The Paris attack - A case for the right to self-defence?

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I hereby declare that I have read and understand the regulations governing the submission of LL.M. by coursework dissertations, including those relating to lengths and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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Abbreviations

Art.	Article
ASR	Articles on Responsibility of States for Internationally Wrongful Acts
Cf.	Confer (lat.)
Etc.	Etcetera
EU	European Union
FARC	Revolutionary Armed Forces of Colombia
GA	General Assembly
ICJ	International Court of Justice
ILC	International Law Commission
IS	Islamic State
Lit.	Litera (lat.)
NATO	North Atlantic Treaty Organization
No.	Number
OAS	Organization of American States
OSCE	Organisation for Security and Co-operation in Europe
Para.	Paragraph
PKK	Kurdish Worker's Party; Kongra-Gel
SC	Security Council
SFRY	Socialist Federal Republic of Yugoslavia
TEU	Treaty on the European Union

UN	United Nations
UNC	United Nations Charter
US	United States
VCLT	Vienna Convention on the Law of Treaties

A) Chapter 1: Introduction

On the evening of Friday 13 November 2015 ten terrorists killed 130 people and injured further 368 people during a coordinated attack in Paris. The terrorist organisation IS claimed responsibility for the attack.[1]

The attack was mostly planned and masterminded in Syria and some of the terrorists had undergone terrorist training by the IS in Syria.[2]

French President Francois Hollande declared that 'France is at war'[3]. On the 16 November, as a direct reaction to the attack, France launched massive air strikes against the IS stronghold in Raqqa, Syria.[4] The operation was carried out in coordination with the US military. French Minister of Foreign Affairs and International Development at that time, Laurent Fabius, said that the retaliatory air strikes were an act of 'self-defence'.[5]

Further reactions in Europe were in line with that statement. Although France did not request the use of the alliance's mutual defence clause in Art. 5 of the NATO Treaty, many NATO allies offered France help.[6]

France did invoke Art. 42 para. 7 of the TEU though and requested military aid from the other member states of the EU.[7]

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[1] Rukmini Callimachi, New York Times, 'ISIS Claims Responsibility, Calling Paris Attacks "First of the Storm"', 14.11.2015, available at: http://www.nytimes.com/2015/11/15/world/europe/isis-claims-responsibility-for-paris-attacks-calling-them-miracles.html?_r=0 (accessed on: 30.08.2016).
[2] BBC News, 27.24.2016, 'Paris attacks: who were the attackers?', available at: http://www.bbc.com/news/world-europe-34832512 (accessed on: 30.08.2016).
[3] Speech of the French President Francois Hollande, 16.11.2015, available at: http://www.diplomatie.gouv.fr/en/french-foreign-policy/defence-security/parisattacks-paris-terror-attacks-november-2015/article/speech-by-the-president-of-the-republic-before-a-joint-session-of-parliament (accessed on: 30.08.2016).
[4] Ben Doherty, The Guardian, 'France launches "massive" airstrike on Isis stronghold of Raqqa', 16.11.2015, available at: https://www.theguardian.com/world/2015/nov/16/france-launches-massive-airstrike-on-isis-stronghold-in-syria-after-paris-attack (accessed on: 30.08.2016).
[5] Speech of the French Minister of Foreign Affairs Laurent Fabius, 15.11.2015, available at: http://www.diplomatie.gouv.fr/en/the-ministry-of-foreign-affairs/events/debate-on-foreign-policy-in-the-senate/article/speech-of-laurent-fabius-minister-of-foreign-affairs-and-international (accessed on: 30.08.2016).
[6] Steven Erlanger & Peter Baker, New York Times, 'For France, an Alliance against ISIS may be easier said than done', 18.11.2015, available at: http://www.nytimes.com/2015/11/19/world/europe/for-france-an-alliance-against-isis-may-be-easier-said-than-done.html?_r=0 (accessed on: 30.08.2016).

Art. 42 para. 7 of the TEU contains the so called 'solidarity clause' that states that if a member of the EU is the victim of 'armed aggression on its territory' other states have an 'obligation of aid and assistance by all the means in their power.'[8]
Art. 42 para. 7 of the TEU is similar to Art. 5 of the NATO Treaty which the US activated after the attack on 11th September 2001, to trigger the US-led alliance's intervention in Afghanistan.
It was the first time that a member state invoked Art. 42 para. 7 of the TEU.[9]

But no matter which political way France chose, legally it all comes down to the right of self-defence, as laid down in Art. 51 of the UNC.

For a long time it was the prevailing view in international law that the right to self-defence requires, *inter alia,* an armed attack by a state. In the present case there was no armed attack by another State. The attack was carried out by a terrorist organisation.

This fact raises the issue whether French air strikes against the IS in Syria really can be classified as an act of self-defence or does France or the USA violate the prohibition on the use of force, set out in Art. 2 para. 4 of the UNC, by carrying out these air strikes?

The present dissertation deals with this issue and clarifies the circumstances under which a state that got attacked by terrorists can exercise its right to self-defence against another state that is hosting –willingly or unwillingly- these terrorists.

The structure of the dissertation is as follows.

Chapter two I first describes the development of the right to self-defence. Furthermore it outlines the current legal framework of the right to self-defence. The explanations refer to the customary right of self-defence as well as to the treaty right. In this context, the question is raised whether or not, the IS is a state under international law. In order to render a solution in form of a legal classification of the IS all four criteria of Art. 1 of the

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[7] Ian Traynor, The Guardian, 'France invokes EU's article 42.7, but what does it mean?', 17.11.2015 available at: https://www.theguardian.com/world/2015/nov/17/france-invokes-eu-article-427-what-does-it-mean (accessed on: 30.08.2016) [Traynor].
[8] Daniel Thym in Blanke&Mangiameli (eds), *The Treaty on the European Union (TEU); A Commentary* (Heidelberg New York London, 2013), Art. 42 (7), para. 17.
[9] Traynor *supra note* 7 (accessed on: 30.08.2016).

Montevideo Convention[10] and are applied and the concept of recognition in international law is discussed.

Chapter three introduces the classical view in international law regarding attribution. This approach requires an armed attack carried out by a state or alternatively an armed attack that is attributable to a state. Therefore I will analyse if the attack in Paris can be attributed to Syria. In doing so, several approaches and ideas will be addressed, *inter alia* the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*[11] as well as the Safe Haven-Doctrine and the Unwilling or Unable-Doctrine, whereby the focus will lie on the last mentioned doctrine. I will have a look at its content and analyse if the doctrine is already a rule of customary international law.

In chapter four I will discuss a new interpretation of the rules of attribution focusing on the Unwilling or Unable-Doctrine. I will examine if, under current international law, an armed attack in the sense of Art. 51 of the UNC can be carried out by a non-state actor without attribution to a state. This debate came up after the attacks of 9/11 in 2001. For this purpose I will analyse the SC resolutions 1368, 1373 and 1438 as well as ICJ jurisprudence after 2001. Furthermore, if attribution to a state is still required, I will show that the traditional standard of attribution is not able to deal effectively with today's threats. Because of that, the rules of attribution have to be interpreted in new way. The basis for that should be the clarified Unwilling or Unable-Doctrine with a clear legal content and defined parameters.

Finally my conclusion is outlined in chapter five.

[10] *Montevideo Convention on Rights and Duties of States*, 165 LNTS 19; 49 Stat 3097 (26 December 1933) *[Montevideo Convention].*

[11] 'Articles on the Responsibility of States for Internationally Wrongful Acts', Report of the ILC on the Work of its fifty-third session, UNGAOR, 56th Sess., Yearbook of the International Law Commission (2001), Volume I, Part II, UN Doc. A/56/10 (2001).

B) Chapter 2: The right to self-defence

I. Development of the right to self-defence

Art. 2 para. 4 of the UNC[12] comprises the prohibition on the use of force of one state against another state. This norm constitutes the cardinal norm of public international law.[13] There have been attempts to restrict the scope of Art. 2 para.4 of the UNC due to its wording.[14] Art. 2 para. 4 of the UNC speaks of force against the 'territorial integrity', the 'political independence' or 'in any other manner inconsistent with the purposes of the UN'. According to this argument, actions that are not aimed against one of these legally protected rights are not covered by the prohibition on the use of force and do not constitute a violation of Art. 2 para. 4 of the UNC.

The ICJ rejected this line of argument in *Corfu Channel.*[15] Apart from that, the *travaux préparatoires* of the article, which, according to Art. 32 of the VCLT[16], ought to be consulted as supplementary means of interpretation, show that the words 'territorial integrity' and 'political independence' were inserted later only under the urging of smaller states in order to highlight violations of a particular gravity.[17] Furthermore, Art. 2 para. 4 of the UNC serves the purpose[18] to reduce the unilateral use of military force.[19]

So, under the UNC there are only two undisputed exceptions to Art. 2 para. 4 of the UNC. The use of force is permitted only if it is authorised by the SC according to chapter VII or in self-defence, Art. 51 of the UNC.[20]

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[12] *Charter of the United Nations*, 15 U.N.C.I.O. 335 (26 June 1945).
[13] Cassese *'International Law'* (Oxford 2005), p. 100 [Cassese]; Brierly *'The Law of Nations'* (Oxford, 1963), p. 414 [Brierly]
[14] See for this argument: Brownlie *'Principles of Public International Law'* (Oxford 2008), p. 732 [Brownlie].
[15] *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania*), Judgment of April 9th 1949, ICJ Reports 1949, p. 4 at p. 35 [*Corfu Channel*].
[16] *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 331 (23 May 1969).
[17] Randelzhofer in Simma (ed), *The Charter of the United Nations, A Commentary*, Vol. I (New York, 2002), Art. 2 (4), para. 36 [author in *UN-Commentary*].
[18] According to Art. 31 para. 1 VCLT a treaty shall be interpreted in its context and in the light of its object and purpose.
[19] Randelzhofer in *UN-Commentary supra note* 17*,* Art. 51, para. 4; Gazzini, *'The changing rules on the use of force in international law'* (Manchester 2005), p. 127.
[20] Randelzhofer in *UN-Commentary supra note* 17*,* Art. 51, para.3; Bennett/Strug *'Introduction to International Law'* (Juta 2013), pp. 322f [Bennett/Strug].

The attacked state itself can carry out the self-defence action or another state can help the attacked state. The former case is referred to as individual self-defence whereas the latter case is known as collective self-defence.[21]

As Art. 2 para. 4 of the UNC has to be interpreted broadly, both cases of self-defence, which constitute an exception to the prohibition on the use of force, have to be interpreted strictly.[22]

According to the traditional definition, a state has '[…] to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation'.[23] And it has to do '[…] nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.'[24] This definition was the result of the *Caroline* case which is seen as the leading case on the customary law of self-defence.[25]

The treaty right to self-defence in Art. 51 of the UNC provides that:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

There have been discussions about the extent of the customary right to self-defence on the one hand and the treaty right under Art. 51 of the UNC on the other hand. Some authors were of the opinion that Art. 51 of the UNC was exhaustive[26] whereas others

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[21] Bothe in Vitzthum (ed), *Völkerrecht* (Berlin, 2010), para. 19 [author in Vitzthum]; Cassese, *supra note* 13*,* pp. 312-313.
[22] Chainoglou, 'Reconceptualising Self-Defence in International Law' (2007) 18 KLJ 61 at 68.
[23] *Caroline case*, 29 BFSP 1137-8 and 30 BFSP 195 [*Caroline*].
[24] *Ibid.*
[25] Bennett/Strug, *supra note* 20, p. 332; Shaw *'International Law'* (Cambridge, 2008), p. 1131 [Shaw].
[26] McDougal, 'The Soviet-Cuban Quarantine and Self-Defense' (1963) 57 AJIL 597 at 600; Moore, 'The Secret War in Central America and the Future of the World Order' (1986) 80 AJIL 43 at 83; Kelsen *'The Law of the United Nations: A Critical Analysis of its Fundamental Problem'* (London 1950), p.914 [Kelsen].

claimed that the customary right to self-defence goes beyond the one laid down in Art. 51 of the UNC as this applies only to situations of an armed attack.[27]

In *Nicaragua* the ICJ clearly stated:

> […] Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter [….] It cannot therefore be held that Article 51 is a provision which "subsumes and supervenes" customary international law.[28]

II. Requirements of the right to self-defence

In *Nicaragua* the ICJ also ruled that the right to self-defence requires an armed attack by another state on the victim state.[29] Unfortunately it did not give a definition of an armed attack.

The Court did state though that 'the most grave forms of the use of force'[30] constitute an armed attack. Additionally it said:

> […] an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" (inter alia) an actual armed attack conducted by regular forces, "or its substantial involvement therein".[31]

Moreover only force of particular scale and effects can be considered an armed attack 'rather than as a mere frontier incident had it been carried out by regular armed forces'.[32]

Furthermore, the actions taken in self-defence must be necessary and proportionate.[33] 'Self-defence would warrant only measures which are proportional to the armed attack

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[27] Randelzhofer in *UN-Commentary supra note* 17*,* Art. 51, paras. 7-9 ; Brierly, supra note 13, pp. 417-418.
[28] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Judgment on the Merits, ICJ Reports 1986, p.14 at para. 176 *[Nicaragua].*
[29] *Ibid.* at paras. 193, 195.
[30] *Ibid.* at para. 191.
[31] *Ibid.* at para. 195.
[32] *Ibid.*
[33] *Ibid.* at paras. 194, 237.

and necessary to respond to it.'[34] So a state may act in self-defence when there is a strong necessity to defend itself. Additionally, the defensive use of force must not be unreasonable or excessive.[35] In this regard particular attention should be paid to the time connection between armed attack and self-defence action. According to the Court, the criterion of necessity is not fulfilled if the retaliatory actions are carried out only several months after the alleged armed attack has occurred.[36]

Further on, in the case of collective self-defence, the victim state has to declare that it has been attacked and make a request for help to the helping state.[37] The ICJ explained this with the reason that

> There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack.[38]

In addition to that, collective self-defence requires the will and the awareness of the helping state to act in self-defence.[39] An indication for that can be the fact whether or not the helping state has informed the SC.[40]

The ICJ upheld its jurisprudence in the *Oil Platforms case.*[41] However, the Court did not give a definition of an armed attack but simply refers to its ruling in *Nicaragua,* stating that 'it is necessary to distinguish "the most grave forms of the use of force (those constituting an armed attack) from other less grave forms"'.[42]

It also left the question open, if one armed attack can consist of a combination of several attacks.[43]

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[34] *Ibid.* at para. 176.
[35] *Caroline supra note* 23*,* p. 1137-8.
[36] *Ibid.* at para. 237.
[37] *Ibid*. at para. 199.
[38] *Ibid.* at para. 195.
[39] *Ibid.* at para. 200.
[40] *Ibid.*
[41] *Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment on the Merits, ICJ Reports 2003, p. 161 at para. 51 *[Oil Platforms].*
[42] *Ibid.* at para. 51.
[43] *Ibid.* at para. 64.

The ICJ did specify the criteria of necessity and proportionality. It stated that '[o]ne aspect of these criteria is the nature of the target of the force used avowedly in self-defence.'[44] The self-defence action has to be aimed at a legitimate military target.[45] Regarding the necessity an objective standard has to be applied.[46] In order to determine the proportionality of the action, the damage caused by the armed attack as well as the full extent of the military reaction to the armed attack have to be considered.[47]

After having examined these two ICJ cases it may be noted that the lawful exercise of self-defence is limited to situations in which the victim state is subject to force of a particular scale and effects across international borders (armed attack). Furthermore, this kind of large-scale use of force must be exercised by another state or another state must be responsible for it.

Without a doubt the attack in Paris can be seen as large-scale use of force with a major effect, therefore constituting an armed attack on France. 130 people were killed, 368 people were injured. The terrorists used firearms as well as explosive belts and acted in a coordinated manner.

III. Statehood of the IS

However, the problem remains, that according to the still prevailing view, another state must be responsible for the armed attack.[48] In the present case, the IS claimed responsibility.

On 29 June 2014 the IS proclaimed itself a caliphate and its leader Abu Bakr al-Baghdadi (Caliph Ibrahim) the chief political and religious authority over the *ummah* (the global community of Muslims).[49] But this alone does not make the IS a state under international law.

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[44] *Ibid.* at paras. 74, 76.
[45] *Ibid.* at para. 76.
[46] *Ibid.* at para. 73.
[47] *Ibid.* at para. 77.
[48] *Nicaragua supra note* 28 at para. 195; *Oil Platforms supra note* 41 at para. 51; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, ICJ Reports 2004, p. 136 at para. 139 [*Palestinian Wall*]; Randelzhofer in *UN-Commentary supra note* 17*,* Art. 51, para. 34; Bothe in Vitzthum, *supra note* 21*,* para. 19.
[49] Matthew Weaver, The Guardian, 'Isis declares caliphate in Iraq and Syria', 30.06.2014, available at: https://www.theguardian.com/world/middle-east-live/2014/jun/30/isis-declares-caliphate-in-iraq-and-syria-live-updates (accessed on: 08.08.2016).

Under international law statehood is defined by the *Montevideo Convention*. Art. 1 of the Convention sets forward the criteria that an entity must fulfil in order to be classified as a state.

According to Art. 1 of the *Montevideo Convention*, the state as a person of international law should possess the following qualifications: a permanent population, a defined territory, an effective government and the capacity to enter into relations with other states.[50]

It has to be noted though, that the elements of statehood are not autonomous and rigid criteria.[51] They are interdependent and linked to each other.[52]

In the following I will show that the IS only fulfils one of the four mentioned criteria, namely that of an effective government. The other three criteria, a permanent population, a defined territory and the capacity to enter into relations with other states, are not met.

1. Permanent population

The IS does not have a permanent population. A minimum number of inhabitants is not prescribed but it is required that the population is permanent within the meaning of a stable community.[53] The criterion does not relate to the nationality of that population.[54] The grant of nationality is a matter that states can only govern by their domestic law.[55] Hence, nationality depends upon statehood and not the other way around.[56] Therefore, the fact that there is no IS-nationality and the inhabitants within the IS territory have different nationalities, namely Syrian, Iraqi and Libyan, does not affect this criterion.

Open to question, is the fact that one could call the inhabitants 'quasi-hostages' since they live at least partly involuntarily under the IS regime and are subject to massive

[50] See: Art. 1 *Montevideo Convention*.
[51] Crawford, '*The Creation of States'* (Oxford, 1979), p. 46 [Crawford]; Brownlie, *supra note* 14*,* p. 70.
[52] Brownlie, *supra note* 14*,* p. 70; Crawford *supra note* 51*,* p. 46.
[53] Crawford *supra note* 51*,* p. 40; Brownlie, *supra note* 14*,* p. 70.
[54] Crawford *supra note* 51*,* p. 40; Craven in Evans (ed), *International Law* (Oxford 2010), p. 216 [author in Evans].
[55] *Nottebohm (Liechtenstein v. Guatemala),* Judgment of April 6th, 1955, ICJ Reports 1955, p. 4 at p. 23.
[56] Crawford *supra note* 51*,* p. 40.

human rights violations. The spread of IS has led to a massive refugee crisis.[57] Those inhabitants who can leave. This is also linked to the next point which is even more problematic.

The population within the IS territory waxes and wanes depending on the gain and loss of territory and how many inhabitants are able to flee. This creates the non-permanent character of the IS-population.

As the population under IS control does not represent a stable community, the permanency of population as required by Art. 1 of the *Montevideo Convention* has to be negated.

2. Defined territory

The second criterion which is not fulfilled, is that of a defined territory. States are territorial entities, that must be in control of a certain area (so called territorial sovereignty).[58] In international law territory is defined not by using private law analogies of real property but by governmental power that is exercised with respect to area and population.[59] There is no rule prescribing the minimum size of the territory.[60] The territory over which a state has territorial sovereignty is determined by the area which the state effectively controls.[61] The IS effectively controls territory in Syria, Iraq and Libya. That the IS territory does not have fully defined frontiers is not a reason to consider this criterion as not fulfilled. A German-Polish Arbitral Tribunal ruled in 1929:

> Whatever may be the importance of the delimitation of boundaries, one cannot go so far as to maintain that as long as this delimitation has not been legally effected the State in question cannot be considered as having any territory whatever .[…] In order to say that a State exists [...] it is enough that this territory has a sufficient consistency, even though its boundaries have not yet been accurately delimited, and that the State actually exercises independent public authority over that territory.[62]

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[57] Orlando Crowcroft, International Business Times, 'Isis: Worst refugee crisis in a generation as millions flee Islamic State in Iraq and Syria', 17.06.2015, available at: http://www.ibtimes.co.uk/isis-worst-refugee-crisis-generation-millions-flee-islamic-state-iraq-syria-1506613 (accessed on: 08.08.2016).
[58] Brownlie *supra note* 14*,* p. 71; Hailbronner/Kau in Vitzthum *supra note* 21, para. 129.
[59] Crawford *supra note* 51*,* p. 42
[60] *Ibid.* p. 36.; Craven in Evans *supra note* 54*,* p. 223.
[61] Hailbronner/Kau in Vitzthum *supra note* 21, para. 129.
[62] *Deutsche Continental Gas-Gesellschaft v. Polish State* (1929) 5 A.D. No. 5, 14-15 [*Deutsche Continental*].

The ICJ confirmed this rule in the *North Sea Continental Shelf Case*:

> The appurtenance of a given area, considered as an entity, in no way governs the precise delimitation of its boundaries, any more than uncertainty as to boundaries can affect territorial rights. There is for instance no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not, as is shown by the case of Albania into the League of Nations.[63]

Therefore, the undelimitated boundaries of the IS territory are not a problem. What is a problem, however, is the constant gain and loss of territory by the IS. Although the boundaries do not have to be defined, there has to be a sufficient consistency of controlled territory.[64] Over the past two years the IS has gained[65] and lost[66] territory again and again. So there is no consistency. At best, Raqqa/Syria could be described as a kind of core territory whereas the IS has recently lost its other stronghold Fallujah/Iraq after two years of occupation.[67]

Besides that Syria, Iraq and Libya are still sovereigns of the territory occupied by the IS despite the fact that they have lost effective control over that territory because they have never given up their territory.[68] Consequently, whenever the IS loses territory, the original state reinstitutes its sovereignty as acquisition of territory by occupation is only possible if the territory concerned is not under another state's territorial sovereignty (so called terra nullius) .[69]

Thus, it cannot be argued that the IS possesses a defined consistent territory. The second criterion of statehood is not met as well.

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[63] *North Sea Continental Shelf Case (F.R.G./Den.; F.R.G./Neth.),* Judgment, ICJ Reports 1969, p. 44 at para. 46 [*North Sea Continental Shelf Case*].
[64] *Deutsche Continental supra note 62,* p.15; Crawford *supra note* 51*,* p. 40.
[65] Tim Mak, The Daily Beast, 'ISIS gaining ground in Syria, despite U.S. strikes', 15.01.2015, available at: http://www.thedailybeast.com/articles/2015/01/14/exclusive-isis-gaining-ground-in-syria-despite-u-s-strikes.html. (accessed on: 09.08.2016).
[66] Marina Koren, The Atlantic, 'The latest military offensives against ISIS', 29.05.2016, available at: http://www.theatlantic.com/international/archive/2016/05/isis-iraq-fallujah/484802/. (accessed on: 09.08.2016).
[67] Zia Weise, The Telegraph, 'Iraqi army declares final "liberation" of Fallujah from Isil', 26.06.2016, available at: http://www.telegraph.co.uk/news/2016/06/26/iraqi-army-declares-fallujah-fully-liberated-from-islamic-state/. (accessed on: 09.08.2016).
[68] Hailbronner/Kau in Vitzthum *supra note* 21, para. 136; Bennett/Strug *supra note* 20, p. 83.
[69] Bennett/Strug *supra note* 20, p. 82; Hailbronner/Kau in Vitzthum *supra note* 21, para. 136.

3. Effective government

The third criterion and the only one that the IS fulfils, requires that an entity has to provide an effective government. Crawford considers this criterion as the central and most important criterion as all the others depend upon it.[70] The form of government does not play a role in this regard; a dictatorship gets treated the same way as a democracy.[71] Therefore, the fact that the IS leader was not elected and that the IS is constantly violating human rights is, in this regard, not an issue.

So the IS might lack democracy but it does not lack structure. Although the exact structure of the IS may never be revealed we do have accurate information regarding the sophisticated bureaucracy that characterises the IS.

At the top, there is the Emirate (al-Imara) which makes the key decisions.[72] The Emirate consists of Caliph Ibrahim who functions as the commander in chief, ensuring executive as well as judicial functions, and his two top deputies Abu Ali al-Anbari, responsible for Syria, and Abu Muslim al-Turkmani, responsible for Iraq.[73] Both were former generals under Sadam Hussein.[74] To each top deputy, governors are subordinated.[75] We know of five governors in Syria and seven governors in Iraq.[76] These governors report to the top deputies. The Emirate is further supported and advised by nine councils.[77] These councils are similar to departments or ministries and report to the top deputies as well.[78] They create and carry out the IS policy.[79]

[70] Crawford *supra note* 51, p. 42.
[71] Craven in Evans *supra note* 54, p. 237.
[72] See here and in the following: Nick Thompson & Atika Shubert, CNN, 'The anatomy of ISIS: How the "Islamic State" is run, from oil to beheadings', 14.01.2015, available at: http://edition.cnn.com/2014/09/18/world/meast/isis-syria-iraq-hierarchy/ (accessed on: 09.08.2016); Jack Moore, Newsweek, 'ISIS releases new video outlining "structure of the Caliphate"', 07.07.2016, available at: http://europe.newsweek.com/isis-releases-new-video-outlining-structure-caliphate-478502?rm=eu (accessed on: 09.08.2016).
[73] *Ibid.*
[74] *Ibid.*
[75] *Ibid.*
[76] *Ibid.*
[77] *Ibid.*
[78] *Ibid.*
[79] *Ibid.*

First there is the Leadership Council. It makes law and handles important decisions.[80] Its decisions must be approved by Caliph Ibrahim.[81] In theory, the Leadership Council has the right to depose the caliph.[82]

The Shura Council advises the Leadership Council.[83] It consists of nine members who function as the highest judges.[84] They handle law and military matters.[85]

The Legal Council deals with family disputes, religious infractions, recruitment of new fighters and punishment.[86]

The Military Council is responsible for the military or fighting strategy of the IS as well as for the defence of the occupied territory.[87]

The Security Council is responsible for the internal policy of the IS and carries out executions which the Legal Council has determined as punishment.[88]

The Intelligence Council provides information to the Leadership Council about enemies of the IS.[89]

The Financial Council functions as a treasury and supervises the tax system that the IS has established.[90] It furthers deals with the illegal oil and weapon sales and the ransom money that the IS has extorted by its abductions.[91]

The Fighters Assistance Council is responsible for providing help and housing for fighters who come from foreign countries.[92]

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[80] *Ibid.*
[81] *Ibid.*
[82] *Ibid.*
[83] *Ibid.*
[84] *Ibid.*
[85] *Ibid.*
[86] *Ibid.*
[87] *Ibid.*
[88] *Ibid.*
[89] *Ibid.*
[90] *Ibid.*
[91] *Ibid.*
[92] *Ibid.*

And finally, the Media Council that controls the performance of the IS in the media, especially in the social media.[93] It is responsible for official pronouncements and declarations and works closely together with the Legal Council.[94]

It is further reported that the IS maintains a social welfare system which includes the provision of education and healthcare and also carries out municipal services like sewage and trash collection.[95]

The IS maintains its internal order, even if it does so with brutal means and draconian punishments. It extracts wealth (in the form of taxes) and labour (mainly military services) from its inhabitants and provides social services and it ensures domestic security for a part of its inhabitants, namely for those who follow its rules and live according to its ideology. It controls effectively the territory it has occupied as well as the population that lives on this territory and it has built up a bureaucratic hierarchy in order to remain in effective control.

Therefore, at least for now, the IS has an effective government that is able to fulfil the key functions of a state.

4. Capacity to enter into relations with the other states

The last criterion that the *Montevideo Convention* lists is the capacity to enter into relations with other states. Crawford has criticised this criterion as being a consequence of statehood rather than a requirement thereof.[96] For Brownlie, this requirement represents the concept of independence.[97]

The IS has no embassies in other states and is not party to any multilateral treaty. It is communicating with the international community though, via international and social media.

So, the question is, what is actually required by the capacity to enter into relations with other states? The actual engagement with other states or the mere capacity to do so? If

[93] *Ibid.*
[94] *Ibid.*
[95] Megan Stewart, Political Violence @ a Glance, 'Why the Islamic State is so Bad at Being a State'. 22.12.2015, available at: https://politicalviolenceataglance.org/2015/12/22/why-the-islamic-state-is-so-bad-at-being-a-state/ (accessed on: 09.08.2016).
[96] Crawford *supra note* 51*,* p. 47; See likewise: Craven in Evans *supra note* 54*,* p. 220.
[97] Brownlie *supra note* 14*,* p. 71.

the latter is sufficient, than one could argue that the IS does fulfil the last criterion of statehood. But bearing in mind the object and purpose of this criterion, that is maintaining external (friendly) relations with other states, it cannot be enough to communicate with the rest of the world via video clips and internet blogs. The IS wants to establish its independence and sovereignty by proclaiming itself a caliphate, in other words, it wants independence and sovereignty by its claim for statehood but it must be the other way around. A state must claim statehood because it is independent and sovereign. Lacking the capacity to enter into relations with other states is keeping a state from being independent.[98]

Apart from that, the IS is not recognised by any other state. Entering into real relations that go beyond media communication with other states is therefore impossible as no other state would engage with the IS, at least not officially.

But this is only the factual effect that the non-recognition of the IS has. What are the legal implications of the non-recognition?
Recognition is a further criterion, which is not mentioned in the *Montevideo Convention.*

There has been much debate about the legal effect of recognition.
The constitutive theory asserts that the legal effect of recognition is constitutive which means that without recognition there is no statehood.[99]
The declaratory theory on the other hand, claims that the legal effect is purely declaratory, that is the pure acknowledgement of an existing fact.[100] Recognition is a merely political act and therefore not necessary for statehood. [101]

Following the constitutive theory, the non-recognition of the IS has the legal effect that the IS is not a state under international law and will not be a state unless it is recognised by the international community.
Following the declaratory theory, the non-recognition of the IS has no legal effect on its statehood. The IS can still be a state under international law, provided that it fulfils the criteria of statehood, even if it is not recognised by the international community.

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[98] *Ibid.*
[99] Bennet/Strug *supra note* 20, p. 73; Hailbronner/Kau in Vitzthum *supra note* 21*,* para. 175.
[100] Hailbronner/Kau in Vitzthum *supra note* 21, para. 175; Bennet/Strug *supra note* 20, p. 74.
[101] Shaw *supra note* 25*,* p. 446; Bennet/Strug *supra note* 20*,* p. 74.

It is very unlikely that the international community will recognised the IS in the future. It will not get recognised and not because of legal reasons.

The recent practice of recognition indicates that entities that do not have democratic structures and that do not ensure protection for human rights have problems to get recognised as states.

For instance, after the dissolution of the SFRY in 1991, Macedonia and Croatia sought (independent) statehood. The Arbitration Commission of the European Conference on Yugoslavia[102] provided legal advice on the issue. In its Opinions No. 5 (regarding Croatia) [103] and No. 6 (regarding Macedonia)[104] it stated that recognition will only be given to those states if they, among other things, adopt a constitution embodying democratic structures and the guarantees for human rights.
The EU had elaborated the '*Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*'[105] according to which the recognition of new states requires that these new states, *inter alia,* respect for the provisions of the UNC and "the Charter of Paris, especially with regard to the rule of law, democracy and human rights."[106] Additionally, the Guidelines provided that '[t]he Community and its Member States will not recognize entities which are the result of aggression'[107]

So this indicates that there are not only legal requirements that an entity has to fulfil in order to get recognised as a state but that the entity must also have some form of legitimacy.

The IS does not have democratic structures, it does not protect human rights, it does not respect the provision of the UNC or the rule of law and its territory is the result of aggression against Libya, Syria and Iraq. It lacks every form of legitimacy. Therefore, it is safe to say that the international community will never recognise the IS. Recognition thus has a constitutive effect.

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[102] Commonly known as the Badinter Commission.
[103] Conference on Yugoslavia Arbitration Commission: Opinions on Questions arising from the Dissolution of Yugoslavia (1992) 31 I.L.M. 1488 at 1504-1505.
[104] *Ibid.,* p. 1510.
[105] *The European Community Declaration on Yugoslavia and on the Guidelines on the Recognition of New States* (1992) 31 I.L.M. 1485.
[106] *Ibid.*
[107] *Ibid.*

The IS also does not fulfil the fourth and last criterion of the *Montevideo Convention*, as it is lacking the capacity to enter into relations with other states.

IV. Interim Conclusion

According to the explanations above the IS is not a state as it does not fulfil three of the four criteria listed in the *Montevideo Convention*. It should be mentioned though that one could argue differently, for example, stating that the IS has a permanent population at least on a de facto-basis or that the city of Raqqa and its suburbs are the core territory of the IS, especially because a minimum size of territory is not required. There is not much in the *Montevideo Convention* that would evidently deny statehood to the IS as legitimacy is no element of the Convention.

But in the international community the IS is not regarded as a state and it will and should never be. The IS has beheaded and burned alive people in front of the recording camera, it has plundered towns and villages, it has robbed territory of Syria, Iraq and Libya and it has threatened to kill anyone who disagrees with its fundamentalist view of Islam. And that is exactly why there is no way it will ever be accepted as a sovereign and equal state and therefore recognised by the international community. Not because of legal reasons but because it lacks legitimacy and because violence and terror should not be honoured.

Therefore, the IS is not a suitable attacker in the meaning of Art. 51 of the UNC although being responsible for the attack in Paris.

C) Chapter 3: The traditional approach: Attribution to Syria

This chapter introduces the traditional view according to which attribution to a state is required if the armed attack was carried out by a non-state actor. Therefore, I will examine if the attack in Paris is attributable to Syria. As a basis for attribution I will firstly discuss the ILC-Draft Articles, secondly the Safe Haven-Doctrine and finally the Unwilling or Unable-Doctrine.

I. Attribution according to the ILC-Draft Articles

The ASR constitute a legal basis for determining the responsibility of states. In their current version, the ASR were prepared by the ILC in 2001.[108] They are not formally binding but reflect to a large extent, that means at least the basic rules in chapter II, customary international law.[109]

1. Art. 5 of the ASR

An attribution according to Art. 5 of the ASR requires that the conduct of the IS must be empowered by the law of Syria in order to exercise elements of the governmental authority.

As the IS has no authority under Syrian law, the requirement of Art. 5 of the ASR is not met.

2. Art. 4 of the ASR

Under Art. 4 of the ASR

> The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

Since the IS is definitely not a state organ of Syria its conduct cannot be attributed to Syria under Art. 4 of the ASR.

[108] See UN GA res 56/83 of 12 December 2001, annex.
[109] 'Commentaries to the Articles on Responsibility of States for Internationally Wrongful Acts', Report of the ILC on the Work of its fifty-third session, UN Doc. A/56/10 (2001), Art. 4, para. 6 [ASR with Commentaries].

3. Art. 11 of the ASR

Attribution according to Art. 11 of the ASR requires that the '[c]onduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.'

Art. 11 of the ASR allows for attribution of private conduct which was not or may not have been attributable at the time it was carried out, but which is subsequently acknowledged and adopted by the state as its own.[110]

Syria has neither acknowledged nor adopted the conduct of the IS, namely the attack in Paris, as its own. Syria's President Assad said that the attack in Paris was a result of the French aid for rebel groups in his country and the consequence of a wrong Western Syria policy.[111] He further stated that Syria as well as France suffered from the terrorism of the IS.[112]

Hence, the requirements of Art. 11 of the ASR are not met.

4. Art. 10 of the ASR

Art. 10 para. 1 and 2 of the ASR provide:

> 1. The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law. 2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

Para. 1 of Art. 10 of the ASR deals with the scenario in which an insurrectional movement becomes the new government of a state.[113] The IS has not become the new government of Syria, so that Art. 10 para. 1 of the ASR does not apply here.

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[110] *Ibid.,*, Art. 11, para. 1.
[111] Hugh Naylor, The Washington Post, 'Syria's President Assad says Paris attacks result from France's aiding of rebels', 14.11.2015, available at: https://www.washingtonpost.com/world/assad-says-paris-attacks-result-from-frances-aiding-rebels-in-syria/2015/11/14/287f7576-8adc-11e5-bd91-d385b244482f_story.html?utm_term=.bb9a3af340d3 (accessed on: 29.11.2016).
[112] *Ibid.*
[113] ASR with Commentaries *supra note* 109, Art. 10, para. 7.

Para. 2 of the ASR covers the scenario in which the insurrectional movement establishes a new state in the territory of an already existing state or in a territory under its administration. As I have shown in chapter two, the IS does not fulfil the criteria of statehood. Hence it has not established a state in the territory of Syria.

Therefore, the attack in Paris cannot be attributed to Syria according to Art. 10 of the ASR.

5. Art. 9 of the ASR

According to Art. 9 of the ASR:

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Art. 9 of the ASR covers the exceptional case of conduct when a person or a group of persons exercise elements of the governmental authority acting in the absence of the official authorities and without any actual authority to do so.[114] The exceptional character of the circumstances considered in the article is illustrated by the phrase 'in circumstances such as to call for'.[115] The underlying principle of Art. 9 of the ASR is the old idea that the citizens of a state, that are private persons, have a right to self-defence in the absence of the regular forces, it is a form of agency of necessity.[116]

Art. 9 of the ASR sets up three conditions that must be fulfilled so that the conduct can be attributed to the state[117]: firstly, the conduct must show the exercise of elements of the governmental authority.[118] Secondly, the conduct must have been carried out in the absence or default of the official authorities.[119] Thirdly, due to the circumstances the exercise of those elements of authority must have been necessary.[120]

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[114] ASR with Commentaries *supra note* 109, Art. 9, para. 1.
[115] *Ibid.*
[116] *Ibid.,* para. 2.
[117] *Ibid.,* para. 3.
[118] *Ibid.*
[119] *Ibid.*
[120] *Ibid.*

The IS is effectively controlling parts of the Syrian territory and exercises on that territory elements of governmental authority.[121] It does so in the absence of the Assad-regime, which is still the rightful and representative government of Syria. At first sight, an attribution to Syria seems therefore possible. However, in the context of the civil war in Syria the IS is fighting the Assad-regime and is hence one reason why the regime has lost control over parts of its territory. The IS is more acting as a de facto government in the parts that it is controlling than as private persons carrying out governmental authority. Art. 9 of the ASR, however, does not apply in such a case as a de facto government is only the replacement of the previous government.[122]

Thus, the attack in Paris cannot be attributed to Syria under Art. 9 of the ASR.

6. Art. 8 of the ASR

However, in the case of private non-state actors carrying out attacks from the territory of the host state, the attacks could be attributed according to Art. 8 of the ASR.

Art. 8 of the ASR states that 'The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.' Thus, the conduct of a private person is attributable to a state if there is a connection between the state and the person concerned.[123] Art. 8 of the ASR covers two such circumstances.[124] The first involves private persons acting on the instructions of the state.[125] The second deals with a more general situation where private persons act under the state's direction or control.[126] It is not clear though, whether 'control' in Art. 8 of the ASR means 'effective' or 'overall' control. The commentaries of the articles are not very helpful in this regard as they refer to the 'effective control-test'[127] as well as to the 'overall control-test'[128] without deciding in favour of one or the other.

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[121] See for that: section B.III.3.
[122] *Ibid.,* para. 4.
[123] ASR with Commentaries *supra note* 109, Art. 8, para. 1.
[124] *Ibid.*
[125] *Ibid.*
[126] *Ibid.*
[127] *Ibid.*, Art. 8, para 4.

a. The 'effective control-test'

In 1986 the ICJ established the 'effective control-test' in Nicaragua[129]. It held that:

> Participation [...] in the financing, organizing, training, supplying and equipping of the contras [...] is still insufficient in itself [...] for the purpose of attributing to the United States the acts committed by the contras [....]. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.[130]

Attribution according to the 'effective control-test' requires factual control.[131] The essence of such a control is the actual exercise of control as well as the factual power to give commands and to demand obedience.[132]

b. The 'overall control-test'

The standard in Nicaragua was somewhat softened by the so called 'overall control-test' that the ICTY applied in Tadić.[133] According to the Court:

> The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The degree of control may, however, vary according to the factual circumstances of each case [....] [In the given case it is therefore sufficient to establish] overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations.[134]

In contrast to the 'effective control-test', this test does not necessarily require exclusive operational command, but the exercise of overall control over the non-state actor.[135]

c. Interim Conclusion

The 'effective control-test' constitutes a high threshold for attribution. Although the 'overall control-test' does lower this standard, it should be noted that both approaches

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[128] *Ibid.* para. 5.
[129] *Nicaragua supra note* 28 at para. 65.
[130] *Ibid.* at para. 115.
[131] Cassese *supra note* 13*,* p. 190.
[132] Cassese, 'The Nicaragua and Tadic Tests Revisited in the Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 EJIL 649 at 653 [Cassese Nicaragua]; Milanovic/Papic, 'As Bad As It Gets: The European Court of Human Rights' Behrami and Saramati Decision and General International Law' (2009) 58 ICLQ 267 at 288-289.
[133] *Prosecutor v. Tadic,* ICTY, Appeals Chamber, 15 July 1999 (Case no. IT-94-1-A), para. 120.
[134] *Ibid.*
[135] *Ibid.*

require that the host state must direct or control the activity of the non-state actor on its territory.[136] Simply encouraging or tolerating in the sense of harbouring terrorists is not enough for attribution.[137]

It should be further noted that the 'effective control-test' as well as the 'overall control-test' have been subject to criticism repeatedly.[138]

The 'effective control-test' was criticised mainly for putting an unrealistic burden of proof on the injured state and not reflecting accurately the current state of international law.[139] Indeed, it is very difficult, if not impossible, to provide evidence of specific instructions or directions that the state in question has given to the non-state actor. Some commentators are of the opinion that 'the traditional "effective control-test" […] seems insufficient to address the threats posed by global criminals and the states that harbor them'.[140]

The 'overall control-test' on the other hand was criticised for being too lax.[141] The ICJ rejected the test with the argument that it is unpersuasive and not suitable for determining state responsibility.[142] The ICTY had only criminal jurisdiction that is jurisdiction over natural persons but not over states.[143] The Court held that: 'In this regard the "overall control" test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility.'[144]

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[136] Reinold, 'State weakness, irregular warfare, and the right to self-defence post-9/11' (2011) 105 AJIL 244 at 251 [Reinold].
[137] *Ibid.*
[138] E.g.: Cassese Nicaragua *supra note* 132*,* p.653.
[139] Stahn, 'Terrorist Acts as "Armed Attack": The Right to Self-defense, Article 51 (1/2) of the UN Charter, and International Terrorism' (2003) 27 FFWAJ 35 at 47 [Stahn].
[140] Burke-White & Slaughter, 'An International Constitutional Moment' (2002) 43 HILJ 1 at 20.
[141] Quoted after: Tyner, 'Internationalization of War Crimes Prosecutions: Correcting the International Criminal Tribunal for the former Yugoslavia's Folly in Tadic' (2006) 18 Fla. J. Int'l L. 843 at 868.
[142] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p.43 at para. 404 [*Genocide Case*].
[143] *Ibid.,* at para. 403.
[144] *Ibid.,* at para. 406.

However, no matter which control test one applies, the attack in Paris cannot be attributed to Syria. Syria has neither directed nor controlled the IS in any way. It had neither effective nor overall control over the IS.

Altogether, the attack in Paris cannot be attributed to Syria according to the ASR.

II. Attribution according to the Safe Haven-Doctrine

But, the attack could be attributed to Syria under the Safe Haven-Doctrine.[145]

Under this doctrine, a state has the right to secure itself with military means against other states that harbour or support terrorist groups in any way.[146] An attribution requires therefore at least some form of collaboration between the harbouring state and the terrorist organisation and that the harbouring state deliberately provides a safe haven for the organisation.

The Safe Haven-Doctrine emerged shortly after the attacks of 9/11 and was used to justify operation 'Enduring Freedom' in which an international US-led coalition invaded Afghanistan as it was assumed that Al-Qaeda was supported by the Taliban and Afghanistan was considered to be a safe haven for Al-Qaeda.[147]
This exactly is the crucial difference between the attack in Paris and the attacks of 9/11. In contrast to the conflict situation in Afghanistan with the Taliban and Al-Qaeda in 2001, the IS being a civil war party in Syria is combated by the Assad-regime. [148] It is in no way tolerated or encouraged, let alone actively supported by it.

Under the Safe Haven-Doctrine the attack in Paris cannot be attributed to Syria. The question if and how legally convincing this doctrine is will thus not be further examined here.

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[145] This doctrine is also referred to as 'Bush-Doctrine'.
[146] Von Arnauld, *'Völkerrecht'* (Heidelberg 2012), para. 1088 [von Arnauld].
[147] *Ibid.*
[148] See e.g.: Reuters, Newsweek, 29.03.2016, 'Inside Putin's and Assad's War against ISIS', available at: http://europe.newsweek.com/putin-isis-assad-syria-palmyra-russia-war-islamic-state-441497?rm=eu (accessed on: 08.09.2016). On the other hand there are also voices claiming that Assad is working together with the IS, e.g.: Zvi Bar'el, Haaretz, 'Assad's Cooperation With ISIS Could Push U.S. Into Syria Conflict', 03.01.2015, available at: http://www.haaretz.com/middle-east-news/1.659340 (accessed on: 08.09.2016).

III. Attribution according to the Unwilling or Unable-Doctrine

However, the Paris attack could be attributed to Syria according to the Unwilling or Unable-Doctrine.

On the 23rd of September 2014 Samantha Powers, the US Ambassador at the UN sent a letter to the Secretary General of the UN, Ban Ki Moon, in which she justified the US military strikes against the IS in Syria as the exercise of Iraq's right to self-defence. She wrote that:

> States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defense, as reflected in Article 51 of the UN Charter, 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.[149]

Furthermore, the letter stated: 'The Syrian regime has shown that it cannot and will not confront these safe-havens effectively itself.'[150]

1. The content of the doctrine

Pursuant to the Unwilling or Unable-Doctrine, a state that has become the victim of an armed attack by a non-state actor that operates from the territory of another state, can only exercise its right to self-defence if it had ensured that the host state is unwilling or unable to supress the threat posed by the non-state actor.[151] If the host state is willing and/or able, the attacked state is not allowed to use defensive force, whereas it is expected from the host state to take appropriate measures against the non-state actor.[152] The Unwilling or Unable-Doctrine is based on two concepts. Firstly, it is based on the understanding that sovereignty entails responsibility, including duties towards third states and secondly, on the relative character of territorial integrity.[153]

The term of 'unwilling or unable' has recently undergone a revival in international law. This revival was triggered by the increasing threat that terrorist attacks posing on international peace and security. For instance, as seen above, the US justified its initial

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[149] Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Doc. S/2014/695.
[150] *Ibid.*
[151] Deeks, ' "Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defence' (2012) 52 Vir. J Int'l L 483 at 487 [Deeks].
[152] *Ibid.*
[153] Stahn *supra note* 139*,* p. 47.

air strikes against the IS in Syria with the exercise of collective self-defence to the benefit of Iraq as Syria cannot and will not take actions against the IS strongholds on its territory.

However, the term is by no means new.[154] It has been a paradigm of US foreign policy for quite a while.[155] Beyond the context of self-defence it has been used as a justification for multilateral interventions without authorisation by the SC within states that do not prevent massive human rights violations within their territory.[156] In contrast to the repeated application of this doctrine in practice stands its rare usage in written legal authorities. The only international treaty that has incorporated the term 'unwilling or unable' regarding states is the Rome Statute of the International Criminal Court.[157]

Even though the doctrine has frequently been used in international practice, there is no established definition with clear criteria. Under current international law every state can or must determine for itself what 'unwilling' and what 'unable' exactly means.

As I have shown above the Assad-regime is willing to fight the IS. That the regime alone was unable to do so was more or less obvious since the IS could stretch out easily on Syrian territory. Only the military strikes by France and the USA as well as the military support of the Assad-regime by Russia and Iran are now keeping the terrorist organisation from conquering more and more territory.

As there is no definition of the criterion of inability, it is difficult to say if Syria can still be considered unable to fight the IS as the Assad-regime by now has strong (military) support from Russia and Iran.

2. A rule of customary international law?

Apart from that, it is highly questionable if the Unwilling or Unable-Doctrine is already a rule of customary international law. The ICJ has laid down the criteria for identifying a

[154] Paulina Starski, 'The "Unwilling or Unable State" as a Challenge to International Law' (2016), Max-Planck-Institut für Ausländisches Öffentliches Recht und Völkerrecht, available at: http://www.mpil.de/de/pub/forschung/nach-rechtsgebieten/voelkerrecht/the-unwilling-or-unable-state.cfm (accessed on: 09.09.2016) [Starski].
[155] *Ibid.*
[156] *Ibid.*
[157] *Rome Statute of the International Criminal Court,* 2187 U.N.T.S. 90 (01 July 2002).

rule of customary international law in *North Sea Continental Shelf.*[158] Accordingly, the existence of a rule of customary international law requires an established state practice together with *opinio iuris.*[159] Established state practice means that there must be a uniform, general and consistent practice.[160] The ICJ held:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. […] The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough.[161]

The following section examines the recent state practice regarding the attribution of terrorist acts in order to find out which status the Unwilling or Unable-Doctrine has.

After becoming independent in 1991, Georgia continued to experience a series of internal struggles.[162] The region of Pankisi Gorge became infamous in the late 1990s as Chechen rebels, criminals and transnational terrorists started to hide there.[163] Allegedly, also members of Al-Qaeda were hiding in the Gorge after 9/11.[164] Following 9/11, Russia started to drop bombs on Chechen rebels that were hiding in the Gorge and that would attack Russian troops and then move back to the Gorge.[165] Russia accused Georgia of harbouring Chechen rebels in the region and demanded that Georgia permits Russian troops to drive these terrorists out of the Gorge.[166] After the rebels had attacked Russian troops multiple times, Russia carried out several raids on Georgian territory, claiming it was exercising its right to self-defence as Georgia was 'unable or

[158] *North Sea Continental Shelf Case supra note* 63 at para. 77.
[159] *Ibid.*
[160] Brownlie *supra note* 14, p. 5-6.
[161] *North Sea Continental Shelf Case supra note* 63 at para. 77.
[162] Akaki Dvali 'Instability in Georgia: A New Proliferation Threat?', 1.8.2003, available at: http://www.nti.org/analysis/articles/instability-georgia/ (accessed on: 30.08.2016) [Dvali]
[163] *Ibid.*
[164] *Ibid.*
[165] Stephen Dalziel, BBC News, 'The Problem with the Pankisi', 05.08.2002, available at: http://news.bbc.co.uk/2/hi/europe/2173878.stm (accessed on: 30.08.2016).
[166] Dvali *supra note* 162.

unwilling to counteract the terrorist threat'.[167] In the beginning Russia denied the intervention but then sent a letter to the UN Secretary General in which it stated:

> The continued existence in separate parts of the world of territorial enclaves outside the control of national governments, which, owing to the most diverse circumstances, are unable or unwilling to counteract the terrorist threat is one of the reasons that complicate efforts to combat terrorism effectively. One such place, where the situation is giving rise to particular alarm in the Russian Federation, is the Pankisi Gorge.[168]

Russia also claimed that Georgia was failing to comply with its sovereign responsibilities under international law, especially, with those constituted by SC resolution 1373 and argued that this failure to comply legitimated its defensive use of force:

> Beginning in 1999, when we proposed to the Georgian leaders that we should carry out joint actions to prevent fighters from Chechnya from penetrating Georgia, up to the events in recent times, the Russian Federation has patiently and persistently attempted to arrange cooperation with the official authorities in Tbilisi on issues related to combating terrorism. […] If the Georgian leadership is unable to establish a security zone in the area of the Georgian-Russian border, continues to ignore United Nations Security Council resolution 1373 (2001) of 28 September 2001, and does not put an end to the bandit sorties and attacks on adjoining areas in the Russian Federation, we reserve the right to act in accordance with Article 51 of the Charter of the United Nations, which lays down every Member State's inalienable right of individual or collective self-defence.[169]

Russia contended further that because of Georgia's non-compliance with its obligation to control its territory effectively, the problem was caused in the first place:

> None of this will be necessary, no measures or special operations will be needed if the Georgian leadership actually controls its own territory, carries out international obligations in combating international terrorism and prevents possible attacks by international terrorists from its territory against the territory of the Russian Federation.[170]

The government of Georgia, on the other hand contended that it was able to effectively control its territory, not least because of military training that Georgian troops had received from the US.[171]

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[167] Statement by Russian Federation President V. Putin, Annex to Letter dated 11 September 2002 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General, UN Doc. S/2002/1012, at 2 (2002).
[168] *Ibid.*
[169] *Ibid.,* at 2-3.
[170] *Ibid.,* at 4.
[171] BBC News, 'Georgia says Gorge "under control"', 2.9.2002, available at: http://news.bbc.co.uk/2/hi/europe/2231955.stm (accessed on: 31.08.2016).

No state commented on the question if the Chechen activities on Georgian territory constituted an armed attack on Russia.[172] Only the USA[173] and the Parliamentary Assembly of the Council of Europe protested against Russia's military action reaffirming Georgia's right to territorial integrity.[174]

Hezbollah is a Shiite Islamist political, military and social organisation that has significant influence in Lebanon.[175] During the Israeli occupation in the early 1980s Hezbollah emerged with the help of Iran.[176] Step-by-step the organisation became a key player in Lebanon's political system, and has effectively gained veto power in the cabinet.[177] Hezbollah has been accused of launching attacks against Jewish and Israeli targets and is labelled a terrorist organisation by western states, Israel, Gulf Arab countries and the Arab League.[178]

In 2006 Israel intervened in Lebanon invoking Art. 51 of the UNC after it had suffered various attacks carried out by the Hezbollah.[179] Israel accused Lebanon of failing to meet its counterterrorism obligations under international law and attributed responsibility for Hezbollah's aggression to the government of Lebanon as Hezbollah was a part of the Lebanese government as well as to the governments of Iran and Syria.[180] While Iran and Syria have actively supported Hezbollah materially and ideologically, Lebanon's responsibility derives only from its 'ineptitude and inaction' in keeping Hezbollah to operate from its territory.[181] Israel further stated that:

> When sovereign States fail to govern responsibly according to their duties under international law, terrorists and other non-State actors seek to take advantage of the void. Similarly, when States support terrorist groups by providing safe haven,

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[172] Reinold *supra note* 136*,* p. 254.
[173] BBC News, 'US warns Russia over Georgia strike', 13.9.2002, available at: http://news.bbc.co.uk/2/hi/europe/2254959.stm (accessed on: 31.08.2016).
[174] Reinold *supra note* 136, p. 254.
[175] BBC News, 'Profile: Lebanon's Hezbollah movement', 15.03.2016, available at: http://www.bbc.com/news/world-middle-east-10814698 (accessed on: 31.08.2016).
[176] *Ibid.*
[177] *Ibid.*
[178] *Ibid.*
[179] Reinold *supra note* 136*,* p. 264.
[180] Identical Letters dated 12 May 2005 from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General and the President of the Security Council, UN Doc. A/59/802-S/2005/312, at 2 (2005).
[181] Identical Letters Dated 12 July 2006 from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General and the President of the Security Council, UN Doc. A/60/937-S/2006/515, at 1 (2006).

> weapons, training and financing, they should bear responsibility for the actions of those groups and be held accountable for violations of international law.[182]

The Lebanese government rejected responsibility for the Hezbollah activities and therefore regarded Israel's strikes during 2006 as an act of aggression:

> The Israeli Government has held the Lebanese Government responsible for certain acts, even though the Lebanese Government […] declared that it was not aware of the incident that occurred on the Blue Line on that date, that it did not take responsibility for it and that it did not endorse that act.[183]

The first international reactions to Israel's strike were positive. The Council of the European Union for instance, affirmed Israel's right to self-defence.[184] But the approval disappeared when hostilities and casualties increased.[185] It was widely accepted that Hezbollah's several small-scale attacks cumulatively amounted to an armed attack on Israel[186] and that Israel in principle had the right to defend itself but that its self-defence actions were disproportionate.[187]

The PKK, the Kurdish Worker's Party was formed in the late 1970s.[188] It fights for a Kurdish state within Turkey and has launched several attacks on Turkish targets since 1984.[189] The PKK claims that the Kurdish people want to live within the borders of Turkey on their own land freely, while Turkey contends that they want to create a separate state in Turkey.[190] The PKK is labelled a terrorist organisation by the EU and the US.[191] From 1991 on the mostly Kurdish-populated regions in northern Iraq became a safe haven for Kurdish PKK fighters who from there frequently launched attacks on Turkish territory.[192] Over the next two decades Turkey regularly attacked PKK

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[182] See: UN Doc. S/PV.5898 (Resumption 1) (May 27, 2008), at p.7.
[183] See: UN Doc. S/PV.5489 (July 14, 2006), at p.4.
[184] Council of the European Union Press Release No. 11575/06 (17./18.07. 2006), available at: http://register.consilium.europa.eu/pdf/en/06/st11/st11575.en06.pdf. (accessed on: 02.09.2016).
[185] Reinold *supra note* 136, p. 265.
[186] *Ibid.,* p. 266.
[187] G-8 Press Release, Middle East (16.07.2006), available at: http://www.g8.utoronto.ca/summit/2006stpetersburg/mideast.html (accessed on: 02.09.2016).
[188] BBC News, 'Who are Kurdistan Workers' Party (PKK) rebels?', 04.11.2016, available at: http://www.bbc.com/news/world-europe-20971100 (accessed on: 02.12.2016).
[189] *Ibid.*
[190] *Ibid.*
[191] *Ibid.*
[192] Funda Keskin, 'Turkey's Trans-Border Operations in Northern Iraq: Before and after the Invasion of Iraq' (2008) 8 RJIS 59 at 59.

headquarters in the region against the will of Iraq.[193] In 2008 Turkey's military actions reached its peak when Turkey expanded its military actions to a full-scale ground offensive.[194] Turkey did not inform the SC of its operation and did not provide a detailed legal basis for its military actions but kept referring to its right to self-defence and stated that Iraq was unwilling or unable to supress the threat the PKK fighters were posing.[195] Turkey's Prime Minister Recep Tayyip Erdogan said: 'We have reached the point of self-defense, and we are ready to do whatever is necessary in light of common sense,'[196] General Yasar Buyukanit, chairman of Turkey's Joint Chiefs of Staff, says there is no difference between the terrorist and the one who gives him shelter.[197] Iraq expressly condemned the invasion but did not bring the matter to the SC.[198]

The international community at large remained silent and those that did comment on the case referred to the political impact of the military actions rather than to its legal foundation.[199] The EU, for instance, called on Turkey to pursue diplomatic solutions and said it hoped that Turkey would respect the territorial integrity of Iraq.[200] China also stated that the parties should resolve the issues through dialogue and consultation.[201] Belgium declared that 'force isn't the best answer' but also called on Iraq to put an end to further terrorist attacks from its territory.[202] Russia demanded for a political settlement und requested Turkey to respect Iraq's territorial sovereignty but also put emphasize on the importance of not permitting 'the territory of some or other states to be used as a

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[193] *Ibid.*
[194] *Ibid.*
[195] Reinold *supra note* 136, p 269.
[196] Sebnem Arsu, The New York Times, 'Iraq Moves to Deter Turkey from Cross-border Offensive', 17.10.2007, available at: http://query.nytimes.com/gst/fullpage.html?res=9F05E1DC153AF934A25753C1A9619C8B63 (accessed on: 05.12.2016).
[197] Tulin Daloglu, The Washington Times; 'Kurdish Terror and the West', 30.10.2007, available at: http://www.washingtontimes.com/news/2007/oct/30/kurdish-terror-and-the-west/ (accessed on: 05.12.2016).
[198] Reinold *supra note* 136*,* p. 270.
[199] *Ibid.,* p. 269f.
[200] Deutsche Welle, 'EU Urges Turkey Not to Attack Kurdish Rebels in Iraq', 17.10.2007, available at: http://www.dw.com/en/eu-urges-turkey-not-to-attack-kurdish-rebels-in-iraq/a-2828232 (accessed on: 05.12.2016).
[201] Embassy of the People's Republic of China in the United Kingdom of the Great Britain and Northern Ireland, Foreign Ministry Spokesperson Liu Jianchao's Regular Press Conference on 23 October 2007, 24.10.2007, available at: http://www.chineseembassy.org.uk/eng/zt/fyrth/t375079.htm. (accessed on: 05.12.2016).
[202] Reinold *supra note* 136*,* p. 270.

bridgehead for terrorist activities against their neighbors.'[203] The US position in this context is unclear. On the one hand, the US never questioned Turkey's right to self-defence and even provided support for the Turkish invasion. On the other hand, it called on Turkey to exercise its right in a proportionate way and to strike a balance between its security interests and Iraq's territorial sovereignty.[204]

According to experts, Ecuador has become 'a key meeting ground for multiple transnational criminal and terrorist organizations and an important part of a pipeline that moves not only cocaine but human cargo, weapons, precursor chemicals and hundreds of millions of dollars a year.'[205] Ecuador as well as Colombia have problems to control the 365-mile border that separates the two countries, mainly because the border region is characterised by low population, thick jungle and almost no government presence.[206] The border region thus became a safe haven for the FARC. The FARC are Colombia's largest rebel group and were founded in 1964 as the armed wing of the Communist Party.[207] Their main founders were small farmers and land workers who had affiliated to fight against the increasing inequality in Colombia at the time.[208] While the FARC have some urban groups, they have always been an overwhelmingly rural guerrilla organisation.[209] While the US, the EU and Colombia regard the FARC a terrorist organisation, other countries, especially ones in the region, consider the FARC fighters freedom fighters.[210] In 2008 Colombia killed two dozen fighters of the FARC, including Paul Reyes, a prominent figure of the organisation, on Ecuadorian territory after these

[203] Ministry of Foreign Affairs of the Russian Federation, Russian MFA Spokesman Mikhail Kamynin Answers a Media Question Regarding Situation on Turkish-Iraqi Border, 22.02.2008, available at: http:// www.un.int/russia/new/MainRoot/docs/off_news/220208/newen2.htm. (accessed on: 05.12.2016).
[204] CNN, 'Iraq Incursion Finished, Turkey Says', 29.02.2008, available at: http://www.cnn.com/2008/WORLD/meast/02/29/iraq.main/ index.html. (accessed on: 05.12.2016).
[205] Douglas Farah & Glenn R. Simpson, 'Ecuador at Risk: Drugs, Thugs, Guerillas and the Citizens Revolution', 24.01.2010, available at: http://www.strategycenter.net/research/pubID.221/pub_detail.asp (accessed on: 05.12.2016).
[206] Reinold *supra note* 136*,* p. 273.
[207] BBC News, 'Who are the Farc?', 24.11.2016, available at: http://www.bbc.com/news/world-latin-america-36605769 (accessed on: 05.12.2016).
[208] *Ibid.*
[209] *Ibid.*
[210] James C. McKinley Jr., The New York Times, 'Nicaragua Breaks Ties with Bogotá over Crisis', 07.03.2008, available at: http://www.nytimes.com/2008/03/07/world/americas/07latin.html (accessed on: 05.12.2016).

fighters had constantly launched attacks on Colombian territory.[211] Colombia justified its action as 'legitimate self-defence'[212], stating that it had frequently asked Ecuador to take action against the FARC.[213] Colombia claimed that its military action was the necessary consequence to Ecuador's failure to fulfil its sovereign responsibilities.[214] Ecuador protested against the military raid and claimed that its territorial sovereignty had been violated.[215] The two biggest regional organisations, the OAS and the RIO group, criticised the raid but did not condemn Colombia officially.[216] The RIO group stated that it has a 'grave concern' regarding the invasion, it denounced the violation of Ecuador's integrity and reaffirmed the principle of non-intervention.[217] However, it also affirmed its 'firm commitment to counter threats to the security of all states, arising from the action of irregular groups or criminal organizations.'[218] The OAS said Colombia's intervention was 'a violation of the sovereignty and territorial integrity of Ecuador,' reaffirmed the principle of non-intervention and stated that 'the right of each State to protect itself [...] does not authorize it to commit unjust acts against another State.'[219] This announcement contradicts the resolution that the OAS has adopted after the attacks of 9/11. In the post-9/11 resolution it reaffirmed the right to self-defence, made no distinction between the terrorists and the state that harbours them, and declared that

[211] Patrick Markey, 'Colombia says it kills FARC commander in Ecuador', The Washington Post, 01.03.2008, available at: http://www.washingtonpost.com/wpdyn/content/article/2008/03/01/AR2008030100993_pf.html (accessed on: 02.09.2016).
[212] Xinhuanet, 'Ecuador breaks off diplomatic relations with Colombia', 04.03.2008, available at: http://news.xinhuanet.com/english/2008-03/04/content_7711157.htm (accessed on: 02.09.2016) [Xinhuanet]
[213] Reinold *supra note* 136*,* p. 273.
[214] *Ibid.*
[215] Xinhuanet *supra note* 212 (accessed on: 02.09.2016).
[216] Reinold *supra note* 136*,* p. 274.
[217] Declaration of the Heads of State and Government of the Rio Group on the Recent Events Between Ecuador and Colombia, 07.03.2008, available at: http:// scm.oas.org/doc_public/ENGLISH/HIST_08/CP19791E11.doc. (accessed on: 05.12.2016).
[218] *Ibid.*
[219] Permanent Council of the Organization of American States, Convocation of the Meeting of Consultation of Ministers of Foreign Affairs and Appointment of a Commission, OAS Doc. OAS/CP/RES. 930 (1632/08), 05.03.2008, available at: http:// www.oas.org/consejo/resolutions/res930.asp. (accessed on: 05.12.2016).

'those that aid, abet or harbor terrorist organizations are responsible for the acts of those terrorists.'[220]

The international community, including the SC and the GA, remained silent on the matter and therefore seemed to accept Colombia's interpretation of the right to self-defence.[221] Only the USA explicitly confirmed Colombia's right to self-defence.[222]

Osama bin Laden was the founder and head of Al-Qaeda, an Islamist terrorist group. He and his terrorist organisation are responsible, *inter alia* for the bombing of the US embassies in Kenia and Tanzania in 1998, for the 9/11 attacks[223] and the attack on the French satirical newspaper Charlie Hebdo in 2015.[224] The US have been trying to capture bin Laden since 2001 and finally became aware of his whereabouts in September 2001.[225] In 2011 a team of US Navy Seals killed bin Laden in a military raid in the city of Abbottabad, on Pakistani territory without the knowledge, consent or cooperation of Pakistan.[226] The compound on which bin Laden lived and was killed was very close to a Pakistani military camp and therefore raised doubts about Pakistan's engagement in the fight against terrorism.[227] The US invoked its right to self-defence. It was believed that bin Laden continuously planned further attacks on the US and that the killing was necessary as Pakistan was unwilling or unable to supress the threat that he and Al-Qaeda posed.[228] Pakistan's behaviour was ambiguous. On the one hand, it approved of the killing but also accused the US of violating the prohibition on the use of

[220] Permanent Council of the Organization of American States, Convocation of the Twenty-third Meeting of Consultation of Ministers of Foreign Affairs, OAS Doc. OAS/CP/RES. 796 (1293/01), 19.09.2001, available at: http://www.oas.org/consejo/resolutions/res796.asp. (accessed on: 05.12.2016).
[221] Reinold *supra note* 136*,* p. 274-275.
[222] CBC News, 'Ecuador, Venezuela Raise the Stakes Against Colombia', 04.03.2008, available at: http://www.cbc.ca/news/world/ecuador-venezuela-raise-the-stakes-against-colombia-1.751540 (accessed on: 02.09.2016).
[223] BBC News, 'Timeline: Al-Qaeda', 07.08.2008 (update), available at: http://news.bbc.co.uk/2/hi/7546355.stm#1998 (accessed on: 12.01.2017).
[224] Aljazeera, 'Al-Qaeda in Yemen claims Charlie Hebdo attack', 14.01.2015, available at: http://www.aljazeera.com/news/middleeast/2015/01/al-qaeda-yemen-charlie-hebdo-paris-attacks-201511410323361511.html (accessed on: 12.01.2017).
[225] CNN, 'Death of Osama bin Laden Fast Facts', 17.04.2016 (updated), available at: http://edition.cnn.com/2013/09/09/world/death-of-osama-bin-laden-fast-facts/ (accessed on: 06.12.2016).
[226] Stephen M. Pezzi, NSJ, 'The Legality of the Killing of Osama bin Laden', 16.5.2011, available at: http://harvardnsj.org/2011/05/the-legality-of-killing-osama-bin-laden/ (accessed on: 02.09.2016).
[227] *Ibid.*
[228] *Ibid.*

force.[229] Although there were some voices claiming that the killing was illegal,[230] the lawfulness of the raid was never really questioned. The killing of bin Laden met a huge worldwide approval, including such of the UN, the NATO, the Arab League and the EU.[231] Only the Prime Minister for the Hamas government in Gaza criticised the killing.[232]

Al-Shabab is an Islamist militant group that is allied to Al-Qaeda and based in Somalia.[233] Somalia, a former British protectorate, collapsed into anarchy in 1991 after President Siad Barre was overthrown and subsequently became a safe haven Al-Shabab fighters.[234] The group is fighting the UN-supported government in Somalia and has carried out several attacks in neighbouring Kenya, targeting mainly tourists and Westerners.[235] Al-Shabab is labelled a terrorist organisation by the US and most European countries.[236] In 2011 Kenya intervened in Somalia with some 2,000 troops after the terrorists had kidnapped several European tourists and aid workers in Kenya.[237] Kenya stated that it 'has the right to defend itself'[238] and that 'the government is taking robust measures to protect and preserve the integrity of the country by invoking Article 51 of the UN Charter'.[239]
The intervention has gained very little to no attention by the international community. Only Israel explicitly approved of it.[240]

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[229] *Ibid.*
[230] The Killing was more questioned under the ius in bello and under human rights law as some commentators believed bin Laden must have been captured instead of killed.
[231] CNN, 'World leaders react to news of bin Laden's death', 03.05.2016, available at: http://edition.cnn.com/2011/WORLD/asiapcf/05/02/bin.laden.world.reacts/ (accessed on: 02.09.2016).
[232] *Ibid.*
[233] BBC News, 'Who are Somalia's al-Shabab?', 03.04.2015, available at: http://www.bbc.com/news/world-africa-15336689 (accessed on: 06.12.2016).
[234] *Ibid.*
[235] *Ibid.*
[236] *Ibid.*
[237] The Guardian, 'Kenyan troops move into Somalia', 16.10.2011, available at: https://www.theguardian.com/world/2011/oct/16/kenyan-troops-somalia-kidnappings (accessed on: 02.09.2016).
[238] *Ibid.*
[239] Mark Kersten, Justice in Conflict, 'Chasing al-Shabaab: Is Kenya 'Right to Intervene' in Somalia?', 31.10.2011, available at: https://justiceinconflict.org/2011/10/31/chasing-al-shabaab-is-kenya-right-to-intervene-in-somalia/ (accessed on: 06.12.2016).
[240] BBC News, 'Israel-Kenya deal to help fight Somalia's al-Shabab', 14.11.2016, available at: http://www.bbc.com/news/world-africa-15725632 (accessed on: 06.12.2016).

Eritrea was annexed by Ethiopia in 1962 but gained independence in 1993.[241] From 1998 to 2000 the two countries fought a border war.[242] Since its independence Eritrea's President Isaias Afwerki runs the country with an iron fist and controls almost every aspect of Eritrean society.[243] He is subject to UN and regional sanctions and is accused of backing Al-Shaba in Somalia, of supporting anti-western or insurgent groups in Djibouti, Uganda and Sudan and providing safe haven to Ethiopian rebels.[244] In 2012 Ethiopia carried out a dawn raid in Eritrea against 'subversive groups' that had carried out attacks on its territory.[245] Ethiopia did not make any reference to a legal justification and simply stated that Eritrea was supporting these groups.[246] The raid received only very little international attention.[247] Britain said it is 'deeply concerned' but did not condemn the intervention expressly.[248] The US called on both countries to 'exercise restraint and to avoid any further military action'.[249]

State practice has shown that the Unwilling or Unable-Doctrine has been used as a basis for attribution. There is a clear trend. Russia expressly invoked it concerning its intervention in Georgia in 2002. Turkey did the same in 2008 as well as the US in 2011 after killing bin Laden. In the other examples (e.g. Colombia and Kenya), the invading state did not mention the doctrine expressly but mostly stated that it had to act and defend itself because the other state did not take actions against the non-state actor or because it did not fulfil its international counter-terrorism obligations. Protests or condemnations by the international community regarding the respective interventions were rare. In most cases states expressed either a general concern (like Britain regarding Ethiopia's intervention in Eritrea) or a general and blank statement (like the

[241] BBC News, 'Ethiopia launches military attack inside Eritrea', 15.03.2016, available at: http://www.bbc.com/news/world-africa-17386161 (accessed on: 06.12.2016) [BBC, Ethiopia].
[242] *Ibid.*
[243] Simon Tisdall, 'Eritrea is an easy target for Ethiopia', 19.03.2016, The Guardian, available at: https://www.theguardian.com/commentisfree/2012/mar/19/eritrea-ethiopia-isaias-afwerki (accessed on: 06.12.2016) [Tisdall, The Guardian].
[244] *Ibid.*
[245] David Smith, The Guardian, 'Ethiopian raid on Eritrean bases raises fears of renewed conflict', 16.3.2012, available at: https://www.theguardian.com/world/2012/mar/16/ethiopian-raid-eritrea-conflict (accessed on: 02.09.2016).
[246] *Ibid.*
[247] *Ibid.*
[248] Tisdall, The Guardian *supra note* 243.
[249] BBC, Ethiopia *supra note* 241.

US regarding the same intervention). In none of the above mentioned examples the international community as a whole condemned the intervention. If there were official condemnations at all, these were made by single states. This shows that there is some form of explicit acceptance that the use of force against a non-state actor on the territory of another state is permitted.

However, state practice is not consistent or uniform, as required, and it cannot be because the content or the parameters of the Unwilling or Unable-Doctrine are not clear. In other words, even if states did apply this doctrine, they do not really know how to apply it. The unclear parameters of the doctrine simply prevent a uniform, consistent and general application.[250] Apart from that, in none of the examples the state seemed to use the Unwilling or Unable-Doctrine because it felt obligated[251] by law to do so.[252] *opinio iuris*, however, is one of the requirements of customary international law.

Thus, there is no consistent state practice and no *opinio iuris.* This leads to the result that it would be too early to qualify the Unwilling or Unable-Doctrine as a rule of customary international law.

Moreover, the attack in Paris to Syria is not attributable according to the Unwilling or Unable-Doctrine.

IV. Interim Conclusion

The examination has shown that the attack in Paris to Syria is not attributable under the ASR, nor under the Safe Haven-Doctrine, nor under the Unwilling or Unable-Doctrine. Regarding the latter, the main reason is its unclear content, which also hinders it from becoming a rule of customary international law. On the other hand, state practice has also shown that there is some form of implied acceptance of the use of force against a non-state actor on the territory of a third state.

[250] Gareth D. Williams, 'Piercing the shield of sovereignty: An assessment of the legal status of the "unwilling or unable" test' (2013) 36 UNSW Law Journal 619 at 640 [Williams].
[251] In the present context it seems that the invading states felt that they are rather permitted and not obligated by law to act.
[252] *Ibid.,* p. 635.

D) Chapter 4: A new interpretation of the rules of attribution

I. Emergence of a new legal framework after 9/11?

Since the incidents of 9/11 there has been a wide-ranging debate if it is necessary to turn away from the traditional interstate perspective and to extend the concept of self-defence to repel also armed attacks by non-state actors, independently from an attribution to a state. This would be inevitable because international law had to find an answer to the emerging threats that non-state actors and above all, terrorist organisations, pose to international peace and security.[253]

Such a new understanding of the right to self-defence is tied to the interpretation of Art. 51 of the UNC, in which according to Art. 31 para. 3 lit. b) of the VCLT, any subsequent practice in the application of the treaty shall be taken into account.

1. Effect of the SC Resolutions 1368, 1373 and 1438

The major argument that supporters of this view have brought forward is the recent decision-making practice of the SC.

After the attacks of 9/11 in 2001 the SC has issued three resolutions in which it found that acts of international terrorism are a threat to international peace and security in the meaning of Art. 39 of the UNC. These are the resolutions 1368,[254] 1373,[255] and 1438.[256]

In the resolutions 1368 and 1373, which were adopted against the backdrop of the 9/11 attacks, the SC further mentions explicitly the inherent right of individual and collective self-defence. Supporters of the above mentioned approach argue therefore that the resolutions 'cannot but be read as affirmations of the view that large-scale attacks by

[253] See for instance: Greenwood, 'International Law and the Preemptive Use of Force: Afghanistan, Al-Qaida, and Iraq' (2003) 4 San Diego Intl.L.J. 7 at 14 [Greenwood]; Van Steenberghe, 'Self-Defence in Response to Attacks by Non-state Actors in the Light of Recent State Practice: A Step Forward?' (2010) 23 Leiden J.Intern'l L 183 at 184; Franck, 'Terrorism and the Right to Self-Defence' (2001) 95 AJIL 839 at 840.
[254] S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001).
[255] S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001).
[256] S.C. Res. 1438, U.N. SCOR, 57th Sess., 4624th mtg., U.N. Doc. S/RES/1438 (2002).

non-State actors can qualify as “armed attacks” within the meaning of Article 51’[257] or that the resolutions constitute a right to self-defence against terrorist organisations.[258]

The OAS[259] as well as the OSCE[260] recognised the right to self-defence within the context of the 9/11 attacks, too.

However, there are three arguments that can be put forward against this view. Firstly, the SC’s power to authorise enforcement measures pursuant to chapter VII is triggered if the SC finds a threat to international peace and security.[261] The right to self-defence, on the other hand, requires an armed attack.[262] An armed attack in the sense of Art. 51 of the UNC and a threat to peace and security in the sense of Art. 39 of the UNC are qualitatively not the same. The threshold for an armed attack is much higher than the threshold for a threat to international peace and security.[263] Consequently, if the SC finds in resolutions 1368 and 1373 that acts of international terrorism are a threat to international peace and security, this only triggers its power to act under chapter VII of the UNC. It means that the SC favours an extensive interpretation of ‘a threat to international peace and security’. It does not automatically imply that the SC favours an extensive interpretation of the notion armed attack as well. Quite the contrary, while an extensive interpretation of ‘a threat to international peace and security’ leads to the desirable broader application of collective enforcement measures, the extensive interpretation of ‘armed attack’ on the other hand, entails an extension of unilateral use of force by states.

Secondly, the wording and the structure of the resolutions speak against interpreting the resolutions as an affirmation of a right to self-defence against terrorist organisation or non-state actors.
Resolution 1368 refers to ‘*recognizing* the inherent right of individual or collective self-defence’, resolution 1373 to ‘*reaffirming*’ this right. Both words implicate a rather general

[257] *Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Rwanda),* Judgment, ICJ Reports 2005, p. 168, sep. op. Simma J. at para. 11 [*Armed Activities*]
[258] See e.g.: Greenwood, *supra note* 253*,* p. 17; Gray in Evans *supra note* 54*,* p.626.
[259] OAS Res.RC.24/RES.1/01 of 21.09.2001.
[260] OSCE Permanent Council Statement of 10.10.2001.
[261] Gray *‘International Law and the Use of Force’* (Oxford 2004), p. 144.
[262] See for this: section B. II.
[263] Cassese *supra note* 13*,* p. 102.

reference of the SC to the right to self-defence which states have in the case of an armed attack.[264] Concrete measures of self-defence against Al-Qaeda, the Taliban or Afghanistan are not granted to the USA.[265]
Furthermore, the resolutions, like all resolutions of the SC, are divided into an acclamatory and an operative part.[266] The acclamatory part can be seen as a preamble which does not contain binding declarations. In the operative part, on the other hand, the SC traditionally makes binding decisions and determinations.[267] The reference to the right to self-defence in both resolutions is in the acclamatory and not in the operative part.[268]
Additionally, although resolution 1373 takes measures to combat international terrorism like the freezing of bank accounts and assets, the installation of effective border controls and in particular the denial of safe haven to terrorists, it does not speak of concrete military measures against the states that harbour terrorists. Instead the resolution refers to (national) criminal or police measures which rather supports the interpretation that terrorists should be treated as ordinary criminals since only states can be the addressees of the obligation to implement those measures.[269]
In total, the wording and structure of the resolutions support the view that the right to self-defence cannot be exercised against non-state actors.

A third argument that is in favour of the traditional view requiring an armed attack by a state or attribution to a state can be deduced from the systematic context of the UNC.
Art. 2 para. 4 of the UNC prohibits the use of force among members of the UN. According to Art. 4 para. 1 of the UNC, only states can become members of the UN. Therefore, it would be impossible for a non-state actor to violate this prohibition. If the right to self-defence in Art. 51 of the UNC is to constitute the exception to the prohibition on the use of force, then Art. 51 of the UNC must allow the use of force, provided that

[264] Baufeld *‚Der 11. September 2001 als Herausforderung für das Völkerrecht‘* (Münster 2005), p. 17 [Baufeld].
[265] See: Murphy, ‘Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter’ (2002) 43 Harv. Int'l L.J., 41 at 44.
[266] Baufeld *supra note* 264*,* p. 16f.
[267] *Ibid.* at p. 17
[268] *Ibid.*
[269] *Ibid.*

the attacker has already committed a breach of the prohibition on the use of force.[270] If an armed attack constitutes at least a violation of the prohibition on the use of force, then logic requires that an armed attack can only derive from a state.[271]

Hence, in summary it is established that the resolutions 1368, 1373 and 1438 do not constitute a right to self-defence against a non-state actor.

2. Jurisprudence of the ICJ

A further argument that supports the traditional interstate view is the settled jurisprudence of the ICJ. After 9/11 the ICJ confirmed in four cases that the right to self-defence pursuant to Art. 51 of the UNC requires an armed attack by a state.

In 2003 the ICJ upheld its findings from *Nicaragua* in *Oil Platforms.*[272] In this case Iran instituted proceedings against the US because the latter had attacked and destroyed three offshore oil production complexes, owned and operated for commercial purposes by the National Iranian Oil Company. The ICJ held again that a lawful act of self-defence requires an armed attack by another state.[273] In the case of a private attack, the attack must be attributable to another state.[274]

One year later, in 2004, the ICJ affirmed this position in *Palestinian Wall*.[275] The UN General Assembly requested an advisory opinion of the ICJ regarding the construction of a wall by Israel in the occupied Palestinian territory. The Court once more pointed out that Art. 51 of the UNC recognises the inherent right to self-defence in the case of an armed attack on one state by another state.[276]

In *Armed Activities,* in 2005 the ICJ decided that Uganda did not prove that the DRC was sponsoring anti-Uganda rebels that were frequently attacking Uganda, operating from the territory of the DRC and therefore held that the attacks of the rebels were not attributable to the DRC.[277] Sadly, it ruled, thus that it was not necessary to examine the

[270] Kelsen *supra note* 26, p.59.
[271] *Ibid.*
[272] See also: section B. II.
[273] *Oil Platforms supra note* 41 at para. 51.
[274] *Ibid.*
[275] *Palestinian Wall supra note* 48 at para.139.
[276] Ibid.
[277] *Armed Activities supra note* 257 at para. 146.

circumstances under which 'international law provides for a right of self-defence against large-scale attacks by irregular forces.'[278]

In 2007 in the *Genocide Case* the ICJ stuck to its traditional jurisprudence. It had to decide about the application of the Genocide Convention to the massacre in Srebrenica committed by units of the Bosnian Serb Army of Republika Srpska and about the question if the acts committed by the Bosnian Serb Army are attributable to Serbia. The Court answered the latter question in the negative and affirmed the 'effective control-test' explicitly as the applicable standard of attribution.[279]

3. Interim Conclusion

The examination has shown that the stronger arguments are in support of the traditional approach that requires the attribution of an armed attack to a state. Neither the SC resolutions 1368, 1373 and 1438 nor the jurisprudence of the ICJ after 2001 allow for another interpretation. Therefore, under current international law there is no right to self-defence against non-state actors. A new legal framework governing the defensive use of force has not emerged (yet).

II. Does the current status of international law meet today's challenges?

The UNC including Art. 51 was drafted in 1945 when international law was a purely state-centred system.[280] Not only were states the major players in the legal system at that time, they were the only players. Individuals or private entities did not play a role. Consequently, Art. 51 of the UNC was sketched to give a state that was attacked by another state a lawful instrument to defend itself because this was, what was required at that time.

But the times have changed. The system in international law is shifting from a state-centred system to one that also takes individuals into consideration.[281] The field of human rights and the field of international criminal law are worth mentioning in this regard. Nowadays, attacks by non-state actors like terrorist organisations pose a much greater threat to international peace and security than attacks by states. Today's

[278] *Ibid.* at para. 147.
[279] *Genocide Case supra note* 142 at para. 400.
[280] Von Arnauld *supra note* 146, para. 58.
[281] Baufeld *supra note* 264, p. 19; Von Arnauld *supra note* 146, para. 58.

terrorist organisations are perfectly organised, very well equipped and have better financial resources than some states. This problem is exacerbated by the fact that more and more states are struggling to maintain internal order and to control their territory effectively. These weak states frequently become a safe haven for terrorist organisations (so called host states).

The current legal system of attribution does not meet the requirements of this new threat scenario because of the 'effective-control-test' making attribution to the host state exceedingly difficult. The high standard was somewhat softened by the 'overall control-test' but also this test has proven to be impractical. State practice after 9/11 is inconsistent but it is meaningful inasmuch as it shows that states have reacted to the inadequacy of the current legal framework by applying a lower threshold of attribution.

Before 9/11 the dominant view was that attacks of terrorists were only attributable to the host state, making it thereby the target of defensive use of force, if the host state exercised some sort of control over the terrorists. Whether one applied the 'effective control-test' or the 'overall control-test', both approaches set out a relatively high standard, requiring either precise instructions over specific conduct or at least the retain of an all-embracing general control.

After or since 9/11 it is not clear pursuant to which standard or rules the necessary attribution has to be made. States have tended to use a much lower threshold of attribution, invoking in principle the Unwilling or Unable-Doctrine but without explicit reference to it or without an application of defined criteria.

Looking at the 'effective control-test', the 'overall control-test' and finally the Unwilling or Unable-Doctrine, one can clearly see that the threshold for attribution was set down lower and lower.

If the right to self-defence should not lose its validity there must be a lawful way in which a state can defend itself when it gets attacked by a terrorist organisation that operates from another state's territory, with or without the consent of that other state.

III. A new standard of attribution

The following section aims at elaborating a new standard of attribution based on the Unwilling or Unable-Doctrine. By establishing a definition of the terms 'unwilling' and 'unable' (in the sense of the doctrine), the doctrine should gain a clearer contour and determined parameters. Another difficulty will be to strike the balance between the security interests of the attacked state and the territorial interests of the host state. In order to solve this tension, preconditions based on the existing law will have to be worked out under which the attacked state's right to self-defence prevails over the host state's territorial integrity.

1. Shortcomings of the Unwilling or Unable-Doctrine

Having already explained the emergence and the content of the doctrine in chapter three. I will now illustrate which shortcomings it has.

The doctrine's major shortcoming and the main reason why it is criticised, is its high level of generality.[282] As I have already mentioned, there is no established definition of the criteria 'unwilling' or 'unable'.[283] What factors must a state consider when it evaluates the host state's unwillingness or inability? The doctrine therefore suffers from 'substantive indeterminacy' since the parameters are not clear.[284] Although many aspects in the use of force area are unclear, for example, what constitutes an armed attack, because of this lack of clarity, the doctrine is not able to provide guidance for states as well as it could do. This is demonstrated very well by the inconsistent and disrupted state practice after 9/11. This dissertation will try to provide some parameters in order to make the doctrine more precise.

Another reason why some commentators view the doctrine with scepticism is the risk of abuse that the doctrine entails. It is argued that the weak host states are more or less entirely at the mercy of the powerful attacked states.[285]

Against this, there are mainly two arguments. Firstly, state practice has shown that it is not always powerful states like the US, Russia or Israel that invade in other states but

[282] Deeks *supra note* 151*,* p. 487; Williams *supra note* 250*,* p. 631.
[283] Deeks *supra note* 151.631.
[284] Deeks *supra note* 151*,* p. 503; Williams *supra note* 250*,* p.631.
[285] See e.g.: Ahmed, 'Defending Weak States Against the "Unwilling or Unable" Doctrine of Self-Defence' (2013) 9 JInt'lLInt'lR 1 at 4.

also states that are not necessarily considered superpowers like Kenya, Colombia or Ethiopia. Secondly, it is true that the unwilling or unable-doctrine can be abused by states but this alone is not a good reason for not having a rule at all. States have always violated and still constantly violate international law, in every filed. Rosalyn Higgins has argued, in the context of humanitarian intervention, that:

> Many writers argue against the lawfulness of humanitarian intervention today. They make much of the fact that in the past the right has been abused. It undoubtedly has. But then so have there been countless abusive claims to the right to self-defence. That does not lead us to say that there should be no right of self-defence today. We must face the reality that we live in a decentralized international legal order, where claims may be made either in good faith or abusively. We delude ourselves if we think that the role of norms is to remove the possibility of abusive claims ever being made.[286]

Hence, the best way to avoid abuse is to make the doctrine more accurate and to give states in this way clear guidance for determining when a state is unwilling or unable.

In theory, the Unwilling or Unable-Doctrine should function as an useful control on the defensive use of force by an attacked state outside of its own territory, but only with a clear legal content will it be able to fulfil this function. This dissertation tries to provide that content.

2. A new approach: a clarified Unwilling or Unable-Doctrine

This section of the dissertation introduces a new standard of attribution in the form of a clarified Unwilling or Unable-Doctrine.

A clarification of the doctrine will bring several advantages. First of all, it will provide guidelines for the attacked state as well as the host state. A clearer doctrine with transparent parameters ensures that both states know what to do and how to assess the respectively other state's behaviour. But above that, it will help states in general to deal with attacks of terrorist organisations, to assess the attacked state's and the host state's behaviour and to react to such attacks appropriately and lawfully. And finally, a clarification of the doctrine would make it more legitimate in the eyes of states.[287] The

[286] Higgins, *'Problems and Process: International Law and How We Use It'* (Oxford 1995), p. 247.
[287] Deeks *supra note* 151*,* p. 512.

clearer or the more determined a norm is, the more, states are willing to comply with it.[288] As reported by Franck:

> Determinacy seems the most important [aspect of legitimacy], being that quality of a norm that generates an ascertainable understanding of what it permits and what it prohibits. When that line becomes unascertainable, states are unlikely to defer opportunities for self-gratification. The rule's compliance pull evaporates.[289]

In the current situation in which no one really knows what the legal situation is and what the requirements are it is very difficult for states to act lawfully even though they want it.

Firstly, it must be emphasized that the clarified Unwilling or Unable-Doctrine applies only to host states hosting non-state actors in the form of terrorist organisations. The state practice that was analysed in the third chapter has clearly shown that the situation in which states have invoked the Unwilling or Unable-Doctrine, sometimes more, sometimes less explicitly, was always the same. A state suffered from (an) attack(s) of a non-state actor and claimed it was attacked by 'terrorists'. Even though there is no generally accepted definition of terrorism, state practice has shown that the Unwilling or Unable-Doctrine is exclusively linked to attacks by non-state actors that were called terrorist attacks. This dissertation thus uses the definition of terrorism that was elaborated by the SC.[290] According to the SC terrorism are:

> Criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as in the international conventions and protocols relating to terrorism.[291]

Secondly, the underlying idea of the clarified Unwilling or Unable-Doctrine is, that states are under a due diligence obligation towards other states or the international community to act against terrorists. This very general due diligence obligation derives from numerous international counter-terrorism obligations. This dissertation will try to give an idea of how this general due diligence obligation looks like and, based on that, to elaborate a definition of inability and unwillingness.

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[288] *Ibid.*
[289] Thomas M. Franck, 'The Power of Legitimacy and the Legitimacy of Power' (2006) 100 AJIL 88 at 93.
[290] Elaborating a definition of terrorism would go far beyond the scope of this dissertation.
[291] S.C. Res. 1566, U.N. SCOR, 59th Sess., 5053rd mtg., U.N. Doc. S/RES/1566 (2004).

Traditionally, due diligence has required states to take preventive action regarding harm that is foreseeable.[292] However, this standard does not fit in the present context. If the host state were to prevent the terrorist organisation from attacking other states there would be no armed attack on the attacked state and therefore the question if and how to exercise the right to self-defence would not come up at all. But due diligence is a standard that varies according to the context.[293] As the International Tribunal of the Law of the Sea held in the *Seabed Mining Advisory Opinion* 'The content of "due diligence" obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the fact that "due diligence" is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity.'[294]

The standard varies as well in the context of common but differentiated responsibilities.[295] It is generally accepted that developing states are usually not able to control the activities on their territory in the same way that developed states can and that this will have an impact on the evaluation of whether they have breached their due diligence obligation or not.[296]

The international legal order is constructed around the concept of states.[297] States are sovereign and equal and bear international rights and duties. It is generally assumed that states are willing and able to adhere to legal rules and fulfil their international obligations.[298] One of their obligations is to fight terrorism. By now, as I will show below, states have numerous counter-terrorism obligations under international law. In general it can be expected from a sovereign state to fulfil these counter-terrorism obligations as sovereignty entails responsibility.[299] Besides, as I have shown above, state practice

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[292] International Law Association Study Group on due diligence in International Law, First Report (2014), 76 Int'l L. Ass'n Rep. Conf. 947 at 973 [ILA Report].
[293] *Ibid.,* p. 974.; Shaw *supra note* 25*,* p. 855.
[294] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Seabed Dispute Chamber of the International Tribunal of the Law of the Sea, Advisory Opinion, 1 February 2011 (Case No 17) at para. 117.
[295] ILA Report *supra note* 292*,* p. 974.
[296] *Ibid.*
[297] Starski *supra note* 154-
[298] *Ibid.*
[299] Reinold *supra note* 136*,* p.247.

indicates that states seem to link unwillingness or inability to the adherence to international or sovereign responsibilities.[300]

a. Obligations under international law

As mentioned before, due diligence is a standard that varies according to the context. It is held therefore, that, the content of the due diligence obligation depends on the counter-terrorism obligation that it derives from.

These counter-terrorism obligations derive primarily from SC resolution 1373 but also from the 16 international counter-terrorism legal instruments.[301] Of course only states that are a party to these legal instruments are concerned with the fulfilment of the respective obligations, although, the rate of adherence has increased significantly after 9/11.[302] Round about two-third of UN member states have either ratified or acceded to at least 10 of the16 instruments and there is no state that has neither signed nor become a party to at least one of them.[303]

On the other hand, the counter-terrorism obligations that resolution 1373 imposes on states are to be found in the operative part of the resolution and are thus binding on all UN member state.

Resolution 1373 mainly obligates states to cooperate with each other and to exchange information regarding terrorist activities.[304] Furthermore, it prohibits the financial support of terrorist organisations by obligating states to prevent and suppress the financing of terrorist acts, to criminalise the wilful provision or collection of funds by their nationals or

[300] See for instance: Russia in the conflict with Georgia, Israel in the conflict with Lebanon and Colombia in the conflict with Ecuador.
[301] These are: the Aircraft Convention, the Unlawful Seizure Convention, the Civil Aviation Convention, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, the Hostage Taking Convention, the Nuclear Material Convention, the Amendments to the Convention on the Physical Protection of Nuclear Material, the Airport Protocol, the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, the Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, the Protocol to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, the Convention on the Marking of Plastic Explosives for the Purpose of Detection, the Terrorist Bombing Convention, the Terrorist Financing Convention and the Nuclear Terrorism Convention.
[302] See concerning this: UN SC, Counter-Terrorism Committee, International Laws, available at: http://www.un.org/en/sc/ctc/laws.html (accessed on: 16.11.2016).
[303] *Ibid.*
[304] See e.g. provisions no. 3 a) – e).

in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts or to freeze funds and other financial assets, e.g. provision no. 1 a), b), c) and d) of the resolution.
Hence, in this context, the host state has, for example, the due diligence obligation to investigate about funds and assets that are used or should be used for committing terrorist acts.
More detailed obligations regarding the suppression of the financing of terrorists are to be found in the *International Convention for the Suppression of the Financing of Terrorism*.[305]

But host states usually do not financially support terrorist organisations. While this might be the case from time to time, the main support that host states give is simply the provision of their territory.

By letting a terrorist organisation operate undisturbed from their territory, the host states violate, for instance, the provisions regarding the obligations to cooperate with other states in order to prevent terrorist attacks. These provisions are contained in no. 3 of resolution 1373. Moreover, a host state that provides a safe haven for terrorists violates the resolution's provision no. 2 b), which obligates the host state to take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other states by exchange of information; provision no. 2 c), that obligates to deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens; as well as provision no. 2 d), which constitutes the obligation to prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other states or their citizens.

But it is not only treaty law or a SC resolution that obligates states to fight terrorism. It is a general and well-recognised principle in international law that each state has the 'obligation not to allow knowingly its territory to be used for acts contrary to the rights of

[305] *International Convention for the Suppression of the Financing of Terrorism,* 2178 U.N.T.S. 197 (09 December 1999).

other states'[306]. Already in 1949, the ICJ held that in *Corfu Channel.* Use in this context covers the planning, threatening, perpetrating or preparing of an armed attack.[307]

So, even in the case where a host state is not a party to one of the counter-terrorism instruments, or (theoretically) not even a member state of the UN, it would still have the obligation not to provide a safe haven for terrorist organisations.

From these counter-terrorism obligations arises, *inter alia*, the host state's due diligence obligation to monitor its territory. If it then finds out about a terrorist organisation that is based on its territory, the host state is under the due diligence obligation to locate them, as well as disarm and arrest them. Another due diligence obligation regarding the warning or informing of other states, is for instance to install reliable communication mechanism that ensure that the gathered information are given to the other state(s).

b. Definition of inability

This section introduces a definition of inability under the clarified Unwilling or Unable-Doctrine.

So, when can a host state be considered unable?
Starting point in this regard must also be the above listed international counter-terrorism obligations and the due diligence obligations resulting from them.

In determining the inability of a host state, only the objective side is decisive. The subjective side does not play a role. An unable host state may want to comply with its due diligence obligations and its international counter-terrorism obligations or it may not want to but the crucial factor is its (objective) ability to do so.
An unable host state does not have the means to comply with its due diligence obligations and in this way its international counter-terrorism obligations. It is not capable of monitoring its territory or of locating and arresting terrorists. It is not capable of installing communication mechanisms and inform other states about terrorist activities on its territory.

[306] *Corfu Channel supra note* 15 at p. 22.
[307] E.g. Daniel Bethlehem, 'Principles relevant to the scope of a state's right to self-defense against an imminent or actual armed attack by nonstate actors' (2012) 106 AJIL 769 at 775 [Bethlehem].

The following section aims at showing how and why a host state is incapable of exercising its due diligence.

One important factor is control. For instance, if the terrorist organisation controls a (more or less large) part of the host state's territory, the host state is not capable of exercising effectively its territorial sovereignty over that part. It will therefore also not be capable to monitor this part of territory and/or locate the terrorists in there and arrest them. Hence, because of the loss of control over parts of its territory it is incapable of exercising its due diligence.

Another factor apart from control is influence. For instance, where a terrorist organisation exercises a significant influence on political decisions and/or government business, it might impossible for the host state to inform other states about the terrorist activities. In this regard it should be mentioned that the terrorist's influence on the host state must be in such a way that it is noticeable.

The host state can also be regarded as incapable to comply with its due diligence and its counter-terrorism obligations when its judicial or political or administrative system has collapsed, for example due to internal riots or tensions.[308]

An additional reason why a host state can be considered not capable to comply is because it lacks personal and/or material resources or the necessary judicial infrastructure to fulfil its due diligence obligations as well as its international obligations.[309]

Hence, a host state can be regarded as unable, if it obviously, that means without extensive research, does not have the means to comply with its due diligence obligations and in this way its international counter-terrorism obligations regardless of its subjective willingness to comply.

After the explanations above one might think that it is not fair to declare a weak state unable and make it in that way the target of defensive force used by the attacked state. Thus, it should be clarified, that main or the core due diligence obligation of these weak

[308] Cf. Saxum, 'The ICC versus Sudan: How Does the Darfur Case Impact the Principle of Complementarity?' (2009-2010) 6 Eyes on the ICC 1 at 4.
[309] *Ibid.*

and unable states is to seek help or at least to accept help when offered to them.[310] Each state has the obligation to do everything it can to fight terrorism. And if a host state finds itself in a situation where it is no longer capable of controlling effectively its territory or of protecting its own citizens from terrorist attacks or of exercising its sovereign governmental powers it has the duty to seek help, either from the UN or from other ally states.

c. Definition of unwillingness

As opposed to the inability of a host state, its unwillingness has an objective as well as subjective side. Actually, the subjective side plays a big role in determining the unwillingness of a host state.

Objectively, a host state is unwilling if it violates its due diligence obligations and does not comply with its international counter-terrorism obligations, although it could do so. Hence, the precondition for unwillingness is, that the host state is generally able to fulfil its international obligations. It has the capacities and resources to comply with them. Subjectively, the unwillingness of a host state requires the intentional decision to act in the just described way. That means the host state willingly violates its due diligence obligation and in this way its counter-terrorism obligation although it knows that it could comply with both of them. The unwilling host state knows that it has the means to investigate, to monitor, to locate, to disarm, to arrest etc. but it decides not to do so.

It can thus be held that, under the clarified Unwilling or Unable-Doctrine, a host state is unwilling, if it, objectively has the means to comply with its due diligence obligations and in this way its international counter-terrorism obligations and subjectively, it makes the deliberate decision not to comply.

d. Interim Conclusion

The previous three sections tried to provide some criteria that make the Unwilling or Unable-Doctrine more accurate and help to understand when a host state can be considered unable or unwilling.

[310] Trapp, 'Back to Basics: Necessity, proportionality, and the Right to Self-Defence against non-state terrorist actors', (2007) 56 ICLQ 141 at 147.

The crux of the matter are the international counter-terrorism obligations and the due diligence obligations that derive from them, above all the obligation not to provide a safe haven for terrorist organisations. The host state can be considered unable if it obviously does not have the means to comply with its due diligence and its counter-terrorism obligations even though it might want to. On the other hand, it can be considered unwilling, if it deliberately does not exercise its due diligence and fulfil its counter-terrorism obligations although it objectively has the means to do so.

3. The tension between the right to self-defence of the attacked state and the territorial sovereignty of the host state

Even if there is a clearer picture of this doctrine now, this does not resolve the problem that the right to self-defence of the attacked state and its security interest clash with the territorial sovereignty and the territorial interests of the host state.

State sovereignty is a fundamental principle in international law but it is not absolute.[311] Therefore, it is submitted that in such a case, international law requires, that the defensive use of force, in order to be justified, should additionally fulfil the following preconditions. If these preconditions are fulfilled the attacked state is allowed to use defensive force against the host state because its security interest prevails over the territorial sovereignty and the territorial interest of the host state.

a. Relevant preconditions for the defensive use of force

The basic prerequisite is of course that the action of self-defence is in accordance with international law. That means, *inter alia* that the self-defence action is proportional to the armed attack and necessary to respond to it.[312]

Furthermore, it should be mentioned that the following preconditions are applicable only in the case in which a host state is considered unwilling or unable, according to the above mentioned criteria, to take actions against a terrorist organisation that operates from its territory. These additional preconditions are designed for this particular case only in order to strike the balance between the interests of the host state and the attacked state and in this way, to provide more guidance for states and more legal

[311] Reinold *supra note* 136, p. 247.
[312] *Nicaragua supra note* 28 at para. 176; *Oil Platforms supra note* 41 at paras. 73-77.

certainty. They should not be applied in every case of self-defence. Of course, basic principles of international law or the UNC apply also to this case. Especially the prohibition on the use of force, Art. 2 para. 4 of the UNC and the principles of territorial integrity and territorial sovereignty have to be taken into account.

Finally, I propose that there should be made a clear distinction between the unwilling and the unable-scenario. The decisive difference between the two scenarios is that unwillingness is a subjective condition, while inability is something objective. In the unwilling-scenario the host state makes the decision not to comply with its international counter-terrorism obligations deliberately or deliberately violates international law. The unwilling state thus bears a certain responsibility for the terrorist activities on its territory. A state that is unable, on the other hand, has usually ran into difficulties through no fault of its own. Normally factors like mismanagement, poverty, civil wars etc. made that state entering into a crisis and therefore vulnerable to be used as a safe haven by terrorist organisations. Of course it is debatable whether such factors are based on the state's fault but the unlawfulness that both types of states are carrying out, is significantly higher in the case of an unwilling state than in the case of an unable state. The following section will show that the preconditions sometimes work differently or have different effects in the two scenarios.

aa. Unilateral military action as means of last resort

The first precondition is that unilateral military action should be the last resort. That means that all diplomatic and other peaceful measures must have been exhausted unsuccessfully and no other effective measures are reasonably accessible.[313] Diplomatic measures in this context involve, first of all, a request by the attacked state to the host state to take actions against the terrorist organisation. Even if the attacked state has made requests before, there should be one final request to act. Above that, diplomatic measures include all good faith attempts to obtain the host state's consent to take military actions against the terrorist organisation und thereby, against the territorial integrity of the host state as well.[314] Furthermore, the attacked state should try to get the

[313] Bethlehem *supra note* 307*,* p. 774.
[314] Deeks *supra note* 151*,* p. 519.

SC involved in order to get an authorisation of its planned use of defensive force under chapter VII of the UNC.

The request for consent should give the host state the opportunity to agree to an effective and appropriate plan of action and, in the case of an unwilling host state, to take such action itself.[315] In this way, the unwilling host state is given the chance to reconsider its position and to get back to international law. The unable state will apparently not be capable to take such action itself.

This should be seen as the general rule. Of course, there are also exceptions to this rule. There might be situations in which it cannot be required from the attacked state to seek consent.
This is especially true for the unwilling-scenario. A state that is unwilling to take action against a terrorist organisation on its territory will probably refuse to give its consent to the attacked state to fight these terrorists. Generally, it should be asked for its consent nevertheless. However, there are exceptional cases. For instance, the attacked state will not have to ask for consent, when there is a reasonable and objective basis to believe that the host state is cooperating with the terrorist organisation.[316] The same goes for the case where the unwillingness of the host state is so obvious that it would not make sense to seek consent because it is clear that the host state will refuse. In such a situation the request for consent would be pointless.

In the case where a host state is unable to address the terrorist activities on its territory but refuses nonetheless to give its consent to the attacked state, it could be considered rather unwilling than unable. As I have already mentioned before, a host state that is unable to act against the terrorists on its territory is under the obligation to seek help or to accept help when offered.

The requirement that unilateral military action must be the last resort, arises on the one hand from the prohibition on the use of force, Art. 2 para. 4 of the UNC and the fundamental principle that all UN member states 'shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice,

[315] Bethlehem *supra note* 307*,* p. 775.
[316] *Ibid.*

are not endangered', Art. 2 para. 3 of the UNC. Both, Art. 2 para. 3 as well as Art. 2 para. 4 of the UNC show that under the system of the UNC, the use of unilateral military force is only permitted in very exceptional cases.[317] Self-defence is one of these exceptional cases.[318] Nevertheless, even in the case in which a state gets attacked by terrorists that operate from the host state's territory it seems to be appropriate, that means in accordance with the fundamental principles of the UNC, that the attacked state first requests the host state to take action against the terrorists on its territory before it uses defensive military force against the host state.

Before the attacked state uses unilateral defensive force it should try to get the authorisation of the UN SC under chapter VII of the UNC. This takes the basic principle of the UNC into account that military force is the monopoly of the SC.[319] The SC has proved to be capable to act very quickly if there is consensus on the matter. This was for example the case with resolution 660[320] which condemned Iraq's invasion of Kuwait. The SC adopted the resolution on the same day as the invasion.
Only in cases in which the attacked state urgently must react to an armed attack and it is foreseeable that the SC will be blocked by vetoes, it cannot be expected that the attacked state first turns to the SC to seek authorisation.

bb. Chances of success of self-defence action

The second precondition is that the chances of success of the self-defence action are good.

This is, for instance, not the case if the attacked state is missing relevant information. If it knows who attacked it and that these terrorists are located on the host state's territory but it has no reliable military information or intelligence regarding the exact whereabouts of the terrorist organisation or how the terrorists are equipped, which arms they are carrying etc. it is extremely unlikely that the self-defence action has a good chance to be successful.

[317] Brownlie *supra note* 14, p.731-732.
[318] See for this: section B. I.
[319] Brownlie *supra note* 14, p. 741.
[320] S.C. Res. 660, U.N. SCOR, 45th Sess., 2932nd mtg., U.N. Doc S/RES/660 (1990).

Another reason why the self-defence action can be unpromising is that the terrorist organisation is militarily (far) superior to the attacked state. This can be the case especially if the attacked state is no rich military super power.

Also, independently from the terrorist organisation's military capacity, a weak attacked state can simply be not capable to carry out a successful self-defence action because it lacks financial and personal resources or military know-how. In such case, the attacked state can seek help though and ask another state to exercise its right to collective self-defence.

Furthermore, the attacked state's self-defence action might have no chances of success because of geographic circumstances.

In all these cases where it would just make no sense to use defensive force against the terrorist organisation and thereby against the host state's territory because the armed attack will most likely not be repelled successfully but the host state's territorial integrity will be violated, the host state's territorial sovereignty prevails over the attacked state's right to self-defence. This is due to the fact that, firstly, a state's territorial sovereignty and integrity is a fundamental right in international law and has in general to be respected by every other state.[321] Secondly, and linked to the first point, it is one of the core principles of the UNC to avoid unilateral use or force against another state.[322] In a case where such force would pointlessly violate another state's territory although it might generally be covered by Art. 51 of the UNC, the territorial integrity should be given preference.

cc. Existence of convincing evidence

The third precondition is the existence of convincing evidence. The attacked state must have convincing evidence that the host state is unwilling or unable to address the terrorist activities on its territory.

This precondition serves to prevent a situation like the one the Bush government was in before and after the 2003 invasion in Iraq. The US invaded in Iraq to bring down Iraqi

[321] Vitzthum in Vitzthum *supra note* 21*,* para. 75; Shaw *supra note* 25*,* p.443
[322] Shaw *supra note* 25*,* p. 5; Bennett/Strug *supra note* 20*,* p.322-323.

dictator Saddam Hussein claiming that he was building weapons of mass destruction.[323] In February 2003, the American Foreign Minister at that time Colin Powell, presented satellite photographs, intercepts of conversations between Iraqi military officers and information from defectors that were supposed to prove that Saddam Hussein was producing nuclear weapons in the UN SC.[324] The presentation did not convince the SC and the US invasion was later called illegal by the Secretary General at that time, Kofi Annan.[325] The US invaded in Iraq in March 2003 nonetheless and captured Saddam Hussein in December 2003 but did not find any nuclear weapons.[326] Later, it was revealed that the surveillance and satellite photos as well as other documents that the US brought forward as evidence were faked, partly with the knowledge of high-ranking US government officials.[327]

This example shows how an invasion of a definitely not peaceful and democratic but nevertheless, sovereign state was based on faked and non-existing evidences and how that state was thrown into crisis through the invasion.[328] In order to prevent this from happening again, the clarified unwilling or unable-doctrine requires that the attacked state has convincing evidence that, first of all, the attacking terrorist organisation is really operating from the host state's territory. And secondly, that the host state is either unwilling to take actions or unable to do so.

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[323] David E. Sanger & John F. Burns, The New York Times, 'Bush Declares Start of Iraq War; Missile Said to Be Aimed at Hussein', 20.03.2003, available at: http://www.nytimes.com/2003/03/20/international/worldspecial/bush-declares-start-of-iraq-war-missile-said-to.html (accessed on: 28.11.2016).

[324] Stephen R. Weisman, The New York Times, 'Threats and responses: Security Council; Powell in U.N. speech, presents case to show Iraq has not disarmed', 06.02.2003, available at: http://www.nytimes.com/2003/02/06/world/threats-responses-security-council-powell-un-speech-presents-case-show-iraq-has.html (accessed on: 28.11.2016).

[325] Ewen MacAskill & Julian Borger, The Guardian, 'Iraq war was illegal and breached UN charter, says Annan', 16.09.2004, available at: https://www.theguardian.com/world/2004/sep/16/iraq.iraq (accessed on: 28.11.2016).

[326] Susan Sachs, The New York Times, 'Arrest by U.S. Soldiers — President Still Cautious', 15.12.2003, available at: http://www.nytimes.com/2003/12/15/international/middleeast/arrest-by-us-soldiers-president-still-cautious.html (accessed on: 28.11.2016).

[327] Stephen R. Weisman, The New York Times, 'Powell Calls His U.N. Speech a Lasting Blot on His Record', 09.09.2005, available at: http://www.nytimes.com/2005/09/09/politics/powell-calls-his-un-speech-a-lasting-blot-on-his-record.html (accessed on: 28.11.2005).

[328] See for this, e.g.: Ernesto Londoño, The Washington Post, 'Iraq, a decade after U.S. invasion, torn between progress and chaos', 19.03.2013, available at: https://www.washingtonpost.com/world/national-security/iraq-a-decade-after-us-invasion-torn-between-progress-and-chaos/2013/03/18/b286006c-8fdc-11e2-9abd-e4c5c9dc5e90_story.html?utm_term=.0a581015c39b (accessed on: 13.01.2017).

The legal basis of this precondition can be found, again, in the prohibition on the use of force, Art. 2 para. 4 of the UNC and the principles of state sovereignty and territorial integrity. All UN member states are obligated to respect these fundamental principles of international law. Especially in the case of terrorism or after a state has been attacked by terrorists it is important to ensure that the attacked state does not overreact and defends itself militarily only if it is sure that the host state is providing a safe haven for terrorists. Such an overreaction might be understandable in the heat of the moment but must in be avoided in cases. If the attacked state has no convincing evidence that the terrorists are operating from the host state's territory and the host state is indeed unwilling or unable, the host state's sovereignty and territorial integrity must prevail over the attacked state's security interests.

The evidence must of course be presented to and evaluated by the international community.[329] The right organ for that would most likely be the GA. If the international community is not convinced, as it was in the above mentioned case with Iraq, the attacked state is not allowed to use defensive force against the host state.

As there is no express standard of proof in international law [330] the strength of the conviction must be determined. Taking practical aspects like the time between the armed attack and the planned self-defence action or the collection of evidence into consideration, it is submitted that an absolute conviction of the international community is not required. This would be unrealistic and for the attacked state impossible achieve. In fact, a valuable level of certainty that leaves the international community without strong doubts muss be reached.[331]

dd. Awareness of the host state

The last precondition that must be fulfilled is a subjective one. It is required that the host state is aware of the help it is providing for the terrorist organisation.[332] If the host state does not know or cannot know that a terrorist organisation is based on its territory and

[329] Hannes Herbert Hofmeister, 'When is it right to attack so-called "host states"? An analysis of the necessary nexus between terrorists and their host states' (2007) 11 S. Y. B. I. L. 75 at 82 [Hofmeister].
[330] *Ibid.*
[331] Cf. § 288 of the German Code of Civil Procedure, which requires a similar level of conviction.
[332] Hofmeister *supra note* 329*,* p. 82-83.

commits an armed attack from there it must not be subject to the defensive force of the attacked state.[333] Again here, we must differentiate between an unwilling and an unable host state.

The situation is pretty straight forward in the unwilling-scenario. A host state that knowingly lets a terrorist organisation operate from its territory and does not put an end to these activities is well aware of its support for this organisation. In such a case this precondition is easily fulfilled.

The situation can be much more difficult in the unable-scenario. A state whose system has (even if only partially) collapsed or that is plagued by internal riots and tensions and that has, as a consequence, lost effective control over (parts of) its territory will most probably not know what exactly is happening in these non-controlled parts. So it might be the case that an unable state is not aware of the illegal use of its territory.

The ICJ held in *Corfu Channel* that in general a state is responsible for illegal activities happening on its territory.[334] However, it limited this principle by stating: '[…] it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors.'[335]

If that is true for a state that exercises effective control over its territory, it must be even truer for a state who has lost effective control over its territory.

Therefore, it can only be required that the unable state exercises its due diligence.[336] In the present context, this means, does the unable state know or does it must know that a terrorist organisation is using its territory.

So, in general it can be said that the unable state must inform itself as far as possible about what activities take place on its territory. But the determination of the exact content of the due diligence obligation that the unable state bears has to be made

[333] *Ibid.*
[334] *Corfu Channel supra note* 15 at p. 18.
[335] *Ibid.*
[336] Hofmeister *supra note* 329, p. 83.

specifically according to the particular facts and circumstances of each individual case.[337]

b. Interim Conclusion

Although this dissertation develops a definition of when a host state is actually unwilling or unable, this does not solve the tension between the right to self-defence of the attacked state and the territorial integrity of the host state. For this purpose the above mentioned four preconditions were proposed based on the existing rules and principles of international law. They help to strike the balance in each individual case. Only if all diplomatic measures were exhausted unsuccessfully, the self-defence action has good chances for success, the attacked state has convincing evidence against the host state and the host state is aware of its support for the terrorist organisation, the attacked state is allowed to exercise its right to self-defence against the terrorist organisation and violate in this way the host state's territorial integrity.

[337] Robert P. Barnidge, Jr., 'The Due Diligence Principle Under International Law' (2006) 8 Int'l Comm. L. Rev. 81 at 118.

E) Chapter 5: Conclusion

Summing up it can be said that even after the attacks of 9/11 it is still the prevailing view in international law that an armed attack must originate from a state or in the case of an attack by a non-state actor, the attack must be attributable to a state. The jurisprudence of the ICJ after the 9/11 attacks has proven that and this did not change through SC resolutions 1368, 1373 and 1438.

On the basis of this result, it can be established that the attack in Paris cannot be attributed to Syria under the current rules of attribution, no matter which test or doctrine one applies. Especially under the, by the ICJ still favoured, 'effective control-test' attribution to Syria is not possible. And that is exactly the (general) problem with the 'effective control-test', attribution is possible but only in theory. The standard that this test sets, is so high that in reality states were not and will not be able to proof effective control of a host state over a terrorist organisation. Irregular warfare poses just as grave a threat to international peace and security as traditional warfare. Therefore, the 'effective control-test' is extremely out of touch with reality and is not able to meet the challenges that today's terrorist attacks represent. Even though the 'overall control-test' makes attribution easier, it is also not the adequate answer to the new threat scenario that terrorist attacks are posing.

Since the attack is not attributable to Syria, there is no armed attack by Syria and thus, France has no right to self-defence against Syria.

Thus it is hardly surprising that, state practice of the last 15 years has shown that states do not apply the tests anymore. A lower threshold is applied, namely the Unwilling or Unable-Doctrine. The major problem with this doctrine is, however, that it is highly indeterminate. In its current form it has no clear legal content and no defined parameters. One reason for that is surely the lack of a general definition of 'armed attack' and a general definition of 'terrorism'.

Thus this dissertation provides a new approach in form of a clarified Unwilling or Unable-Doctrine. The underlying idea of the clarified Unwilling or Unable-Doctrine is that states are under due diligence obligations towards other states. This due diligence

obligations derive from the numerous international counter-terrorism obligations and vary according to the respective counter-terrorism obligation. The core counter-terrorism obligation in the present context is every state's obligation not to permit anyone intentionally to use its territory for acts that violate another state's rights.

Therefore, under the clarified Unwilling or Unable-Doctrine, a host state is unwilling if it, objectively has the means to comply with its due diligence obligations and in this way its international counter-terrorism obligations and subjectively, it makes the deliberate decision not to comply. As opposed to this, a host state is unable, in the meaning of the doctrine, if it obviously, that means without extensive research, does not have the means to comply with its due diligence obligations and in this way its international counter-terrorism obligations regardless of its subjective willingness to comply.

But even after the clarification of the doctrine, there is still a tension between the right to self-defence of the attacked state and the territorial integrity of the host state. This tension can be mitigated on the basis of four preconditions. These preconditions are, that the unilateral military action is a mean of last resort, the chances of success of the self-defence action are good, the attacked state must have convincing evidence that the host state is unwilling or unable and the host state is aware of its support for the terrorist organisation. Only if these four preconditions are met, the attacked state's right to self-defence prevails over the territorial integrity of the host state, which means that the attacked state is allowed to defend itself with unilateral military force against the host state.

One can definitely argue now that the modified Unwilling or Unable-Doctrine is still too indeterminate. In this respect it should be underlined that there will not be and there should not be a one-size-fits-all-solution.[338] Some of the parameters have to stay somewhat malleable in order to give the state the necessary flexibility and to make the doctrine applicable to each individual case.[339]

But apart from that, the current legal situation in which the standard of attribution is totally unclear, is really unsatisfactory. Non-state actors in general and terrorist

[338] Deeks *supra note* 151*,* p. 533.
[339] *Ibid.,* p. 547.

organisations in particular play an increasingly important role in the world. Thus, the international community would be well-advised to find an appropriate legal solution for the new rules of attribution now and not only after another horrible terrorist attack has occurred and our ability to make clear and lawful rules is diminished by panic and emotion.

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