

**WHEN IS IT RIGHT TO ATTACK SO-CALLED ‘HOST STATES’?  
AN ANALYSIS OF THE NECESSARY NEXUS BETWEEN  
TERRORISTS AND THEIR HOST STATES**

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This article deals with a highly topical question of international law: Under what circumstances can military force be used against uncooperative “host” states? It argues that both the traditional “effective control” approach and the new “harbouring doctrine” are inadequate to deal with the emerging threats of the new millennium, in particular international terrorism. While the “effective control” approach sets too high a threshold for attributing the activities of terrorists to the host state, the “harbouring theory” is too vague and therefore open to abuse. What is needed instead, is a more nuanced and objective approach that takes into account the dramatic changes in the nature of warfare. This article therefore develops an alternative legal framework which could guide the decisions of states on whether to use force in self-defence against “host states”.

I. INTRODUCTION

The attacks of 9/11 “discredit many of the conventional assumptions about national security and law enforcement”.<sup>1</sup> While traditionally regarded as a mere law enforcement problem, it is now evident that transnational terrorism will often necessitate some sort of military response.<sup>2</sup> The 9/11 attacks, after all, illustrate vividly that non-state actors now have the capacity “to project catastrophic force globally”.<sup>3</sup> Non-state actors thus present a significant threat to international peace and security.

Yet these non-state actors must also be supported from somewhere. Their funds, weapons and supplies must come from somewhere. More importantly, they must operate from somewhere. They need a “safe haven” from which to plan and launch their attacks. These safe havens can only be provided by states, so-called “host” states. Such “host” states have often obstructed efforts to suppress transnational terrorism. For instance, they frustrate international law “enforcement efforts by shielding terrorists from investigation, extradition and prosecution”.<sup>4</sup> Therefore, one of the central questions in the “war” against terror is, under what circumstances can military force be used against uncooperative “host” states? Generally speaking, the victim state can invoke the right to self-defence under Article 51 of the United Nations Charter (UN Charter), which, in turn, requires an armed attack by the host state. The concept of “armed attack” has, however, been fundamentally challenged in the aftermath of 9/11.

Hence, this article will first briefly review the concept of “armed attack” prior to 9/11. It will then analyse the impact of the 9/11 bombings on the concept of “armed attack”.

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<sup>1</sup> D. Jinks, “State Responsibility for the Acts of Private Armed Groups” (2003) 83 *Chicago Journal of International Law* at 91; see also H. Münkler, *Die neuen Kriege* (Berlin: Rowohlt, 2004).

<sup>2</sup> Jinks, *ibid.* at 91.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

In particular, it will examine under what circumstances private acts can be imputed to the host state and the effect 9/11 had on these criteria. A particular focus will be on the Bush Administration's "harbouring theory". Last but not least, it will argue that none of the criteria proposed to attribute to states the attacks of private groups is convincing. It will therefore develop a new and more objective legal framework which could guide the decisions of states on whether to use military force against "host" states.

## II. WHEN CAN AN ATTACK BY A NON-STATE ACTOR BE ATTRIBUTED TO THE "HOST STATE"?

### A. Attribution Prior to 9/11

Article 51 of the UN Charter gives states the right to use military force in self-defence if an "armed attack" occurs. The term "armed attack", however, is neither defined in the UN Charter, nor does any detailed discussion of the term appear in the records of the San Francisco Conference.<sup>5</sup> Hence the meaning of this phrase has generated a vast literature with little consensus on its definition.<sup>6</sup> Consensus existed only over the observation that armed attacks could only be committed by states. If private groups committed an attack, it had to be attributable to a state for Article 51 to apply. In that regard, private acts can be attributable to a state if it either exercised effective control over the private actors or adopted their acts as its own.

#### 1. Effective control

In the *Nicaragua Case*, the International Court of Justice (ICJ) held that the acts of the Nicaraguan contras could only be imputed to the US, if the latter had exercised *effective control* over the contras.<sup>7</sup> A similar test is included in Article 8 of the International Law Commission (ILC) Draft Articles on State Responsibility (2001),<sup>8</sup> which codify customary international law.<sup>9</sup> Article 8 provides:

The conduct of a person . . . shall be considered an act of a state . . . if the person is acting on the instructions of, or under the *direction or control* of that state . . .

Historically, the ILC has insisted that in order to meet this test it has to be proved '*in each and every case* that the person . . . had really been charged by the state organs to carry out that *specific act*'.<sup>10</sup>

This rigid approach appears to have been somewhat softened by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadic* case.<sup>11</sup> In *Tadic*, the ICTY

<sup>5</sup> See M. Herdegen, *Völkerrecht* (München: CH Beck, 2005) at 226-234.

<sup>6</sup> See C. Gray, *International Law and the Use of Force* (Oxford: Oxford University Press, 2004) at 108-120.

<sup>7</sup> *Military and Paramilitary Activities in and against Nicaragua* (Nicar.v. US) (Merits), 1986, ICJ 14 at paras. 103-115.

<sup>8</sup> The Articles on State Responsibility are based on an exhaustive review of state practice. See J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002).

<sup>9</sup> The principles laid down in the rules on state responsibility, such as attribution, can also be applied in the context of self-defence. Wolfrum and Philipp rightly argue that the rules on attribution are 'not only a matter of state responsibility but a *general mechanism* to establish whether a certain action has been undertaken by a given subject of international law. The attempt to create different forms of responsibility blurs the fact that state responsibility and acts of self-defence both serve as mechanisms to enforce compliance with obligations under international law'. See R. Wolfrum & C. Philipp, "The Status of the Taliban: Their Obligations and Rights under International Law" (2002) 6 *Max Planck Yearbook of UN Law* at 594.

<sup>10</sup> L. Condorelli, "The Imputability to States of Acts of International Terrorism" (1989) 19 *Israeli Yearbook of Human Rights* at 239.

<sup>11</sup> *Prosecutor v. Dusko Tadic*, ICTY Case No IT-94-1-A, (1999) 38 *ILM* at 1518.

argued that states need only exercise *overall control* over private armed groups:

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.<sup>12</sup>

Yet, it is unclear whether the “overall control” test established in *Tadic* has replaced the “effective control” test. A number of reasons suggest the retention of the “effective control” test<sup>13</sup>: First, the ICTY’s jurisdiction is limited to questions of individual criminal responsibility.<sup>14</sup> Moreover, when the ILC adopted Article 8 of the ILC Draft Articles in 2001, it deliberately chose to follow the stricter “effective control” test and not the “overall control” test.<sup>15</sup>

## 2. Adoption

Attribution is also possible if a state has acknowledged and adopted the conduct of the private party as its own,<sup>16</sup> as set out in Article 11 of the ILC Draft Articles on State Responsibility.<sup>17</sup> The drafting of this Article was largely motivated by the *Iran Hostages* case.<sup>18</sup> In that case the ICJ was faced with the question of whether the actions of the Iranian students in taking over the US Embassy and holding members of its staff hostage could be imputed to the Iranian government. The Court concluded that, although the militants initially acted on their own, Iran’s approval and perpetuation of the hostage crisis transformed the acts of the private militants into those of the state.<sup>19</sup>

## 3. Critical analysis

The high threshold tests for the attribution of private terrorist acts to states, laid down in Articles 8 and 11, make it almost impossible for a state to use force in self-defence in response to terrorist attacks.<sup>20</sup> Indeed, the conditions of these two articles are too rigid for states to protect themselves effectively against private attacks.

For instance, the ICJ’s act-by-act approach to de facto agency,<sup>21</sup> also sketched out in Article 8, requires evidence of state control of *each and every act* carried out by non-state actors before the conduct can be imputed to the state.<sup>22</sup> ‘This approach risks mistaking

<sup>12</sup> *Tadic, ibid.* at 1541, para. 117 and 1546, para. 145.

<sup>13</sup> See also J. Crawford & S. Olleson, “The Nature and Forms of International Responsibility” in M. Evans (ed.), *International Law* (Oxford: Oxford University Press, 2003) at 456-457.

<sup>14</sup> And not state responsibility or jus ad bellum; see J. Crawford, *supra* note 8 at 110-113.

<sup>15</sup> J. Crawford, *ibid.* Last but not least, even the ICTY employs the overall control test *only* in very limited circumstances, i.e. in cases of organised and hierarchically structured (para-) military groups. In all other cases the ICTY, too, employs the “Nicaragua formula”—see *Tadic, supra* note 12, at 1542, para. 120.

<sup>16</sup> As early as 1758, Emmerich de Vattel argued that “if the nation, or its ruler, *approve and ratify* the act of the citizen, it takes upon itself the act, and may then be regarded by the injured party as the real author of the affront”: E. De Vattel, *The Law of Nations*, Book II, 74.

<sup>17</sup> Article 11 of the *ILC Draft Articles on State Responsibility* (2001) reads: “Conduct 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”.

<sup>18</sup> *United States Diplomatic and Consular Staff in Tehran Case* (US v. Iran), 1980 ICJ 3, para. 91.

<sup>19</sup> *Ibid.*, para. 73.

<sup>20</sup> As well as in the *Nicaragua Case, supra* note 7, and the *Iran Hostages Case, ibid.*, note 19.

<sup>21</sup> *Nicaragua Case, supra* note 7, paras. 109-115.

<sup>22</sup> S. Malzahn, “State Sponsorship and Support of International Terrorism: Customary Norms of State Responsibility” (2002-03) 26 *Hastings International and Comparative Law Review* at 101.

the trees for the forest with the effect that states can get away with sponsoring terrorists so long as they do not direct specific acts. Moreover, it is often difficult to collect evidence of state control of terrorists, who operate in circumstances of secrecy and concealment'.<sup>23</sup> With regard to Article 11, it is highly unlikely that a state would adopt an armed attack by private actors as its own, thus running the risk of making itself the object of a counterattack.<sup>24</sup>

## B. *The Post 9/11 Situation*

### 1. *Attribution—still necessary after 9/11?*

Following the 9/11 attacks, some commentators argued that attribution to a state had become an obsolete concept,<sup>25</sup> and that international law has evolved to recognise that private actors (without any state nexus) can commit armed attacks. This view, however, is not convincing.<sup>26</sup> The better approach seems to be to retain the notion that private actors cannot commit “armed attacks” within the meaning of Article 51. Both state practice and the dangers inherent in such a wide interpretation of armed attack suggest the retention of the traditional “state” element. The findings of the ICJ in *Palestinian Wall*, too, support this conclusion.<sup>27</sup>

Therefore, in order to qualify as an “armed attack”, private conduct still needs to be attributed to a state. The attribution requirement thus remains an essential part of the concept of “armed attack”. The following chapter will therefore analyse the impact the events of 9/11 had on these criteria.

### 2. *“Harbouring”*

The collective response to the World Trade Center bombings seems to suggest that the threshold for attribution has been lowered substantially in the aftermath of 9/11. ‘*Harbouring*’ a non-state actor—it is now claimed by the Bush administration<sup>28</sup>—is a sufficient basis for attributing private acts to a state.

(a) *Arguments*: Apologists of this view<sup>29</sup> argue that states’ reactions to the 9/11 attacks shows that the threshold for attribution has been lowered significantly. Merely harbouring non-state actors, it is argued, is now sufficient to attribute the conduct of these groups to the “host” state. In support of their view, they point to several factors.

<sup>23</sup> *Ibid.* at 101.

<sup>24</sup> For example, even the Taliban refrained from adopting Al-Qaeda’s conduct as their own, see C. Stahn, “International Law at the Crossroads, The Impact of September 11” (2002) 62 *Zeitschrift für ausländisches öffentliches Recht und Rechtsvergleichung* at 216-221.

<sup>25</sup> See, e.g., C. Stahn, “The Right to Self-Defence, Article 51 (1/2) of the UN Charter, and International Terrorism” (2003) 27 *Fletcher Forum of World Affairs* at 35; C. Greenwood, “International Law and the Preemptive Use of Force: Afghanistan, Al-Qaeda, and Iraq” (2003) 4 *San Diego International Law Journal* at 17; E. Myjer and N. White, “The Twin Towers Attack: An Unlimited Right to Self-Defence?” (2002) 7 *Journal of Conflict and Security Law* at 5-17.

<sup>26</sup> For more details on this interesting question, which cannot be discussed here due to space limitations see S. Murphy, “Self-Defence and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?” (2005) 99 *American Journal of International Law* at 62-76, and C. Wandscher, *Internationaler Terrorismus und Selbstverteidigungsrecht* (Berlin: Duncker & Humblot, 2006).

<sup>27</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, para. 139, online: <<http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>>.

<sup>28</sup> National Security Strategy of the United States, September 2002 at 5, online: <<http://www.whitehouse.gov/nsc/nss.pdf>>.

<sup>29</sup> See, e.g., S. Ratner, “*Ius ad Bellum* and *Ius in Bello* after September 11” (2002) 96 *American Journal of International Law* at 906; M. Byers, “Terrorism, the Use of Force and International Law after 11 September” (2002) 51 *International and Comparative Law Quarterly* at 409-410.

First, such an interpretation accords with the legal arguments advanced by the US in the aftermath of 9/11. Only hours after the attack, the Bush administration asserted that it “would make no distinction between the terrorists who committed these acts and those who harbour them”.<sup>30</sup> In addition, the Joint Resolution of Congress authorising force did so against states which “planned, authorized, committed or aided the terrorist attacks . . . or *harboured* such organizations”.<sup>31</sup> The international community’s support for the ensuing military operations in Afghanistan also seems to indicate a growing acceptance of the harbouring requirement.<sup>32</sup>

Second, only the harbouring theory gives adequate consideration to the essential role which host states play in 21<sup>st</sup> century. Truly many terrorist networks are financially independent from states these days. Yet, their existence nevertheless depends on a safe haven, where they can seek refuge and plan further attacks. By focusing on this crucial aspect, the “harbouring theory” adequately confronts the challenges of the 21<sup>st</sup> century. But can a state really be attacked with military force, simply because it harbours terrorists?

(b) *Critical analysis*: So far, no precise definition of the term ‘harbouring’ has been given. As regards the objective element (‘the actus reus’<sup>33</sup>), it must be asked for instance, in what way ‘harbouring’ is to be distinguished from ‘tolerating’ or ‘encouraging’ non-state actors. Even more confusing is the fact, that it is sometimes claimed that a state must ‘harbour *and* support’ terrorists, in order to become a legitimate target.<sup>34</sup> Sometimes, however, it appears to be sufficient that a state *either* ‘supports *or* harbours’ terrorists.<sup>35</sup> It is, therefore, not clear whether these elements apply cumulatively or alternatively.

The situation regarding the subjective element (‘the mens rea’) is equally unclear. Sometimes it is argued that a state must “willingly” harbour terrorists in order to attribute their acts to the state. Sometimes it seems to be sufficient that the host state “knowingly”<sup>36</sup> harbours non-state actors. Yet, it makes a big difference whether a state merely knows that something will happen, or whether it actually wants something to happen.

This lack of a precise definition could prove dangerous because it may open the road to abuse as will be explained in the next paragraph.

Because the definition of “harbouring” is so imprecise, it creates a potentially broad and uncertain exception to the UN Charter’s proscription on the use of force. For instance, it could be argued that a state “harbouring a group of democratic insurgents that attempts to assassinate a brutal dictator in another state has committed an armed attack on the dictator’s state, thus justifying an armed response against the ‘harbouring’ state”.<sup>37</sup> Moreover, it must be borne in mind that many international terrorist networks operate cells in different states. Based on the approach outlined above, all those ‘host’ states would become potential targets: The harbouring doctrine proposed by the Bush administration makes no distinction between a state that harbours one terrorist who poses little ongoing threat, and another state that

<sup>30</sup> Statement by the President in his Address to the Nation (11 September 2001), online: <<http://news.bbc.co.uk/1/hi/world/americas/1539328.stm>>.

<sup>31</sup> (2001) 40 *ILM* at 1282.

<sup>32</sup> See, e.g., Nato Press Release 124, 12 September 2001, online: <<http://www.nato.int/docu/pr/2001/p01-124e.htm>>.

<sup>33</sup> This term is borrowed from criminal law.

<sup>34</sup> See for instance the “Letter from the President to the Speaker of the House of Representatives”, 20 September 2002, online: <<http://www.whitehouse.gov/news/releases/2002/09/20020920-4.html>>.

<sup>35</sup> See for example the “Authorization for the Use of Force; ‘[T]he President is authorized to use all necessary and appropriate use of force against those nations . . . he determines planned, authorized, committed *or aided* the terrorist attacks . . . *or harboured* such organizations”, *supra* note 31 at 1282.

<sup>36</sup> See National Security Strategy of the United States, September 2002 at 5, online: <<http://www.whitehouse.gov/nsc/nss.pdf>>.

<sup>37</sup> G. Travalio, “Terrorism, International Law and the Use of Military Force” (2000) 18 *Wisconsin International Law Journal* at 155.

hosts a highly organized terrorist network which continues to commit attacks.<sup>38</sup> In order to avoid the uncertainty of having multiple targets, it is therefore essential to refine this doctrine.<sup>39</sup> Such a refined approach must provide a more specific basis for identifying those countries whose assistance in terrorist activity makes it truly necessary to use military force.<sup>40</sup> If this is not done, there will always remain a danger that states may abuse the extended right of self-defence as a means of pursuing their own strategic interests (e.g. regime change).<sup>41</sup>

In short, it cannot be in the interests of the international community to make the category of “armed attack” under Article 51 so broadly and potentially open-endedly, such that nations “harbouring”<sup>42</sup> non-state actors who commit violent acts in other states will be considered to have made an attack on the target state.

### C. *Inadequacy of the Current Legal Framework*

None of the approaches outlined above provides an adequate legal framework. The pre-9/11 “effective control/adoption” approach sets too high a threshold for attributing the activities of terrorists to the host state. The post-9/11 “harbouring theory” promulgated by the Bush administration, on the other hand, is too vague and therefore open to abuse.

Thus, policymakers need a new framework to help them decide when military action against non-state actors and their host states is legal. The next part of this article will therefore develop a new approach which could guide the decisions of states on whether to use military force in self-defence when faced with lethal terrorist attacks.

## III. A NEW APPROACH: A REFINED “HARBOURING” THEORY

This part of the article proposes a new normative framework in the form of a refined “harbouring” theory, in the conviction that the paradigm outlined here will lead to greater peace and stability and reduce the threat of terrorist attacks. It will argue that while a refined “harbouring” element should be retained, additional conditions must be met in order to attribute the attacks of a non-state actor to the “host” state.

### A. *Theoretical Underpinnings*

The theoretical foundation of a right to use force against the host state can be derived from an analogy to Article 3(f) of the UN Resolution 3314 on the Definition of Aggression.<sup>43</sup> According to this Article,

the action of a State in allowing its territory, which it has placed at the disposal of *another State*, to be used by that *other State* for perpetrating an act of aggression against a third State, qualifies as an act of aggression.<sup>44</sup>

When this provision was drafted in the early 1970s, states were still regarded as the main international actors. Back then, only states had the military power to seriously threaten

<sup>38</sup> G. Travalio & J. Altenburg, “Terrorism, State Responsibility and the Use of Military Force” (2003) 4 *Chicago Journal of International Law* at 117.

<sup>39</sup> A. Garwood-Gowers, “Self-defence against Terrorism in the post 9/11 World” (2004) 4 *QUT Law and Justice Journal* at 16.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> As understood by the Bush Administration.

<sup>43</sup> General Assembly Resolution 3314 (Definition of Aggression), 14 December 1974.

<sup>44</sup> *Ibid.*, Article 3(f).

international peace and security. Hence Article 3(f) referred to states only. Yet, the attacks of 9/11 illustrate starkly that non-state actors now have the organisational capacity and political will to project catastrophic force globally too.<sup>45</sup> Some terrorist organizations, for example, are as well-funded as some small states. The individual worth of Osama bin Laden alone is estimated to be hundreds of millions of euros.<sup>46</sup> With weapons of mass destruction readily available on the international arms market to the highest bidder,<sup>47</sup> terrorists no longer have to search for ways of spending their money. Their access to weapons of mass destruction as well as their substantial financial resources, combine to pose a threat much greater than that posed by the militaries of many states. Hence it can be argued, that if Article 3(f) was drafted today it would probably cover the “provision of territory to *non-state actors*” as well.

In sum, it can be argued that in analogy to Article 3(f) “the action of a State in allowing its territory, which it has placed at the disposal of a *non-state actor*, to be used by that *non-state actor* for perpetrating an act of aggression against a third State”, should qualify as an act of aggression by the host state. Yet, in order to provide states with a clear guideline on whether to use military force in self-defence against a terrorist attack, this formula requires further refinement.

#### B. Material Element: “Harbouring”—A Different Approach

The host state must provide support in the form of “harbouring” the non-state actors, for instance, by providing a safe haven for them, even though it is aware of the fact that the non-state actors use the territory provided to launch an attack against another state.<sup>48</sup> Most non-state actors crucially depend on the promise of a safe harbour from which they may plan future attacks.<sup>49</sup>

In order to avoid an “overapplication” and potential abuse of this still rather broad concept of “harbouring”, it is necessary to define clearly “*whom*” a state must harbour in order to become the legitimate target of an attack. This article proposes that only non-state actors that either have already violated international law or have explicitly declared their intent to do so,<sup>50</sup> should qualify as potential subjects that “can be harboured”.<sup>51</sup> Without such a restrictive definition, the concept of harbouring would be too open-ended, risking the possibility of abuse, which would not be in the interest of the international community. Hence a restrictive definition of “harbouring”, as outlined above, is necessary.

<sup>45</sup> D. Jinks, *supra* note 1 at 91.

<sup>46</sup> See D. Ackermann, “The Cost of Being Osama Bin Laden”, *Forbes* (14 September 2001), online: <<http://www.forbes.com/2001/09/14/0914ladenmoney.html>>.

<sup>47</sup> See M. Sieff, “Russian ‘Kleptocracy’ risks Spread of Nuclear Weapons”, *Washington Times* (30 September 1997) at A3, and B. Slavin, “Nuclear Weapons Threat Lurks in Russia: Poorly Paid Guards are a Security Concern”, *USA Today* (24 November 1998) at A 20.

<sup>48</sup> This subjective element will be discussed in detail below, see Part III.E.

<sup>49</sup> And perhaps even more important, where they are safe from persecution and extradition.

<sup>50</sup> Al Qaeda’s repeated public statements, for example, make clear that it would carry out more attacks on the scale of September 11, if the opportunity arose, see for example, Al Qaeda Vize ruft zu Anschlägen und Boykott auf, *Der Spiegel Online*, online: <<http://www.spiegel.de/politik/ausland/0,1518,404404,00.html>>. See also the statement issued by Osama bin Laden entitled “Ladenese epistle: Declaration of War” in August 1996, an English translation of which is available online at <<http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A4993-2001Sep21>>.

<sup>51</sup> As early as 1625 Hugo Grotius argued that “a community, or its rulers, may be held responsible for *refuge afforded to those who have done wrong elsewhere*”: H. Grotius, *The Law of War and Peace*, Book II, translated by J. Scott (Washington: Carnegie, 1925), Chapter 21, section 2.

### C. *The Causal Link: The “Conditio Sine Qua Non” Standard*

An additional safeguard against abuse of this still rather broad concept of “harbouring” is the requirement of a *strict causal link*. State support (*i.e.* harbouring) can only amount to an armed attack within the meaning of Article 51, if it substantially contributed to the attack by the non-state actor, which can be determined by applying the “*conditio-sine-qua-non*” test, which focuses on the causal link between state support and the terrorist attack: Only if state support (*i.e.* harbouring) is an essential precondition for the attack, can the attack be imputed to the supporting state.<sup>52</sup>

The existence of such a causal link justifies attributing the acts of private armed groups to the supporting state, since the latter practically decides whether or not the attack will take place. Should it withdraw its support, then the attack will not happen. Hence, it seems justified to hold the state fully responsible and to impute the acts of private armed groups. On the other hand, if the attack would have occurred irrespective of any state support, then the state cannot be considered to have committed an armed attack within the meaning of Article 51 since its support was not the decisive causal factor facilitating the attack.

### D. *Existence of Clear and Compelling Evidence*

A further safeguard against abuse of the still rather wide concept of “harbouring” is the high standard of proof required. States intending to use force against “host states” should not proceed unless they have ascertained through clear and compelling evidence that the host state is actually harbouring terrorists who have already conducted an attack or have definite plans to conduct an attack. Even though no express standard of proof exists in public international law, “clear and compelling” seems to be an acceptable standard.<sup>53</sup> This standard was articulated by the US several times in the aftermath of the 9/11 attacks.<sup>54</sup> For example, the US ambassador to the UN cited this standard in his notification to the Security Council that the US was acting in self-defence when attacking the Taliban.<sup>55</sup> Yet instead of criticising the subsequent military operations, the UN Security Council endorsed them, thereby signalling its acceptance of the “clear and compelling” standard.<sup>56</sup>

Finally, the evidence must also be presented to the international community so that states may not make empty claims based on mere suspicion or pretence.

### E. *Subjective Element*

Last but not least, the host state must be aware that its support contributes to the commission of an attack against another state. This means that a state providing support (*i.e.* harbouring)

<sup>52</sup> Put differently, only if the attack by a non-state actor would have been impossible without the provision of a safe haven, is it justified to impute the attack to the state.

<sup>53</sup> See for example the statement made by Nato Secretary General Lord Robertson on 2 October 2001, online: <<http://www.nato.int/docu/speech/2001/s011002a.htm>>. See also M.E. O’Connell, “Evidence of Terror” (2002) 19 *Journal of Conflict and Security Law* at 22-28; M. Schmitt, “Deconstructing October 7<sup>th</sup>: A Case Study in the Lawfulness of Counterterrorist Military Operations”, in: G.L. Beruto & M. Schmitt (eds.), *Terrorism and International Law* (San Remo: International Institute of Humanitarian Law/Marshall Center Publications, 2002) at 39, 47.

<sup>54</sup> For example when it presented evidence to Nato, which implicitly endorsed this standard: See statement by Nato Secretary General Lord Robertson, *supra* note 53.

<sup>55</sup> Letter from John Negroponte, Permanent Representative of the United States of America to the United Nations, 7 October 2001, online: <<http://www.un.int/usa/s-2001-946.htm>>.

<sup>56</sup> See, *e.g.*, Security Council Resolution 1378 (14 November 2001), Security Council Resolution 1383 (6 December 2001) and Security Council Resolution 1386 (20 December 2001); see also Schmitt, *supra* note 53, at 39, 47.

to private actors, will not be exposed to military action if it is unaware that its support is being used for illegal purposes, such as committing an armed attack against another state.

However, a state cannot argue that it was unaware of the illegal use of its territory by a group of private actors if it fails to exercise *due diligence*.<sup>57</sup> The central element of due diligence is fault; while due diligence requires that a state either has knowledge or should have knowledge of the acts concerned, there is controversy as to whether due diligence also requires an element of opportunity or ability.<sup>58</sup> While early scholars such as Pufendorf presumed the general capability of heads of state to prevent “what is openly and frequently done by their subjects”,<sup>59</sup> this absolutist view was rightly rejected by later scholars such as Grotius<sup>60</sup> and De Vattel,<sup>61</sup> on the basis that

it is impossible for the best governed state... to regulate at will all the acts of its subjects and to hold them on every occasion to the most exact obedience. It would be unjust *to impute* to the nation... all the acts of its citizens.<sup>62</sup>

Due diligence by a state thus requires that a state, upon obtaining knowledge of non-state actors using its territory for illegal purposes, has the *opportunity to prevent* such acts from resulting in armed attacks. This requires the state to possess the *capability* to prevent such acts—a requirement that may be difficult to satisfy where “failed states” are concerned.

#### F. Conclusion

The criteria outlined above effectively limit the inherently broad concept of “harbouring”. These criteria, if adhered to, will eliminate the ability of states to use the “harbouring theory” as a pretext for regime change or unwarranted military action. On the other hand, they will signal that the international community is willing to deal effectively with and respond adequately to new threats of the 21<sup>st</sup> century.

#### IV. CONCLUSION: “TO HARBOUR OR NOT TO HARBOUR?”

The military response to the 9/11 attacks undoubtedly had an impact on international law. Mainly, “some elasticity”—in time, place and space—was imported into the legal understanding of self-defence. In this regard, the collective response to those terrorist attacks can be constructed as a jurigenerative event<sup>63</sup> that challenged a traditional principle of international law, namely that order is to be pursued through peace. “Instead, and in particular regarding anti-terrorist action, there is now a sense that order is best pursued through force.”<sup>64</sup> With this as a new *grundnorm*, some countries are claiming additional entitlements regarding the use of force.<sup>65</sup> The most aggressive expansionary entitlement—the Bush

<sup>57</sup> *Corfu Channel Case* (UK v. Albania), 1949 ICJ 4.

<sup>58</sup> This is particularly important in the case of so-called ‘failed states’ which are often unable to prevent the use of their territory by non-state actors. In these cases the opportunity (capability) element is lacking and attribution is not possible.

<sup>59</sup> S. Pufendorf, *The Law of Nature and Man*, Book II, translated by W. Oldfather (Oxford: Oxford University Press, 1934), Chapter 16, section 9.

<sup>60</sup> “... rulers may be held responsible for a crime of a subject if they know of it and do not prevent it *when they could and should prevent it*”: Grotius, *supra* note 54, Chapter 21, section 2.

<sup>61</sup> E. De Vattel, *The Law of Nations*, Book II, translated by J. Chitty (Philadelphia: Philadelphia University Press, 1849), Chapter 6, section 73.

<sup>62</sup> *Ibid.*

<sup>63</sup> M. Drumbl, “Self-Defence and the Use of Force”, in D. Kinsella & C. Carr (eds.), *The Morality of War* (Boulder: Lynne Rienner, 2006) at Chapter 5, 47.

<sup>64</sup> Or even war, *ibid.*

<sup>65</sup> *Ibid.*

Doctrine—even posits that states now have the right to attack other states which “*harbour*” terrorists.

This article has sought to demonstrate that neither the Bush administration’s “harbouring theory” nor any other approach employed so far provides an adequate legal framework that can cope with the emerging threats of the 21<sup>st</sup> century, in particular international terrorism. While the “effective control/adoption” approach sets too high a threshold, the “harbouring” theory is far too vague and therefore open to abuse. The latter in particular risks opening up a Pandora’s Box.

What is needed instead is a more nuanced and refined approach. While such a new framework must allow for a more flexible approach than the strict “effective control/adoption” theory it must also lay down more objective criteria than the vague “harbouring” theory of the Bush administration. This article has therefore sought to develop four criteria which could guide the decisions of states on whether to use military force in self-defence in the face of a prospective catastrophic. These include:

1. Material element: A refined definition of “harbouring”
2. Causal link: The “condition sine qua non” standard
3. “Clear and compelling” evidence
4. Subjective element

These guidelines should both be able to help counter contemporary threats, such as international terrorism, and at same time avoid the open-ended and ultimately anarchic resort to force too quickly. They could also form the basis of a new normative framework that could gain international consensus.<sup>66</sup>

<sup>66</sup> The criteria developed are merely a starting point for a new framework. While they are certainly imperfect, they represent the main components that should be included in such a new framework.