

# Right to Self-Defense, Attribution and the Non-State Actor

## – Birth of the “Unable or Unwilling” Standard? –

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*Inter arma enim silent leges.*  
Cicero

## Abstract

The debate surrounding “unwilling or unable” states and terrorist attacks stemming from their territory reached a zenith during the United States (US) led strikes against Islamic State (IS) posts in Syria in September 2014. The questions raised mainly concern the concept of “armed attack” within the meaning of Art. 51 United Nations Charter (UNC). Concentrating on the notion of “attribution” of non-state actor conduct to states this article evidences that all approaches put forward in favor of grounding attribution on “unwillingness” or “inability” of states to suppress terrorist activities have not reached the level of *lex lata*. The systematics of the Charter allocate the responsibility to deal with “unwilling or unable” states to the Security Council (SC). Even if the Security Council is paralyzed and fails to act, “armed enforcement actions” by states against non-state actors are as of current law not legal. This result makes sense also from a policy perspective.

On 23.9.2014 the Secretary-General of the United Nations (UN) – *Ban Ki-Moon* – received a letter from *Samantha Powers* – the Ambassador of the United States at the UN –, where she justified US military actions against the *Islamic State*<sup>1</sup> in Syria as the exercise of Iraq’s right to self-defense arguing that “[S]tates must be able to defend themselves, in accordance with the inherent right of individual and collective self-defense, as reflected in Article 51 UNC, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks”. These comments succeeded US strikes launched against IS posts, the *Khorasan* group in the west of Aleppo and the *al-Nusra Front* around *Ar-Raqqah* on 22.9.2014. Whilst it is necessary to distinguish between these three targets,<sup>2</sup> this article shall focus solely on the invocation of collective self-defense in favor of Iraq. The US led operations were directed against attacks by non-state actors launched from Syria’s territory which apparently had failed in suppressing terrorists activities. Since – in the absence of Syrian consent – they constituted use of force and coincided with an infringement of Syria’s territorial sovereignty and right to noninterfer-

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<sup>1</sup> Formerly *Islamic State of Iraq and the Levant* (ISIS).

<sup>2</sup> The operation against the *Khorasan*-group as well as *al-Nusra Front* might require a specific legal evaluation since the USA relied on their very own right to self-defense in this respect.

ence, they required justification and especially raised the question as to the constitutive elements of “armed attack” within the context of Art. 51.<sup>3</sup>

Scholarly invocations of the evolution of a new standard of attribution – the “unwilling or unable”-formula – surfaced quite quickly and were propagated as suitable means to address the problem of terrorism<sup>4</sup> and merely passively behaving states. This well-known line of argument<sup>5</sup> – also called the “Shultz doctrine”<sup>6</sup> – has formed an integral part of the semantics of the “war on terror”.<sup>7</sup> Long before the IS operations, notions of “unwillingness”, “inability”, “safe havens”<sup>8</sup> and “harbouring” gained prominence during the Afghanistan conflict: The *Taliban* as Afghanistan’s *de facto* government and hence Afghanistan itself were regarded to be responsible for *Al Qaeda*’s activities since they harbored it.<sup>9</sup>

<sup>3</sup> All articles cited refer to the UN Charter unless it is indicated otherwise.

<sup>4</sup> A term whose practicability is questionable, cf. *R. Higgins*, *The General International Law of Terrorism*, in: *R. Higgins/M. Flory* (eds.), *Terrorism and International Law*, 1997, 13 (28). Nevertheless it shall be employed here taking into account a certain ignorance coming along with it.

<sup>5</sup> *S. D. Murphy*, *Contemporary Practice of the United States Relating to International Law*, *AJIL* 96 (2002), 237 (242 et seq.); *C. Gray*, *International Law and the Use of Force*, 2<sup>nd</sup> ed. 2004, 166. Cf. also the Joint Resolution of Congress, Public Law 107 et seq., 115, 224, especially Sec. 2 (a). Cf. Memorandum for Edwin Meese III (15.8.1984) during the *Reagan* administration. It also appears in Art. 1 lit. c (xi) of the *AU Non-aggression and Common Defence Pact*.

<sup>6</sup> *G. P. Shultz*, *Low-Intensity Warfare*, *ILM* 25 (1986), 204 (206); cf. *T. Ruys*, “Armed Attack” and Article 51 of the UN Charter, 2010, 422.

<sup>7</sup> Critical analysis of term “war on terror by” *F. Mégret*, “War” – Legal Semantics and the Move to Violence, *EJIL* 13 (2002), 361 et seq.; *A. Cassese*, *Terrorism Is also Disrupting some Crucial Legal Categories of International Law*, 5 *EJIL* (2001), 993 (993); *P.-M. Dupuy*, *State Sponsors of Terrorism*, in: *A. Bianchi/Y. Naqvi* (eds.), *Enforcing International Law Norms against Terrorism*, 2004, 3 (3); *A. Addis*, “Informal” Suspension of Normal Processes: The “War on Terror” as an Autoimmunity Crisis, *B.U.L. Rev.* 87 (2007), 323 (329 et seq.).

<sup>8</sup> Defined by the US Department of State as “ungoverned, under-governed, or ill-governed areas of a country and non-physical areas where terrorists are able to organize, plan, raise funds, communicate, recruit, train, and operate in relative security because of inadequate governance capacity, political will, or both”. U.S. Department of State, Office of the Coordinator for Counterterrorism, *Country Reports on Terrorism 2011*, Report 31.7.2012, Chapter 5.

<sup>9</sup> *George Bush* cited by the 9/11 Commission Report: *Final Report of the National Commission on Terrorist Attacks upon the United States* (2004), 326. Cf. Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, 7.10.2001, SC, UN Doc No. S/2001/946 (2001). This assumption presupposes severability of the *Taliban* from *Al Qaeda*. For the opposing view *J. A. Frowein*, *Der Terrorismus als Herausforderung für das Völkerrecht*, *ZaöRV* 62 (2003), 879 (887).

This paradigm of US foreign policy was also employed by numerous other states rising to the challenge of terrorist attacks.<sup>10</sup> The Israeli narrative regarding its military response against *Hezbollah* violence originating in Lebanon during the “Second Lebanon War” in 2006 is an example.<sup>11</sup> Israel justified actions directed against the *Palestine Liberation Organization* (PLO) in Lebanon with a similar argumentative pattern<sup>12</sup> and reiterated this line of argument after attacking PLO headquarters in Tunisia in 1985.<sup>13</sup> Russia proceeded against Chechen rebels in Georgia in 2002 citing Georgia’s inability to prevent violent attacks on Russia.<sup>14</sup> Even the UN Security Council – whilst refraining from categorizing 9/11 as an armed attack – condemned the *Taliban* regime for “for allowing Afghanistan to be used as a base for the export of terrorism by the Al-Qaida network [...] and for providing safe haven to Usama Bin Laden, Al-Qaida and others associated with them”.<sup>15</sup>

It is this article’s aim to show that all approaches put forward in order to attribute non-state actor behavior to inactive host states suffer from inconsistencies and are unconvincing. The Charter attributes the competence to deal with terrorism stemming from states incapable of or unwilling to suppress terrorist non-state actor activities to the Security Council even if it is paralyzed. In cases of Security Council inaction scholars should withstand a reinterpretation of Art. 51 *contra legem* and admit that counterstrikes comparable to the IS/Syria example are *illegal*. It is also particularly problematic to translate such military strategies against terrorism into the language of international legality making use of the semantics of self-defense from a policy perspective. The repercussions would pose a severe threat to peace between states.

Since the problem addressed here is multilayered, I shall approach it step by step. After delineating different levels of state involvement in terrorist

<sup>10</sup> It is reflected in the Chatham House Principles of International Law on the Use of Force in Self-Defense, ICLQ 55 (2006), 963, which however lack reference to any authorities.

<sup>11</sup> Identical letters dated 12.7.2006 from the Permanent, Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, A/60/937 S/2006/515. Cf. A. Zimmermann, *The Second Lebanon War: Jus ad bellum, in bello and the Issue of Proportionality*, Max Planck UNYB 11 (2007), 99 (115 et seq.).

<sup>12</sup> Letter from the Representative of Israel to the President of the United Nations Security Council (29.12.1968), reprinted in 23 U.N. SCOR, Supp. (Oct.-Dec. 1968) 180, U.N. Doc. S/8946 (1968).

<sup>13</sup> Statement by *Binyamin Netanyahu*, see UNSC 2611<sup>th</sup> Meeting, 2.10.1985, UN Doc. S/PV. 2611 (1985), 22 et seq.

<sup>14</sup> A. S. Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defence, *Va. J. Int’l L.* 52 (2012), 483 (486).

<sup>15</sup> SC Res. 1378, UN Doc No. S/RES/1378 (2001).

activities (I.) I will elaborate on the concept of armed attack (II.) and briefly analyze how mere unwillingness or inability of states to suppress terrorist activities fits into its scheme (III.). This will be followed by a glance at the notion of attribution (IV.) and its interrelatedness with armed attack (V.). After showing that traditional attribution formulae are of no avail in the context of the IS/Syria constellation in order to construe an armed attack (V.), this article's major part will evaluate the purported normative status of the unwilling or unable-formula as a new standard of attribution (VII.). I will conclude by showing why broadening the scope of Art. 51 is not only legally but also politically misguided (VIII.)

## I. Cascade of State Involvement in Terrorist Attacks

In the context of Art. 51, unwillingness and inability refer to prior or subsequent state conduct in respect to an attack and address the problem of state involvement in terrorist activities. State support of terrorist activities is not uniform but resembles a cascade of different levels of participation.<sup>16</sup> Their categorization proves difficult. The extent of supportive measures to a specific attack, the "*mens rea*" of the state, and the nature of the state conduct – action or omission – could serve as determinants for a classification. All forms of support are connected by a chain of causation with a specific terrorist attack. State organs themselves may instruct terrorist cells to conduct a specific attack (level 1) or rather support them by financing, delivery of weapons or propaganda (level 2). They may consent explicitly to a specific attack (level 3) or generally to terrorist activities as such (level 4). They might tolerate these activities by remaining passive or refrain from prosecuting against the perpetrators out of conviction (level 5). They might just omit to prevent a specific attack or to prosecute the offenders in its aftermath out of mere (negligent) ignorance (level 6) or incapacity (level 7). Lastly they might not take counteraction against terrorist activities in general due to lack of knowledge (level 8) or incapacity (level 9). Levels 5 to 9 are the main playing field of the unwilling or unable-formula. In all these cases the effect of the state conduct is that it offers terrorists "harbor"<sup>17</sup> or "sanc-

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<sup>16</sup> See also V.-J. Proulx, *Transnational Terrorism and State Accountability*, 2012, 34 et seq.; Appendixes I et seq.

<sup>17</sup> Cf. D. Jinks, *State Responsibility for the Acts of Private Armed Groups*, Chi. J. Int'l L. 4 (2003), 83 (91). For some scholars tacit approval is a prerequisite for "harboring", cf. J. Brunnée, *The Security Council and Self-Defence: Which Way to Global Security?*, in: N. M. Blokker/N. Schrijver (eds.), *The Security Council and the Use of Force*, 2005, 107 (123).

tuary”.<sup>18</sup> All these blurred levels of participation capture conduct which qualifies as an omission.

## II. The Concept of “Armed Attack” and the Question of Attribution

Art. 2 para. 4 entails a comprehensive prohibition on the use of force against the “territorial integrity” and “political independence” of states and “in any other manner inconsistent with the purposes of the United Nations”. The use of force against a state without its consent<sup>19</sup> and outside of operations based on the powers Chapter VII of the UNC grants is only legal if it constitutes self-defense.<sup>20</sup> A counterstrike against non-state actors acting from the territory of a foreign state violates – in the absence of the host state’s consent – cumulatively the prohibition on the use of force, the host state’s territorial sovereignty and its right to noninterference<sup>21</sup> and hence calls for justification which puts the prerequisites of Art. 51 into the spotlight.

The discussion whether Art. 51 is exhaustive or rather complemented by a right to self-defense resting in customary international law is undeniably in flux. It is however this paper’s premise in view of the genesis of the Charter and its *telos* that Art. 51 corresponds entirely with the “inherent right” of self-defense as to be found in customary international law.<sup>22</sup> Art. 51 and Art. 2 para. 4 are directly interrelated and fill the prohibition on the use of

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<sup>18</sup> Cf. *B. Michael*, Responding to Attacks by Non-State Actors: The Attribution Requirement of Self-Defence, *Australian International Law Journal* 16 (2009), 133 et seq.; *K. Zemanek*, Self-Defence against Terrorism: Reflexions on an Unprecedented Situation, in: F. M. Mariño Menéndez (ed.), *El Derecho internacional en los albores del siglo XXI*, 2002, 695 (704).

<sup>19</sup> Current international law does not prohibit the justification of the use of force based on consent, *D. Wippman*, Pro-Democratic Intervention, in: M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law*, 2015, 797 (805). The relationship between use of force and consent is however ambiguous, *A. Deeks*, Consent to the Use of Force and International Law Supremacy, *Harv. Int’l L J* 54 (2013), 1 (26).

<sup>20</sup> Humanitarian Intervention has not reached the level of a normative exception yet, *A. Randelzhofer/O. Dörr*, in: B. Simma et al. (eds.), *The Charter of the United Nations*, 3<sup>rd</sup> ed. 2013, Art. 2(4), para. 57.

<sup>21</sup> Cf. *M. E. O’Connell*, Dangerous Departures, *AJIL* 107 (2013), 380 (383); *C. Tams*, The Use of Force Against Terrorists, *EJIL* 20 (2009), 359 (365).

<sup>22</sup> *H. Kelsen*, *The Law of the United Nations*, 1951, 913 et seq. For the contrary view *M. Kühn*, *Unilaterale Präventive Gewaltanwendung*, 2009, 280; *D. W. Bowett*, *Self-Defence in International Law*, 1958, 187 et seq.

force with substance. Since Art. 2 para. 4 constitutes an *ius cogens* norm,<sup>23</sup> the same applies to the corresponding and “inextricably linked” Art. 51.<sup>24</sup>

The key to the invocation of self-defense is the notion of armed attack. One of the most disputed issues is the scope *rationae personae* of Art. 51: Does armed attack equal “state attack”<sup>25</sup> or is to be understood more broadly as encompassing violent actions by private actors?<sup>26</sup> Since most authors appear to be discussing the unwilling or unable-standard within the context of attribution, my analysis shall concentrate on this notion. Hence for the purposes of this paper a few considerations regarding the concept of armed attack shall suffice here: While it is true that Art. 51 does not limit the potential originator of armed attacks to states *expressis verbis*<sup>27</sup> and the UNC was drafted in a legal surrounding with little awareness towards threats of internationally organized terrorism, the International Court of Justice (ICJ) has refrained from giving such an interpretation its blessing until now.<sup>28</sup> It is true that the Court did not reject the inclusion of non-state actors into the scope of Art. 51 explicitly. However, in its *Oil Platforms Case* (2003)<sup>29</sup> – decided some time after 9/11 when the question of non-state actors as aggressors was intensely debated – it continued to apply the state-centric concept of armed attack without hinting at – e.g. by ways of an *obiter dictum* – any interpretative changes. It *de facto* reinforced the traditionally confined approach by finding that “the evidence indicative of Iranian responsibility for the attack on the Sea Isle City is not sufficient to support the contentions of the United States. The conclusion to which the

<sup>23</sup> According to *N. Schrijver* only “perhaps,” see *The Ban of the Use of Force in the UN Charter*, in: M. Weller (ed.), *The Use of Force in International Law*, 2015, 465 (487). However, the *ius cogens*-nature of the prohibition on the use of force appears essential for preventing fragmentation which would endanger peaceful state relations, cp. *A. Orakhelashvili* *Changing Ius Cogens Through State Practice*, in: M. Weller (note 19), 157 (175).

<sup>24</sup> *T. Ruys* (note 6), 27.

<sup>25</sup> Answering this in the affirmative *B. Michael* (note 18), 134 et seq.

<sup>26</sup> Answering in the affirmative *J. J. Paust*, *Self-Defense Targetings of Non-State Actors and the Permissibility of U.S. Use of Drones in Pakistan*, *J. Transnat'l L. & Pol'y* 19 (2010), 237 (238). Quite anachronistically many scholars refer to the “locus classicus” of *Caroline*, see e. g. *S. D. Murphy*, *Terrorism and the Concept of Armed Attack in Article 51 of the UN Charter*, *Harv. J. Int'l L.* 43 (2002), 41 (50). Regarding *Caroline* see *R. Y. Jennings*, *The Caroline and McLeod Cases*, *AJIL* 32 (1938), 82 (92).

<sup>27</sup> *M. Kowalski*, *Armed Attack, Non-State Actors and a Quest for the Attribution Standard*, *Polish Y.B. Int'l L.* 30 (2010), 101 (119); *Chatham House Principles* (note 10), 969; *J. J. Paust*, *Use of Armed Force Against Terrorists in Afghanistan, Iraq and Beyond*, *Cornell Int'l L. J.* 35 (2002), 532 (534). Cf. to the concept of a state in international law Art. 1 of the Montevideo Convention, *AJIL Supplement* 28 (1934), 75 et seq.

<sup>28</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, 139, para. 139. See *A. Orakhelashvili* (note 23), 172.

<sup>29</sup> ICJ, *Oil Platforms Case*, ICJ Reports 2003, 161, para. 51.



Court has come [...] is thus that the burden of proof of the existence of an armed attack by Iran on the United States [...].”<sup>30</sup> The same is true for its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,<sup>31</sup> where the ICJ merely stressed that Art. 51 entailed a right to self-defense “in the case of armed attack by one State against another State”.<sup>32</sup> The Israeli barrier was not justified in the Court’s view since Israel did not claim that it had been attacked by a state. Although non-state actors played a major role in the *Armed Activities* case decided some time later the ICJ missed the perfect opportunity for making a clear statement on the scope of Art. 51. It held on to the requirement of attribution implying to follow the “state armed attack” concept by stating: “The Court has found above that there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of General Assembly resolution 3314 (XXIX) [...]. The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC.”<sup>33</sup> What seems to be a clear confirmation of the state-centric concept of armed attack at first glance, is admittedly obscured by the subsequent paragraph where the Court states that it had “no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defense against large-scale attacks by irregular forces”.<sup>34</sup> While it is arguable that the ICJ created some leeway for parting with the state-centric interpretation of Art. 51 in the future hereby, it is not convincing to understand the Court’s findings as an acknowledgment of the inclusion of non-state actors into the concept of armed attack as *lex lata*. The Court’s reluctance and indecisiveness rather evidence that this is not the case. A reading of Art. 51 as including non-state actor attacks would furthermore not explain why the simultaneous violation of the host state’s sovereignty that necessarily comes along

<sup>30</sup> *Oil Platforms Case* (note 29), para. 61.

<sup>31</sup> *Legal Consequences of the Construction of a Wall* (note 28). Opposing views presented by Judges *Buerghenthal, Higgins, Kooijmans*, see Separate Opinion *Buerghenthal, Higgins, Kooijmans*.

<sup>32</sup> *Legal Consequences of the Construction of a Wall* (note 28), para. 139.

<sup>33</sup> ICJ, *Armed Activities on the Territory of the Congo*, ICJ Reports 2005, 168, para. 146.

<sup>34</sup> *Armed Activities on the Territory of the Congo* (note 33), para. 147. See *C. Tams* (note 21), 384. Assuming that the ICJ clearly rejected the idea of including non-state actors into the concept of armed attack *A. Randelzhofer/O. Dörr* (note 20), para. 31; *M. Hakimi*, *Defensive Force Against Non-State Actors: The State of Play*, *International Law Studies* 91 (2015), 1 (6); *D. Tladi*, *The Nonconsenting Innocent State*, *AJIL* 107 (2013), 570 (572).



with the counterstrike is justified.<sup>35</sup> Hence the state-centric understanding of armed attack is the premise of my further analysis.

### III. Passivity and Omissions as “Armed Attack”

Some voices regard mere state support of terrorist activities culminating in a sufficiently severe attack even in cases of a state’s sheer “passivity” – hence the harboring itself – as armed attack.<sup>36</sup> The ICJ has not given an abstract definition of armed attack and mainly referred to the *Definition of Aggression* annexed to General Assembly Resolution 3314 (XXIX).<sup>37</sup> It made clear, however, that an armed attack must overstep a certain level of gravity. Art. 3 lit. g of the Resolution regards “substantial involvement” in “sending [...] armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above [...]” as an armed attack. Starting with a literal interpretation, armed attack implies immediate force; “substantial involvement” refers to a certain activity. The debates of the *Working Group* on the final compromise version of the resolution remain inconclusive.<sup>38</sup> The *Report of the Sixth Committee* debating the final compromise version of the *Definition of Aggression* appears more definite: Neither the mere fact “that the receiving State organized, helped to organize or encouraged the formation of armed bands should constitute an act of aggression independently of whether or not it also participated in sending them on the incursions. Nor was it acceptable, a fortiori, that by making its territory available to such armed bands a State could be considered as committing an act of aggres-

<sup>35</sup> C. Tams (note 21), 385; K. N. Trapp, Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors, ICLQ 56 (2008), 141 (146).

<sup>36</sup> H. Kelsen, Principles of Int. Law, 2<sup>nd</sup> ed. 1966, 62 et seq.; E. C. Stowell, International Law, 1931, 89 et seq.; B. A. Feinsein, Paradigm for the Analysis of the Legality of the Use of Armed Force against Terrorists and States that Aid and Abet Them, Transnational Lawyer 17 (2004), 51 (81); H. Hofmeister, When Is It Right to Attack So-Called “Host States”?, Singapore Yearbook of International Law 11 (2007), 1 (7); D. Brown, Use of Force against Terrorism after September 11th: State Responsibility, Self-Defence and Other Responses, Cardozo J. Int’l & Comp. L. 11 (2003), 1 (13 et seq.). C. Kreß, Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen bei Staatlicher Verwicklung in Gewaltakte Privater, 1995, 150. For passivity as aggression M. R. García-Mora, International Responsibility for Hostile Acts of Private Persons against Foreign States, 1962, 119.

<sup>37</sup> ICJ, *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports 1986, 14 para. 195.

<sup>38</sup> Document 26, 29<sup>th</sup> Sess., Supp. No. 19, A/9619, Report of Special Committee, Annex I.

sion.”<sup>39</sup> Hence the “involvement” requirement referred to the sending itself. This also finds support in the ICJ’s *Nicaragua* judgment: “The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the Court does not believe that the concept of ‘armed attack’ includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support.” Such conduct does not amount to an armed attack, but “may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States”.<sup>40</sup> Thereby the ICJ established a difference between the definition of an armed attack and the concept of prohibited force.<sup>41</sup> If the supply of weapons constitutes conduct “short of an armed” attack, *argumentum maiore ad minus* passivity cannot be regarded as an armed attack. Mere passivity would in view of the case-law most likely not pass the threshold of gravity.

This leads us to following result: If armed attack is understood as state attack and passivity in the meaning of participatory levels 5 to 9 does not qualify as armed attack, attribution of non-state actor behavior to the state becomes crucial.<sup>42</sup> Approaches arguing that the attribution requirement within Art. 51 was abandoned by state practice and *opinio iuris* in the aftermath of 9/11 necessarily imply the inclusion of non-state actors into the scope of armed attack.<sup>43</sup> Hence they all fail to convince for the same reasons invoked against a non-state-centric reading of Art. 51. It is particularly significant in this regard that the ICJ explicitly analyzed the attributability of

<sup>39</sup> Sec A/9411, 10.12.1973 para. 22.

<sup>40</sup> *Military and Paramilitary Activities in and against Nicaragua* (note 37), paras. 195.

<sup>41</sup> *M. Kowalski* (note 27), 110.

<sup>42</sup> Likewise holding on to the attribution requirement *A. Randelzhofer/O. Dörr* (note 20), para. 31; *C. Tams* (note 21), 392; *A. Randelzhofer/G. Nolte*, Art. 51, in: B. Simma et al. (eds.), *The Charter of the United Nations*, 2002, para. 37; *D. Tladi* (note 34), 572.

<sup>43</sup> Some authors argue to substitute the attribution requirement with a “sufficient external link”, see *C. Stahn*, *Terrorist Acts as “Armed Attack”: The Right to Self-Defense, Article 51 (½) of the UN Charter, and International Terrorism*, *Fletcher Forum of World Affairs* 27 (2003), 35 (43); cf. *R. v. Steenberghe*, *Self-Defense against Non-State Actors: Recent State Practice*, *LJIL* 23 (2010), 183 (207). *Steenberghe* wants to establish this link within the requirement of “necessity”. Others interpret the ICJ’s ruling as requiring only an attribution of the non-state actor attack to the state if the state itself is the target, not if only the non-state actor is attacked, cf. *K. N. Trapp* (note 35), 145. Since attacks analyzed here simultaneously infringe a host state’s sovereignty, this distinction is of no avail.

the attack in question to Iran in its judgment in the *Oil Platforms* case – way after 9/11 – and to the Democratic Republic of the Congo (DRC) in its *Armed Activities* case.<sup>44</sup> Nevertheless I will take a closer look at two approaches which tackle the problem of non-state actors outside the question of attribution at the end of this article in order to present a broader picture of the debate [VII.,1., 2.], while keeping the main focus on attribution. So: What does this concept entail?

#### IV. “Armed Attack” and Attribution

Attribution is a normative operation.<sup>45</sup> Its function is to create a linkage between human conduct and a state. While Art. 51 is silent on any attribution rules, a catalogue of imputability principles can be found in the International Law Commission (ILC) Articles on State Responsibility (ILC Articles) which codify customary law.<sup>46</sup> These articles evidence two crucial points: First of all, the simple fact that an activity takes place within the territory of a state does not transform it into an act of it.<sup>47</sup> Art. 5 et seq. ILC Articles base attribution on specific and limited grounds. Secondly, the ILC Articles show that the object of attribution is the conduct of the actually acting entity itself: In the first instance, Art. 2 ILC Articles requires an action or omission which – in a second step – has to be attributable to the state (Art. 2 lit. a ILC Articles). The ILC Articles predominantly capture situations – with the exception of retrospective appropriation in Art. 11 – where a private actor acts as a *de facto* state organ. Besides these specific grounds private conduct is not attributable to the state, unless a broader *lex specialis* regime of attribution can be evidenced (Art. 55 ILC Articles) as was confirmed by the ICJ in its *Genocide* case.<sup>48</sup> A state does however have certain obligations regarding the behavior of subjects who stand under its

<sup>44</sup> *Oil Platforms* Case (note 29), para. 72. See *M. Hakimi* (note 34), 6.

<sup>45</sup> Cf. Report of the ILC, 53<sup>th</sup> Sess., GA Official Records, Fifty-sixth session, Supp. No. 10 (A/56/10), 71; ILC, YILC 1973 II, 180 para. 3; *J. G. Starke*, Imputability in International Delinquencies, BYIL 19 (1938), 105.

<sup>46</sup> *A. Sarvarian*, The Attribution of Conduct in the Law of International Responsibility, the European Union and the Jurisprudence of the European Court of Human Rights, *Journal européen des droit d l'homme* (2013/4), 654 (655).

<sup>47</sup> *A. J. J. de Hoogh*, Articles 4 and 8, BYIL 72 (2001), 255 (265).

<sup>48</sup> *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports 2007, 43 et seq., para. 401; *T. Ruys* (note 6), 491. Cf. *A. Kees*, Attribution, in: MPEPIL online, para. 17; *M. Kowalski*, Prawo do Samoobrony, 2013, 202 et seq.; *M. Lehto*, Indirect Responsibility for Terrorist Acts: Redefinition of the Concept of Terrorism Beyond Violent Acts, 2009, 405.

authority and control. It can incur “indirect” as opposed to “direct”<sup>49</sup> or “original responsibility” for violating these obligations. In cases of “indirect” responsibility – in the broader sense – the state’s failure to conform to its obligations in relation to private conduct leads to its very own genuine responsibility.<sup>50</sup> What is widely rejected is the idea of “vicarious responsibility”.<sup>51</sup> According to this concept a state is liable for private conduct itself if it fails to take certain actions with respect to non-state actors. Today it is undisputed that in such constellations the state is not responsible for the private behavior but for its very own omission.<sup>52</sup> As will be shown, the unwilling or unable-formula has a propensity to reintroduce the concept of vicarious responsibility into the realm of Art. 51. But first of all, I will address the question whether the principles of attribution established within the regime of state responsibility and hence secondary norms are applicable to Art. 51.

## V. The Correlation between Principles of State Responsibility and Attribution within the Context of Art. 51 UNC

Almost all lines of argument in this context are based on the premise that the rules of the ILC Articles correspond to the attribution criteria within Art. 51.<sup>53</sup> This congruity is neither a legal nor even a logical necessity. Quite

<sup>49</sup> *H. Kelsen*, *Théorie du Droit International Public*, Hague Recueil 84 (1953), 90.

<sup>50</sup> Cf. *A. E. Boyle*, *State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International Law: A Necessary Distinction?*, *ICLQ* 39 (1990), 1 (20 et seq.); *A. Seibert-Fohr*, *Die völkerrechtliche Verantwortung des Staats für das Handeln von Privaten*, *ZaöRV* 73 (2013), 37 (42 et seq.).

<sup>51</sup> *L. Oppenheim*, *International Law*, 1912, § 149 et seq. *Proulx* regards the terms “indirect” and “vicarious responsibility” as synonyms, *V.-J. Proulx*, *Babysitting Terrorists: Should States Be Strictly Liable for Failing to Prevent Transborder Attacks*, *Berkeley J. Int’l L.* 23 (2005), 615 (629). Cf. to the idea of “state complicity” already *H. Grotius*, *De Jure Belli ac Pacis Libri Tres*, Bk. II, Ch. XVII, Sec. 20 (translation by F. W. Kelsey, 1925); *S. Pufendorf*, *De jure naturae et gentium Libri Octo*, Bk. VIII, Ch. VI, Sec. 12 (translated by C. H. and W. A. Oldfather, 1934). In favor of a “vicarious” responsibility regime in the context of human rights *A. Reimisch*, *The Changing International Legal Framework for Dealing with Non-State Actors*, in: P. Alston (ed.), *Non-State Actors and Human Rights*, 2005, 37 (79).

<sup>52</sup> *A. Epiney*, *Die völkerrechtliche Verantwortlichkeit*, 1992, 108 et seq.

<sup>53</sup> This view is taken by most authors, cf. *M. Krajewski*, *Selbstverteidigung gegen bewaffnete Angriffe nicht-staatlicher Organisationen*, *AVR* 40 (2002), 183 (189 et seq.). Deploying an in-depth discussion of this point *A. Nollkaemper*, *Attribution of Forcible Acts to States*, in: N. M. Blokker/N. Schrijver (note 17), 2005, 133 (139); *M. Kowalski* (note 27), 103; *J. Kammerhofer*, *Uncertainties of the Law on Self-Defence in the United Nations Charter*,

on the contrary: It is doctrinally rather problematic and requires specific justification. At the root of this problem lies the very nature of Art. 51: Is it a primary norm or a special emanation of “countermeasures” belonging to the realm of secondary norms? In the latter case the application of the ILC Articles would be – even if not a matter of course – at least easily arguable.

The ILC Articles treat self-defense as separate from countermeasures. The only interrelatedness they acknowledge is that self-defense precludes the wrongfulness of an act (Art. 21 ILC Articles). This distinction proves contentious. The conventional view differentiates between countermeasures and self-defense based on the motives for an action. Countermeasures are primarily employed to urge another state to comply with its international obligations. At the same time they have a sanctioning effect with regard to previous wrongful behavior.<sup>54</sup> They are employed to deter. Self-defense is in contrast directed at neutralizing an ongoing attack. It is non-retributive and non-sanctioning in nature.<sup>55</sup> However, a clear delimitation by reference to the objectives proves to be difficult since most actions are guided by a panoply of various overlapping and non-exclusive motivations.<sup>56</sup> Self-defense actions may well yield a deterring effect. A clear separation appears nevertheless important in view of one of international law’s essentials: The UNC strictly forbids unilateral measures using armed force to coerce compliance with obligations of international law – traditionally called “armed reprisals”.<sup>57</sup> Solely unilateral countermeasures by the injured state below the threshold of armed force are allowed as reactions to violations of international obligations (Art. 49 ILC Articles).<sup>58</sup> Should a violation of *erga omnes*-obligations occur, any other state than an injured state may resort to countermeasures (Art. 48 ILC Articles). In any case countermeasures “shall

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NYIL 35 (2005), 143 et seq.; *R. v. Steenberghe* (note 43), 195 et seq. It can be widely found in jurisprudence. The Appeals Chamber in the *Tadić* case for example consulted – after finding that international humanitarian law did not establish the specific degree of control a state must exercise over a group of individuals in order to be regarded as responsible – principles of state responsibility, see ICTY, Case IT-94-1, *Prosecutor v. Tadić*, ILM 38 (1999), 1518, at paras. 90 et seq. A different thread of argument is based on the idea of “law enforcement”, see below.

<sup>54</sup> Cf. *D. W. Bowett*, Reprisals Involving Recourse to Armed Force, *AJIL* 66 (1972), 1 (3).

<sup>55</sup> *J. L. Kunz*, Sanctions in International Law, *AJIL* 54 (1960), 324 (332.).

<sup>56</sup> *Y. Dinstein* propagates an assimilation of “armed reprisals” that are defensive with self-defense, see *Aggression*, 5<sup>th</sup> ed. 2011, 244 et seq.

<sup>57</sup> *I. Brownlie*, *Principles of International Law*, 8<sup>th</sup> ed. 2012, 586. For the contrary view *P. A. Seymour*, The Legitimacy of Peacetime Reprisal as a Tool Against State-Sponsored Terrorism, *Nav. L. Rev.* 39 (1990), 221 (233).

<sup>58</sup> Art. 49 et seq. ILC Draft. Cf. *V. Gowlland-Debbas*, The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance, *EJIL* 11 (2000), 361 (378).

not affect the obligation to refrain from the threat or the use of force as embodied in the Charter of the United Nations [...]” (Art. 50 para. 1 lit. a ILC Articles). Hence the idea of “armed countermeasures” is a *contradiction in adiecto* from the perspective of international law as it stands today. Consequently the term “armed reprisals” has almost vanished from the terminology of international law outside the context of actions by belligerents in the course of an international armed conflict.<sup>59</sup> Irrespective of this fact some voices argue that Art. 51 – at least in substance – could be seen as a substitute for armed reprisals and pave the way for “extraordinary countermeasures” by military force.<sup>60</sup> This cannot convince in light of the *Friendly Relations Declaration*,<sup>61</sup> consistent case-law,<sup>62</sup> state practice and *opinio iuris*. If an armed measure is undertaken against a state without the authorization of the Security Council and is not justified based on Art. 51, it is illegal leaving no room for “defensive armed reprisals”.<sup>63</sup> This is also the very reason why states reacting to attacks short of an armed attack generally refer to the semantics of self-defense and not the concept of armed reprisals.<sup>64</sup> Since international law emancipated self-defense from armed reprisals, it simultaneously abolished any remnants of secondary norms within Art. 51. It encompasses a primary rule by giving the prohibition on the use of force specific content.<sup>65</sup> Because primary and secondary rules have “separate identities and functions”,<sup>66</sup> principles of state responsibility do not automatically apply to Art. 51. While it is true that in some cases the categorization of a norm as primary and secondary may appear to be rather “arbitrary”, the unreflected employment of the ILC Articles as a tool to interpret a primary rule enshrined in the UNC conflicts with the Charter’s precedence over other state obligations stemming from international law (Art. 103). However both the regime of state responsibility as well as the regime of self-

<sup>59</sup> J. Crawford, *State Responsibility*, 2013, 685.

<sup>60</sup> Cf. A. Nollkaemper (note 53), 149; B. Conforti, *International Law and the Role of Domestic Legal Systems*, 1993, 176; M. Kowalski (note 27), 105; T. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks*, 2002, 67.

<sup>61</sup> GA, Resolution 2625 (XXV).

<sup>62</sup> Cf. PCA, *Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII of the UN Convention on the Law of the Sea (Guyana and Suriname)* (17.9.2007), para. 446.

<sup>63</sup> For the contrary view Y. Dinstein (note 56), 250.

<sup>64</sup> O. Corten, *Judge Simma’s Separate Opinion in the Oil Platforms Case: To What Extent are Armed “Proportionate Defensive Measures” Admissible in Contemporary International Law*, in: U. Fastenrath et al. (eds.), *From Bilateralism to Community Interest*, 2011, 843 (848).

<sup>65</sup> Cp. J. Kammerhofer, *The Armed Activities Case*, 107 et seq.; T. Ruys (note 6), 490; M. Kowalski (note 27), 105.

<sup>66</sup> A. Nollkaemper (note 53), 144.

defense face a similar problem, namely the determination of what qualifies as state conduct. Hence it is widely accepted practice to consult the ILC Articles as a template or interpretative aid for Art. 51. This is regularly done in case-law and can frequently be found in scholarship.<sup>67</sup> This approach is legitimate as long as it is kept in mind that the ILC Articles and the customary rules that they reflect do not have the last word on the question of attribution of an armed attack.

## VI. Attribution Formulae in the Syrian Case

The invocation of the unwilling or unable-formula in the IS context is a reaction to one central finding: Reference to and application of ILC imputability principles leads to the conclusion that the IS attacks were not attributable to Syria. Even though Art. 4 and 5 ILC Articles illustrate that “state organ” is not to be interpreted formalistically, IS does not fit into this scheme since it lacks total dependency on the Syrian state.<sup>68</sup> Art. 9 ILC Articles regulating cases of state default is likewise not applicable here. While it can well be argued that IS exercised governmental authority in a part of Syrian territory, Art. 9 remains inapplicable. It presupposes a certain legitimate action and agency (*levée en masse*) on the part of the citizenry after governmental powers have already collapsed.<sup>69</sup> Since it does not cover the active substitution of state authority by non-state actors,<sup>70</sup> it is not relevant in the IS constellation. Obviously the most prominent criterion for attribution is “effective control” which was born in the paradigmatic *Nicaragua* case decided by the ICJ in 1986.<sup>71</sup> It has since overshadowed each debate surrounding the attribution question and inspired Art. 8 of the ILC Articles<sup>72</sup> despite its ambiguity and the Court’s quite poor legal grounding of it.<sup>73</sup> “Effective control” of military or paramilitary activities does not re-

<sup>67</sup> R. Wolfrum speaks of “borrowing”, see The Attack of September 11, 2001, The War against the Taliban and Iraq, Max Planck UNYB 7 (2003), 1 (37).

<sup>68</sup> Cf. Concerning this criterion ECtHR, *Loizidou v. Turkey*, 18.12.1996 (40/1993/435/514); A. Zimmermann (note 11), 111.

<sup>69</sup> Report of the ILC (note 45), 109. Cf. J. Hessbruegge, The Historical Development of the Doctrines of Attribution and Due Diligence in International Law, N.Y.U. J. Int’l L. & Pol. 36 (2003-2004), 265 (274).

<sup>70</sup> M. Kowalski (note 27), 118; M. Milanović, State Responsibility for Genocide, EJIL 17 (2006), 553 (586).

<sup>71</sup> *Military and Paramilitary Activities in and against Nicaragua* (note 37).

<sup>72</sup> Report of the ILC (note 45), para. 68; A. Zimmermann (note 11), 114.

<sup>73</sup> A. Cassese, The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia, EJIL 18 (2007), 649 (653).



quire absolute state dependency of the non-state actor but merely state authorization.<sup>74</sup> Syria did not, however, authorize IS activities. A broader of attribution departing – at least in degree<sup>75</sup> – from the *Nicaragua* standard was applied by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case.<sup>76</sup> The ICTY concluded that the dynamics and hierarchy within (sufficiently) organized groups would make their activities attributable to the state if they stood under its “overall control”.<sup>77</sup> Such a degree of control is given if the state has a role “in organizing, coordinating or planning the military actions”, even if the non-state actor does not act on state instructions or even contrary to these.<sup>78</sup> The ICTY ruling does not lead to a different result in the *IS/Syria* case. First of all, the Tribunal addressed the international character of the conflict in question and the applicability of Art. 2, 4 and 147 of Geneva Convention IV,<sup>79</sup> hence humanitarian issues and neither questions of state responsibility nor armed attack. Secondly, in the *Armed Activities* case the ICJ rejected the “overall control”-standard.<sup>80</sup> Although its reasoning was disputed,<sup>81</sup> it reflects *lex lata* and was confirmed in its *Genocide* case.<sup>82</sup> The last resort for attribution appears to be Art. 11 ILC Articles, which grounds imputability on subsequent adoption and appropriation of the private conduct of the state. As established in the *United States Diplomatic and Consular Staff in Tehran* judg-

<sup>74</sup> *Military and Paramilitary Activities in and against Nicaragua* (note 37), para. 115; S. Shukurov, State Responsibility in Cases of Self-Defence against Non-State Actors: A Pillar in Establishing an International Rule of Law, 2011, 216 et seq. A. Zimmermann (note 11), 113. Traditionally “substantial involvement” was equated with *de facto* organs, P. L. Zanardi, Indirect Military Aggression, in: A. Cassese (ed.), *The Current Legal Regulation of the Use of Force*, 1986, 111 (115).

<sup>75</sup> Cf. T. Becker, *Terrorism and the State*, 2006, 70.

<sup>76</sup> *Prosecutor v. Tadić* (note 53) 1518, at paras. 116 et seq.; D. Jinks (note 17), 89; K. Mohan, *Terrorism and Asymmetric Warfare: State Responsibility for the Acts of Nonstate Entities – Nicaragua, Tadic, and Beyond*, *Journal of the Institute of Justice and International Studies* 8 (2008), 211 (213); M. E. O’Connell, *Enhancing the Status of Non-State Actors through a Global War on Terror*, *Colum. J. Transnat’l L.* 43 (2004), 435 (449).

<sup>77</sup> ICTY (note 53), para. 120

<sup>78</sup> ICTY (note 53), para. 137, 121. Cf. A. J. J. de Hoogh (note 47), 263; M. Kowalski (note 27), 114.

<sup>79</sup> ICTY (note 53), paras. 68 et seq.; A. J. J. de Hoogh (note 47), 255 et seq. Cf. ICTY, Trial Chamber, *Prosecutor v. Tibomir Blaskic*, paras. 73 et seq.

<sup>80</sup> *Armed Activities on the Territory of the Congo* (note 33). For an opposing interpretation of the ICJ’s judgment K. N. Trapp, *Can Non-State Actors Mount an Armed Attack*, in: M. Weller (note 19), 679 et seq. Cf. K. Mohan (note 76), 218.

<sup>81</sup> ICJ, *Armed Activities on the Territory of the Congo* (note 33), Judge Kooijmans. Sep. Opinion, para. 29 et seq.; ICJ, Sep. Opinion Simma, para. 11.

<sup>82</sup> *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (note 48), para. 392; S. Shukurov (note 74), 219; K. Mohan (note 76), 219.

ment, attribution requires an unequivocal appropriation of the non-state actor conduct; mere consent is insufficient.<sup>83</sup> Syria however expressly condemned the actions of IS.

So the crucial question is whether a broader standard of attribution going beyond the ILC Articles applies to Art. 51.<sup>84</sup> At this stage the “harboring doctrine” gains relevance. In this context one *caveat* must be pointed out: There is a difference between interpreting and amending norms. Art. 51 is not to be understood as a “dynamic reference” to current customary law.<sup>85</sup> Obviously to a certain extent treaty provisions may “change” via interpretative means. While subsequent state practices are acknowledged momenta of treaty interpretation as Art. 31 para. 3 (a), (b) Vienna Convention on the Law of Treaties (VCLT) provides, states do not have the power to factually supersede *ius cogens* norms by subsequent agreement unless it is also preemptory in nature.<sup>86</sup> Proclamations of new standards of attribution in the context of Art. 51 are henceforth to be handled with care.

## VII. The “Harboring Doctrine”: Birth of the New Attribution Standard of “Unwilling or Unable”?

A “deadly connection”<sup>87</sup> undeniably exists between states “supporting” terrorist activities on the participatory levels 5 to 9 and terrorism in its modern emanation. This form of “passive participation” allows terrorism to flourish and appears as its necessary precondition. As I have demonstrated above, established principles of attribution will not lead to imputability in cases of these participatory levels.<sup>88</sup> In particular, the “effective control” re-

<sup>83</sup> ICJ, *Diplomatic and Consular Staff*, ICJ Reports 1980, 3, para. 67, 35. Cf. to the situation regarding Afghanistan *S. D. Murphy* (note 26), 51.

<sup>84</sup> Answering in the affirmative *C. Tams* (note 21), 392.

<sup>85</sup> *J. Kammerhofer*, The Resilience of the Restrictive Rules on Self-Defense, in: M. Weller (note 19), 627 (642 et seq.). For the opposing view *R. v. Steenberghe* (note 43), 183 (185).

<sup>86</sup> *M. E. Villiger*, Commentary on the Vienna Convention on the Law of Treaties, 2009, Art. 53, para. 8.

<sup>87</sup> *D. Byman*, Deadly Connections: States that Sponsor Terrorism, 2005; confirming this for “most critically failed states” *B. L. Coggins*, Does State Failure Cause Terrorism?, *J. Conflict Resolut.* 59 (2015), 455 (477). Cf. also *A. S. Odomovo*, New Security Threats, Unilateral Use of Force, and the International Legal Order, *Military and Strategic Affairs* 5 (2013), 111 (122). Critically *E. Newman*, Failed States and International Order, *Contemp. Sec. Pol’y* 30 (2009), 421 (431).

<sup>88</sup> Cf. *Legal Consequences of the Construction of a Wall* (note 28), Sep. Opinion *Higgins*, para. 33; *A. M. Slaughter/W. W. Burke-White*, An International Constitutional Moment,

quirement appears problematic. First of all, it puts a severe burden of proof on the state which is attacked.<sup>89</sup> This evidentiary hurdle creates an option for states to evade responsibility by hiding in a grey zone of tacit support.<sup>90</sup> Secondly, it is an “all or nothing”-approach<sup>91</sup> and fails to reflect the factual cascade of state involvement, which terms like “state support” or “state sponsorship” try to capture.<sup>92</sup> The danger that impunity “will be invoked [...] by culprits to avoid responsibility for wrongful acts”<sup>93</sup> might surface and lead to a “surrogate warfare”.<sup>94</sup> This problem is aggravated by the discrepancy between the definition of armed attack and the prohibition on the use of force that the ICJ introduced in its *Nicaragua* ruling:<sup>95</sup> Since certain violations of the prohibition on the use of force do not suffice to be regarded as an armed attack,<sup>96</sup> there are cases in which a state confronted with violence may not protect itself based on Art. 51. International law requires a state which is the victim of illegal force – as long as it is short of an armed attack – to refrain from forceful reactions. Consequently the “effective control”-formula “prioritizes the host state’s right to noninterference over the

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Harv. Int’l L.J. 43 (2002), 1 (20). Furthermore *T. Ruys*, Quo vadis ius ad bellum, Melbourne Journal of International Law 9 (2008), 334 (352 et seq.).

<sup>89</sup> Cf. *J. Kittrich*, Can Self-Defence Serve as an Appropriate Tool Against International Terrorism?, Me. L. Rev. 61 (2009), 134 (1146).

<sup>90</sup> Cf. *Armed Activities on the Territory of the Congo* (note 33), para. 361 et seq. (Sep. Opinion of Judge Ad Hoc *Taketa*); *S. A. Barbour/Z. A. Salzman*, “The Tangled Web”: The Right of Self-Defence Against Non-State Actors in the Armed Activities Case, N.Y. U. J. Int’l L. & Pol. 40 (2008), 53 (74).

<sup>91</sup> Cf. *S. A. Barbour/Z. A. Salzman* (note 90), 74; *J. N. Maogoto*, Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror, 2005, 158.

<sup>92</sup> *A. Malzahn*, State Sponsorship and Support of International Terrorism: Customary Norms of State Responsibility, Hastings Int’l & Comp. L. Rev. 26 (2002-2003), 83 (96); ASIL, Nonviolent Responses to Violence-Prone Problems: The Cases of Disputed Maritime Claims and State-Sponsored Terrorism, Studies in Transnational Legal Policy 22 (1991), 9 (18). Cf. *J. Paust* (note 27), 542. With regard to different levels of state support *A. Cassese*, International Community’s Legal Response to Terrorism, ICLQ 38 (1989), 589 (599).

<sup>93</sup> *Armed Activities on the Territory of the Congo* (note 33), para. 361 et seq., Sep. Opinion of Judge Ad Hoc *Taketa*, para. 34.

<sup>94</sup> *T. Franck* (note 60), 50; *S. A. Barbour/Z. A. Salzman* (note 90), 102. F. also *M. R. García-Mora* (note 36), 29.

<sup>95</sup> *Military and Paramilitary Activities in and against Nicaragua* (note 37), para. 195. For critique Sep. Opinion *Jennings*, p. 533; *O. Schachter*, The Lawful Use of Force by a State against terrorists in another country, Isr. Y. B. Hum. Rts. 19 (1989), 209 (218). For an extensive critique cf. *M. Kowalski*, Napaść zbrojna w prawie międzynarodowym – w poszukiwaniu współczesnej definicji [Armed Attack in International Law – In Search of Contemporary Definition], Studia Prawnicze 3/2008, 59 (65 et seq.).

<sup>96</sup> *M. Kowalski* (note 27), 110.

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victim state's security concerns [...].<sup>97</sup> What makes this situation even more severe is the number of states failing to address terrorist threats effectively. It is precisely this “deadlock” – obligation of a victim state to remain passive while its rights are violated – which has led the USA to object to the *Nicaragua*-formula. Against this background numerous scholars aim with manifold approaches at one goal: Operations which neutralize terrorist attacks conducted by non-state actors out of the territorial sphere of a *foreign* state<sup>98</sup> which generally would – in cases where a host state's consent is lacking and no Security Council authorization exists – violate the prohibition on the use force as well as infringe the host state's territorial integrity and the principle of noninterference shall not constitute breaches of international law. Basically three lines of argument can be identified in this context: The first focusses on the attribution of the activities of the terrorist actor to the harboring host state allowing the targeted state to rely on Art. 51 [1.]; the second constructs a limitation of the protective scope of the sovereignty of the unwilling or unable host state [2.]. The third approach tries to construe the application of Art. 51 as a legitimate law enforcement measure in view of Security Council passivity [3.].<sup>99</sup>

## 1. Attribution

States are undoubtedly obliged to prevent the use of their territory as a launching pad for terrorist attacks.<sup>100</sup> Under certain circumstances – which I shall elaborate on in the next section – omissions of a state with respect to terrorist activities constitute a violation of international law. However – as I have already stressed above – an infringement does not automatically

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<sup>97</sup> *T. Reinhold*, State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11, *AJIL* 105 (2011), 244 (251); *M. Kowalski* (note 27), 115.

<sup>98</sup> I will not address the case of defense actions against armed operations by foreign nationals – even if they act as a state's agents – on the territory of the attacked state. My article presupposes that the defense action violates the territorial sovereignty of the host state since its effects unfold themselves on its territory. Operations against non-state actors which occur either within the territory of the attacked state or in a sphere which is not under (formal) territorial sovereignty of any state might have to be assessed differently.

<sup>99</sup> A fourth approach would assume that attribution is not necessary and mere “responsibility” of the host state which could rest on a violation of its due diligence obligations would suffice. As already pointed out I argue that attribution is still a requirement within Art. 51.

<sup>100</sup> ICJ, *Corfu Channel* Case, ICJ Reports 1949, 22; *K. Zemanek* (note 18), 703; *K. Oellers-Frahm*, Der IGH und die “Lücke” zwischen Gewaltverbot und Selbstverteidigungsrecht – Neues im Fall “Kongo gegen Uganda”?, *ZEuS* 1/2007, 83 (85); *N. Lubell*, Extraterritorial Use of Force Against Non-State Actors, 2010, 36 et seq.

amount to attribution. The idea of “vicarious responsibility” is alien to international law.<sup>101</sup>

In contrast, the “harboring doctrine” aims at creating a connection between a state’s violation of international law resulting from its passivity towards non-state actors and the attribution of an attack. To evaluate the legal soundness of this approach I will first take a closer look at the nature and content of state obligations regarding terrorist activities [a]) and secondly analyze the conditions under which state responsibility is incurred for their infringement [b)]. This will be followed by an assessment of the relevance of such violations for attribution [c)]. Finally I will highlight an alternative attribution model which puts the Security Council into focus [d)].

### a) Duties with Regard to Terrorist Activities

Generally a distinction can be made between positive duties to abstain and protect against terrorist activities including their prevention [(1)] from duties to apprehend and prosecute terrorists in the aftermath of terrorist attacks [(2)].

#### (1) Positive Obligation to Abstain, Prevent and to Protect

In modern international law the existence of positive duties incumbent on states is widely recognized. Most fundamentally a state is obliged to protect other states from harm which is essentially connected with its sovereignty<sup>102</sup> or effective control over territory:<sup>103</sup> A state’s territory shall not be the origin of harmful acts against other states.<sup>104</sup> Sovereignty not only entails rights but also obligations. This principle of *sic utere tuo ut alienum non laedas* (“no harm shall be done to other states”) is reflected in numerous documents. Amongst others Art. 10 adopted by the *Third Committee of the Hague Codification Conference* of 1930 or Art. 22 of the *Alfaro Draft Declaration on the Rights and Duties of States* are relevant. The *sic utere non laedas*-rule roots in the duties of states regarding aliens and the obligation to

<sup>101</sup> Cf. *Y. Dinstein* (note 56), 268 et seq.; *P. L. Zanardi* (note 74), 113.

<sup>102</sup> *Island of Palmas Case*, II Reports of International Arbitral Awards (1949), 829, 839.

<sup>103</sup> ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion*, ICJ Reports 1971, para. 118. Cf. also *L. Zegveld*, *Accountability of Armed Opposition Groups in International Law*, 2002, 209.

<sup>104</sup> Cf. UN Survey of International Law, UN Doc A/CN.4/1/Rev.1, 1949, 34; *V.-J. Proulx* (note 16), 20; *T. Reinhold* (note 97), 250. *M. R. García-Mora* (note 36), 18 et seq. *Already E. de Vattel*, *Droit des Gens*, Bk. II, Ch. VI, Sec. 72 (translation by C. G. Fenwick, 1916).

protect them from harmful action by private actors.<sup>105</sup> States are obliged to prevent the commission of acts that are injurious to aliens because these are automatically – according to the classical state-centric concept of international law – injurious to states.<sup>106</sup> The second doctrinal home of this “no harm rule” is international environmental law. In this context the *Trail Smelter*<sup>107</sup> and *Lac Lanoux*<sup>108</sup> arbitrations as well as the ICJ’s *Gabčíkovo-Nagymaros*<sup>109</sup> judgment and the *Advisory Opinion on Nuclear Weapons*<sup>110</sup> appear highly significant. According to the *Trail Smelter* reasoning a “State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction”. Moreover: “[N]o State has the right to use or permit the use of territory in such a manner as to cause injury by fumes in or to the territory of another State [...]”<sup>111</sup> Similarly in its *Nuclear Weapons Opinion* the ICJ stated: “The existence of the general obligations of States to ensure that activities within their jurisdiction and control respect the environment of other States [...] is now part of the corpus of international law relating to the environment.”<sup>112</sup> The rule of *sic utere laedas* has also been incorporated in Principle 21 of the *Stockholm Declaration* as well as the *Rio Declaration*. In cases where harmlessness cannot be guaranteed, it requires a reduction of risk as far as possible.<sup>113</sup> Although these cases and documents focus specifically on environmental law and polluting activities, their cornerstone remains the legal assessment of physical transboundary harm. Whilst terrorist activities are not environmental dangers in a strict sense, they bear the high potential of transboundary harm at their very core. Hence their rationale is transferable to the terrorist challenge. As a specific emanation of this *sic utere non laedas*-rule a state is obliged to abstain from the facilitation of terrorist activities against foreign states from its very own territory, which is enshrined in many sources of international law ranging

<sup>105</sup> C. Wolff, *Ius gentium method scientifico pertractatum*, 1764, I; P.-M. Dupuy/C. Hoss, *Trail Smelter and Terrorism*, in: R. M. Bratspies/R. A. Miller (eds.), *Transboundary Harm in International Law*, 2006, 225 (232); R. Pisillo-Mazzeschi, *Forms of International Responsibility for Environmental Harm*, in: F. Francioni/T. Scovazzi (eds.), *International Responsibility for Environmental Harm*, 1991, 15 (22, 36). It is also a part of domestic legal orders, see *United States v. Arjona*, 120 U.S. 479 (1887). Cf. T. Becker (note 75), 119.

<sup>106</sup> R. B. Lillich/J. M. Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, *Am. U. L. Rev.* 26 (1977), 217 (221).

<sup>107</sup> *United States v. Canada*, RIAA, Vol. III, 1905 et seq. (AJIL 35 (1941), 684 et seq.).

<sup>108</sup> (1957) 24 I.L.R. 101.

<sup>109</sup> ICJ, *Gabčíkovo-Nagymaros Project*, ICJ Reports 1997, 7.

<sup>110</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, 226 et seq.

<sup>111</sup> *United States v. Canada* (note 107), (AJIL 35 (1941), 684 et seq. (714, 716)).

<sup>112</sup> *Legality of the Threat or Use of Nuclear Weapons* (note 110), para. 29.

<sup>113</sup> P.-M. Dupuy/C. Hoss (note 105), 229.

from UN documents to numerous multilateral treaties.<sup>114</sup> The *Friendly Relations Declaration*, for example, orders states to “refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts”.<sup>115</sup> This duty can also be traced back to the *League of Nations*, which after the assassination of *Prince Alexander* adopted the *Convention for the Prevention and Punishment of Terrorism* – the first “antiterrorism” document –, which was ultimately ineffective. In its Art. 1 it reaffirmed the “duty of every State to refrain from any act designed to encourage terrorist activities directed against another State and to prevent the acts in which such activities take shape” as well as the “duty of every State neither to encourage nor tolerate on its territory any terrorist activity with a political purpose [...]”. A state is obliged to “do all in its power to prevent and repress acts of this nature and must for this purpose lend its assistance to Governments which request it [...]”.<sup>116</sup> All these provisions and statements evidence existing customary international law. In their very essence they are also reflected in more current documents: Sec. 5 of General Agreement (GA) Resolution 49/60 of 1994 urges states to “take effective and resolute measures in accordance with the relevant provisions of international law [...] for the speedy and final elimination of international terrorism [...]”. Most importantly SC Resolutions 1373 and 1368 – which signaled a problematic turn of the Security Council to quasi-legislative activities – are to be mentioned. Resolution 1373 obliges States to “(c) [d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens [...]”. Accordingly a state not only violates international law if it colludes with terrorists but also if it does not control its territory effectively thereby failing to prevent its misuse by non-state actors as a forum for terrorist attacks or even only by their supporters.<sup>117</sup> But even if it is assumed that a state’s mere support of terrorists operating against another state, which may also be the result of mere tolerance,<sup>118</sup> infringes – irrespective of any attribution of the non-state actor activities – the right to nonin-

<sup>114</sup> Cf. *R. Pisillo-Mazzeschi* (note 105), 31 et seq.; *T. Becker* (note 75), 118 et seq.; *V.-J. Proulx* (note 16), 18, 26; *D. Brown* (note 36), 1 (4 et seq.). See Declaration on Measures to Eliminate International Terrorism, GA Res 49/60, 49<sup>th</sup> Sess., Supp. No. 49, UN Doc A/RES/49/60 (1994), 303, Annex Art. 5 (a). Regarding treaties cf. *A. Sambei/A. du Plessis/M. Polaine*, Counter-Terrorism Law and Practice: An International Handbook, 2009, Chap. 2, 6.

<sup>115</sup> GA Res. 2625, U.N. GAOR, 25<sup>th</sup> Sess., Supp. No. 28, at 76, U.N. Doc. A/8028 (1971).

<sup>116</sup> Convention for the Prevention and Punishment of Terrorism, 16.11.1937, League of Nations Doc. C.546M.383 (1937)/League of Nations O.J. 12 (1934), 1760.

<sup>117</sup> UN Doc. S/PV.5898 (Resumption 1), (27.5.2008).

<sup>118</sup> *T. Becker* terms this a “constructive use of force standard”, see note 75, 183.



terference and sovereignty of the target state and in certain cases Art. 2 para. 4 itself,<sup>119</sup> this would – as evidenced by the *Nicaragua* case – not automatically pave the way to Art. 51.

(2) Duty to Apprehend, Prosecute and Punish – *aut dedere aut judicare*

While it has long been disputed whether international law requires states to prosecute against terrorists who injured other states,<sup>120</sup> strong evidence suggests that this is the case in modern international law.<sup>121</sup> Such a duty is enshrined in numerous treaties.<sup>122</sup> It has also been expressly addressed by international bodies monitoring human rights treaties.<sup>123</sup> In the terrorist context, specific duties to criminalize terrorist behavior originate from SC Resolution 2178 on foreign terrorist fighters. The obligation to prosecute is complemented by the prohibition to give shelter to terrorists after the commission of an attack. Moreover, if a state does not prosecute, it is under a duty to extradite terrorists – a norm which – at least in the terrorist context – reached the level of international customary law leaving extradition

<sup>119</sup> See SC Res. 748 of 31.3.1992, para. 7. The ICJ is not clear on the point what kind of assistance oversteps the threshold of use of force, *Military and Paramilitary Activities in and against Nicaragua* (note 37), para. 228; O. Dörr, Prohibition on the Use of Force, in: MPEP-IL, last update June 2011, para. 17. In any case the supported unit has to use or threat with force, A. Randelzhofer/O. Dörr (note 20), para. 28. For passivity as use of force cf. M. Krjewski (note 53), 195; K. Schmalenbach, Die Beurteilung von grenzüberschreitenden Militäreinsätzen gegen den internationalen Terrorismus aus völkerrechtlicher Sicht, NZWehr 2000, 177 (186); H. Kelsen (note 36), 62 et seq.; D. W. Bowett (note 22), 46; R. Higgins, Legal Limits to the Use of Force by Sovereign States United Nations Practice, BYIL 37 (1961), 269 (278); G. Roberts, Self-Help in Combatting State-Sponsored Terrorism: Self Defense and Peacetime Reprisals, Case W. Res. J. Int'l L. 19 (1987), 243 (265 et seq.). Critically J. E. Alvarez, Hegemonic International Law Revisited, AJIL 97 (2003), 873 (879).

<sup>120</sup> R. B. Lillich/J. M. Paxman (note 106), 297 et seq. Grotius answered this in the affirmative based on his natural law assumptions, see note 51, Ch. XI, para 4.

<sup>121</sup> ILC, The Obligation to Extradite or Prosecute, Final Report of the ILC, 2014, 2; Y. Dinstein (note 56), 269; P.-M. Dupuy (note 7), 11. There is a strong trend for a customary rule to prosecute or extradite with respect to *ius cogens* international crimes, M. Ch. Bassiouni, International Extradition: United States Law and Practice, 6<sup>th</sup> ed. 2014, 9. See also Inter-Am. Ct.H.R., Velásquez Rodríguez, Ser. C, Case No. 4, 1988, para. 177. Cf. P.-M. Dupuy (note 7), 11.

<sup>122</sup> Cf. Art. 7 Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking Convention), 860 U.N.T.S. 105, entered into force 14.10.1971; Art. 8, 1979 New York Convention on the Taking of Hostages, 1316 U.N.T.S. 205; European Convention on the Suppression of Terrorism, 1137 U.N.T.S. 93. Also Convention for the Prevention and Punishment of Terrorism, 16.11.1937, League of Nations O. J. 19 (1938), 23 (never entered into force).

<sup>123</sup> CCPR, Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland. 6.12.2001, CCPR/CO/73/UK; CCPR/CO/73/UKOT, para. 8.

not up to a state's discretion anymore.<sup>124</sup> Support for this assumption can be found in awards granted by the *United States/Mexico General Claims Commission*, especially in the cases *Janes*,<sup>125</sup> *Youmans*<sup>126</sup> and *Massey*,<sup>127</sup> as well as the Supreme Court's ruling in *United States v. Arjona*.<sup>128</sup> In order to assume a duty to prosecute or extradite it is not decisive whether the actual injury or damage – e. g. death of foreign citizens – occurred within the jurisdiction of the obliged state or within the territorial realm of the injured (or third) state. It is however crucial that the individual perpetrator is located within the jurisdiction of the obliged state – this is exactly the case in harboring-constellations.

## b) State Responsibility for Omissions: The Question of Fault

State participation on the levels 5 to 9 which encompass omissions potentially violates the *non laedas*-rule as well as obligations to apprehend, prosecute and punish. An international delict requires in most cases a certain subjective element on the part of the state. Since the ILC Articles create an objective regime, subjective elements have to be derived from primary obligations.<sup>129</sup> Case-law has developed a certain rationale: Traditional doctrine generally conditions state responsibility in cases of omissions on fault applying a subjective responsibility scheme.<sup>130</sup> Fault [(1)] however excludes state responsibility in cases of a state's incapacity [(2)] – a result which certain approaches attempt to avoid in view of the terrorist problem [(3), (4)]. I will show that these endeavors remain unpersuasive in the very end. In

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<sup>124</sup> *P.-M. Dupuy/C. Hoss* (note 105), 234; *T. Becker* (note 75), 353. Cf. Supreme Court of Venezuela, *Re Tribble*, 20 I.L.R. 366 (Fed. Ct. 1953). The ICJ has left this question open in its case *Questions Relating to the Obligation to Prosecute or Extradite*, ICJ Reports 2012, 423, paras. 54, 55. Denying a customary rule to prosecute or extradite in cases of crimes against humanity, *E. C. Westbrook Mack*, Does Customary International Law Obligate States to Extradite or Prosecute Individuals Accused of Committing Crimes Against Humanity?, *Minn. J. Int'l L.* 24 (2015), 73 (99); *H. McDermott*, The Structure of International Cooperation in the Transfer of Suspects. Extradite or Abduct?, *IntCrimLRev* 15 (2015), 245 (280 et seq.).

<sup>125</sup> *US v. Mexico*, 4 R.I.A.A. 82 (1926).

<sup>126</sup> *US v. Mexico*, 4 R.I.A.A. 110 (1926).

<sup>127</sup> *US v. Mexico*, 4 R.I.A.A. 155 (1927).

<sup>128</sup> *United States v. Arjona* (note 105), 497.

<sup>129</sup> *M. Lehto* (note 48), 222.

<sup>130</sup> *British Property in Spanish Morocco Case*, 2 R.I.A.A. (1925), 615 (642). Cf. *R. P. Barnidge*, Non-State Actors and Terrorism: Applying the Law of State Responsibility and the Due Diligence Principle, 2008, 61, 67; *F. V. Garcia Amador*, State Responsibility, Some New Problems, *RdC* 94 (1958), 369 (388). Also *J. Crawford/S. Olleson*, Nature and Forms of International Responsibility, in: M. D. Evans (ed.), *International Law*, 3<sup>rd</sup> ed. 2003, 441 (458).

many cases the harboring of terrorists will not constitute an internationally wrongful act.

(1) “Unwilling” – Fault

Generally the *sic utere non laedas*-obligation is fault-based: International law does not impose a warranty on the state for everything happening on its territory.<sup>131</sup> One prerequisite of culpable behavior is knowledge of the circumstances potentially injurious to another state.<sup>132</sup> Translated to the harboring problem a host state has to be aware of terrorist activities but not necessarily of a specifically planned attack. In judicial practice knowledge is mainly a question of burden of proof and established if no “reasonable doubt” remains regarding a state’s awareness.<sup>133</sup> This puts the attacked state in a difficult procedural position, since the harming state is protected against “evidence collection” from the outside by its territorial sovereignty.<sup>134</sup> Mere exclusive control is neither sufficient to assume a *prima facie* responsibility nor to shift the burden of proof,<sup>135</sup> but it does allow recourse to circumstantial evidence.<sup>136</sup> The accumulation of circumstantial evidence proves to be difficult in the harboring constellation. But: Nowadays states widely collect intelligence information on terrorist cells. Furthermore it is acknowledged that in certain situations a state may be expected to be alert and vigilant when the probability of incidents injurious to other states is high, especially when a state has been put on “constructive notice”.<sup>137</sup> In such constellations jurisprudence tends to a knowledge presumption: In the *Corfu Channel*

<sup>131</sup> Cf. *Spain v. UK (British Property in Spanish Morocco)*, (note 130); J. Wolf, *Zurechnungsfragen bei Handlungen von Privatpersonen*, ZaöRV 45 (1985), 232 (234); ILC, YILC 1975 II, 73; cf. *E. de Vattel* (note 104), Bk. II, Ch. IV, Sec. 73.; C. Eagleton, *Responsibility of States in International Law*, 1928, 77.

<sup>132</sup> *Corfu Channel Case* (note 100), 22; M. R. García-Mora (note 36), 22. Cf. also Special Rapporteur’s draft articles on international liability for injurious consequences arising out of acts not prohibited by international law in their 1989 version, (1989) UN Doc. A/CN.4/423, ILC, 41<sup>st</sup> Sess. Arts. 10-17. Cf. regarding the different emanations and definitions of fault R. P. Barnidge, *The Due Diligence Principle Under International Law*, ICLR 8 (2006), 81 (82 et seq.).

<sup>133</sup> *Corfu Channel Case* (note 100), 18.

<sup>134</sup> Cf. G. A. Christenson, *Attributing Acts of Omission to the State*, Mich. J. Int’l L 12 (1990-1991), 312 (328); E. L. Guruli, *The Terrorism Era: Should the International Community Redefine Its Legal Standards on Use of Force in Self-Defense*, Willamette Journal of International Law & Dispute Resolution 12 (2004), 100 (118).

<sup>135</sup> *Military and Paramilitary Activities in and against Nicaragua* (note 37), para. 158; G. A. Christenson (note 134), 328. For the contrary view S. Pufendorf (note 51), Bk. VIII, Ch. VI, Sec. 12; W. E. Hall, *A treatise on international law*, 1884 § 65, 193.

<sup>136</sup> R. P. Barnidge (note 130), 86; G. A. Christenson (note 134), (328).

<sup>137</sup> R. B. Lillich/J. M. Paxman (note 106), 244, 246, 257.

case the ICJ grounded Albanian responsibility for harm suffered by the United Kingdom on the fact that Albania knew positively – at least within the meaning of constructive knowledge – that mines are to be found in its territorial waters, whilst omitting to inform other states of that fact.<sup>138</sup> This strategy of “constructive notice” might be applied by the harmed state to alleviate its evidentiary position. Furthermore since there is a general awareness towards terrorism, alertness is to be expected of states whose territory potentially might be abused as a harbor.

However, the modern concept of fault in the context of the *sic utere non laedas*-duty does not focus on positive knowledge of injurious circumstances but on non-compliance with standards of “due diligence”.<sup>139</sup> Due diligence is in the end nothing more than a standard of reasonableness.<sup>140</sup> A wrongful act requires the host state’s awareness of a terrorist threat and – in view of this – its failure to undertake (objectively) appropriate measures to prevent terrorist activities and to minimize possible risks irrespective of their success from an *ex post* perspective.<sup>141</sup> In cases where a state is unaware of terrorist activities, it is at least obliged to make efforts to collect information.

The appropriateness of measures undertaken depends on numerous factors.<sup>142</sup> These may include the economic power of the state which is obliged to act,<sup>143</sup> the specific obligation in question,<sup>144</sup> the effectiveness of control in a certain part of the state’s territory,<sup>145</sup> the remoteness of the area that the activities of non-state actors stem from,<sup>146</sup> the significance of the interest

<sup>138</sup> *Corfu Channel* Case (note 100), 22 et seq.

<sup>139</sup> *R. B. Lillich/J. M. Paxman* (note 106), 246; *J. Hessbruegge* (note 69), 275; *R. Pisillo-Mazzeschi* (note 105), 25. Furthermore Judge *Moore*, Sep. Op., S. S. Lotus, 1927 PCIJ (*Fr. v. Turk*) (Ser. A) No. 10, 88 (7.9.1927).

<sup>140</sup> *R. P. Barnidge* (note 130), 138; *P.-M. Dupuy/C. Hoss* (note 105), 235. It is also circumscribed with terms like “good faith” and “vigilance”, see *C. G. Fenwick*, *International Law*, 3<sup>rd</sup> ed. 1948, 301; *A. Malzahn* (note 92), 104.

<sup>141</sup> Cf. *P.-M. Dupuy*, *Reviewing the Difficulties of Codification*, EJIL 10 (1999), 371 (379). Cf. also in Art. 3 of the ILC Draft on the Prevention of Transboundary Harm.

<sup>142</sup> Cf. *A. Seibert-Fohr* (note 50), 52 et seq.

<sup>143</sup> ILC Report 2001, 394.

<sup>144</sup> *R. Pisillo-Mazzeschi* (note 105), 45.

<sup>145</sup> Cf. *Leonor Buckingham* Case, (Decision) (*Great Britain v. United Mexican States*), UNRIAA V, 286 (288) (3.8.1931).

<sup>146</sup> Cf. *R. B. Lillich/J. M. Paxman* (note 106), 243. Cf. *Armed Activities on the Territory of the Congo* (note 33), para. 226 et seq.

that is to be protected<sup>147</sup> as well as the foreseeability of the damage incurred.<sup>148</sup>

All of these factors play a major role in the context of terrorist activities. If a state's economic power and the extent of its actual control over its territory are to be taken into account, states at the verge of failing will have to conform to a much lower due diligence standard. Thus the norms of state responsibility might not capture the participatory levels 5 to 9 being willful toleration, negligent ignorance, incapacity and unawareness – all either with regard to a specific attack or terrorism in general.

(2) “Unable”: *Ultra Posse Nemo Tenetur*

This is naturally even more true in cases of unable states: Due diligence depends on the capability of a state to fulfill its duties.<sup>149</sup> The general principle of “[i]mmunity follows inability”<sup>150</sup> goes back to the works of *Grotius*,<sup>151</sup> *Pufendorf*<sup>152</sup> as well as *de Vattel*<sup>153</sup> and it is also an element of neutrality principles (Art. 25 of the Hague Convention XIII (1907)).<sup>154</sup> The ICJ made clear – particularly in its *Armed Activities* judgment – that passivity due to inability cannot be equated with willful toleration.<sup>155</sup> Incapacity is however only “immunizing” if it is factual and not purely legal in nature. Immunity in this context means that a state does not incur international responsibility for a certain conduct. Understanding the *sic utere non laedas*-rule as conditioned on fault, a state incapable of controlling its territory consequently does not incur state responsibility for its misuse.<sup>156</sup>

<sup>147</sup> *Francisco Mallén (United Mexican States) v. U.S.A.*, 4 R.I.A.A. (1927), 173 (185); *William E. Chapman (U.S.A. v. United Mexican States)*, 4 R.I.A.A. (1930), 632 (640).

<sup>148</sup> *R. Pisillo-Mazzeschi* (note 105), 44.

<sup>149</sup> See *Diplomatic and Consular Staff* (note 83), para. 68; *R. B. Lillich/J. M. Paxman* (note 106), 246.

<sup>150</sup> *Otto Kummerow Case (Germany v. Venezuela)*, *J. Ralston*, *Venezuelan Arbitrations of 1903, 1904*, 526, 559.

<sup>151</sup> *H. Grotius* (note 51), Bk. II, Ch. XXI, Sec. 1; *M. R. García-Mora* (note 36), 17.

<sup>152</sup> *S. Pufendorf* (note 51), Bk. VIII, Ch. VI, Sec. 12.

<sup>153</sup> *E. de Vattel* (note 104), Bk. II, Ch. LXXII.

<sup>154</sup> “A neutral Power is bound to exercise such surveillance as the means at its disposal allow to prevent any violation of the provisions of the above Articles occurring in its ports or roadsteads or in its waters”. Cp. *J. L. Kunz* (note 55), 331 et seq.

<sup>155</sup> *Armed Activities on the Territory of the Congo* (note 33), para. 301.

<sup>156</sup> Cf. *D. Thürer*, *The “Failed State” and International Law*, *Int'l Rev. of the Red Cross* 81 (1999), 731 (747).

### (3) Concept of Strict Liability

In light of this finding the idea of strict liability – mainly rooted in international environmental as well as humanitarian law<sup>157</sup> – experiences a renaissance.<sup>158</sup> In the first place, strict liability means that a subject is held legally responsible for certain results irrespective of any culpability on its part. Such a regime bears concomitantly both advantages as well as disadvantages: On the one hand it neutralizes the “immunizing effect“ of incapacity.<sup>159</sup> Incapacity excludes the wrongfulness of conduct, if wrongfulness requires fault. On the other hand it might – contrary to the idea of liberal values – encourage states to exercise more control over their subjects.<sup>160</sup> The findings of the *Trail Smelter* arbitration, which is also relevant in the terrorist context, are predominately regarded as the prototype of the application of a strict liability regime.<sup>161</sup> *Opinio iuris* and state practice however do not suggest that the *non laedas*-rule comprises a strict liability regime – even in the terrorist context. The exemplary SC Resolution 1373 obliges states to “[t]ake the necessary steps to prevent the commission of terrorist acts”. Similarly SC Resolution 1624 “[c]alls upon all States to adopt such measures as may be necessary and appropriate [...] to: [...] Deny safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct; [...]”. The terminology used (“necessary steps”/“appropriate measures”) is indicative of a standard of due diligence.<sup>162</sup> A strict liability regime is far from legal reality. Hence a state incapable of suppressing terrorist activities does not incur state responsibility.

<sup>157</sup> Cf. Art. 3 of the Forth Hague Convention.

<sup>158</sup> B. A. Feinsein (note 36), 66; M. Dixon, Textbook on International Law, 5<sup>th</sup> ed. 2005, 230; M. R. García-Mora (note 36), 25 et seq. (esp. 28); C. Hyde, International Law as Interpreted and Applied by the United States, Vol. 1, 2<sup>nd</sup> ed. 1945, 723. Crit. S. A. Barbour/Z. A. Salzman (note 90), 93 et seq.

<sup>159</sup> Cf. B. A. Feinsein (note 36), 67.

<sup>160</sup> R. P. Barnidge (note 130), 59; A. Seibert-Fohr (note 50), 41.

<sup>161</sup> Arguing in favor of a strict liability regime H. S. Lee, Post Trusteeship Environmental Accountability: Case of PCB Contamination on the Marshall Islands, Den. J. Int’l L. & Pol’y 26 (1998), 399 (413); T. W. Merrill, Golden Rules for Transboundary Pollution, Duke L. J. 46 (1997), 931 (950 et seq.); R. P. Barnidge (note 132), 102. R. Pisillo-Mazzeschi however argues the Tribunal’s statements lack sufficient clarity on this point, see note 105, 29 et seq.

<sup>162</sup> Cf. A. Bianchi, Enforcing International Law Norms against Terrorism: Achievements and Prospects, in: A. Bianchi/Y. Naqvi (note 7), 2004, 490 (517).

#### (4) Splitting up of the Due Diligence Duty

Others try to neutralize the “immunizing effect” of incapacity by dividing the obligation to prevent harmful acts into two sub-elements, one of them being the duty to use the state apparatus to prevent injurious incidents and the other being the duty to uphold a governmental infrastructure – hence to “maintain counter-terrorism capacity”.<sup>163</sup> It is similarly argued that the obligation to prosecute comprises the duty to uphold a structure capable of prosecuting on the one hand and its effective use on the other.<sup>164</sup> Such a division is only helpful for establishing responsibility of incapable states if – as it is indeed argued – the obligation to uphold a functioning state structure is regarded as absolute in nature,<sup>165</sup> while the duty to employ it is considered to be dependent on due diligence. Besides the scarcity of authority for this<sup>166</sup> such a construction would transform due diligence duties into strict obligations, undermine their very rationale and should therefore be rejected.<sup>167</sup>

To sum up: An unwilling state only incurs state responsibility if it fails to comply with the due diligence requirements of the *non laedas*-obligation. If it is incapable of doing so, it is internationally not responsible in the legal sense. Only the “able but unwilling” state violates international law – unlike the “unable but willing” or “unwilling or unable” state. A large part of state participation on levels 5 to 9 will consequently not fall under the regime of state responsibility.

#### c) Violation of an Obligation as Grounds for Attribution?

As seen, attribution standards enshrined in the ILC Articles would not lead to attribution in cases of harboring. However, as I have argued, doctrinally, the ILC standards are not as a matter of course applicable to Art. 51. It is within this emancipation of Art. 51 from the attribution principles of

<sup>163</sup> R. Pisillo-Mazzeschi (note 105), 26; T. Becker (note 75), 144. Cf. E. M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, 1915, 213; H. Lauterpacht, *Revolutionary Activities by Private Persons Against Foreign States*, AJIL 22 (1928); C. Eagleton (note 131), 86.

<sup>164</sup> R. Pisillo-Mazzeschi (note 105), 28 et seq.

<sup>165</sup> T. Becker (note 75), 144.

<sup>166</sup> Some cite *Texas Cattle Claims* (*American-Mexican Claims Commission, Report to the Secretary of State*, 1948, 51 (753)) or the *Alabama Claims Arbitration* (J. B. Moore, *Digest of International Law*, 1906, 1059 et seq.); R. B. Lillich/J. M. Paxman (note 106), 259 et seq.; R. Pisillo-Mazzeschi (note 105), 25.

<sup>167</sup> Similar objection by T. Becker (note 75), 145.



the ILC Articles where the unwilling or unable-standard comes into play. The idea is to ground attribution on the violation of the *non laedas*-obligation by the host state.<sup>168</sup> There are two essential reasons for tying the attribution of a terrorist attack to internationally wrongful conduct of the host state: In its traditional interpretation, Art. 51 requires “delictual pre-conduct” of the target.<sup>169</sup> Furthermore, Art. 51 presupposes that the attacker and the target of the counterstrike are identical. The right to self-defense only justifies measures against the actual attacker. Since the target of a counterstrike – even if it is solely directed against the non-state actor – simultaneously is the host state, attacker-target identity would have to be denied in the absence of attribution. Even if the counteroffensive targets the non-state actor it entails – in the constellations analyzed here – the use of force against the host state, a violation of its sovereignty and its right to noninterference. Although the objectives of the unwilling or unable-approaches are understandable, it is my position that the interrelatedness of attribution and wrongful conduct does not reflect the law as it stands [(1)-(3)].

(1) “Unwilling to Prevent Terrorist Activities”: Violation of Due Diligence Obligation and Art. 51 UNC

The interrelatedness between wrongful conduct and attribution is not completely unknown to international law<sup>170</sup> and has been acknowledged by the ILC: “[...] there is often a close link between the basis of attribution and

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<sup>168</sup> *T. Bruha/M. Bortfeld*, Terrorismus und Selbstverteidigung, VN 2001, 161 (166). Cf. *M. Kühn* (note 22), 61; *P.-M. Dupuy/C. Hoss* (note 105), 236; *P.-M. Dupuy* (note 7), 9; *R. P. Barnidge* (note 130), 216. This thought is also elaborated by *Y. Dinstein* (note 56), 227 et seq.; *M. Kowalski* (note 27), 127 et seq.; *D. Kretzmer*, Targeted Killings of Suspected Terrorists, EJIL 16 (2005), 171 (187). Cf. *M. R. García-Mora* (note 36), 16. *Crit. A. Cassese* (note 7), 997. *Becker* acknowledges an interrelatedness between a legitimate use of force and the responsibility of the target, *T. Becker* (note 75), 350. Cf. also *I. Brownlie* who finds that “armed attacks by armed bands whose existence is tolerated by the territorial sovereign generate legal responsibility and therefore constitute ‘armed attacks’ for the purpose of Article 51” (*Armed Activities on the Territory of the Congo [Democratic Republic of the Congo v. Uganda]*, Statement of *Ian Brownlie* of 18.4.2005, *Compte Rendue* 2005/7, 30 para. 80) and *Q. Wright* (“[...] failure of a government to prevent armed bands or insurgents from organizing within its territory to engage in hostilities across frontier, will make it responsible for aggression, if such hostilities actually occur”), *Q. Wright*, Prevention of Aggression, AJIL 50 (1956), 514 (517). It is unclear whether these authors want to consider this violation within the “attribution” requirement.

<sup>169</sup> *H. Kelsen* (note 36), 61; *J. L. Kunz* (note 55), 332; Report of the ILC on the work of its 32<sup>nd</sup> Sess., Official Records of the General Assembly, 35<sup>th</sup> Sess., Supp. No. 10, YBILC, II, 53, fn. 175; *F. Mégret* (note 7), 382.

<sup>170</sup> *A. J. J. de Hoogh* (note 47), 265. With tendency towards “attribution solution” *M. Borchard* (note 163), 217. Cf. *M. E. O’Connell* (note 76), 435 et seq.

the particular obligation said to have been breached, even though the two elements are analytically distinct.”<sup>171</sup> The “particular obligation” in question would be the the *non laedas*-duty which encompasses the obligation to prevent terrorist activities on the host state’s territory.<sup>172</sup> Nevertheless, to base attribution on wrongful conduct is alien to the rules of state responsibility. First of all, such a concept appears unnecessary in the realm of state responsibility: If an omission constituting one wrongful act was grounds for attributing the actual non-state actor, conduct to the state, the consequence would be a second wrongful act. In the end this would result in a (unnecessary) “doubling” of the wrongfulness of conduct. Secondly, this construction would reintroduce the concept of “vicarious responsibility”, which has vanished from international legal doctrine, and question the principle of the non-attributability of non-state actor conduct. The only case in which genuinely private conduct is attributed appears to be Art. 11 ILC Articles.<sup>173</sup> Furthermore attribution via violation of obligations leads to a kind of strict liability-regime in safe haven-constellations. Granting safe havens constitutes a permanent violation of the *non laedas*-duty. Since this constant violation would be grounds for attribution, a guarantee would be imposed on the host state for any possible future terrorist attacks stemming from its territory.<sup>174</sup> As I have already elaborated it does not flow from all these objections *per se* that an armed attack cannot be attributed based on a violation of state obligations since Art. 51 and the ILC Articles have distinct identities. But: A paradigm change directed at the introduction of an attribution standard which would reflect the core idea of a “vicarious responsibility” – a regime that has been abandoned from the realm of international law in general – demands sufficient normative authority. If supporting evidence was found for attribution based on vicarious wrongdoing within Art. 51, objecting arguments claiming that this created considerable inconsistencies with state responsibility standards would lack merit. It would furthermore be ill-guided to assume that an extensive interpretation of attribution within Art. 51 inevitably led to a change of the attribution regime applicable to questions of state responsibility. In this respect it cannot be stressed enough that primary and secondary norms live their own lives in doctrinal terms.

States, however, have widely objected to justifying the infringement of a host state’s sovereignty in cases of defense actions against non-state actor

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<sup>171</sup> Report of the ILC, Fifty-third Session (23.4.-1.6. and 2.7.-10.8.2001), GA Official Records, Fifty-sixth session, Supp. No. 10 (A/56/10), 81.

<sup>172</sup> H. Kelsen (note 169), 61.

<sup>173</sup> M. Schröder, *Verantwortlichkeit, Völkerstrafrecht, Streitbeilegung und Sanktionen*, in: W. Graf Vitzthum/A. Proelß (eds.), *Völkerrecht*, 6<sup>th</sup> ed. 2013, para. 25, note 75.

<sup>174</sup> M. Kühn (note 22), 327.

attacks based on state participation levels 5 to 9 since the very beginning of the UN era. Their resistance became particularly apparent during the Israeli attacks against the PLO.<sup>175</sup> But some voices identified a moment of normative change in the reaction of the international community in the aftermath of 9/11 and the general acceptance of the operation “Enduring Freedom” which is attributed “precedential” character.<sup>176</sup> It is argued that the SC, the Organization of American States (OAS) and the North Atlantic Treaty Organization (NATO) at least tacitly accepted attribution based on mere harboring of terrorists.<sup>177</sup> *Gray* assumes these events amounted to an instant reinterpretation of the UNC forming “instant customary law”<sup>178</sup> – a highly problematic concept in itself. On the one hand it allows to eliminate the *consuetudo* requirement and to rest customary law solely on *opinio iuris*,<sup>179</sup> on the other hand – quite inversely – it regards a common state reaction as sufficient for the creation of new customary law, even if it is not accompanied by a broad state conviction to behave in a certain way. In consequence it blurs categories of illegality and legality since normativity loses any stability. Furthermore to assume a “reinterpretation” of treaty provisions which have the rank of *ius cogens* norms via state practice and *opinio iuris* is questionable. Even if it is accepted that such a “reformative” treaty construction does respect methodological barriers of interpretation and instant customary law might supersede provisions of the UNC, severe doubts remain as to the *lex lata* status of an attribution standard based on unwillingness or inability.

It is true that each decision to use force becomes “part of the law-shaping process, influencing expectations as to the acceptability of future actions

<sup>175</sup> *T. Ruys* (note 6), 423 et seq.

<sup>176</sup> For the opposite view cf. *J. J. Paust* (note 27), 540, 542; *E. P. J. Myjer/N. D. White*, The Twin Towers Attack: An Unlimited Right to Self-Defence, *Journal of Conflict Security Law* 7 (2002), 5 et seq.

<sup>177</sup> *D. Jinks* (note 17), 90. See *K. Mohan* (note 76), 216; *A. Randelzhofer/G. Nolte* (note 42), para. 38; *T. Reinhold* (note 97), 245. *Deeks* even finds some evidence that the “unwilling or unable test” has the quality of customary international law, see note 14, 503.

<sup>178</sup> *C. Gray*, The Use of Force and the International Legal Order, in: *M. D. Evans* (ed.), *International Law*, 2<sup>nd</sup> ed. 2006, 589 (602). *C. Gray* seems to have backed off the “instant customary concept” herself, cf. *C. Gray*, The Use of Force and the International Legal Order, in: *M. D. Evans* (ed.), *International Law*, 3<sup>rd</sup> ed. 2010, 615 (629 et seq.). See also *S. R. Ratner*, *Ius ad Bellum and Ius in Bello after September 11*, *AJIL* 96 (2002), 905 (910 et seq.). Cf. regarding the idea of “instant customary law” *B. Langille*, It’s “Instant Custom”, *B. C. Int’l & Comp. L. Rev.* 26 (2003), 145 et seq.; *Y. Arai-Takahashi*, Shifting Boundaries of the Right of Self-Defence, *Int’l Law* 36 (2002), 1081 (1094 et seq.). Critically *T. Ruys* (note 6), 530.

<sup>179</sup> *B. Cheng*, United Nations Resolutions on Outer Space: “Instant” International Customary Law, *Indian Journal of International Law* 5 (1965), 23 (35).

influencing use of force”.<sup>180</sup> However, the fact that numerous states did refrain from an explicit protest against the undertaken US measures in the aftermath of 9/11 appears insufficient to assume a reinterpretation of an *ius cogens* norm contrary to its long established substance.<sup>181</sup> Furthermore, the US measures were strongly opposed by Iraq, Sudan and North Korea and heavily criticized by Iran, Cuba and Malaysia.<sup>182</sup> Additionally, in the specific case of 9/11 the extraordinary circumstances must not be neglected: An “emotional reaction [...] may not amount to the consistent practice and *opinio iuris* required for customary change”.<sup>183</sup> Traumatic experiences often foster the “suspension [...] of ordinary processes”.<sup>184</sup> Reactions of UN organs in this context appear likewise inconclusive. Declarations like the General Assembly (GA) Resolution No. 1 of 2001 stating those who harbored perpetrators will be held “accountable” do not pave the way to a unilateral military reaction.<sup>185</sup> While the Security Council included a reference to the right to self-defense in the preamble of its Resolution 1368 (2001) after the attack on the Twin Towers, it has refrained from this practice in subsequent resolutions addressing similar cases like the terrorist attacks in Bali and Madrid.<sup>186</sup>

Since then state practice and *opinio iuris* have been inconsistent.<sup>187</sup> On the one hand several states accepted Turkey’s operations against Partiya Karkerên Kurdistanê (PKK) posts in northern Iraq in 2008, on the other hand the reaction to Colombia’s actions against a Fuerzas Armadas Revolucionarias de Colombia (FARC) camp in Ecuador and the killing of FARC’s second-in-command in the same year were widely disapproved of, especially by the OAS.<sup>188</sup> Many states – while having sympathy for Turkey’s posi-

<sup>180</sup> O. Schachter, Self-Defence and the Rule of Law, AJIL 83 (1989), 259 (266).

<sup>181</sup> Differently S. R. Ratner (note 178), 910. Zemanek sees in any case an uncertainty about the present construction of Art. 51, see K. Zemanek (note 18), 714.

<sup>182</sup> See S. R. Ratner (note 178), 910.

<sup>183</sup> A. Cassese, International Law, 2<sup>nd</sup> ed. 2005, 475.

<sup>184</sup> A. Addis (note 7), 324.

<sup>185</sup> G.A. Res. 1, U.N. GAOR, 56<sup>th</sup> Sess., U.N. Doc. A/56/L.1 (2001); U.N. SCOR, 4370<sup>th</sup> Mtg. at 1, U.N. Doc. S/Res/1368 (2001). B. Langille refers to this Declaration, however does not make exactly clear what the content of the “Bush doctrine” she regards as instant customary law is, see It’s “instant custom”, B. C. Int’l & Comp. L. Rev. 26 (2003), 145 (153).

<sup>186</sup> H. Hofmeister, To Harbour or Not to Harbour? Die Auswirkungen des 11. September auf das Konzept des “bewaffneten Angriffs” nach Art 51 UN-Charta, ZÖR 62 (2007), 475 (483). Cf. M. Lehto (note 48), 441.

<sup>187</sup> Cf. J. Wouters/F. Naert, The European Union and September 11, Indiana International and Comparative Law Review 13 (2003), 719 (773); critically also M. Kowalski (note 27), 109. For opposite view cf. Y. Arai-Takahashi (note 178), 1094 et seq.

<sup>188</sup> Report of the OAS Commission that Visited Ecuador and Colombia 10, OEA/Ser.F/II.25 RC.25/doc. 7/08 (16.3.2008).

tion – still urged it to use diplomatic means. The US neither accepted the intervention nor did it explicitly oppose it in 2008.<sup>189</sup> Furthermore it is lastly not to be forgotten that the ICJ rejected the harbor and support-rule in view of the 9/11 tragedy in the *Armed Activities* case.<sup>190</sup> In this light, referring to rules guiding the law of neutrality – as some do – cannot lead to a different result.<sup>191</sup> It is true that a neutral state is obliged to suppress activities of belligerents directed at other states from its territory with due diligence and in cases of its failure the attacked state may take action against the belligerent and thereby infringe the territorial integrity of the neutral state.<sup>192</sup> However, principles of neutrality presuppose an international armed conflict. The “war on terror” does not fit this terminology.

The question remains whether the US led operations in Syria which started in September 2014 lead to a different conclusion. Whilst Australia, Israel, Japan and Turkey praised the US offensive and the Netherlands showed understanding,<sup>193</sup> they were opposed by Russia, which was not willing to support any operations without authorization by the Security Council,<sup>194</sup> Ecuador,<sup>195</sup> Iran<sup>196</sup> and criticized by Argentina.<sup>197</sup> China – while not being unequivocal – has stressed its worries about the protection of the sovereignty of states in which IS operates and the observance of the UNC.<sup>198</sup> Undeniably several states actively support the US endeavors in the IS conflict. Bahrain, Canada, Jordan, Saudi Arabia and the United Arab Emirates (UAE) have conducted airstrikes in Syria. Australia, Denmark, France, Jordan, the Netherlands as well the United Kingdom (UK) have attacked IS posts in Iraq, however, are not intervening in Syria.<sup>199</sup> The situation regarding Iraq is distinct since actions of the anti-IS coalition on Iraqi soil are based on its very own invitation, which several states have emphasized re-

<sup>189</sup> *T. Ruys* (note 6), 340.

<sup>190</sup> *Armed Activities on the Territory of the Congo* (note 33).

<sup>191</sup> *A. S. Deeks* (note 14), 497 et seq.; *T. Ruys* (note 6), 503.

<sup>192</sup> *M. Krajewski* (note 53), 203.

<sup>193</sup> *D. Schindler*, *Die Grenzen des völkerrechtlichen Gewaltverbots*, BDGV 26 (1986), 11 (39).

<sup>194</sup> Cf. *C. Freemann*, *The Telegraph*, 26.9.2014, <<http://www.telegraph.co.uk>>; *Business Insider*, 24.9.2014, <<http://www.businessinsider.com>>.

<sup>195</sup> *I. Black/D. Roberts*, *The Guardian*, 12.9.2014, <<http://www.theguardian.com>>.

<sup>196</sup> Statement of Chancellor *R. Patiño*, 25.9.2015, <<http://www.elcomercio.com>>.

<sup>197</sup> Secretary of Iran's Supreme National Security Council *A. Shamkhani* cited by *Agence-France Presse*, 13.9.2014, <<http://www.ndtv.com>>. Cf. *D. Esfandiary/A. Tabatabai*, *Iran's ISIS policy*, *Int'l Aff.* 91 (2015), 1 et seq.

<sup>198</sup> *Buenos Aires Herald*, 25.9.2015, <<http://www.buenosairesherald.com>>.

<sup>199</sup> *S. Tiezzi*, *The Diplomat*, 24.9.2014, <<http://www.thediplomat.com>>.

<sup>200</sup> U.S. Department of Defense, <<http://www.defense.gov>>.

peatedly.<sup>200</sup> French President *Hollande* for example explicitly justified the French intervention in Iraq with Iraq's request and stressed that France lacked a similar mandate for Syria.<sup>201</sup> Australia which has been recently requested by the United States of America (USA) to conduct strikes in Syria is hesitating at the moment to extend its operations – obviously because the basis for an operation in Syria is not as clear as in the Iraqi case.<sup>202</sup> Numerous states have remained silent with respect to the offensive against IS on Syrian territory. There seems to be a general consensus that IS poses a severe security threat and hence its destruction is more than welcome. In spite of this reality there is considerable hesitation to proclaim the clear conformity of the operations in question with international law. Some exceptions are the US and UK which have expressly stated that the attacks against IS are internationally lawful.<sup>203</sup> Furthermore French Foreign Minister *Fabius* was not as careful as President *Hollande* and called their legality out of question.<sup>204</sup> Very few states have explicitly mentioned the standard of unwilling or unable within the debate. This reluctance to “legitimize” the ongoing strikes “with legal language”<sup>205</sup> is significant. While *opinio iuris* which would carry the emergence of new customary law may express itself in tacit acquiescence,<sup>206</sup> the normative value of the prohibition on the use of force as *ius cogens* has to be taken into account with respect to the threshold that “silence” must overstep to be considered as tacit approval. Obviously it would be exaggerated to require states to refer precisely to the terms “unwillingness”, “inability” and “attribution” to assume that the standard which I am analyzing here has actually emerged. It is the task of the judiciary and scholars to translate state behavior into doctrines that fit into the existing international legal order and preserve its coherence. But as of today the inconclusiveness of statements and the silence of many states allow – in view of the *ius cogens* character of Art. 51 and the prohibition on the use of force – only one finding: A rule that in cases in which a host state violates its obligation to suppress terrorist activities the victim state targeted by

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<sup>200</sup> Letter dated 20.9.2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, S/2014/691.

<sup>201</sup> Cf. <<http://www.reuters.com>>.

<sup>202</sup> The Guardian, 23.9.2015, <<http://www.theguardian.com>>.

<sup>203</sup> Identical letters dated 25.11.2014 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General and the President of the Security Council, S/2014/851.

<sup>204</sup> *D. Bases/A. Mohammed*, Reuters, 22.9.2014, <<http://www.reuters.com>>.

<sup>205</sup> *M. Hakimi* (note 34), 4.

<sup>206</sup> Denying the necessity to identify *opinio iuris* amongst others *M. Mendelson*, *The Subjective Element in Customary International Law*, BYIL 66 (1996), 177 (208).

these terrorists may infringe the host state's rights based on Art. 51 is not *lex lata*.

(2) "Unable to Prevent Terrorist Activities": Violation of an Obligation?

A state would also be considered as "unable" in the eyes of the propagators of the unwilling or unable standard if it tried to neutralize a terrorist threat in compliance with its due diligence obligation but remained unsuccessful, which evidences the severe implications of this formula. The idea to rest attribution on wrongful conduct of the host state fails either way in constellations of incapacity as seen above. Hence, if operations against unable states were also justified by Art. 51, this would constitute a major departure from the core principle of this article which requires the target of self-defense actions to violate of international law. To uphold the elementary requirement of wrongful pre-conduct two options are viable: First of all, the idea of "division of duties" which I have touched upon previously may serve as a possible remedy. If the duty to uphold an effective state infrastructure is interpreted as one of strict liability, it might serve as the basis for construing wrongful behavior on the part of the target state. I have already rejected the idea of such a separation since it contests the very core of due diligence obligations and introduces a strict liability regime so to speak "through the backdoor".<sup>207</sup> The second alternative would be to shift the focus to another element of state behavior: If terrorists are active within an unable state's territory and this state, after request by the attacked state, withholds its consent to defense operations of the attacked state on the host state' soil, this refusal might constitute a violation of international law.<sup>208</sup> Following this line of argument, *García-Mora* argues that a state's inability should not "be accompanied by inactivity or indifference" on its part.<sup>209</sup> In this respect *Brownlie* seems to concur with him by stressing that in a state of incapacity certain due diligence duties remained with the "paralyzed"

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<sup>207</sup> Some scholars try to mitigate the far-reaching effects of such an approach by adjusting the proportionality level that the counterstrike has to conform with. It is purported that the target state's infrastructure must not be destroyed and the attack has to be limited to the terrorist group itself in cases of incapacity *T. Reinhold* (note 97); *A. Randelzhofer/G. Nolte* (note 42), para. 41. Cf. *T. Ruys* (note 6), 493 et seq. See also *J. Brunnée* (note 17), 123 et seq. Cf. *S. Ratner*, Self-Defense Against Terrorists: The Meaning of Armed Attack, in: L. v. d. Herik/N. Schrijver (eds.), *Counter-Terrorism Strategies in a Fragmented International Legal Order*, 2015, 334 (353 et seq.). This does not invalidate the basic objections against such an approach.

<sup>208</sup> Cf. *S. Shukurov* (note 74), 184; *M. R. García-Mora* (note 36), 30. Cf. also *B. Levenfeld*, Israel's Counter-Fedayeen Tactics in Lebanon: Self-Defence and Reprisal Under Modern International Law, *Colum. J. Transnat'l L.* 21 (1982), 1 (12).

<sup>209</sup> *M. R. García-Mora* (note 36), 30.



state.<sup>210</sup> The established principle of cooperation which forms a component of *sic utere non laedas* could serve as a source of a duty to consent to a foreign action in such cases.<sup>211</sup> However, between a duty to cooperate and a duty to consent to foreign operations lie not only quantitative but qualitative differences. Limiting the duty to consent to situations in which no legitimate interests of the host state are at stake<sup>212</sup> would in view of the ambiguity of the terms “legitimate interests” only marginally protect the host state’s territorial sovereignty. The major impacts of such a duty for the host state’s sovereignty call for overwhelmingly persuasive authority to assume it is part of current international law, which as demonstrated in the preceding paragraph on unwillingness could not be identified. Several states insisted on Syrian consent as a prerequisite of the legality of strikes against IS posts. Drawing parallels to the concept of “hot pursuit” – a line of argument employed by the US in the context of Mexican raids by armed bands in the 19<sup>th</sup> century<sup>213</sup> but also by South Africa in 1986<sup>214</sup> – remains likewise unconvincing and anachronistic in view of lacking state practice.

(3) “Unwilling to Prosecute”: Behavior in the Ex-Post Phase as Grounds for Attribution?

Another line of argument in the context of 9/11 and “Operation Enduring Freedom” focused on the obligation to apprehend and extradite terrorists and its violation as grounds for attribution. *Frowein* implies a correlation between the duty to extradite and Art. 51: He assumes only an immediate extradition of *bin Laden* would have hindered the USA to invoke Art. 51.<sup>215</sup> *Brunnée* sees a tacit approval of terrorist activities in the refusal to apprehend the perpetrators. Neither state nor Security Council practice support this view: While Resolution 1378 condemned the Taliban for “allowing Afghanistan to be used as a base for the export of terrorism by the Al-Qaida network and other terrorist groups and for providing safe haven

<sup>210</sup> *I. Brownlie* stressed this point already in 1958 see *International Law and the Activities of Armed Bands*, ICLQ 7 (1958), 712 (735).

<sup>211</sup> Cf. *J. Kittrich* (note 89), 145.

<sup>212</sup> Cf. *J. A. Frowein* (note 9), 884; *P.-M. Dupuy/C. Hoss* (note 105), 233.

<sup>213</sup> Cited in *A. S. Hershey*, *Incursions into Mexico and the Doctrine of Hot Pursuit*, AJIL 13 (1919), 557 (560). The lawfulness of such “hot pursuit” depended on the conditions that neither persons or property of the invaded state are harmed nor a challenge of territorial integrity intended, *I. Brownlie* (note 210), 733. *Crit. Y. Dinstein* (note 56), 270 et seq.

<sup>214</sup> Cf. *E. Kwakwa*, *South Africa’s May 1986 Military Incursions into Neighbouring African States*, Yale J. Int’l L. 12 (1987), 421 et seq.

<sup>215</sup> *J. A. Frowein* (note 9), 887.

to Usama Bin Laden, Al-Qaida and others associated with them [...],”<sup>216</sup> it refrained from taking position on the legality of the US bombing of Taliban posts and left the question of attribution in the context of Art. 51 open.

To conclude briefly: The “attribution via wrongful conduct” has as of now not become a legal rule, moreover in the case of unable states, this approach would fail either way in the absence of wrongful conduct on the part of the host state. To abolish the requirement of wrongful pre-conduct of the target state does not fit into the traditional rationale of Art. 51 and would require an explanation why the host state has to accept the infringement of its territorial sovereignty. Admittedly there might be constructive ways which would produce an answer, but any endeavors in this direction are not supported by state practice and opinion.

#### d) “Qualified Inaction”: Security Council as an Instance of Attribution?

Since this conclusion appears unsatisfactory the Security Council gains attention in the debate surrounding attribution. Referring mainly to Art. 25, the Security Council is propagated as a possible “mediator” between states invoking Art. 51 and unwilling or unable states by deciding on the question of attribution.<sup>217</sup> The objective of this approach is to deal with another flaw in the idea to rest attribution on unwillingness, which has not been addressed so far and is inherent to the nature of Art. 51 as a self-help measure. The decision whether a host state is unwilling would in the moment of the counterstrike lie with the state invoking Art. 51 without any prior objective review by another authority. To act in self-defense is a subjective decision of the targeted state in the first place,<sup>218</sup> which flows from the competence of the Security Council to intervene as the 2<sup>nd</sup> part of the first sentence of Art. 51 presupposes. Obviously, a state’s decision to resort to force is subject to retrospective evaluations<sup>219</sup> and the state bears the burden of proof for the

<sup>216</sup> SC Res. 1378, U.N. Doc. S/RES/1378 (14.11.2001).

<sup>217</sup> Cf. A. Zimmermann (note 11), 120 et seq. Critically M. Kowalski (note 27), 109; M. C. Wood, The Role of the UN Security Council in Relation to the Use of Force Against Terrorists, in: L. v. d. Herik/N. Schrijver (note 207), 322. Cf. GA Res 62/272. In favor of an expansion of Art. 39 UNC J. Morris/J. N. Wheeler, The Security Council’s Crisis of Legitimacy, Int’l Pol. 44 (2007), 214 (224).

<sup>218</sup> T. L. H. McCormack, Self-Defense in International Law, 1996, 259.

<sup>219</sup> O. Schachter, Self-Judging Self-Defense, Case W. Res. J. Int’l L. 19 (1987), 121 et seq.

prerequisites of Art. 51.<sup>220</sup> At the moment of this post-attack evaluation however, the damage is already done.

Obviously, the Security Council might play a “constructive role” concerning the interpretation of Art. 51,<sup>221</sup> but to attest it “attributing competence” would go beyond that. Not only would it create a tension with the principle that the exercise of self-defense does not require Security Council authorization, it would also yield severe effects on the collective security system of the UN and its relationship with Art. 51. Furthermore, it is questionable whether the Council has the power to broaden the scope of Art. 51,<sup>222</sup> which is silent on any Council “induced” attribution. This would presuppose not only the exercise of quasi-legislative functions by the Security Council but its competence to “adjust” *ius cogens* norms. It might be arguable that in cases covered by Chapter VII in which the Council might authorize unilateral action it would not overstep its competences in substance by “attributing” an attack.<sup>223</sup> However, since the Charter gives the Security Council different instruments at hand to authorize state action – *ergo* by applying Chapter VII explicitly – the Charter’s systematics argue against an “attributing competence”. In any case the practice of the Security Council does not imply that it has any ambitions to become a forum for questions of attribution. Although the Council has repeatedly mentioned the right to self-defense in its resolutions, it merely did so with the intention to enhance legal certainty<sup>224</sup> and not to attribute certain behavior. Scholars of the contrary view usually refer to Resolution 1368 to support their argument.<sup>225</sup> However, reference to self-defense was only made in the preamble but not in the Resolution’s substantive part. More importantly, the Resolution did not explicitly regard Art. 51 as justification for the US operation.<sup>226</sup> Neither did it determine the possible target of the self-defense ac-

<sup>220</sup> *Oil Platforms Case* (note 29), para. 57; A. Cassese (note 183), 357; B. Schiffbauer, *Vorbeugende Selbstverteidigung im Völkerrecht*, 2012, 124.

<sup>221</sup> J. Brunnée (note 17), 131.

<sup>222</sup> Rejecting an “attribution competence” of the SC *M. D. Kielsgard*, *National Self-Defense in the Age of Terrorism; Immediacy and State Attribution*, in: A. Masferrer (ed.), *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism*, 2012, 315 (339).

<sup>223</sup> Cf. J. A. Frowein (note 9), 886.

<sup>224</sup> F. Mégret (note 7), 373.

<sup>225</sup> Irrespective of some contradicting voices (*D. Jinks* [note 17], 86 et seq.), it is hence widely agreed that the intervention in Afghanistan was not authorized by a Security Council resolution based on its Chapter VII powers, especially not Resolution 1373 (2001), *M. Krajewski* (note 53), 184; J. J. Paust (note 27), 545.

<sup>226</sup> J. Wouters/F. Naert (note 187), 772.

tion nor who was entitled to its invocation.<sup>227</sup> It even omitted to qualify the incidents of 9/11 as armed attacks which it had done explicitly regarding the Iraqi attack against Kuwait.<sup>228</sup> It merely assessed them as “terrorists attacks”.<sup>229</sup> Security Council Resolution 1373, which obliged the states amongst other things to “[d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens”<sup>230</sup> and hence specified the obligations of states with regard to terrorists likewise omitted to address questions of attribution.<sup>231</sup>

## 2. Limitation on State Sovereignty

As I have already hinted at in the beginning, some authors try to solve the problem of the unwilling or unable state outside of the question of attribution. One idea includes a kind of “teleological reduction” of the sovereignty principle. These approaches are manifold and hard to categorize. The first stream of thought is that a state forfeits protection by the sovereignty principle and its corollary, the right of noninterference, if it fails to suppress terrorist activities.<sup>232</sup> A similar line of argument seems to employ – although not explicitly – the notion of “estoppel”: A state incapable of controlling terrorists is not entitled to invoke a violation of its sovereignty.<sup>233</sup> A third line of argument applies an “ungoverned spaces” standard and focuses on the rationale behind the concept of territorial integrity which secures a state’s right to determine its internal affairs.<sup>234</sup> Non-state actors launching attacks against foreign states would step out of the sovereign veil of the state losing its protection.<sup>235</sup> Others argue based on a concept of what might be

<sup>227</sup> *H. Hofmeister* (note 186), 483.

<sup>228</sup> SC Res. 661 (1990); *E. P. J. Myjer/N. D. White* (note 176), 9; *F. Mégret* (note 7), 378.

<sup>229</sup> Cf. also *H. Hofmeister* (note 186), 483.

<sup>230</sup> SC Res. 1373 (2001) adopted by the Security Council at its 4385<sup>th</sup> Meeting (28.9.2001).

<sup>231</sup> Cf. *S. A. Barbour/Z. A. Salzman* (note 90), 89; *F. Mégret* (note 7), 374; unclear *M. Lehto* (note 48), 391 et seq. The contrary view is taken by *S. Shukurov* (note 74), 221. Concerning the ambiguity of the resolutions *A. Cassese* (note 7), 996.

<sup>232</sup> *M. R. García-Mora* (note 36), 27. Cf. also *R. Wedgwood*, Responding to Terrorism: The Strikes Against Bin Laden, *Yale J. Int’l L.* 24 (1999), 559, (565). Cf. *T. Reinhold* (note 97), 285; *B. Levenfeld* (note 208), 12. See also *H. Lauterpacht* (note 163), 105 (128).

<sup>233</sup> *Y. Blum*, The Beirut Raid and the International Double Standard: A Reply to Professor Richard A. Falk, *AJIL* 64 (1970), 73 (85); *B. A. Feinstein* (note 36), 77; Institut de Droit International, Present Problems of the Use of Force in International Law, Resolution 10A, No.10, (ii).

<sup>234</sup> Cf. *M. Hakimi* (note 34), 28.

<sup>235</sup> *M. Krajewski* (note 53), 204.

called “frustrated sovereignty” basically leading to an approximation of *de facto* with *de iure* sovereignty: In cases of uncontrolled non-state actor activities a “State’s territorial integrity is already compromised beyond the point where a lawful use of force in self-defense by another State could be viewed as a violation of territorial integrity of the host State”.<sup>236</sup> Some authors argue with view to failed states for an emancipation of the statehood concept from external sovereignty: While failed states remained states, external sovereignty would not be attributed to them.<sup>237</sup> Consequently they would fall out the scope of Art. 51. Although these approaches correspond with the unwilling or unable-standard to the extent that they aim to exclude states hosting terrorists from the protection of Art. 51, there is one significant difference: The construction of unwritten and not clearly delimited exceptions to the scope of the protection of territorial sovereignty carries the immense danger of hollowing out the prohibition on the use of force<sup>238</sup> and is in methodological terms more than dubious. If international law offers specific norms – Art. 51 –, these norms have to be the starting point of discussion.

### 3. Forceful Actions against Terrorists as Law Enforcement?

A second argumentative thread outside the question of attribution interprets actions against terrorists acting from the territory of passively behaving states as measures of law enforcement.<sup>239</sup> States failing to meet their due diligence obligations to suppress terrorist activities – although being capable to – violate international law. The argument of the law enforcement-stream is as follows: After a successful counteraction the attacked state actually fulfilled the duty of the host state to prevent terrorist attacks thereby enforcing law. This is hardly convincing. As could be seen, the host state is only obliged to undertake reasonable measures to suppress terrorist activities. His duties are obligations of conduct and not of result and do not require that his actions successfully eliminate the threat. Hence the effect of a successful self-defense action and a host state’s obligation to prevent terrorist attacks are not congruent. Most importantly, the defender is not authorized

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<sup>236</sup> S. A. Barbour/Z. A. Salzman (note 90), 84.

<sup>237</sup> K. Chan, State Failure and the Ius ad Bellum, *Journal of Conflict Security Law* (2013), 395 (423 et seq.).

<sup>238</sup> J. N. Maogoto (note 91), 172 et seq.

<sup>239</sup> Cf. Y. Dinstein (note 56), 268 et seq.; J. Combacau, The Exception of Self-Defence in U. N. Practice, in: A. Cassese (note 74), 9 (25).

to enforce law under the Charter.<sup>240</sup> Armed law enforcement is the *métier* of the Security Council, which can authorize uni- or multilateral actions as well as regional organizations (see Art. 53) to enforce law. Armed self-protection outside Art. 51 is not acknowledged in current international law.<sup>241</sup> Likewise any law enforcement with regard to non-state actors requires the host state's consent.<sup>242</sup> This rule also applies to situations in which the Security Council remains passive. The *Uniting for Peace Resolution*<sup>243</sup> passed in view of the Korean conflict cannot be seen as a precedent for unilateral action by states. In this case a UN organ – the General Assembly – assumed powers of the Council and not a state or a group of states. This “implied powers” doctrine is an evolutionary tool directed at expanding the powers of UN organs and not to limit their competences in favor of states.<sup>244</sup>

## VIII. Conclusion

A few states have – followed by a number of academics – expressly invoked the unwilling or unable-standard in order to address the problem of terrorism and broaden the scope of Art. 51. This contribution's main goal was – taking the state-centric concept of armed attack as starting point – to evidence that all arguments put forward in order to base attribution within Art. 51 on unwillingness or inability ultimately fail to convince *de lege lata*. This does not mean the Charter lacks the means to address the problem of unwilling or unable states: If Art. 51 does not apply and the host state does not consent to a counterstrike, systematics of the UNC lead to the Security Council as the competent forum to deal with this matter.<sup>245</sup> By allowing self-defense “until the Security Council has taken measures”, Art. 51 reflects the Security Council's principal position regarding exemptions from the ban on the use of force and the monopolization of coercion by military means in the Charter system.<sup>246</sup> The Security Council has a large arsenal of

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<sup>240</sup> J. L. Kunz (note 55), 332.

<sup>241</sup> For the opposing view T. D. Gill, *The Forcible Protection, Affirmation and Exercise of Rights by States under Contemporary International Law*, NYIL 23 (1992), 105 et seq.

<sup>242</sup> D. Tladi (note 34), 576.

<sup>243</sup> GA Res 377 (1950).

<sup>244</sup> V. Gowlland-Debbas (note 58), 374.

<sup>245</sup> M. E. O'Connell (note 21), 383.

<sup>246</sup> J. Brunnée (note 17), 127. Cf. to the exact content of a Security Council resolution necessary for blocking the invocation of the right of self-defence E. V. Rostow, *Until What? Enforcement Action or Collective Self-Defense?*, AJIL 85 (1991), 506 et seq. Cf. for the con-

tools to address terrorist threats.<sup>247</sup> Particularly it may authorize unilateral or multilateral law enforcement by military means.<sup>248</sup> It should be noted, however, that the Security Council itself has contributed to blurring the lines between self-defense and law enforcement. By adopting ambiguous resolutions as in the past the Security Council furthers the “erosion of its regulation of the use of force”.<sup>249</sup> Especially by statements reaffirming the “inherent right of self-defense” in situations in which a conservative interpretation would deny the applicability of Art. 51 the Security Council runs the danger of “progressively” writing “itself out of the collective security business”.<sup>250</sup>

Against the background of the paralyzed situation the Security Council proved to be in during the crisis in Syria<sup>251</sup> reference to the primary responsibility of the Council may for some appear utopian, if not even sarcastic. While in the case of Libya the Council rose up to the role assigned to it, such occasions feeding hopes are rather rare. Since the Council is in practice nothing more than a “realistic political compromise among the powerful”<sup>252</sup> and frequently unable to act due to political and strategic preferences of its members,<sup>253</sup> insisting on its sole role in the constellation of unwilling or unable states is dissatisfying: If an attacked state defends itself on the ground of the host state without the latter’s consent or the Security Council’s authorization, it violates international law. Irrespective of how harsh this result is, it corresponds with the fundamental value judgment the UNC makes: It grants the collective security system priority over the right to self-defense, which is reflected by the second part of the 1<sup>st</sup> sentence of Art. 51.<sup>254</sup> This is the situation *de lege lata*.

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trary view *K. M. Meessen*, Unilateral Recourse to Military Force Against Terrorist Attacks, *Yale J. Int’l L.* 28 (2003), 341 (347).

<sup>247</sup> See *M. C. Wood* (note 217), 317 (318); *B. Fassbender*, The UN Security Council and International Terrorism, in: *A. Bianchi/Y. Naqvi* (note 7), 83 (91).

<sup>248</sup> *H. Freudenschuß*, Between Unilateralism and Collective Security, *EJIL* 5 (1994), 492 (522 et seq.).

<sup>249</sup> *E. P. J. Myjer/N. D. White* (note 176), 16.

<sup>250</sup> *J. Brunnée* (note 17), 131.

<sup>251</sup> *P. Webb*, Deadlock or Restraint? The Security Council Veto and the Use of Force in Syria, *Journal of Conflict Security Law* 19 (2014), 471 et seq.; *S. Mohamed*, Omissions, Acts, and the Security Council’s (In)actions in Syria, *B.U. Int’l L. J.* 31 (2013), 413 et seq.

<sup>252</sup> *I. Hurd*, Of Words and Wars: The Security Council’s Hard Life among the Great Powers, *Seton Hall Journal of Diplomacy and International Relations* 5 (2004), 69 (70).

<sup>253</sup> Cf. *P. Okowa*, Case Concerning Armed Activities on the Territory of the Congo, *ICLQ* 55 (2006), 742 (750); *J. A. Frowein* (note 9), 886; *E. P. J. Myjer/N. D. White* (note 176), 16.

<sup>254</sup> *N. Krisch*, Selbstverteidigung und kollektive Sicherheit, 2002, 394 et seq.



But I will go beyond this mainly “positivist” line of argument and conclude by presenting some thoughts on why attempts by scholars to legalize actions infringing a host state’s sovereignty based on methodologically doubtful stretching of Art. 51 are problematic from a policy perspective:<sup>255</sup>

1. The application of primary rules of international law – *ergo* Art. 51 – is not the right tool to meet terrorist threats.<sup>256</sup> Self-defense is an interim measure, terrorism a long-term problem. It requires collective (military) action of the international community, the effective employment of (international) criminal law and should – since it endangers the international public order as such – be addressed by a centralized authority.<sup>257</sup>
2. Military defense actions against non-attributable attacks by non-state actors constitute in fact armed reprisals or forceful law enforcement measures against the host state and introduce an *ius ad bellum* that has been long overcome and contradicts the UNC in its very core.
3. A widening of the scope of Art. 51 would legitimize and foster violence contrary to the two purposes of the UNC – international peace and security. It paves the way to escalation<sup>258</sup> and facilitates a state of permanent war. Allowing states “to use force against other states in reply to acts of indirect aggression” runs the risk “of transforming civil wars, which are the typical scenario for indirect aggression, into international conflicts”.<sup>259</sup>
4. The notions of necessity and proportionality limiting the exercise of self-defense are insufficient to preclude escalation, if the requirement of state attribution within Art. 51 is abandoned.<sup>260</sup> The prohibition on the use of force should remain precise as possible and “invulnerable [...] to self-serving interpretations”.<sup>261</sup>
5. The application of Art. 51 in cases of unwilling or unable states opens a wide sphere of discretion and auto-determination on the part of the potential victim state and devalues the principle of state sovereignty. Which states are unwilling, which unable? Indexes of state fragility developed by the social sciences might be consulted in order to determine incapacity. However, it is unclear what they actually measure. The nimbus of authoritativeness surrounding them fades quickly when their methodologies are

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<sup>255</sup> Cf. *J. D’Aspremont*, Mapping the Concepts Behind the Contemporary Liberalization of the Use of Force in International Law, *U. Pa. J. Int’l L.* 31 (2014), 1089 (1149).

<sup>256</sup> Cf. *D. Jinks* (note 17), 95.

<sup>257</sup> *P.-M. Dupuy*, State Sponsors of Terrorism, in: A. Bianchi/Y. Naqvi (note 7), 3 (15).

<sup>258</sup> *T. Ruys* (note 6), 533.

<sup>259</sup> *P. L. Zanardi* (note 74), 116.

<sup>260</sup> For the contrary view *K. N. Trapp* (note 35), 141 et seq.

<sup>261</sup> *L. Henkin*, The Use of Force, in: L. Henkin/S. Hoffmann/J. J. Kirkpatrick (eds.), 2<sup>nd</sup> ed. 1991, *Right v. Might*, 37 (60).

considered, which include hidden normative determinants.<sup>262</sup> Since terrorist cells are active in different states whose levels of supportive participation varies, the decision to initiate military operations against them should be decided by a body with international legal authority: Within the current institutional framework this role can only be fulfilled by Security Council, which is capable of taking over a jurying and scrutinizing function.<sup>263</sup> To regard it as the attacked state's prerogative to decide whether its target state is unwilling or unable to suppress terrorist activities and to reduce the Security Council's role into an *ex post* instance of control paves the way to an uncontrollable armed law enforcement by states.

6. It should not be forgotten that the Council's paralysis in "moments of the greatest tension between the Great Powers"<sup>264</sup> may prove sensible. The prohibition on the use of force is not dependent on the Security Council's capacity to act. Resisting an overextension of Art. 51 furthermore may be a trigger to force the Council to act. It may facilitate a reform of the Security Council. In the aftermath of the Council's deadlock during the Syrian crisis voices fostering a "responsibility not to veto" – RN2V – and a code of conduct guiding the exercise of veto powers became louder<sup>265</sup> and the pressure on the Council and its members higher.<sup>266</sup>
7. Approaches fostering the unwilling or unable-standard are in fact subcutaneous pleas for a change of law. Until Art. 51 is modified, defensive actions not covered *de lege lata* are in a sphere of non-legality.

Obviously all these objections suffer from two major deficiencies: First of all, from a *realpolitik* perspective states – even those opposing US actions in Syria – when attacked by terrorists from the soil of unwilling or unable states will most likely strike back – irrespective of the host state's consent or Security Council authorization. Furthermore declaring self-defense actions against non-state actors as illegal has a tendency towards neglecting the target state's essential security interests which are legitimate and legally pro-

<sup>262</sup> For a comprehensive critique cf. *N. Bhuta*, Governmentalizing Sovereignty: Indexes of State Fragility and the Calculability of Political Order, in: K. Davis/A. Fisher/B. Kingsbury/S. E. Merry (eds.), *Governance by Indicators: Global Power Through Quantification and Rankings*, 132 et seq.

<sup>263</sup> Cf. *T. Franck*, Legality and Legitimacy in Humanitarian Intervention, in: T. Nardin/M. S. Williams (eds.), *Humanitarian Intervention*, 143 (151); *A. Addis* (note 7), 344 et seq.; *A. Cassese* (note 183), 365.

<sup>264</sup> *I. Hurd* (note 252), 71.

<sup>265</sup> See France, Statement at the Opening of the 68<sup>th</sup> Session of the United States General Assembly, 2013, 1 et seq.

<sup>266</sup> The Council was heavily criticized with regard to Syria, Statements of the USA, France, Germany, United Kingdom, Canada and Japan in U.N. SCOR, 67<sup>th</sup> Sess., 6816<sup>th</sup> Mtg., 12, 24-25, 35, 36 (U.N. Doc. S/PV.6816).

tected. However, one essential quality of legal norms is that they stabilize counterfactual expectations of behavior and remain valid even if they are disappointed.<sup>267</sup> Obviously norms which do not grasp the realities of international relations lose their justification. But: While the unwilling or unable-standard might possibly be on the verge of emerging, it is not yet law. What we witness at this moment is rather a state of general confusion surrounding Art. 51 in politics and the legal realm. Considering the law-creative role of legal academia and the responsibility it hence bears scholarship should be cautious with premature proclamations of the birth of a fundamentally altered concept of self-defense. It appears to me that a strict interpretation of Art. 51 would yield less severe repercussions for the preservation of international peace than its nonreflective expansion.

Undeniably the rules on self-defense are in flux at this moment. Future developments have to be observed carefully by scholars. Turkey – which after a phase of reluctance recently allowed the US to operate from the strategically important *Incirlik* Base – joined the fight against IS in Syria, however, it is simultaneously conducting strikes against the Kurdish Workers' Party PKK acting in Syria – in both cases invoking Art. 51.<sup>268</sup> While there might be good reasons to classify the PKK as a terrorist organization, there are reports suggesting that Turkey uses the offensive against IS and the veil of an “extended” self-defense doctrine as an excuse to solve its problems with Kurdish secessionist endeavors forcibly without having to face international resistance.<sup>269</sup> Allegedly Turkey launched over 500 strikes against PKK and Yekîneyên Parastina Gel (YPG) – a Kurdish militia active in Syria – and only three against IS in August 2015.<sup>270</sup> A ceasefire between Turkey and the PKK disintegrated in July 2015 after Turkish operations against IS had begun.<sup>271</sup> Turkey has furthermore taken first steps to set-up a buffer zone on Syrian territory.<sup>272</sup> Much earlier *Binyamin Netanyahu* adopted a similar line of argument and equaled Israeli strikes against Hamas with the operations against IS.<sup>273</sup> We might be – although it is beyond my capacity to

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<sup>267</sup> See *N. Luhmann*, *Ausdifferenzierung des Rechts: Beiträge zur Rechtssoziologie und Rechtstheorie*, 1999, 17.

<sup>268</sup> See *M. Nichols*, 24.7.2015, Reuters, <<http://www.reuters.com>>.

<sup>269</sup> BBC News, 10.8.2015, <<http://www.bbc.com>>. One of the USA's most efficient partner in the fight against ISIS is the YPG – a Kurdish militia active in the North of Syria, which is however combatted by Turkey, *S. Almkhhtar/T. Wallace*, *Why Turkey Is Fighting the Kurds Who Are Fighting ISIS*, NY Times, 12.8.2015, <<http://www.nytimes.com>>.

<sup>270</sup> *K. Sengupta*, *The Independent*, 20.8.2015, <<http://www.independent.co.uk>>.

<sup>271</sup> BBC News, 26.7.2015, <<http://www.bbc.com>>.

<sup>272</sup> See note 270.

<sup>273</sup> *The Guardian*, 29.9.2014, <<http://www.theguardian.com>>.

make a sufficiently secure prognosis witnessing –here some first evidence that Pandora’s Box has been opened.

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