³ U.N. CHARTER, art. 27.

¹¹⁴ See *supra* note 87 and corresponding text.

provided support. However, the state will be responsible to the extent of its *support*, not for the resulting acts of terrorism.

States also have a positive duty to take measures to prevent terrorism, a duty of due diligence that is at least as old as the United Nations and defined by the Court in *Corfu Channel*, as one of: “certain general and well defined principled, namely... every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.”¹¹⁵ Should States fail to take adequate measures, Ago explains:

*the Government of that State will be accused of having failed to fulfil its international obligations with respect to vigilance, protection and control, or having failed in its specific duty not to tolerate the preparation on its territory of actions which are directed against a foreign Government or might endanger the latter’s security and so on.*¹¹⁶

An interpretation of the Security Council’s resolutions within the classical view of state responsibility would indicate that the degree of diligence due to prevent terrorism has been considerably expanded, particularly by Resolutions 1373 and 1540. This indicates a change in the primary rules without posing a challenge to the traditional view of state responsibility *per se*. As such, it is comparable to Cook’s approach of expanding positive obligations of states to protect individuals, particularly women, from “private” violations of human rights.¹¹⁷ Should the state fail to meet the standards required by the resolutions, the state will be responsible, *not* for the terrorist attacks (or private human rights violations) but for the separate delict of its failure to protect. “[T]hese alleged cases of State responsibility for the acts of individuals are really cases

¹¹⁵ *Corfu Channel*, *supra* note 87, at 22.

¹¹⁶ Roberto Ago, *Fourth Report on State Responsibility: The Internationally Wrongful Act of a State, Source of International Responsibility* (1972) 2 Y.B. INT’L L. COMMISSION., U.N. Doc. A/CN.4/264 and Add.1, 70, 120, para. 135.

¹¹⁷ *See, supra*, text accompanying notes 50-54.

of responsibility of the State for omissions by its organs: the State is responsible for having failed to take appropriate measures to prevent or punish the individual's act."¹¹⁸

It is possible, however, that Resolution 1368 be interpreted as indicating a direct accountability for terrorist acts that a state has failed to prevent even in the absence of the organ or agency tests being met. Such an interpretation would indicate a more radical dispensation with the public/private dichotomy, in line with Charlesworth's and Chinkin's approach to private violations of women's rights.¹¹⁹ This approach would be plausible if one takes the view that the right of self-defense exists only against an "armed attack" (itself uncontroversial) and that only states can commit armed attacks (more controversial).¹²⁰ However, the uncertainty as to the identity of the perpetrators of the attacks when this resolution was passed makes this interpretation a less convincing one.

Counter-Terrorism Scholarship

Scholars have likewise questioned the public/private dichotomy in light of state responsibility for terrorism.¹²¹ Travalio and Altenburg make the case that state responsibility for

¹¹⁸ Ago, *supra* note 109, at 199, para. 35.

¹¹⁹ See, *supra* text accompanying notes 34-47 & 55-61.

¹²⁰ U.N. CHARTER art. 51. For a summary of the debate, see BECKER, *supra* note 54, at 158-162. See also, Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law* 12 EUR. J. INT'L L. 993, 995-998 (2001); Giorgio Gaja, *In What Sense was There an "Armed Attack?"* EUR. J. INT'L L. DISCUSSION FORUM: THE ATTACK ON THE WORLD TRADE CENTER: LEGAL RESPONSES, available at http://www.ejil.org/forum_WTC/ny-gaja.html (last visited Aug. 7, 2007); and Iain Scobbie, *Words my Mother Never Taught Me: "In Defense of the International Court"* 99 AM. J. INT'L L. 76 (2005), (all arguing that state responsibility is a *sine qua non* of an "armed attack"). They are supported by the International Court of Justice in *Nicaragua*, see note 24 and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 43 I.L.M. 1009 (2004). But see, Thomas Franck, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 839, 840 (2001); Ruth Wedgwood, *The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense*, 99 AM. J. INT'L L. 52, 57-59 (2005); Joining Becker uncomfortably on the fence is CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE, 164-167 (2nd ed., Oxford University Press, 2004); see also Christine Gray, *The Use of Force and the International Legal Order*, in INTERNATIONAL LAW, 589 (2nd ed., Malcolm D Evans, ed., 2006).

¹²¹ Travalio & Altenberg, *supra* note 80; Vincent J el Proulx, *supra* note 79; BECKER, *supra* note 54.

terrorism exists when there are links meeting a much lower threshold than that held in *Nicaragua* or the *Iran Hostages* cases.¹²² They argue, essentially, that contemporary international terrorism creates unique threats, and as a matter of necessity, this justifies a *lex specialis* in the secondary rules of state responsibility in order to allow for state self-protection.¹²³ They cite Oscar Schachter (famously “alienated” by the Australian feminists’ attack on the public/private dichotomy¹²⁴) in support of blurred boundaries with reference to terrorism: “When a Government provides weapons, technical advice, transportation, aid and encouragement to terrorists on a substantial scale it is not unreasonable to conclude that the armed attack is imputable to that government.”¹²⁵

Travalio and Altenburg argue not only that the law of state responsibility ought to evolve to allow states to protect themselves against major terrorist threats, but also that it has already so evolved, citing in support the *opinio iuris* of the United States considered above and, more importantly, the absence of express objections to that state’s position by other members of the international community.¹²⁶ They argue that this new doctrine of state responsibility for terrorism, requiring as it does a much lower threshold of “support” in order for the state to be held accountable, has been tacitly accepted and is now customary international law.¹²⁷ They conclude:

¹²² Greg Travalio & John Altenburg, *supra* note 80, especially at 100-111 (2003). *But see Genocide Convention case*, *supra* note 9, at para. 385-407 reiterating the *Nicaragua* standard, *Nicaragua*, *see* note 24.

¹²³ Travalio & Altenburg, *supra* note 80, 112-13.

¹²⁴ Charlesworth, *Alienating Oscar*, *supra* note 33.

¹²⁵ Travalio & Altenburg, *supra* note 80, 106; *but see Genocide Convention case*, *supra* note 9, para. 401: “The rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*.” The secondary rules of state responsibility for terrorism are anything but “clearly expressed” so we must assume that the Court’s position is that the ILC Articles apply equally to terrorism as they do to genocide.

¹²⁶ Travalio & Altenburg, *supra* note 122, at 109.

¹²⁷ *Id.*

*the standard for state responsibility is one of **sanctuary or support**, and it has been accepted by the world community. The pronouncements of the United Nations over the past three decades that states have a responsibility under international law to refrain from supporting or harboring terrorists have been transformed into a principle of state **accountability** for the acts of terrorists. Once a state makes it clear that it is uninterested in eliminating a terrorist threat emanating from its soil, it has assumed responsibility for the actions of the terrorists, and has opened itself to the lawful use of force by the threatened state.*¹²⁸

Vincent-Joël Proulx claims that post 9/11, the *Nicaragua* and *Tadić* tests for state responsibility have been abandoned, at least with respect to terrorism.¹²⁹ Although he agrees that the United States' administration has collapsed the distinction between direct and indirect responsibility — between responsibility for actions and omissions — he does not agree with Travaglio and Altenburg that this is the contemporary state of international law.¹³⁰ Instead, according to Proulx, the better view is one in line with that of Rebecca Cook, where there remains a distinction between direct responsibility (for organs and agents who fail to respect international law) and indirect responsibility (for the failure of due diligence to prevent non-state violations of international law).¹³¹ However, indirect responsibility is now taken much more seriously, just as Cook would like to see with regard to women's human rights.¹³² The international responses to the attacks of 9/11 have led to a: “monumental shift in international law from direct to indirect state responsibility. Indirect responsibility is no longer a second-best

¹²⁸ *Id.* at 111.

¹²⁹ Proulx, *supra* note 79, at 633. Prosecutor v *Tadić*, Case No. IT-94-1-A, Appeal on Jurisdiction, paras. 98-145 (July 15, 1999) [hereinafter *Tadić*]; *Nicaragua*, 1986 I.C.J.14, 110 (June 27).

¹³⁰ Proulx, *supra* note 79.

¹³¹ *Id.* at 637; Cook discussed *supra* text accompanying notes 50-54.

¹³² Proulx, *supra* note 79 at 637; Cook discussed *supra* text accompanying notes 50-54.

when direct responsibility cannot be established; rather, it has supplanted direct responsibility as the dominant theme in the field of attribution.”¹³³ He claims that indirect responsibility is just as serious as direct responsibility when terrorist attacks occur: “[A] state’s passiveness or indifference toward terrorist agendas within its own territory might trigger its responsibility, possibly on the same scale as though it had actively participated in the planning.”¹³⁴

However, Proulx remains dissatisfied with indirect responsibility for terrorism and an expansion of positive obligations, given the fundamental objectives of “saving lives and protecting citizens.”¹³⁵ Instead, he prescriptively argues that the rules of attribution should be circumvented altogether in favor of a form of “strict liability” for terrorism.¹³⁶ He mitigates this slightly by introducing a possible defense for states whose territory is used by terrorists to prepare attacks, allowing them to exclude their liability should they successfully demonstrate that they have exercised due diligence to prevent the attacks.¹³⁷ His answer then is not so much strict liability, but rather a rebuttable presumption of responsibility followed by a shift in the burden of proof.

Tal Becker provides the deepest and most nuanced analysis of state responsibility for terrorism in his 2006 book *Terrorism and the State*.¹³⁸ Like the feminists before him, he recognizes that the distinction between positive and negative responsibility, between acquiescence and the failure of due diligence, is not easy to maintain in practice.¹³⁹ Becker’s view is that neither a simple strict liability approach, nor a weak approach that allows states to excuse their inaction by claiming good faith are adequate models to respond to the contemporary

¹³³ Proulx, *supra* note 79, at 637.

¹³⁴ *Id.* 624.

¹³⁵ *Id.* at 653; *but see infra* note 218, on the considerably greater threat to life by virtue of being conceived female.

¹³⁶ Proulx, *supra* note 129, at 643-659.

¹³⁷ *Id.* at 656-57. Due diligence is an obligation of conduct, not an obligation of result.

¹³⁸ BECKER, *supra* note 54.

¹³⁹ *Id.* at 132.

terrorist threat.¹⁴⁰ He explains the positive responsibilities on states to prevent terrorism as underlined by due diligence at two levels. States must first “pursue and acquire” territorial control and adequate administrative apparatuses; secondly, they must employ those capabilities.¹⁴¹ States would accordingly engage liability for a “separate delict” should they fail on either of these counts.¹⁴²

Unpersuaded by the adequacy of this due diligence model, Becker argues for a looser regime for attribution of responsibility. He suggests that states which have suitable counter-terrorism organs in place, but operate them only formally and without vigor should be held *directly* accountable for any resulting terrorist attacks. In Becker’s view, their failure is tantamount to acquiescence and as such, is a violation of the negative duty to abstain from terrorist activities.¹⁴³ States who have instead not acquiesced, but nevertheless fail to exercise due diligence remain responsible by virtue of failing to meet their positive obligations to prevent (a separate delict).¹⁴⁴ Finally, a state of limited capacity that does its utmost but still fails to prevent a terrorist attack will not be in violation of the due diligence standard and will not bear any responsibility.¹⁴⁵ Becker’s model shifts the focus from the need to establish an organ or agency relationship between state and perpetrator to a focus on the wrongful act with causation as the basis of responsibility.¹⁴⁶ Becker’s argument is prescriptive, but he also defends it as potentially descriptive, with an examination of recent state practice in response to terrorist attacks.¹⁴⁷ His position is that this causation theory of state responsibility may be *lex specialis*

¹⁴⁰ *Id.* at 143-44.

¹⁴¹ *Id.* at 146; *see also*, Riccardo Pisillo-Mazzeschi, *The Due Diligence Rule and the Nature of the International Responsibility of States*, 35 GERMAN YB INT’L L. 9, 25-26.

¹⁴² BECKER, *supra* note 54, at 146.

¹⁴³ BECKER, *supra* note 54, at 151.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 156; 331-360.

¹⁴⁷ *Id.* at 186-206.

pertaining to terrorism, or alternatively, a general basis of state responsibility for private acts in international law.¹⁴⁸ The latter argument would, of course, have major implications in international human rights law, in particular with regard to private violations of women's rights. The state would bear direct responsibility for private wrongs, instead of only indirect responsibility pivoting on the due diligence standard.

Becker makes a number of statements that are reminiscent of the radical feminist writings:

*The agency paradigm not only neglects the subtle relationships between the private and public sphere in the perpetration of acts of terrorism, it encourages [acts of terrorism].*¹⁴⁹

*Persistent State failure to prevent wrongs within the private domain can be as much a form of State policy as direct governmental action. But by conceiving of responsibility through the prism of the public/private distinction this method of State action can be concealed. The result is to shield the functioning State from direct responsibility when its wrongful conduct was a direct cause of the private harm.*¹⁵⁰

Because the State is subject to a detailed duty to prevent terrorism, its failure to regulate terrorist conduct in the private domain, when it has the capacity to do so, can be a form of State participation in the private wrong. This is not because the State necessarily controls the private conduct as principal in an agency relationship or because it is complicitous in the criminal sense, but rather because it is the State's unlawful failures that have made possible the very private terrorist activity that it is charged to forestall.

In an international system in which only the State enjoys widespread monopoly on the legitimate use of force, it cannot be indifferent to the illicit use of force by private

¹⁴⁸ *Id.* at, 359-360.

¹⁴⁹ *Id.* at 259.

¹⁵⁰ *Id.* at 274.

*actors which it is obligated to prevent and then claim that its responsibility is limited to the conduct of its own agents. The very monopoly over force in international affairs makes the State, at least potentially, a direct participant in the private violence that is acts or omissions wrongfully allow.*¹⁵¹

To Becker's credit, he is the only one of the scholars discussed here who recognizes the links with earlier feminist approaches. However, despite quoting Chinkin and Romany, he does not explore these links in any depth or examine any of the responses by "mainstream" international lawyers to the feminist approach as they might be applied to his own argument.¹⁵²

Derek Jinks considers changes in state practice and *opinio iuris* following 9/11 and concludes that these may indicate a change in the secondary rules of state responsibility, suggesting that "the emergent rule arguably reconfigures the distinction between public and private conduct."¹⁵³ He cautions against acceptance of such a change, instead arguing that terrorism is best countered by increasing states' obligations through stronger primary rules, requiring states to take greater measures to prevent terrorism.¹⁵⁴ As such, his position is consistent with the pragmatic approach of Rebecca Cook in improving women's enjoyment of human rights.¹⁵⁵

¹⁵¹ *Id.* at 281-82.

¹⁵² *Id.* at 273-74. For an early response to the radical feminist arguments, see Fernando R. Tésón, *Feminism and International Law: A Reply*, 33 VA. J. INT'L L. 647 (1993).

¹⁵³ Jinks, *supra* note 79, at 90.

¹⁵⁴ *Id.*

¹⁵⁵ Cook discussed *supra* text accompanying notes 50-54.

Opinio Iuris of the United States

The United States' administration in the immediate aftermath of 9/11 shared the "radical feminist" position, evidenced by the famous statement of the president on September 11 that "We will make no distinction between the terrorists who committed these acts and those who harbor them."¹⁵⁶ The president expanded upon this later the same month, stating:

By aiding and abetting murder, the Taliban regime is committing murder . . . Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime."¹⁵⁷

In November 2001, he continued: "If you harbor terrorists, you are terrorists. If you train or arm a terrorist, you are a terrorist. If you feed a terrorist or fund a terrorist, you're a terrorist, and you will be held accountable by the United States and our friends."¹⁵⁸

The president's position was echoed on the floor of the Security Council, with the American representative similarly stating: "We will make no distinction between the terrorists who committed these acts and those who harbor them. We will bring those responsible to account."¹⁵⁹

¹⁵⁶ George W. Bush, President of the United States of America, *Address to the Nation* (Sep. 11, 2001), <http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html>.

¹⁵⁷ George W. Bush, President of the United States of America, *Address to a Joint Session of Congress and the American People* (Sep. 20, 2001), <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>.

¹⁵⁸ George W. Bush, President of the United States of America, *Remarks to Troops and Families at Fort Campbell, Kentucky* (Nov. 21, 2001), <http://www.whitehouse.gov/news/releases/2001/11/20011121-3.html>.

¹⁵⁹ U.N. SCOR, 56th Sess., 4370th mtg. at 7-8 U.N. Doc. S/PV.4370 (Sep. 12, 2001).

State Practice: Operation Enduring Freedom (Afghanistan)

Within a few weeks of 9/11, the United States and a coalition of allies had begun an aerial campaign against Afghanistan and later sent in ground troops in order to root out the terrorists behind the attacks of 9/11.¹⁶⁰ The Taliban, as the self-declared and de facto but largely unrecognized government of Afghanistan, had been given the option of avoiding invasion by surrendering Bin Laden and other purported terrorists; releasing all detained foreign nationals; protecting journalists, diplomats and aid workers; closing all terrorist training camps; and giving unrestricted access to the terrorist training camps to allow verification that they were all beyond use.¹⁶¹ To no-one's surprise, the Taliban rejected these demands, instead responding that they would try Bin Laden in Afghanistan and asking the United States to provide evidence of his involvement in the attacks.¹⁶² This counter-offer was likewise rejected.¹⁶³ Military action commenced shortly afterwards, aimed, according to the United States, "at the Taleban [sic.] rather than the Afghan people."¹⁶⁴ Days after the commencement of aerial bombing, the Taliban offered to surrender Bin Laden to a neutral third country for trial. This offer was similarly unsatisfactory to the United States.¹⁶⁵

¹⁶⁰ For a summary of events leading up to the military action, see, *Contemporary Practice of the United States Relating to International Law: Legal Regulation of Use of Force*, 96 AM. J. INT'L. L. 237 (Sean D. Murphy, ed., 2002). On the process of the campaign and legal analysis of the same from 2001-2004, see GRAY, INTERNATIONAL LAW AND THE USE OF FORCE, *supra* note 120, at 164-172.

¹⁶¹ President of the United States of America, Address to a Joint Session of Congress and the American People, *supra* note 157. See also, *Contemporary Practice of the United States Relating to International Law: Legal Regulation of Use of Force*, *supra* note 160, at 243-44; GRAY, INTERNATIONAL LAW AND THE USE OF FORCE, *supra* note 120, at 159.

¹⁶² *Contemporary Practice of the United States Relating to International Law: Legal Regulation of Use of Force*, *supra* note 160, at 244.

¹⁶³ Nic Robertson and Kelly Wallace, *U.S. rejects Taleban Offer to Try bin Laden*, CNN.COM (Oct. 7, 2001) <http://edition.cnn.com/2001/US/10/07/ret.us.taliban/index.html>.

¹⁶⁴ *Id.*

¹⁶⁵ *Bush Rejects Taliban Offer to Hand Bin Laden Over*, THE GUARDIAN (on-line edition) (London) (Oct. 14, 2001), at <http://www.guardian.co.uk/world/2001/oct/14/afghanistan.terrorism5>, *Contemporary Practice of the United States Relating to International Law: Legal Regulation of Use of Force*, *supra* note 160, at 248.

In line with Article 51 of the Charter, the actions taken in “self-defense” against Afghanistan were duly notified to the Security Council. After briefly describing the attacks, the United States informed the Security Council of its possession of “clear and compelling information that the Al-Qaeda organization, which is supported by the Taliban regime in Afghanistan, had a central role in the attacks” and that the attacks and the ongoing threat “posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation.”¹⁶⁶ The military self-defense operations were aimed at “Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan.”¹⁶⁷

The letter from the United Kingdom similarly referred to “information” indicating Al-Qaeda’s responsibility for the attacks and claimed their military operations were “directed against Osama Bin Laden’s Al-Qaeda terrorist organization and the Taliban regime that is supporting it.”¹⁶⁸ The following day, the United Kingdom presented a further letter outlining the basis of the claim that Bin Laden and Al-Qaeda were behind the 9/11 attacks. That letter concluded: “[t]he attack could not have occurred without the alliance between the Taleban [sic.] and Osama Bin Laden, which allowed Bin Laden to operate freely in Afghanistan, promoting, planning and executing terrorist activity.”¹⁶⁹ The theme of an “alliance” or even a “close alliance” between the Taliban and Al-Qaeda is the main predicate for the justification of military action against the Taliban’s own institutions.¹⁷⁰ However, even accepting the United Kingdom’s conclusions as presented to the Security Council in the absence of the supporting evidence —

¹⁶⁶ Letter S/2001/946, *supra* note 94.

¹⁶⁷ *Id.*

¹⁶⁸ Letter from the Chargé d’affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern to the United Nations addressed to the President of the Security Council (Oct. 7, 2001) S/2001/947, p. 11, para. 70.

¹⁶⁹ Letter from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, (Oct. 8, 2001) S/2001/949.

¹⁷⁰ *Id.* at paras. 10-19.

which was withheld from the Security Council owing to the “need to protect intelligence sources”¹⁷¹ — the United Kingdom did not argue that the Taliban and Al-Qaeda are synonymous or that the organs of the Taliban coordinated the 9/11 attacks and pose an ongoing threat. At best, the United Kingdom attempted to portray a relationship in line with much of the “overall control” test of the *Tadić* case,¹⁷² but to the extent that the relationship is portrayed as one of mutual support and shared objectives, it is likewise one of mutual independence. One cannot readily characterize it as one of “control”; neither does the Taliban exercise any control over Al-Qaeda, nor Al-Qaeda over organs of the Taliban.

It is important to recall here the widely held pre 9/11 view on the legality of self-defense under Article 51:

*[a]ny state that seeks to invoke the right of self-defense should be required to furnish the international community with credible evidence that it has suffered an attack, that the entity against which the right of self-defense is exercised was the source of that attack, that the attack or threat of attack is continuing, and that the use of force is necessary to protect the state from further injury.*¹⁷³

Ignoring Charney’s concerns that sufficient evidence was not in fact presented to the Security Council to prove Al-Qaeda’s responsibility, two more pressing questions remain.¹⁷⁴ The first is whether the definition of armed attack — and thus legitimacy of measures taken in self-defense — still pivots on the *Definition of Aggression* from the *Nicaragua* case, namely, “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 acts of

¹⁷¹ *Id.* at para 3.

¹⁷² *Tadić*, Case No. IT-94-1-A, Appeal on Jurisdiction, at paras. 98-145.

¹⁷³ Jonathan I Charney, *The Use of Force Against Terrorism in International Law*, 95 AM J. INT’L L. 835, 836 (2001).

¹⁷⁴ *Id.* at 836.

aggression.”¹⁷⁵ The text “armed attack” of Article 51 is inconclusive; however, state practice and *opinio iuris* suggest that attribution of responsibility to a state was a prerequisite for legal intervention in the territory of a sovereign host state, at least prior to 9/11.¹⁷⁶ The second question is whether the military actions were lawful *against the Taliban* rather than against Al-Qaeda itself. None of the states involved in the coalition in Afghanistan ever suggested that the Taliban was directly behind the attacks; rather its “support” for Al-Qaeda was enough to justify military action against its own institutions.¹⁷⁷ Becker explains: “Operation Enduring Freedom was explicitly justified on the contentious claim that the act of harboring terrorists is legally indistinguishable from the actual perpetration of the terrorist acts.”¹⁷⁸

The incursions into Afghanistan were not aimed solely at the terrorists as authors of the attacks, but equally at the *de facto* government, the Taliban.¹⁷⁹ The United States and its allies intentionally overthrew that regime. Links between the Taliban and Al-Qaeda go beyond the merely territorial, but nonetheless are a far cry from the threshold of complete dependence or effective control applied in the *Nicaragua* Judgment and recently reiterated in the *Genocide Convention Case*.¹⁸⁰ They do not even come close to the criteria of “overall control” of the *Tadić* decision, a test that has now been discredited by the International Court of Justice.¹⁸¹

¹⁷⁵ *Nicaragua*, 1986 I.C.J.14, 110 (June 27), at para. 195; *see also*, GRAY, INTERNATIONAL LAW AND THE USE OF FORCE, *supra* note 120, at 165.

¹⁷⁶ *See supra* note 120 for commentary on this point. *See also* Pierre-Marie Dupuy, *The Law after the Destruction of the Twin Towers*, EUR. J. INT’L L. DISCUSSION FORUM: THE ATTACK ON THE WORLD TRADE CENTER: LEGAL RESPONSES, available at http://www.ejil.org/forum_WTC/ny-dupuy.html (last visited Aug. 23, 2007); GAZZINI, *supra* note 96, at 190-97.

¹⁷⁷ *See supra* text accompanying notes 166-172.

¹⁷⁸ BECKER, *supra* note 54, at 218; *see also*, Jinks, *supra* note 153, at 84.

¹⁷⁹ *See supra* Letter S/2001/946, *supra* note 94; Letter S/2001/947, *supra* note 168; Letter S/2001/949, *supra* note 169.

¹⁸⁰ *Nicaragua*, 1986 I.C.J.14, 110 (June 27), at paras.109-112; *Genocide Convention case*, 46 I.L.M. 85, at paras. 391-93 & 399-400.

¹⁸¹ *Tadić*, Case No. IT-94-1-A, Appeal on Jurisdiction, at paras. 98-145; *Genocide Convention case*, 46 I.L.M. 85, at para. 403.

The military action, and the wide international support for the same, against the Taliban, as opposed to merely Al-Qaeda members and locations, can be interpreted as an example of state practice which equates non-state and state conduct for the purposes of responsibility.¹⁸² By holding the Taliban responsible for the actions of terrorists that it merely hosts on its soil (albeit willingly), the boundaries between public and private conduct in international law take on a fundamentally new shade.¹⁸³ If this example of state practice and the wide *opinio iuris* in its support is to be considered as sufficient to constitute a new rule of customary international law, then the more radical feminists have won a battle, albeit in a manner they might themselves find difficult to support.¹⁸⁴ In short, this new rule holds that states are responsible, directly responsible, for permitting private violations of international law to occur. Governments in such circumstances should anticipate the possibility of immediate repercussions against their own institutions, not just against the private actors who directly caused the harm.

It takes Eric Posner, in a book review addressed to a political science audience, to point to the elephant in the room.

The organizing premise [of Becker's thesis, arguing that the Afghanistan war constitutes a new rule of international law] is that all states are treated the same by international law; the goal is to derive a universal norm from a handful of legal and historical precedents. Thus, Becker largely ignores the most likely scenario: that nations that approved of or acquiesced in the U.S. invasion of Afghanistan did so for geopolitical reasons and did not believe that they thereby committed themselves to a general legal

¹⁸² International support for the military action was wide, including N.A.T.O., the O.A.S. and all the permanent members of the Security Council, see *Contemporary Practice of the United States Relating to International Law: Legal Regulation of Use of Force*, *supra* note 160, at 248-49; see also GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE*, *supra* note 120, at 159; BECKER, *supra* note 54, at 214-15; Jinks, *supra* note 153, at 87-89. It was not, however, universal, see, *Contemporary Practice of the United States Relating to International Law: Legal Regulation of Use of Force*, at 249.

¹⁸³ Jinks, *supra* note 153, at 90.

¹⁸⁴ Hilary Charlesworth & Christine Chinkin, *Sex, Gender, and September 11*, 96(3) AM. J. INT'L L. 600, 605 (2002).

*norm that permits any nation attacked by foreign terrorists – India, Israel, Russia, Iraq – to invade a country that harbored them, as the causation-based theory requires. It may be that one set of rules governs the United States and another set of rules governs other nations.*¹⁸⁵

It may be too much to suppose that the law in this area is principled and coherent and that “all states are treated the same.”¹⁸⁶ The United States was under enormous domestic pressure to make a show of force in response to an unprecedented attack on its home soil against predominantly United States civilians. In their rush to express outrage at the attacks and support for the global hegemon, much of the *opinio iuris* in support of the military action may have been too little considered. On the other hand, it seems inconceivable that states and their representatives were oblivious to the significance of their words and actions. World leaders may not be scholars of international law — they may not even be particularly interested in international law — but they are backed by teams of advisors who are.

However, one should not rely too heavily on the single example of the response in Afghanistan to the perceived Al-Qaeda threat. Customary international law contains space for exceptions and this may be one such exception, especially considering the unique circumstances under which it was undertaken.¹⁸⁷ It will take a great deal more state practice and *opinio iuris* to answer the age old question of customary international law: when do the exceptions become the norm?¹⁸⁸

¹⁸⁵ Eric Posner, *Book Review*, 121(3) POL. SCI. Q. 505 (2006); *see also* GRAY, INTERNATIONAL LAW AND THE USE OF FORCE, *supra* note 120, at 160.

¹⁸⁶ *Id.*

¹⁸⁷ *Nicaragua*, 1986 I.C.J.14, 110 (June 27), at para. 186; *see also*, GRAY, INTERNATIONAL LAW AND THE USE OF FORCE, *supra* note 120, at 23.

¹⁸⁸ Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT’L L. 607, 614-5 (2003).

Later military action in the “War on Terror” does not cast any new light on the question of state responsibility. The 2003 invasion of Iraq is of less significance in identifying the boundaries between public and private responsibility. At least prior to 2003, the perceived threat emanating from Iraq to Western democracies was from clearly identifiable public (state) actors, most obviously the president and members of his extended family exercising elements of governmental and administrative authority.¹⁸⁹

PART FOUR: UNLIKELY BEDFELLOWS, DANGEROUS BEDFELLOWS

The Public/Private Divide Lives On

Despite much official hand-wringing over the plight of Afghan women in the fall of 2001, feminists would be wise to retain doubts that international law has radically changed or is ready to bring women’s daily challenges to the forefront of its attention.¹⁹⁰ The traditional narrow vision of the state was firmly upheld in the *Genocide Convention case* by the International Court of Justice, international law’s ultimate arbiter.¹⁹¹ Should it face a terrorism case, it is not a foregone conclusion that the Court would back an expanded notion of responsibility, attributing to the state terrorist activities by ostensibly private actors. They may

¹⁸⁹ U.N. SCOR, 58th Sess., 4721st mtg. U.N. Doc. S/PV.4721 (Mar. 19, 2003) at 13, 15-16 & 19.

¹⁹⁰ President of the United States of America, Address to a Joint Session of Congress and the American People, *supra* note 157; REPORT ON THE TALIBAN’S WAR AGAINST WOMEN, (Bureau of Democracy, Human Rights and Labor, United States of America, Washington D.C., Nov. 17, 2001), <http://www.state.gov/g/drl/rls/c4804.htm>; Christine Chinkin, Shelley Wright & Hilary Charlesworth, *Feminist Approaches to International Law: Reflections from Another Century*, in INTERNATIONAL LAW: MODERN FEMINIST APPROACHES, *supra* note 8, 17, 33; SUSAN FALUDI, THE TERROR DREAM: FEAR AND FANTASY IN POST-9/11 AMERICA 39-41 (New York, 2007).

¹⁹¹ *Genocide Convention case*, 46 I.L.M. 85, (2007) (Feb. 26); for commentary, see, e.g. Sandesh Sivakumaran, *Case Comment*, 56 INT’L. & COMP. L.Q. 695 (2007); Marina Spinedi, *L’attribuzione allo Stato dei comportamenti di gruppi armati da esso sostenuti nella sentenza della Corte internazionale di giustizia sul genocidio in Bosnia-Erzegovina*, XC RIVISTA DI DIRITTO INTERNAZIONALE 417 (2007).

consider terrorism as *lex specialis*; or, more likely, they would continue to rely instead on the *Nicaragua* test as they did in the *Genocide Convention case*.¹⁹²

It is unlikely that *The Boundaries of International Law* occupies space on the personal bookshelves of President George W. Bush, or that its contents informed his speechwriters.¹⁹³ Those most forcefully advocating an expansion of state responsibility for terrorism are not doing so with the feminist arguments in mind.¹⁹⁴ Although keen to enlarge the range of state responsibility for terrorism and thus undermine the traditional public/private divide of international law, there remains a simultaneous insistence, even dependence, on the public/private divide by the states most deeply engaged in counter-terrorist operations and conflict in Afghanistan and Iraq. A few select examples can demonstrate this.

“Enemy Combatants”

The state which harbors terrorists might be responsible for any international attacks that those terrorists carry out; but the terrorists themselves are not, according to the United States, to be considered agents or organs of the state in the *Nicaragua* or *ILC Articles* sense.¹⁹⁵ The position of the United States is that they are to be considered, once detained, as “enemy combatants,” neither prisoners of war nor civilians entitled to the protections of Geneva Conventions III and IV respectively.¹⁹⁶ This asymmetry operates to the benefit of the United

¹⁹² See *Genocide Convention case*, 46 I.L.M. 85, (2007) (Feb. 26), at para. 401, indicating that the Court would require the *lex specialis* to be unambiguous to depart from the general secondary rules of state responsibility (quoted *supra* at note 125).

¹⁹³ CHARLESWORTH & CHINKIN, *supra* note 48.

¹⁹⁴ See, *supra* text accompanying notes 121-159.

¹⁹⁵ ILC Articles, *supra* note 1; *Nicaragua*, 1986 I.C.J.14, 110 (June 27).

¹⁹⁶ John C. Yoo & James C. Ho, *The Status of Terrorists* 8-20 (Boalt Working Papers in Public Law, Univ. of Cal., Berkeley, No. 25, 2003); see also, Jinks, *supra* note 153, at 93-94 arguing that state responsibility might actually require recognition of terrorists as POWs and give them immunity for their “crimes.”

States and its allies by legitimizing their military action as lawful under the Charter without requiring those same states to extend the usual protections to those detained in its course.¹⁹⁷

Private Contractors in Combat and Quasi-Combat Operations

Extensive use of private contractors in the “War on Terror” in both Afghanistan and Iraq further reifies the public/private dichotomy to the extent that the states paying the contractors’ salaries will seek to exclude themselves from liability when those contractors violate either international law or domestic law in the state of their operations.¹⁹⁸ It is very much in the interests of the states hiring the contractors to continue to insist upon a test of state responsibility pivoting on Articles 4, 5 and 8 of the ILC Articles, namely, the *Nicaragua* tests of complete dependence or effective control (Article 4 and 8) or the test of “exercising elements of governmental authority” (Article 5) to ensure that any wayward actions of the contractors will not be attributable to the those states.¹⁹⁹ Further, the jurisdiction of the Iraqi domestic legal process has been curtailed against the same private contractors by virtue of an executive order of the occupying forces.²⁰⁰ Thus internationally unlawful actions of contractors fall into a legal

¹⁹⁷ UN CHARTER, art. 51.

¹⁹⁸ See Simon Chesterman, *Leashing the Dogs of War: The Rise of Private Military and Security Companies* (N.Y. Univ. Public Law and Legal Theory Working Papers, No. 85, 2008).

¹⁹⁹ There might be responsibility by virtue of omission, but this is less serious than direct responsibility; see Marina Spinedi, *La Responsabilità dello Stato per Comportamenti di Private Contractors*, in LA CODIFICAZIONE DELLA RESPONSABILITÀ INTERNAZIONALE DEGLI STATI ALLA PROVA DEI FATTI 67, 101 (2006). See also *id.* at 99, on problem of establishing “elements of governmental authority.”

²⁰⁰ Coalition Provisional Authority Order Number 17 (Revised): Status of the Coalition Provisional Authority, Mnf - Iraq, Certain Missions and Personnel in Iraq, Section 4, para. 3, CPA/ORD/27 (June 17, 2004), available at http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf. See also Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5(2) CHI. J. INT’L L. 511, especially 516-17 (2005).

black hole; there can be no domestic legal process against the individuals or their firms, nor international legal process against the states which gives them license.²⁰¹

Private Contractors in Reconstruction and Privatization of Services

As military operations take out bridges, roads, electricity, and safe water supplies, private contractors, predominantly United States' companies, are engaged to restore them.²⁰² Furthermore, the development and maintenance of market-based economies (involving transfer of service sectors and infrastructure from public to private control) is itself lauded as a central pillar of counter-terrorism strategies as well as a necessary feature of development.²⁰³

This is unlikely to be good news for the poorest women of Iraq or Afghanistan or to those engaged primarily in unpaid and unrecognized labor. Privatization of vital social services is translated amongst poor populations as the transfer of responsibility from the state to women's backs, from paid labor to invisible unpaid family labor, "a transfer of costs from the market to

²⁰¹ See also, Peter W. Singer, *Warriors for Hire*, (The Brookings Institution, April 15, 2004), available at http://www.brookings.edu/articles/2004/0415defenseindustry_singer.aspx (last visited April 7, 2009); Nils Rosemann, *The Privatization of Human Rights Violations – Business' Impunity or Corporate Responsibility? The Case of Human Rights Abuses and Torture in Iraq*, 5 NON-STATE ACTORS AND INTERNATIONAL LAW 77 (2005).

²⁰² See SPECIAL INSPECTOR GENERAL FOR AFGHANISTAN REPORTS TO CONGRESS (Quarterly) <http://www.sigir.mil/reports/quarterlyreports/default.aspx> (last visited Feb. 26, 2009); see also U.S. Government International Trade Administration, Afghanistan Investment and Reconstruction Task Force <http://www.trade.gov/afghanistan/> (last visited Feb. 26, 2009); SPECIAL INSPECTOR GENERAL FOR IRAQ REPORTS TO CONGRESS (Quarterly) <http://www.sigir.mil/reports/quarterlyreports/default.aspx> (last visited Feb. 26, 2009); see also U.S. Government International Trade Administration, Iraq Investment and Reconstruction Task Force <http://trade.gov/iraq/> (last visited Feb. 26, 2009).

²⁰³ NATIONAL STRATEGY FOR COMBATING TERRORISM, (United States of America, Washington D.C., Feb. 2003) 22-23; George W. Bush, President of the United States of America, State of the Union Address (Jan. 29, 2002) <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>; George W. Bush, President of the United States of America, *State of the Union Address* (Jan. 20, 2004), <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html>.

the household.”²⁰⁴ Privatization of education and health-care means less of both for the poorest women and girls.

Shortly before the seismic events of 9/11, Charlesworth and Chinkin wrote: “The two major challenges to all human rights, and especially to those of women, in the twenty-first century will be the forces of religious extremism and of economic globalization.”²⁰⁵ Development in Afghanistan and redevelopment in Iraq following the usual contemporary model will serve to reinforce the comparative disadvantages of women and permit, even require, further exploitation of women’s unpaid labor.²⁰⁶

The (Private) Place of Women

Hand in hand with the liberalization of the market in the post-intervention economies comes the further reification of the public/private dichotomies long criticized by feminists in Western democracies, as women (and violence against them) are considered non-political. Women are effectively excluded from positions of governance in Afghanistan and Iraq, and similarly have been largely excluded in negotiations between competing factions.²⁰⁷ The (male)

²⁰⁴ LOURDES BENERÍA, *GENDER, DEVELOPMENT AND GLOBALIZATION: ECONOMICS AS IF ALL PEOPLE MATTERED*, 49-50 (Routledge 2003).

²⁰⁵ CHARLESWORTH & CHINKIN, , *supra* note 48, at 249.

²⁰⁶ See, e.g., Diane Otto, *Holding up Half the Sky: But for Whose Benefit? A Critical Analysis of the Fourth World Conference on Women* 6 AUSTRALIAN FEMINIST L.J. 7 (1996); BENERÍA, *supra* note 204, at 47-53; Ambreena Manji, *Remortgaging Women’s Lives: The World Bank’s Land Agenda in Africa*, 11 FEMINIST LEGAL STUD. 139 (2003) especially at 147-157; Ambreena Manji, “*They Beautiful Ones*” of Law and Development, in INTERNATIONAL LAW: MODERN FEMINIST PERSPECTIVES, *supra* note 8, at 159, especially at 165-168; Fiona Beveridge, *Feminist Perspectives in International Economic Law*, in INTERNATIONAL LAW: MODERN FEMINIST PERSPECTIVES, *id.* at 173, especially at 178-81 & 189.

²⁰⁷ Chinkin, *et al.*, *supra* note 190, at 19; Charlesworth & Chinkin, *supra* note 184, at 602. Of the twenty ministries in the transitional Afghan Government (2002-2004), only 2 portfolios were held by women; human rights, and health. The President, five vice-presidents and five national defense commissioners were all men: *Transitional Government of Afghanistan*, AFGHANLAND.COM, <http://www.afghanland.com/history/transitional.html> (last visited Aug. 27, 2008). The current cabinet of 26 has only one, Hosn Bano Ghazanfar, with the unsurprising portfolio of women’s affairs: *The Cabinet*, (Office of the President, Islamic Republic of Afghanistan),

self-declared leaders are presumed to speak for all and women's rights become a matter of relative cultural values.²⁰⁸ This is self-determination of a highly selective "self." Violence against women *qua* women is considered a matter of domestic law, and when domestic process fails to take it seriously, no questions are raised by the state's allies about the legitimacy of the government or its sovereign inviolability.²⁰⁹ Despite changes in the language of state responsibility, little has changed for women since the "liberation" of Kuwait from the oppressive Iraqi invader in 1991, after which Kuwaiti women remained disenfranchised from the electoral process and foreign women found themselves targets of sexual violence by Kuwaiti men, often ostensibly under color of state authority.²¹⁰

Masculinity and the "War on Terror"

Finally, the discourse of the "War on Terror" itself revealed a perceived need for the state to define its masculinity in the aftermath of attack. This required painting men as heroes and women as victims.²¹¹ Chinkin and Charlesworth described the media responses in the immediate aftermath in which women featured as heavenly rewards for terrorists or as victims of the attack,

<http://www.president.gov.af/english/cabinet.mspix> (last visited Aug. 27, 2008). The interim Iraqi Government (2003-2005) of 37 included 6 women, all in junior roles: Sharon Otterman, *Iraq: The Interim Government Leaders*, (Council of Foreign Relations, June 2, 2004), <http://www.cfr.org/publication/7664/#1>. The post 2006 election Iraqi Government has portfolios for 4 women, namely environment, housing, health and women's affairs *Member's of Iraq's Government*, (Education for Peace in Iraq Center, May 1, 2007), http://ww2.epic-usa.org/files/EPIC/IRAQ_Government.pdf.

²⁰⁸ When pressed on the question of women's rights, the U.S. response was "Right now we have other priorities," see FALUDI, *supra* note 190, at 41.

²⁰⁹ *Afghanistan: "One Month in Afghanistan: A Step Backwards for Women in Afghanistan,"* (Women Under Muslim Laws, June 20, 2007), <http://www.wluml.org/english/newsfulltxt.shtml?cmd%5B157%5D=x-157-554302>; IRAQ: WOMEN'S RIGHTS UNDER ATTACK: OCCUPATION, CONSTITUTION AND FUNDAMENTALISMS, (Women Under Muslim Laws, Occasional Paper, No. 15, 2006).

²¹⁰ CHARLESWORTH & CHINKIN, *supra* note 48, at 262.

²¹¹ Charlesworth & Chinkin, *supra* note 184; Shelley Wright, *The Horizon of Becoming: Culture, Gender and History after September 11*, 71 NORDIC J. INT'L L. 215, 245 (2002), comparing the collapse of the twin towers to a castration, feeding a need for the American state to reclaim its virility. See also, CHARLESWORTH & CHINKIN, *supra* note 48, at 137-39; see also FALUDI, *supra* note 190, at 46-64 & 89-115.

preferably widows of murdered men, rather than the women who themselves worked daily in the twin towers or in the rescue services.²¹² Women in the armed services and firefighting teams were conspicuous by their invisibility.²¹³ Women in Afghanistan are depicted as victims of a brutal Taliban, requiring rescue by heroic (Western) men – though not political participation.²¹⁴ The suffering women endure under the airpower of those same Western forces and the hardship encountered as essential services are put beyond their use are unfortunate “collateral damage” — a sacrifice for their greater long-term good.²¹⁵ Susan Faludi’s 2007 investigative retrospect of the media in the aftermath of 9/11 provides thorough confirmation of the Australians’ early impressions.²¹⁶ In such times, a feminist perspective of the state that seeks women’s empowerment and equal participation in the public sphere is unlikely to find favor.²¹⁷

Final Words

Ultimately, being conceived female constitutes a much greater threat to one’s survival and level of well-being than the threat of terrorist attacks.²¹⁸ On reflection, the counter-terrorism strategies and rhetoric considered more broadly indicate that this stark fact is likely to remain so for some time to come.

²¹² Charlesworth & Chinkin, *supra* note 184, at 600-601,

²¹³ *Id.* at 600.

²¹⁴ *Id.*, at 602-3.

²¹⁵ Charlesworth & Chinkin, *supra* note 184, at 601.

²¹⁶ FALUDI, *supra* note 190, Part One, *especially* 19-45.

²¹⁷ *Id.*, *see, e.g.*, at 20 where Faludi recounts being gleefully informed that “this sure pushes feminism off the map!”

²¹⁸ CHARLESWORTH & CHINKIN, *supra* note 48, at 233-34; the World Health Organization reports that 1600 women die *every day* in childbirth from preventable causes: 10 FACTS ABOUT WOMEN’S HEALTH, (World Health Organization, Geneva, 2008), <http://www.who.int/features/factfiles/women/en/index.html> (last visited April 23, 2008). Domestic Violence likewise remains a principal threat to women’s lives and health throughout the world: WHO MULTI-COUNTRY STUDY ON WOMEN’S HEALTH AND DOMESTIC VIOLENCE AGAINST WOMEN: SUMMARY REPORT, (World Health Organization, Geneva 2005).