The effect of the Harboring Doctrine on the rules of attribution of non-state actors to states: back to square one?
## Table of Contents

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Subject</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td><strong>Research Proposal</strong></td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>1.1. Problem Indication</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>1.2. Research Goal</td>
<td>6</td>
</tr>
<tr>
<td></td>
<td>1.3. Research Question</td>
<td>6</td>
</tr>
<tr>
<td></td>
<td>1.4. Delineation</td>
<td>8</td>
</tr>
<tr>
<td>2</td>
<td><strong>State responsibility</strong></td>
<td>9</td>
</tr>
<tr>
<td></td>
<td>2.1. State Responsibility: an Overview</td>
<td>9</td>
</tr>
<tr>
<td></td>
<td>2.2. Attribution</td>
<td>12</td>
</tr>
<tr>
<td></td>
<td>2.3. Jus ad Bellum and Jus in Bello</td>
<td>13</td>
</tr>
<tr>
<td></td>
<td>2.3.1. the Relation between Jus Ad Bellum and Jus In Bello</td>
<td>14</td>
</tr>
<tr>
<td></td>
<td>2.3.2. Historical development</td>
<td>15</td>
</tr>
<tr>
<td></td>
<td>2.3.3. the Distinction of Jus Ad Bellum and Jus In Bello</td>
<td>16</td>
</tr>
<tr>
<td></td>
<td>2.3.4. Legal Basis</td>
<td>16</td>
</tr>
<tr>
<td></td>
<td>2.3.5. Concluding Remarks</td>
<td>18</td>
</tr>
<tr>
<td>3</td>
<td><strong>Evolution of Attribution</strong></td>
<td>20</td>
</tr>
<tr>
<td></td>
<td>3.1. the Tehran Hostages Case</td>
<td>20</td>
</tr>
<tr>
<td></td>
<td>3.2. the Nicaragua Case</td>
<td>21</td>
</tr>
<tr>
<td></td>
<td>3.3. the Tadic Case</td>
<td>23</td>
</tr>
<tr>
<td></td>
<td>3.4. the Armed Activities Case</td>
<td>24</td>
</tr>
<tr>
<td></td>
<td>3.5. the Bosnian Genocide Case</td>
<td>25</td>
</tr>
<tr>
<td></td>
<td>3.6. Concluding Remarks</td>
<td>26</td>
</tr>
<tr>
<td>4</td>
<td><strong>Harboring Doctrine</strong></td>
<td>28</td>
</tr>
<tr>
<td></td>
<td>4.1. the Bush Doctrine</td>
<td>28</td>
</tr>
<tr>
<td></td>
<td>4.2. the Harboring Doctrine</td>
<td>31</td>
</tr>
</tbody>
</table>
4.2.1  Harboring or Supporting  34
4.2.2  the Definition of Terrorism  35
4.3  the Legal Rationale behind the Harboring Doctrine  35

5  Evolvement into Customary law  38
5.1.  International Custom  38
5.1.1.  Definition of International Custom  38
5.1.2.  Comments on the ICJ’s Case Law  39
5.2.  Recent State Practice and Opinio Juris  42
5.2.1.  Articles on State Responsibility  43
5.2.2.  the Israel/Lebanon Conflict  43
5.2.3.  Other Indications of Evolvement into Customary Law  46
5.3.  Concluding Remarks  47

6  Conclusion  48

Bibliography  52
Chapter 1  Research proposal

1.1.  Problem indication

After the attacks on the Twin Towers of 11 September 2001, the United States attributed the acts of al Qaida to the Taliban regime in Afghanistan. After these attacks the United States developed a foreign policy consisting of various principles, this foreign policy was named after the incumbent president, the Bush Doctrine. One of these principles is on attribution of actions of non-state actors to a state and is called the “Harboring Doctrine”, for this test of attribution it is sufficient that a state merely harbors terrorists, this can then lead to the United States to attack preemptive.

The interpretation of the legal concept of attribution of actions of non-state actors to a state can be highly important for *jus ad bellum*, which is the law governing resorting to war, and *jus in bello*, also known as international humanitarian law, which is the law governing hostilities. In practice there can be various consequences for attribution, attribution is important *inter alia* for responding with force to attacks through self-defense, however acts of non-state actors can also constitute an international wrongful act of a state and hence, reparation can be demanded by international law through restitution, compensation or satisfaction.¹

Some recent conflicts where attribution has been important are the following; the conflict between Georgia and Russia where acts of South-Ossetian rebels might be attributable to Russia², when they took hostages and looted under Russian supervision. Another conflict is the one between Hezbollah and Israel where acts of Hezbollah were attributed to Lebanon, which led Israel to invoke self-defense against that Lebanese state. The assassination of the Archduke of Austria-Hungary in Sarajevo by the Black Hand, which led Austria-Hungary to declare war to Serbia and the consequences of that attribution can also be mentioned to show the importance of well-developed rules of attribution.³

Already in 1984 the International Court of Justice (hereinafter the ICJ) gave a landmark decision on attribution of non-state actors, in this case Nicaragua sought to attribute the human rights violations of the *contras* to the United States. Also the International Criminal Tribunal for the former Yugoslavia

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¹ Article 34 of the Articles on State Responsibility.
³ Williamson 1988, p. 806.
(hereinafter the ICTY) gave a landmark decision in *Tadic*, here the rules of attribution were used to internationalize a conflict which established jurisdiction for the ICTY. Both tests have met a considerable amount of criticism for many reasons; however, this has not stopped other courts, like the European Court of Human Rights (hereinafter the ECtHR), from developing their own standards for attribution.

The last decade has seen a lot of turmoil and conflicts, and the possibility exists that a new test of attribution has emerged with it, which might already have evolved into international custom. Briefly after the attribution of the Al Qaeda attacks to the Afghan government some authors already stated that the Harboring Doctrine had turned into instant custom⁴, while others suggested that the requirement of attribution can be dropped altogether in cases of self-defense against non-state actors which are situated in weak states.⁵ Yet other authors state that from an operational perspective, when looking at military resources and political will, even the United States themselves will not be able to maintain Bush Doctrine, making it a dead letter.⁶

Recent developments in attribution have also been noted by Judge Kooijmans in his Separate Opinion in the *Case Concerning Armed Activities on the Territory of the Congo* (hereinafter the *Armed Activities Case*), in his Separate Opinion he points to UN Security Council Resolution 1368 and 1373, both Resolutions recognize the inherent right of self-defense without making reference to a state, this means that self-defense can also be used against non-state actors without the need to attribute their acts to a state.⁷

Nevertheless, what is certain is that the use of force used after the attacks of September 11 and the legal justification of that force has left a mark on the body of international state responsibility and its rules on attribution. This also means the world currently is in a situation of legal uncertainty since it is not clear whether or not a new rule on state responsibility for non-state actors has emerged. As previous examples have shown, it is has serious legal implications for a wide array of situations to know if actions of non-state actors can be attributed to a state or not.

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⁴ Langille 2003, p. 145.
⁵ Reinold 2011, p. 257.
1.2. **Research goal**

The goal of this research is to investigate what the impact of the Harboring Doctrine is on the legal body of international state responsibility and especially on the doctrine of attribution of actions of non-state actors to states. Both the ICJ and the ICTY have stressed in their case law that rules on attribution should not differ unless there might be a *lex specialis*, therefore the assessment of the influence of the Harboring Doctrine will involve *jus ad bellum* as well as *jus in bello*. However, the relation between the areas of *jus ad bellum* and *jus in bello*, is very peculiar and the “dichotomy” between them will receive special attention.

1.3. **Research question**

Based on the foregoing the central research question of this thesis will be the following:

*Has the Harboring Doctrine emerged as the new international custom on attribution of non-state actors to states, by doing so, diminishing older tests of attribution of the ICJ and the ICTY?*

To answer this question thoroughly the following sub questions must be discussed:

- The first sub question will investigate what the relation of attribution towards the body of international state responsibility is. Investigated will be what sort of acts are attributable to a state, what is attribution and what is state responsibility. This sub question will also look into the distinction and autonomy between *jus ad bellum* and *jus in bello* and the effects that this difference may have on rules of attribution. This is important because it seems the Harboring Doctrine regulates *jus ad bellum* only.

- The second sub question will look into the evolvement of the customary rules through the decisions of the ICJ and the ICTY. This will explain the background of attribution and what the influential courts think these backgrounds ought to be. This helps to assess if the Harboring Doctrine actually is a “new” doctrine. More importantly it will explain the effect *jus ad bellum* and *jus in bello* have on rules of attribution.
A sub sub question will discuss the relation of the Harboring Doctrine with the other tests of attribution. This is important because the Harboring Doctrine might be a simple evolvement of the older tests, or the older tests might support the Harboring Doctrine. Then there could be no such thing as an evolvement of a new rule of attribution. This is explained by the ICJ, stating that breaches of a rule should in general be “treated as breaches of that rule, not as indications of the recognition of a new rule”. Therefore the United States could be a pertinent objector to the older tests of attribution.

The third sub question will investigate what the Bush Doctrine is and also what its intellectual background is, this intellectual background is important for the evolvement of state practice into international custom. The legal rationale of the Bush Doctrine is very influential on the Harboring Doctrine. The Harboring Doctrine is an element of this doctrine and its scope, background and legal rationale will be researched more specifically.

The fourth sub question will look into the evolvement of customary international law in relation to the Harboring Doctrine.

First and foremost there will be looked into the status of international customary law itself. The requirements of usus and opinio juris, that need to be met for the Harboring Doctrine to become international customary law will be discussed. Especially since these requirements are not very clear and still under development.

There will be researched whether or not there exists a coherent state practice, attention will also be given to the support that states have given to the Harboring Doctrine. This research also includes the question whether or not there is diverging state practice. This means that state practice that follows a different path on attribution will be discussed as well, since this is important for the possible emergence of a new customary rule as well because it can prove there is or is no consensus.

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8 ICJ 27 June 1986 (Case Concerning Military and Paramilitary Activities in and Against Nicaragua), §186.
Investigated will be if there exists usus and opinio juris. This sub sub question will also investigate if states see the Harboring Doctrine only as a temporary solution or whether they see it as a maintainable doctrine, especially since the Harboring Doctrine may set a too low standard and since it has already received significant criticism.\(^9\) A sub sub question will investigate what the influence is of “terrorism” in the Harboring Doctrine on customary law of attribution, there will be researched if the Harboring Doctrine also includes non-terrorist acts.

1.4. **Delineation**

What will not be investigated in this research are the consequences of a lenient approach of attribution. Even though these consequences are highly important, this thesis will only investigate the customary state of attribution of state responsibility of non-state actors as it is today. Therefore this paper will not be on how the international law ought to be. *Jus post bellum* will not be specifically investigated either in this thesis, *jus post bellum* is heavily influenced by findings of *jus ad bellum* or *jus in bello*, therefore assessment of only *jus ad bellum* and *jus in bello* suffices.

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Chapter 2  State responsibility

Attribution is only a small part of the comprehensive body of international state responsibility, understanding the evolvement of the whole body of international state responsibility, is also to understand the difficulties that exist with rules on attribution. This Chapter therefore explains the characteristics of international state responsibility. For certain states it is beneficial when this area of law remains unregulated, since regulation can constrain their sovereign powers. These difficulties have an impact on the forming of customary international law as well, as will be shown in Chapter 5.

2.1  State Responsibility: an Overview

The infamous “De jure belli ac pacis libri tres” of Hugo Grotius is seen by many as the starting point of modern international law10, international law is, however one of the youngest bodies of law and also remains one of the least developed, especially the field of state responsibility. International law primarily governs the relation between states, they are the primary subjects.11 In 1953 Lauterpacht stated that international law is “still a defective legal system in the vital aspects of creation, ascertainment, and enforcement of the law”.12 Today his statement holds ground especially for the field of state responsibility.

State sovereignty emerged together with the birth of modern states, during the sixteenth and seventeenth century, after the peace of Westphalia. State responsibility is an elementary part of state sovereignty, while state sovereignty is a “dominant factor” in the relation between nations.13 The doctrine of state sovereignty was originally envisaged as a “principle of internal order”14, nevertheless state sovereignty also meant rigorous equality and independence of other states’ interference, therefore it also meant that states could now behave independently in a Hobbesian chaotic and anarchistic manner.15

10 Lesaffer 2006, p. 5.
12 Lauterpacht 1953, p. 212.
13 Idem, p. 6.
15 Neff 2005, p. 218.
After the First World War the basic notion of state sovereignty already underwent significant changes.\textsuperscript{16} Then, after the Second World War state sovereignty got altered even more with the creation of the UN and with it came a world based on a general norm of radical pacifism, this meant that states were now forbidden to resort to force\textsuperscript{17}, which was a former sovereign right, due to Article 51 of the UN Charter. State responsibility has always been a hot topic for states, especially since rules on state responsibility can effectively limit the use of their powers.\textsuperscript{18}

The law of state responsibility used to be dictated primarily by customary rules evolving out of state practice. The issues were mostly on the treatment of foreigners of industrialized countries in non-industrialized countries, such as Latin-America states.\textsuperscript{19} One of the major characteristics of state responsibility is its primitive character, meaning that it is not entirely clear for what breaches and under what circumstances state responsibility can arise.\textsuperscript{20} This rudimentary character also provides states with leeway to use their powers; therefore not all states are keen on regulating state responsibility since regulation can restrain such powers. This primitive character of state responsibility also implies the state as a whole bears collective responsibility and it is the state as a whole that needs to take the required remedial measures.\textsuperscript{21} Because states are the primary subjects of international law, rules on attribution are needed to invoke liability for conduct of other actors for whom they bear responsibility. Individual responsibility is scarce in international law, the known examples are piracy and war crimes.\textsuperscript{22} The International Criminal Court also needs to be mentioned since it broadens individual responsibility for international crimes. Traditionally, it are also only states that can perform an armed attack which could lead to self-defense, see Article 51 of the UN Charter. It is still controversial whether or not an act of a non-state actor not acting on behalf of a state can lead to self-defense.\textsuperscript{23}

Already in 1953 the UN General Assembly requested the UN International Law Commission (hereinafter the ILC) to undertake a codification process on “\textit{the principles of international law of

\textsuperscript{16} Lesaffer 2006, p. 7. \\
\textsuperscript{17} Neff 2005, p. 314. \\
\textsuperscript{18} Allott 1988, p. 2. \\
\textsuperscript{19} Becker 2006, p. 11 and Cassese 2005, p. 243. \\
\textsuperscript{20} Cassese 2005, p. 241 and 242. \\
\textsuperscript{21} Idem, p. 241. \\
\textsuperscript{22} Idem, p. 243. \\
\textsuperscript{23} Okimoto 2012, p. 60.
State responsibility”. The area of state responsibility has been greatly influenced by the work of the ILC and their work has been taken note of by the UN General Assembly through Resolution 56/83 of 2001. The ILC’s work is seen as an important guide on state responsibility, nevertheless, even though the ILC has made important progress on informing disputes on the current state of state responsibility, resorting to primary sources will still be needed, since according to Meron the area of state responsibility remain uncodified. The ICJ already used the Articles on State Responsibility in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide in 2007 (hereinafter the Bosnian Genocide Case).

The doctrine of state responsibility assigns the “legal consequences of the international wrongful act of a state”, this means that it creates legal consequences or obligations for the wrongdoing state and rights or powers for the state that has been wronged. Customary rules provides that if a state violates an international rule this also means it faces international responsibility for that breach. This could mean the injured state should be made reparation for the breach, or otherwise the injured state would be entitled to self-help, this self-help can consist of forceful actions or non-forceful measures, even though those are subject to requirements, such as proportionality.

There are some requirements to state responsibility, there can only be state responsibility for a wrongful act, state responsibility has an objective and a subjective side. The objective side contains the requirement that the conduct was inconsistent with an international obligation, that there was material or moral damage and that there is an absence of circumstances that exclude wrongfulness. The subjective side of international responsibility requires that in some limited circumstances there should be fault of the state agent when infringing the international obligation, however the infringement should always be imputable to the state. The subjective requirement of imputation leads us to the requirement of attribution. Because states can only act through individuals it is necessary to determine whether or not the acts of individuals can be attributed to the state.

26 Meron 2008, p. 400.
28 Cassee 2005, p. 244.
The rules on attribution have also found their place in the Articles on State Responsibility, most notably Article 4 and 8.

State responsibility towards other states is an important facet of state sovereignty. The concept of sovereignty however, requires that states see each other as sovereign and respect each other’s sovereignty. It is through a lacuna in international state responsibility, states are still able to influence other states’ sovereignty by using force. On the one hand, a high standard of attribution allows states to use non-state actors to intervene in other states’ sovereignty without incurring responsibility thereof. On the other hand, a low standard of attribution of actions of non-state actors to states can also infringe the sovereignty of the responsible states, as well as that of the injured states. A low standard of attribution, such as the Harboring Doctrine, can have serious consequences as well, such as the payment of damages and resorting to self-defense too easily. Because of the aforementioned state responsibility remains one of the more controversial concepts of politics and international relations, also because of this, a right equilibrium between a high or low standard for attribution is difficult to achieve, hence it is only logical there has emerged a myriad of legal interpretations on attribution. All major international and regional courts follow to a certain extent their own interpretation of attribution, and most of these interpretations seem to be flatly ignored by states.

2.2 Attribution

Attribution of acts to a state is a legal area which falls under the scope of state responsibility. Attributing acts of non-state actors to a state is based upon the agency-concept. The agency theory justifies attributing acts of non-state actors to a state since it are the states that are the primary subjects of international law, if there was an agency-type relation between the perpetrator and the responsible state. There is already international consensus that acts of state actors are attributable to a state, even while they act ultra vires, while actions of non-state actors are not, this has already been established in the Tellini Case of 1923. The ICJ stated that “the conduct of any organ of a state must be regarded

32 Croxton 1999, p. 571.
33 Kurtulus 2006, p. 3.
34 Idem, p. 3 and 42.
35 League of Nations November 1923, Official Journal, 4th Year, No. 11, p. 1349 (Tellini Case).
as an act of that state”. However it is the state’s internal law which decides what is a state organ, however certain institutions will be determined a state actor irrespective of their internal designation, irrespective if they are autonomous or independent, police forces are an example of this. There does remain a grey area, or the so called “gap in international law of state responsibility” wherein non-state actors to whom a state has certain connections can operate without there existing clear responsibility. The degree of state involvement in the actions of these non-state actors is what divides most opinions. State responsibility consists of primary rules, which contain substantive obligations of states and secondary rules, secondary rules determine on what conditions a breach of a primary rule may have occurred and what the legal consequences will be. Rules of attribution fall under secondary rules, they determine whether a state has breached a primary rule, this can happen through an action as well as through an omission. Rules of attribution are part of international law; therefore attribution occurs based upon rules of international law and not on domestic law, which normally requires only a “mere recognition of a link of factual causality”, as will be shown in the following Chapters, this is different for international law. Attribution must also be distinguished from the characterization of certain conduct as being internationally wrongful. Showing that acts can be attributed to a state does not state anything about the legality of such conduct, however often there exists a close connection between the sort of violations that have occurred and a state’s obligations.

2.3. Jus ad Bellum and Jus in Bello

Rules of attribution fall under the body of law of jus ad bellum and of jus in bello, both of these areas deal with the same subject, the use of force, therefore both areas of law are closely related but also distinct. Jus ad bellum generally regulates the prohibition of the use of force and the exceptions to that rule, being collective and individual self-defense and Security Council enforcement measures. On

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36 ICJ 29 April 1999 (Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights), § 62.
37 Crawford 2002, p. 91 and 92.
38 Cassese 2005, p. 244.
39 Idem, p. 244.
41 Idem, p. 92.
42 Okimoto 2012, p. 46.
the other hand *jus in bello* regulates and sets limits on the conduct of hostilities, *jus in bello* is also known as international humanitarian law.43

2.3.1. *The Relation between Jus Ad Bellum and Jus in Bello*

The relation between both areas of law can be complicated, however through state practice, court decisions and legal experts three main principles can be extracted that govern their relation. The first principle contains the separation of *jus ad bellum* and of *jus in bello*, however this separation does not affect the application of either one of them. Second, *jus in bello* applies even if an actor is unlawful based upon *jus ad bellum*. The third principle contains that *jus in bello* and *jus ad bellum* are in fact one set of rules, which means that force can only be lawful if it complies with the standards of both bodies of law, they are cumulatively applicable.44 This simultaneous application however, does not mean that they are linked or interdependent.45

Even though *jus in bello* and *jus ad bellum* operate in the same situations, they do operate in a very distinct manner which can lead to tension between them.46 This tension is noticed most when the status of the actors is assessed, *jus ad bellum* creates a sharp distinction between lawful and unlawful actors whereas the most essential characteristic of *jus in bello* is, that it does not make such a distinction.47

According to *jus in bello* international humanitarian law applies to all combatants irrespective of their status. It is the separation between *jus in bello* and *jus ad bellum* which makes it possible that combatants which are unlawful, based upon *jus ad bellum*, do receive the same international humanitarian law guarantees of *jus in bello*, it is also the separation of the two bodies which makes it possible that the status of the one does not affect the other.48 This is essential for achieving the goal of *jus in bello*, protecting humanitarian standards for all those affected by the use of force.

Rules of attribution have different outcomes under both branches, for *jus in bello* they can lead to criminal liabilities or financial compensation, and for *jus ad bellum* it can lead to actions of self-defense. The Harboring Doctrine therefore has very different outcomes for *jus in bello* and *jus ad

44 Idem, p. 46.
46 Okimoto 2012, p. 48.
47 Idem, p. 48 and 49.
48 Idem, p. 49 and 50.
Nevertheless, rules of attribution are not explicitly claimed by either one of these areas of law, both areas share other definitions as well, like proportionality and necessity for instance, however it needs to mentioned that these terms have an autonomous meaning in both areas of law.\textsuperscript{49} Jus in bello and jus ad bellum are in fact two totally autonomous bodies and this autonomy is even called an “international holy gospel”\textsuperscript{50}, this autonomy also relates to the used definitions and requirements. Their autonomy must be seen as a dichotomy\textsuperscript{51}, this means that both bodies of law are strictly separated and non-overlapping.

2.3.2. \textit{Historical development}

Both areas of law also have a quite different history, jus ad bellum is the oldest of both bodies of law and existed already in the Roman times, even though it was then not known by its current name. In the Roman era when a foreign nation had violated an obligation towards the Roman Empire this would create a \textit{justa causa}, or a legal just cause for war. War was only limited by jus ad bellum and because of that war was unrestrained and it allowed all sorts of \textit{jus in bello} violations such as plundering, enslaving and massacring.\textsuperscript{52} After the peace of Westphalia states were literally free to resort to war for whatever reason, according to Spinoza resorting to war was even seen as a state’s sovereign right\textsuperscript{53}, after the emergence of the UN Charter this practice was halted, since the use of force was then prohibited, leading to modern jus ad bellum.

Modern usage of \textit{jus in bello} as we know it, emerged thanks to the efforts of Henri Dunant who founded the International Committee of the Red Cross in 1864.\textsuperscript{54} However, one of the main principles of \textit{jus in bello}, namely that both parties in a conflict are equally lawful regardless of their reasons which led them to take up force was already stated by Vattel in 1758.\textsuperscript{55}

The first appearance of the twin terms \textit{jus in bello} and \textit{jus ad bellum} was in the time of the League of Nations, and until the Second World War they were only rarely used, even though “like” words were

\textsuperscript{49} Lehmann 2012, p. 137. \\
\textsuperscript{50} Schmitt 2008, p. 154. \\
\textsuperscript{51} Österdahl 2010, p. 553. \\
\textsuperscript{52} Sloane 2008, p. 57. \\
\textsuperscript{53} Neff 2005, p. 137. \\
\textsuperscript{54} Sloane 2008, p. 16. \\
\textsuperscript{55} Bugnion 2003, p. 14.
used to describe similar situations before. The usage of both terms as we know today it is a product of the twentieth century.

2.3.3. *the Distinction of Jus Ad Bellum and Jus In Bello*

Apart from their history the goals of *jus ad bellum* and *jus in bello* are also distinct, *jus ad bellum* means that only certain objectives are allowed as a justification for resorting to war, while *jus in bello* restricts what either side may during conflict, without reference to cause or objectives. What adds to their distinction is that their sources also differ, the primary source of *jus ad bellum* is the UN Charter, which prohibits the use of force, the only exceptions being the right to individual and collective self-defense of Article 51 and collective military enforcement under Chapter VII. *Jus in bello* is among others found in the Hague Conventions and the Geneva Conventions and their Additional Protocols. The prohibition on the use of force is therefore the exclusive terrain of *jus ad bellum*, however when use of force is initiated it is *jus ad bellum* and *jus in bello* which then apply cumulatively.

Both bodies of law do have a strong connection, they share definitions whose explanations differ only slightly. For instance, the concepts of necessity and proportionality exist in both bodies of law and are related, however in a very careful and delicate manner, still they remain autonomous. Proportionality in *jus in bello* means a very delicate balance is aimed at between civilian loss and military objectives while proportionality in *jus ad bellum* is more complex, like *jus in bello* civilian loss is weighed against repelling a military attack, however such losses are more relative and need also to be weighed against the adverse effect that not repelling the attack will have on civilians.

2.3.4. *Legal Basis*

The separation of *jus in bello* and *jus ad bellum* has been well established through case law, state practice and the international legal doctrine. The first case wherein the separation of *jus in bello* and

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56 Kolb 1997, p. 554.
57 Giladi 2008, p. 249.
59 Okimoto 2012, p. 47.
61 Idem, p. 57.

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jus ad bellum was established was the Hostage Case of the Nuremberg Trials, here the applicant stated that the law of occupation was not applicable since Germany’s occupation in itself was unlawful. This line of reasoning was rejected by the Tribunal, the Tribunal stated that “Whatever may be the cause of a war that has broken out, and whether or not the cause be a so-called just cause, the same rules of International Law are valid”. Here the legality of resorting to force, jus ad bellum, was seen as a separate question of the law of occupation, which falls under jus in bello. The same needs to be noted when one looks at modern conflicts of the post UN Charter era, here the legality of jus ad bellum does not affect the applicability of jus in bello to “unlawful” combatants. This has also been subsequently been affirmed in the case law of the ICJ through her Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.

In her Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons the ICJ ruled that the rules of jus ad bellum and jus in bello do not exclude each other, jus in bello and jus ad bellum are simultaneously applicable and are cumulative. Use of force will need to comply with both bodies of law in order to be legal. Even though the ICJ left open the possibility that the use of nuclear weapons contrary to international humanitarian law might nonetheless be lawful. The ICJ even stated that it could not “lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence” when a state’s survival is at stake. Nuclear weapons through their characteristics are “scarcely reconcilable” with jus in bello, however their use in self-defense, which falls under jus ad bellum may perhaps be used in extreme cases of survival. Sloane states this is a conflation of jus in bello and jus ad bellum, nevertheless the case shows that the distinction between both bodies of law can lead to different outcomes. Also Judge Kooijmans in his Separate Opinion in the Armed Activities Case points at the “Conceptual distinction” of jus in bello and jus ad bellum.

64 US Military Tribunal, Nuremberg 8 July 1947, Case No. 47 (Hostages Trial or Wilhelm List and Others).
65 Idem, p. 60.
66 Idem, p. 61.
67 Idem, p. 51 and 52.
68 ICJ 9 July 2004 (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory) and Okimoto 2012, p. 53.
69 ICJ 8 July 1996 (Legality of the Threat or Use of Nuclear Weapons), § 42.
70 Moussa 2008, p. 972.
71 ICJ 8 July 1996 (Legality of the Threat or Use of Nuclear Weapons), § 96.
72 Sloane 2008, p. 31 and ICJ July 8 1996 (Legality of the Threat or Use of Nuclear Weapons), § 95.
73 Sloane 2008, p. 31.
74 ICJ 19 December 2005 (Case Concerning Armed Activities on the Territory of the Congo), Separate Opinion Judge Kooijmans, § 58.
At large the distinction of both bodies of law is upheld by case of international courts, especially the equal application of *jus in bello* to all combatants regardless of their status according to *jus ad bellum* has been upheld by international tribunals and national courts. The Eritrea-Ethiopia Claims Commission even uses different models for compensation for *jus in bello* or *jus ad bellum* violations, for the former the gravity of the violation is taken into account while for the latter the magnitude and the character of the force used are taken into account.

This distinction is further strengthened through the support of international legal experts. Greenwood states that both bodies of law “*seldom sat happily together*” and that they "*can and should be regarded as distinct from another*”. Some authors even state that Grotius and Kant made some early expressions indicating a distinction between the two bodies.

### 2.3.5. Concluding Remarks

Most critiques on the separation of *jus in bello* and *jus ad bellum* are on the applicability of *jus in bello* in certain situations and not on separation of their definitions with their inherent requirements, for example some states have stated that *jus in bello* should not apply to aggressor states. Apart from that, there are no real challenges to the fact that the distinction between *jus in bello* and *jus ad bellum* is a part of positive international law. Because of aforementioned examples it can be stated that the dichotomy of *jus in bello* and *jus ad bellum* is firmly rooted in international law, even though the distinction is not always entirely absolute, and that the distinction between the two can sometimes be blurred due to confusion in applying mirror terms inaccurately.

As will be shown in the next Chapter, the distinction of *jus in bello* and *jus ad bellum* is important for attribution of acts of non-state actors to states as well, the ICJ decided in the *Bosnian Genocide Case* that rules on attribution do not differ based upon the nature of the wrongful act, “*in the absence of a lex specialis*”. This means that attribution of the crime of genocide is the same for other crimes, such

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75 Moussa 2008, p. 981.
76 Giladi 2008, p. 255.
78 Okimoto 2012, p. 54.
79 Bouvier 2006, p. 110, see in general Greenwood 1983.
80 Giladi 2008, p. 249.
81 Idem, p. 111.
82 Giladi 2008, p. 250.
83 Roberts 2008, p. 932.
84 Moussa 2008, p. 981.
as war crimes. The ICJ found that this was customary law and this has now been reflected in the ILC Articles on State Responsibility. The ICTY more or less found the same in *Tadic*, where it stated that rules on attribution do not differ when they give rise to international responsibility of a State or when they ensure that an armed conflict is classified as international.\(^8^5\) Both the ICJ and the ICTY therefore indicate that there should be one test for attribution and one test only, a closer look at the ICTY and ICJ case law shows that they until so far have only judged on rules of attribution in cases which fall under *jus in bello*. However this will be discussed in more detail in the next Chapter. This also means that the rules of attribution of acts of non-state actors to states for *jus ad bellum* violations currently are ungoverned.

Since *jus in bello* and *jus ad bellum* are distinct and autonomous bodies of law, principles can develop under one body of law independently from one another, this means rules of attribution can also develop autonomously of one another. The dichotomy of both bodies of law therefore also implies that a *lex specialis* is not needed for rules of attribution which evolve under *jus ad bellum* when they differ from such rules under *jus in bello*, since principles of one body of law do not fall under the legal scope of the other, they are autonomous and therefore they evolve autonomously as well, this autonomy is applicable to principles such as proportionality and even for models of compensation.

\(^8^5\) ICTY July 15 1999, IT-94-1-A (*Prosecutor v. Duško Tadic*), § 42.
Chapter 3  
Evolution of Attribution

Even before the Harboring Doctrine the notion of attribution was already a highly discussed topic in various courts’ rulings and the international legal doctrine. This Chapter will show the evolution of attribution through the most important court decisions. A short introduction into these decisions is needed to understand the rules on attribution better. This Chapter shows that the most influential Courts have not reached consensus on what criteria should apply to attributing acts of non-state actors to a state, however the standards the ICTY and the ICJ have set are much closer aligned than they are to the Harboring Doctrine. As previous Chapter stated, this Chapter will explain the fundamental principles on which attribution is based, which as will be shown, differs between the courts but also between the courts and the Harboring Doctrine.

It is furthermore important to note that states also refer to court decisions when they discuss international custom or use it as evidence for a certain point, since an evaluation of custom is difficult and time consuming. Therefore court decisions can be very influential for the development of international customary law.

From all interpretations on state responsibility the one given by the ICJ remains the most influential in international legal academic research. The ICJ has given several decisions on state responsibility and attribution. Even though these decisions are authoritative, it needs to be emphasized that the ICJ’s decisions have no binding force, they only bind the state parties involved in the dispute, therefore they do not have a formal precedential value.

3.1.  
the Tehran Hostages Case

The first case wherein the ICJ judged on the rules of attribution was the Case Concerning United States Diplomatic and Consular Staff in Tehran of 1980 (hereinafter the Tehran Hostages Case). In this case the ICJ had to decide whether or not the acts of students were attributable to the Iranian state. The students did not have any official status whatsoever of the Iranian state nor did they act on behalf

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87 Sloane 2008, p. 79.
of the state. Therefore the acts of the students, when seizing the embassy could not be attributed to Iran, even though there existed a positive obligation of the Iranian state to take "appropriate steps" to protect the embassy premises.\textsuperscript{89} Due to negligence the Iranian government failed completely in doing so.

What was decisive for the ICJ was that Ayatollah Khomeini gave his approval to the actions of the students towards the embassy of the United States because the United States had granted asylum to the former Shah of Iran. This policy of approval secured that the hostages remained hostage; this was then strengthened by a public endorsement of the Minister for Foreign Affairs, Mr. Ghotbzadeh, who stated that the taking of hostage was “done by our nation”. This led the ICJ to decide that the militant students had now transformed into agents of the state, and this implied state responsibility for their actions.\textsuperscript{90}

3.2. the Nicaragua Case

After the Tehran Hostages Case the next decision on attribution is the Case Concerning Military and Paramilitary Activities in and Against Nicaragua\textsuperscript{91} (hereinafter the Nicaragua Case). This was also the first case wherein a state requested the ICJ to “adjudge and declare that another state has the duty to cease and desist immediately from the use of force against it”, as Judge Schwebel stated.\textsuperscript{92}

The Nicaragua Case actually contains two tests of attribution, the first test covers the United States’ use of the UCLAS forces that were “paid by, and acting on the direct instructions of, United States military or intelligence personnel”.\textsuperscript{93} The acts of these “assets” were attributed to the United States, since “United States nationals participated in the planning, direction and support. The imputability to the United States of these attacks appears therefore to the Court to be established”.\textsuperscript{94}

The second test of attribution covered the attribution of the violations of international law obligations to the United States, such as kidnapping and killing civilians, which the contras allegedly committed.

\textsuperscript{89} ICJ 24 May 1980 (Case Concerning United States Diplomatic and Consular Staff in Tehran), § 58, 61, 63 and 68.
\textsuperscript{90} Idem, § 71 and 74.
\textsuperscript{91} ICJ 27 June 1986 (Case Concerning Military and Paramilitary Activities in and Against Nicaragua).
\textsuperscript{92} Gray 2003, p. 870.
\textsuperscript{93} ICJ 27 June 1986 (Case Concerning Military and Paramilitary Activities in and Against Nicaragua), § 75.
\textsuperscript{94} Idem, § 86.
The *contras* were those fighting the Nicaraguan government, consisting of the FDN and the ARDE.\(^95\)

Judging on the use of the *contras* the ICJ states that it is established that the United States largely financed, trained, equipped, armed and organized the FDN. However the evidence did not support that the United States gave direct and critical combat support.\(^96\) Moreover the ICJ stated that, for attribution to be possible, the relation between the United States and the *contras* needed to be one of dependence on the one side and control on the other. So the *contras* should be equated legally with an organ of the United States or they should act on behalf of the United States.\(^97\)

The ICJ furthermore noted that the *contras* were, at a certain point in their relation, so dependent on the United States, that without United States’ support they could not conduct their most crucial operations, however for an equation with a *de jure* United States organ there should be a relation of "complete dependence".\(^98\) Still, the ICJ concludes that the general control that the United States had over the *contras* was insufficient for the attribution of their acts to them, therefore the United States were not responsible for the *jus in bello* violations the *contras* allegedly committed.\(^99\) In his Separate Opinion Judge Ago regrets that the ICJ did not seize the opportunity in the *Nicaragua Case* to elaborate more upon the position it took in the *Teheran Hostage Case* which contained relevant similarities.\(^100\)

Even though the ICJ ruled in favor of the United States through not attributing the *contras*’ conduct to them, the United States never endorsed the ICJ’s decision but internally propagated a more far reaching state responsibility for actions of private actors operating on a state’s territory, even without a state having effective control over these actors, this is shown by a 1984 internal White House memorandum. This memorandum even granted the United States the right to use self-defense against such a state or the private actor.\(^101\)

\(^{95}\) Idem, § 20.

\(^{96}\) Idem, § 108.

\(^{97}\) Idem, § 109.

\(^{98}\) Idem, § 110 and 111.

\(^{99}\) Idem, § 115.

\(^{100}\) ICJ 27 June 1986 (Case Concerning Military and Paramilitary Activities in and Against Nicaragua), Separate Opinion of Judge Ago,§ 190.

\(^{101}\) Reinold 2011, p. 251.
In 1999 the ICTY ruled in the individual criminal case of Duško Tadic for international humanitarian rights violations.\(^{102}\) For reasons of jurisdiction the ICTY saw itself forced to judge upon the rules of attribution, since the conflict could be then internationalized and hence, generate ICTY’s jurisdiction. Its reasoning herein is interesting, because the ICTY stated that the rules of attribution in this case might as well be found in another body of law than that of state responsibility, namely that of international humanitarian law or \textit{jus in bello}.\(^{103}\) The aim of international humanitarian law is significantly different than that of state responsibility and would certainly lead to different results. The ICTY therefore bases its judgment on the Geneva Conventions which requires actors to \textit{“belong to a party in the conflict”} for them to be legal actors. Accordingly, the ICTY also stated that this means that rules of attribution are built on effectiveness and on deterring deviation from international humanitarian standards.\(^{104}\) The fact that the ICTY uses the Geneva conventions in their decision again shows the distinction between \textit{jus in bello} and \textit{jus ad bellum}, the latter is derived from the UN Charter.

According to Cassese the ICTY and the ICJ both discussed the same area of law, that of state responsibility, which has been contested by the ICJ in the \textit{Bosnian Genocide Case}. He states that the \textit{Tadic} test is applicable in cases of state responsibility and he also states that the ICJ’s argument that \textit{Tadic} was about the \textit{“nature of armed conflicts”} and that of \textit{Nicaragua} is about state responsibility is \textit{“flimsy”}. Meaning that both cases are essentially on the same area of law. Nevertheless, the \textit{Tadic} test is motivated entirely different, being based upon international humanitarian law, namely the Geneva Conventions. Moreover, Cassese states that international humanitarian law is valid to determine what rules of attribution apply to state responsibility.\(^{105}\)

The material difference between the \textit{Tadic} and the \textit{Nicaragua Case} is that the ICTY did not find specific orders or instructions to be necessary for attribution of acts of military or paramilitary groups, overall control was found to be sufficient which could be proved out of the participation in the planning and supervision of military operations, but it should go beyond the mere financing and

\(^{103}\) Idem, § 90.
\(^{104}\) Idem, § 94 and 96.
\(^{105}\) Cassese 2007, p. 663.
equipping of such forces.\textsuperscript{106} On the one hand, the final result of the ICTY decision needs to be seen more as a nuance of the \textit{Nicaragua Case} than as something totally different, however the reasoning which led to the ICTY’s decision is based upon completely different grounds.

On the other hand the ICTY dictates an even more strict test for attribution for individuals or groups that are not military, for these actors the ICTY states that specific instructions or public approval should have been given.\textsuperscript{107} This distinction in the threshold of attribution between military and nonmilitary actors is an important difference between the ICTY and the ICJ; a high threshold should not be needed in all cases according the ICTY.

The International Commission of Inquiry for Darfur (hereinafter the ICID) also used the \textit{Tadic} test of effective control when it attributed actions of the Janjaweed militia to the government of Sudan, however it must be noted that the ICID was led by Cassese which was also the former president of the ICTY.\textsuperscript{108} That could have been a reason for the ICID to use the same test.

\textbf{3.4. the Armed Activities Case}

The ICJ also touched upon state responsibility and the rules of attribution in the \textit{Armed Activities Case} in 2004, however it did not elaborate upon them. In the \textit{Armed Activities Case} the ICJ also had the opportunity to rule on a case of attribution of \textit{jus ad bellum} violations, here Uganda stated to have reacted in self-defense against the Democratic Republic of Congo (hereinafter the DRC) after attacks of the Allied Democratic Forces (hereinafter the ADF), however Uganda did not allege that the ADF actions were attributable to the DRC. Therefore the ICJ ruled that there was no attribution\textsuperscript{109} and this also means that until now attribution has never been used by the ICJ in a \textit{jus ad bellum} situation. The ICJ also did mention vaguely the \textit{Nicaragua} test of attribution in this case when a question arose on attribution of acts of non-state actors to Uganda from the DRC in a \textit{jus in bello} situation.\textsuperscript{110}

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{106}] ICTY 15 July 1999, IT-94-1-A (Prosecutor v. Duško Tadić), § 131 and 145.
\item[\textsuperscript{107}] Idem, § 132.
\item[\textsuperscript{108}] Abass 2007, p. 906 and 872.
\item[\textsuperscript{109}] ICJ 19 December 2005 (Case Concerning Armed Activities on the Territory of the Congo), § 146 and 147.
\item[\textsuperscript{110}] Idem, § 160.
\end{enumerate}
\end{footnotesize}
3.5. **the Bosnian Genocide Case**

More recently, the ICJ upheld and elaborated upon the doctrine of attribution of the *Nicaragua Case* in the *Bosnian Genocide Case*. This case concerned the request to attribute the Srebrenica massacre, committed by non-state actors, which constituted the crime of genocide, to the Serbian and Montenegro state.\(^{111}\) It must be noted that the *Bosnian Genocide Case* is also a clear case of *jus in bello* violations.

The ICJ used the Articles on State Responsibility extensively here even though they are soft law. It explained attribution could either occur based upon Article 4 or on Article 8, and the ICJ emphasized that both of them are different questions. Under Article 4 actions of a non-state actor can be equated with a *de jure* organ if it actually is a *de facto* organ. The test for this equation is the following: actors can only be then equated with a state organ if that status does not come from internal law, if those actors act “in complete dependence” on the State, of which they are ultimately merely the *instrument*.\(^{112}\) Equation with a state organ must therefore be the exception rather than the rule.\(^{113}\) If the non-state actor maintains “some qualified, but real, margin of independence” then there will be no attribution through equating the actor with a state organ.\(^{114}\)

The test of Article 8 is different, it states that actions of non-state actors can “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”. This means that under Article 8 complete dependence on the state is not needed, however the actors needs to have handled according to the instructions of the state or they needed to be under “effective control” in a specific operation. The non-state actor should thus be under effective control in the specific operation and not under effective control in general.\(^{115}\)

In the *Bosnian Genocide Case* the ICJ also discusses of the overall control test of the *Tadic Case*, and stated that the ICTY’s decision on state responsibility was not indispensable to its case of individual criminal law, and through their judgment the ICTY has stretched the scope of state responsibility well


\(^{112}\) Idem, § 392.

\(^{113}\) Idem, § 393.

\(^{114}\) Idem, § 394.

\(^{115}\) Idem, § 400.
beyond the fundamental principle, that a state is only responsible for its own conduct.\textsuperscript{116} The ICJ also notes that even though acts cannot be attributed to a state, they can still be complicit in that act through aiding or assisting, and this question is not significantly different to that of attribution of international state responsibility.\textsuperscript{117}

3.6. Conclusion Remarks

Even though the rulings of both the courts are important for the evolvement of international law, they remain conservative on issues which relate to state responsibility and international criminal law.\textsuperscript{118} Especially in the light of recent state practice the ICJ is accused of flatly refusing to acknowledge “the existence of a more lenient test of attribution”.\textsuperscript{119}

An important but underlying difference between the two leading thoughts on attribution is that the ICJ’s view on attribution is based upon state responsibility in general, while that of the ICTY is based upon international humanitarian law, or \textit{jus in bello}, derived from among others, the Geneva Conventions. Even so, the difference between the both courts only seems marginal; under both tests the threshold for attribution is high. The ICTY offers a slightly more lenient test of attribution in the case of military or paramilitary groups, however for nonhierarchical private groups, or private persons, such as terrorists their test is actually very strict, leading to attribution only in exceptional cases.

For the evolvement of a new doctrine as custom it is important to examine that it does not fall within the boundaries of another doctrine. The discussed cases are all on \textit{jus in bello} violations and do not handle cases of \textit{jus ad bellum}, like self-defense based upon attribution of acts of non-state actors to a state. The cases of the ICTY and of the ICJ show that even for attribution there is a dichotomy between \textit{jus in bello} and \textit{jus ad bellum}. Since the used cases only discuss \textit{jus in bello}, there is no judicial guidance on attribution of \textit{jus ad bellum} situations.

As the following Chapter will show, the United States’ practice on attribution is not in line with the older tests attribution, whether it is the \textit{Nicaragua} or the \textit{Tadic} test. The ICJ has stated that for an established custom its practice need not to be perfect, it is sufficient that in general state practice is

\textsuperscript{116} Idem, § 406.
\textsuperscript{117} Idem, § 420.
\textsuperscript{118} Meron 2006, p. 399.
\textsuperscript{119} Mohan 2008, p. 218 and 219.
consistent with customary law.\footnote{120} When looking at United States’ practice after the September 11 attacks one sees that their practice is not consistent with the rules of attribution at all, rules of which the ICJ stated that they were international customary state practice in the \textit{Nicaragua Case} and the \textit{Bosnian Genocide Case}. The United States´ practice is not in line with the test of attribution of the \textit{Tadic Case} either.

It could therefore be that the United States is a persistent objector to the \textit{Nicaragua} and the \textit{Tadic} test\footnote{121}; this can be derived from their statements and from their actual behavior. The ICJ seems to have endorsed the persistent objector theory in the \textit{Asylum Case}\footnote{122} and in the \textit{Fisheries Case}\footnote{123}, however there is still no unanimity under legal scholars.\footnote{124} In the \textit{Nicaragua Case} the ICJ has among other things stated that for a customary rule to be custom it does not have to be followed perfectly consistent. If there are deviations they as well can be proof of the crystallization of that rule. However, there is little state practice supporting the \textit{Nicaragua} judgment and Cassese even states the \textit{Nicaragua Case} has not been built on state practice at all.\footnote{125} Moreover contrary practice has become so abundant that it is not clear if the \textit{Nicaragua Case} at present day reflects international customary law.

Nevertheless, this Chapter and previous Chapter have shown that there exists a dichotomy between \textit{jus ad bellum} and \textit{jus in bello}, both areas of law are autonomous. The decisions of \textit{Nicaragua} and \textit{Tadic} have only been applied in a situation of \textit{jus in bello}. Since the Harboring Doctrine only falls under \textit{jus ad bellum}, no \textit{lex specialis} is needed for the Harboring Doctrine to have evolved into customary law, this implies that only the normal requirements of evolvement into customary law are needed. As the following Chapter will show, the United States apply their own doctrine of attribution in \textit{jus ad bellum} situations, without regard to the tests of \textit{Tadic} or \textit{Nicaragua}.

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\footnote{120}{\footnotesize ICJ 27 June 1986 (\textit{Case Concerning Military and Paramilitary Activities in and Against Nicaragua}), § 186.}
\footnote{121}{\footnotesize Meron 2006, p. 374.}
\footnote{122}{\footnotesize ICJ 20 November 1950 (\textit{Asylum Case}).}
\footnote{123}{\footnotesize ICJ 18 December 1951 (\textit{Fisheries Case}).}
\footnote{124}{\footnotesize Meron 2006, p. 374.}
\footnote{125}{\footnotesize Cassese 2007, p. 665.}
Chapter 4  

Harboring Doctrine

This Chapter discusses the Harboring Doctrine, which is a part of the Bush Doctrine. The assessment of these doctrines is essential for the evolvement into customary law. Since there needs to be *opinio juris*, which means that states need to believe that their practice is rendered obligatory\(^{126}\), therefore the intellectual background of a doctrine is key for its evolvement into customary international law. This Chapter will also show that the thoughts behind the Harboring Doctrine are very different compared to the legal rationale of the ICJ of the ICTY, which puts even more emphasis on the dichotomy between *jus in bello* and *jus ad bellum*.

4.1.  the Bush Doctrine

The Bush Doctrine emerged as the United States’ response to the terrorist attacks on the Twins Towers. Under Bush the use of force has been greatly extended even though president Bush in his 2000 presidential campaign repeatedly called for a less extensive and more “humble” foreign policy for the United States.\(^{127}\) After the attacks of September 11 some statesmen publically wondered if modern times demanded a revision of legal tools in combatting modern day problems, such as terrorism.\(^{128}\) The current stance on the use of force taken by the United States differs from its predecessors in that it is defined as being unilateral instead to United States’ previous multilateralism or even isolationism, because of this current unilateralism *inter alia* the United States see themselves less bound by international law.\(^{129}\)

The Harboring Doctrine is one of the two elements of the broader Bush Doctrine which governs the current use of force of the United States. The other element is on the use of preemptive force against rogue states that seek weapons of mass destruction, terrorists or the states that support them.\(^{130}\) Former law professor at Berkeley and official under the Bush administration, Yoo, gives useful insight on the rationale of the Harboring Doctrine. The Bush Doctrine expands the use of force through widening the

\(^{126}\) ICJ 20 February 1969 (*North Sea Continental Shelf Cases*), § 77.
\(^{127}\) Ryn 2003, p. 383.
\(^{128}\) Proulx 2005, p. 111.
\(^{129}\) Hammond 2005, p. 97.
\(^{130}\) Dombrowski 2003, p. 397.
concept of self-defense, which is the only legitimate use of force allowed by the UN, through Article 51 of the UN Charter. Yoo rejects the old imminence standard of self-defense, derived from the Caroline case and states that a new standard should take into account “developments in weapons and the rise of terrorism and rogue nations” that “stabilize the existing international order”. These new developments in technological warfare, such as nuclear arms but also terrorism, have outdated the Caroline test which states that to react to an attack, the attack needs to be “instant, overwhelming, leaving no choice of means, and no moment for deliberation”.131

The legal doctrine surrounding this broader concept of self-defense of the Bush Doctrine is built around the 1985 “hegemonic stability theory”, which is a theory based upon a theory of international public goods which comes out of the area of politics and economics.132 This theory states that international stability is beneficial to all states and is a “public good”. International stability contains the two elements of a public good, because international stability is non-rivalrous and non-exclusive. This means that one’s consumption from international stability does not leave less for others and it is also beneficial for states which did not contribute to it. There are also the known downsides to public goods, which are also present with international stability; one downside is that international stability can “be under produced by rational nation-states pursuing their own national interest. If anything, therefore, the international legal system should promote conduct that encourages stability enhancing uses of force, rather than seeking to reach a zero level of violence, as current rules do”.133

The Harboring Doctrine has been successful in attributing the acts of al Qaida to the Taliban regime and therefore allowed the United States to apply the rules of individual self-defense of the UN Charter. The hegemonic stability theory provides a general theoretic framework for the Harboring Doctrine with a low standard for attribution, which is then used as a mechanism for “legitimate” use of self-defense, which falls under jus ad bellum. The Harboring Doctrine can be defended since it allows more force to be used which can contribute to international stability, currently the only legitimate use of force is self-defense, or enforcement measures of the Security Council.

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131 Yoo 2004, p. 740.
132 Yoo 2004, p. 793.
133 Idem, p. 786.
The Harboring Doctrine thus allows states to correspond in situations wherein they want to resort to force, situations of *jus ad bellum*, situations which would normally not be seen as able of invoking the right of self-defense, in which states would not be able to respond under other less lenient tests of attribution. Therefore the Harboring Doctrine can be beneficial for hegemonic stability theory, it promotes stability through the use of force. Nevertheless, Yoo explains that under the hegemonic stability theory, force will only be used when it yields sufficient positive externalities. This means that in situations where force could be used to stop human right infringements but their negative externalities do not outweigh the positive externalities, in those situations force will not be used.

It should be noted that the Bush Doctrine is in line with the “*self-defense revolution*” as described by Neff. While self-defense used to be a, very narrow defined, concept, due to the abolition of using force by the UN Charter, it has now become of increased importance to resort legally to force. Acts which did not constitute a justification for self-defense are now gathered under its legal definition to make the use of force possible. The Bush Doctrine is a very clear example of this revolution; for the evolvement into customary law it is important to note that this theory can have a profound impact on a state’s sovereignty, as Yoo also notes.

There are of course also other important jurists which have had influence on the Bush Doctrine, another one is Krasner which elaborates on the principle of state sovereignty. Krasner has served twice under the Bush administration. His notion on state sovereignty is that powerful states’ interests are furthered through intervening in the domestic affairs of less powerful states. This theorem sees sovereignty as an organized hypocrisy, it sees state sovereignty as a paradox, states are not allowed to intervene in another’s internal affairs, however to maintain one’s sovereignty, states sometimes must intervene in the sovereignty of other states. This becomes increasingly important in the case of failed states which can affect other states through being a breeding ground for terrorism, diseases, crime, migration and sometimes even genocide. Thus, these violations of another states’ sovereignty are the exception to the rule which upholds the Westphalian perception of sovereignty, these violations

134 Idem, p. 793.
135 Neff 2005, p. 327.
136 Yoo 2004, p. 794.
138 Idem, p. 275.
139 Krasner 2004, p. 1100.
are not “aberrations, but rather an enduring characteristic of the sovereign state system”.\textsuperscript{140} Some
problems cannot be effectively solved if the principle of sovereignty is fully respected.\textsuperscript{141} Moreover, Krasner
states that intervention in a sovereign state can be justified based upon four alternative principles as well, namely, human
rights, international stability, religious toleration and minority rights, the first two of these principles were used for the
invasion of Iraq.\textsuperscript{142} These principles also means that on sovereignty rests a certain responsibility, \textsuperscript{143} for example the responsibility to not conduct a genocide, otherwise a state’s right not to be left alone will disappear.\textsuperscript{144} Krasner furthermore points to three inherent problems of the notion of sovereignty, the absence of a final authority, unequal
distribution of power among states and divergence about substantive and procedural norms. Therefore a self-enforcing idea
of sovereignty does not exist nor will it ever exist, this also means that states do not believe they are worse off when they violate another’s sovereignty\textsuperscript{145}, at least not all states, and therefore violations of a state’s sovereignty will not cease to exist.

There is however criticism that Krasner’s theorem is not used to protect the principle of state sovereignty as such, as as for the protection of the sovereignty of only some states, moreover the higher norms on which he allows intervention are not higher norms but are criticized to be nothing more than serving to protect the United States’ “national security”\textsuperscript{146}

### 4.2. the Harboring Doctrine

As stated before, the Bush Doctrine contains the “Harboring Doctrine” on attribution, the Harboring
Doctrine has been proclaimed by former president Bush during his presidency several times.

The well-known theories of attribution, the Nicaragua and Tadic tests, are based upon direct state responsibility, this direct responsibility occurs when a state approves the terrorist act or when the perpetrator is a state organ. Proulx presents “indirect state responsibility”, this is a broader kind of state responsibility where a state bears responsibility when it’s actions can be attributed through an innocent or deliberate omission, instead of an act. However this sort of responsibility can invoke the

\textsuperscript{140} Krasner 2004, p. 1078 and 1079.
\textsuperscript{141} Idem, p. 1101.
\textsuperscript{142} Acharya 2007, p. 276.
\textsuperscript{143} Interview with Krasner of 2003 (See; http://globetrotter.berkeley.edu/people3/Krasner/krasner-con6.html , last visited on July 24 2012).
\textsuperscript{144} Acharya 2007, p. 278.
\textsuperscript{145} Krasner 2004, p. 1075.
\textsuperscript{146} Acharya 2007, p. 276.
same responses as direct responsibility. Some authors state that the Harboring Doctrine falls under Proulx’ theory of indirect responsibility. The Bush administration did not claim that there existed an agency relation between the Taliban and al Qaida, attribution was not based upon controlling or directing the al Qaida actions. Therefore, the Harboring Doctrine allows the United States to use force against a state, based upon a non-deliberate omission, without those states, in this case Afghanistan, giving permission to attack the non-state entities on their territories.

There are several statements, which together form the Harboring Doctrine, the most important will be discussed. On 12 September, 2001 President Bush declared that the United States will “make no distinction between the terrorists who committed these acts and those who harbor them”. In doing so the acts of a non-state actor, al Qaeda, were attributed to the Taliban regime of Afghanistan, which probably did not know from those attacks before 11 September, nor did they endorse them afterwards. This attribution asserted to the United States the right of self-defense of Article 51 of the UN Charter against Afghanistan. The next day the UN Security Council as well stressed that “those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable”.

The US National Security Strategy of 2002 is another leading document in understanding the philosophy behind the Harboring Doctrine. Instead to oral presentations of the doctrine this document is a written elaboration of the doctrine. It makes clear that the Harboring Doctrine is to be used against terrorism, and terrorism is defined as “politically motivated violence perpetrated against innocents.” US National Security Strategy states that political grievances should be addressed through the correct political process and not by ways of terrorism. The document then continues with the infamous phrase “We make no distinction between terrorists and those who knowingly harbor or provide aid to them.” It continues ”Today our enemies have seen the results of what civilized nations can, and will, do against regimes that harbor, support, and use terrorism to achieve their political goals.”

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149 Becker 2006, p. 5.
152 Proulx 2005, p. 121.
the Harboring Doctrine sees terrorism as an instrument that states, or regimes use to achieve their goals.

The line of reasoning of the United States’ president is further strengthened by the United States Congress that after the September 11 attacks quickly adopted Senate Joint Resolution 23 which stated that Congress authorized the president to use military force against “those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks” of September 11, or “harbored such organizations or persons.” Congress had an opportunity to block the United States president’s way of attribution but chose to support it.155

In the fall of 2004 President Bush was given the opportunity to defend the Harboring Doctrine and stated the following, “We’ve upheld the doctrine that said, if you harbor a terrorist, you’re equally as guilty as the terrorist.”156 As is known today President Bush was reelected afterwards giving even more legitimacy to the Harboring Doctrine from a constitutional perspective. The documents and speeches show that the Harboring Doctrine was supported by the whole United States government. However it must be noted that the Bush Doctrine, containing the Harboring Doctrine, emerged gradually over the course of the first two years. Many times its elements evolved in response to fast-breaking events after which their explanation followed.157

When we look just a little further in history we can see that the Clinton administration already used the same language when striking at terrorist related facilities in Sudan and Afghanistan in 1998. Those strikes were retaliation for a bombing on United States embassies in Tanzania and Kenya. In his Address to the Nation President Clinton stated that “The United States does not take this action lightly. Afghanistan and Sudan have been warned for years to stop harboring and supporting these terrorist groups. But countries that persistently host terrorists have no right to be safe havens”.158 Looking even further we see the United States’ attacks, in 1986 under the Reagan administration, on Libya which were provoked by Libya’s support for terrorist groups and organizations.159 It becomes clear that the United States has used the Harboring Doctrine even before the Bush administration did.

155 Yoo 2005, p. 156.
157 Dombrowski 2003, p. 397.
158 Delahunty & Yoo 2002, p. 508
159 Idem, p. 509
however it is through the Bush administration that it has become known internationally. The background and legal rationale of the Harboring Doctrine show that it is a doctrine for situations of *jus ad bellum* and in this narrow field it specializes on situations of terrorism.

### 4.2.1. Harboring or Supporting

The various statements of the Harboring Doctrine do not give any clear guidance on what “harboring” or “supporting” of terrorism actually is. However it seems that the terrorist activities must occur on the territory of a state.\(^{160}\) Tests on the connection between a non-state actor and a state from the ICJ, the ICTY or the ECtHR are well demarcated and their explanation covers several pages. The ICJ has always handled the subject of attribution with great caution, especially when it implies resorting to force.\(^{161}\) The Harboring Doctrine does not contain any of such guidance and it seems that the mere existence or tolerance of terrorist groups in a state can be sufficient for attributing their acts to that state and the consequences thereof, invoking the right of self-defense of the UN Charter.

There do seem to be some parameters of importance here, for instance whether or not the state has made sufficient efforts in combatting terrorism and whether or not the state might be a failed state. Furthermore there seems to be a sliding scale in attribution according to Travailio and Altenburg, the level of force allowed when a state resorts to force seems to relate to the level of “support” or “harboring” the state gives to terrorism.\(^{162}\) Moreover attribution seems more likely in situations where a state has received repeated warnings stop from supporting a terrorist group, the perceived illegitimacy of the State, involvement of the UN Security Council, and high severity of the terrorist threat.\(^{163}\) An interview with United States ambassador John Bolton seems to indicate that culpability plays a role here as well, meaning that Afghanistan is more culpable when not cooperating deliberately with the international community than Lebanon, which was unable to remove terrorists from its territory.\(^{164}\) Nevertheless, most of these “parameters” do not show from official US statements or from the US National Security Strategy but are derived from international legal doctrine.

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160 Travailio & Altenburg 2003, p. 98.  
162 Travailio & Altenburg 2003, p. 112.  
164 Reinold 2011, p. 268.
From the text of the National Security Strategy it does not seem to matter whether or not a state is succeeding in its efforts to combat terrorism because it states that the United States will also hold account those states which are “compromised by terror”, because as they state “the allies of terror are the enemies of civilization”.165

4.2.2. the Definition of Terrorism

Even though the US National Security Agency explained what terrorism is, namely the “politically motivated violence perpetrated against innocents”, this definition remains vague. The first relevant use of the word terrorism dates back to the French Revolution and is connected with the Jacobin “Reign of Terror” under which the French state, controlled by Robespierre, killed some seventeen thousand enemies of the state.166 After both world wars there have been some efforts as to define what actually defines terrorism, however these efforts have remained fruitless and even though the UN General Assembly has, on various occasions, condemned terrorism a single definition remains obsolete and cannot be found in customary or conventional international law. This is especially due the fact that most international approaches combatting terrorism risked also covering national liberation movements and therefore lacked support, especially from Arab nations.167 Looking at the al Qaeda attack on the U.S.S. Cole in 2000, killing seventeen US Navy military personnel, it seems that the United States already maintain a broader definition of terrorism than is normal, their definition not merely covers civilians, but also non-combatants, such as military personnel who are not deployed in a war like zone.168

4.3. the Legal Rationale behind the Harboring Doctrine

There appears to be a myriad of well documented statements and several legal documents explicitly restating the Harboring Doctrine. The Harboring Doctrine, described in the statements and the National Security Strategy, shows that the United States’ approach to fighting terrorism is built on the

165 White House 2002, preamble.
166 Malzahn 2002, p. 86.
167 Idem, p. 92.
168 Idem, p. 89.
notion that the best defense against terrorism is a good offense against it. This wording already demonstrates the manner in which self-defense is used by the United States.

Even though the doctrine of harboring and supporting terrorism has been used sufficiently by various administrations it still lacks proper explanation of its significance, this means that the doctrine remains rather vague, especially in comparison with the Nicaragua or Tadic test.

Moreover, while most concepts of attribution are applicable in a whole array of situations, even though they have only been applied in jus in bello violations. The Harboring Doctrine is only mentioned in a situation of jus ad bellum, of resorting to self-defense. Another important factor in the appreciation of the Harboring Doctrine is that it is set in a weak precedent, most states allowed action to be taken against the Taliban regime because that regime was globally detested.

Moreover the Harboring Doctrine is not always consistent, the US National Security Agency pronounces that states harbor or support terrorism in order to achieve political goals, this seems an inconsistency with other statements which do not mention such an element. Sometimes the Harboring Doctrine speaks of guilt as an requirement and sometimes it does not.

In comparison with the tests of the ICJ and the ICTY, the Harboring Doctrine is based on a very distinct legal rationale. The ICJ bases its findings on the body of state responsibility and the ICTY bases its legal rationale on that of international humanitarian law, the Harboring Doctrine is quite distinctively based upon unilateralism. Not all states will be able to attribute acts of non-state actors to other states in the same manner as the United States are able to do. Yoo clearly shows that the Harboring Doctrine is based upon the idea of hegemonic powers. This is contrary to the ICJ and the ICTY which have been careful in formulating their theories on attribution in the light of the norm of non-intervention. The Bush Doctrine but also specifically the Harboring Doctrine and the grounds on which they are based do not reflect this norm of non-intervention. Moreover they do not respect the principle of state sovereignty and this is explicitly affirmed by Yoo and Krasner, one could even state that the Harboring Doctrine sees infringing other state’s sovereignty as legitimate. Yoo and Krasner furthermore make clear that they see the use of force as a legitimate tool to achieve certain goals.

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These are all factors that need to be taken into account if the Harboring Doctrine is to achieve status as customary law.

Because of the aforementioned, the Harboring Doctrine falls solely under the regime of *jus ad bellum*, which governs causes of resorting to force, since it is only on the rules of attribution if they can lead to an use of force. The Harboring Doctrine lowers the bar for attribution, therefore it allows self-defense to be used more arbitrary and as a policy tool.
Chapter 5    Evolvement into Customary law

The importance of customary law seems to be declining for a variety of reasons, while the ICJ’s decisions and advisory opinions show contradictory signs in the assessment of customary law. This makes it harder for new rules, like the Harboring Doctrine to reach the status of customary law. This Chapter discusses the requirements and the difficulties of customary law according to ICJ rulings and the comments of authoritative authors. This Chapter must also be seen in the light of the rudimentary character of international state responsibility and the vagueness of the Harboring Doctrine., which are not helpful for the evolvement of a doctrine into customary law.

5.1.    International Custom

The Harboring Doctrine has been stated as being customary law shortly after the United States’ response of self-defense on Afghanistan, nevertheless it was an already tried doctrine, even before the Bush administration.172 However one still needs to be cautious to see the legal reactions after September 11 as a precedent of the international recognition for applying the Harboring Doctrine as customary law, especially since the broad international support for the actions taken against Afghanistan were due the particular circumstances of that time, including the earlier human right violations of the Taliban regime.173 Moreover one needs to take into account that international custom has a fluent character and can be influenced by public opinion, and that “the political dimension is often obvious”.174

5.1.1.    Definition of International Custom

The most authoritative definition of international custom as a source of law, is found in Article 38.1 (b) of the Statute of the ICJ, it states that international custom shall be applied “as evidence of a general practice accepted as law”.

173 Idem, p. 227.
The landmark decision of the ICJ on international customary law, the *North Sea Continental Shelf Cases*, states that for a custom to be accepted as a general practice accepted as law, it needs to fulfill two elements, that of state practice, or usus, and the corresponding view of states that there is a legal obligation to act correspondingly. This corresponding view can consist out of *opinio necessitatis* or *opinio juris*. *Opinio necessitatis* is the earlier stage of custom and in this stage a practice evolves imposed by social, economic or political needs, *opinio necessitatis* is therefore not sufficient for a custom to be accepted as law.

Only when states begin to believe that they have to conform to that practice because international law obliges them, then there is *opinio juris* and it is this *opinio juris* that is needed for a custom to be accepted as law. *Opinio juris* is explained in the *North Sea Continental Shelf Cases*, it states the following, “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 need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation”. State practice itself does not need to be completely uniform for the forming of international custom, to a certain extent deviations from the rule can even confirm the existence of a rule.

5.1.2. Comments on the ICJ’s Case Law

This all appears to be very clear, however, the ICJ is criticized for not applying the standard it has set out in the *North Sea Continental Shelf Cases*. When assessing customary law Meron, current president of the ICTY, criticizes the ICJ for its avoidance of evaluating state practice. When treaties exist in a respective area of law, Meron states the ICJ tends to use the treaty as a distillation of custom even when states are not party and therefore not bound by it. Meron also states that even in the *Nicaragua Case* the ICJ relied more on the UN Charter, treaties and declarations than on actual state practice. As noted before also Cassese stated that the *Nicaragua Case* had not been built on any state practice or

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175 ICJ 20 February 1969 (*North Sea Continental Shelf Cases*), § 74.
176 ICJ 20 February 1969 (*North Sea Continental Shelf Cases*), § 77.
178 Meron 2006, p. 402.
judicial precedent at all. This criticism has also been heard internal, when the ICJ judged upon the case of the Democratic Republic of the Congo v. Belgium, Judge Van den Wyngaert claimed in her Dissenting Opinion that the ICJ had not considered sufficiently state practice and opinio juris. Not only the ICJ but also other courts, as well as states rather use previous decisions rather than evaluating what the actual condition of state practice is, and this has led to an ”informal stare decisis”, this means that actual state practice is given less value than it should be given based upon the North Sea Continental Shelf Cases.

Cassese notes that in general the role custom once played has declined after the Second World War since states now seldom resort to custom to regulate new issues and old custom has eroded. This is especially due the emergence of the influence of Third World States and former socialist states that felt that older customary rules represented Western values. Another important factor which has led to the decline of custom is the fact that states are more and more divided, economically and politically than they were used to. On top of that, there are now more than 200 states, making the process of customary law making more difficult. Instead of custom, codification through treaties nowadays is a more important means for the development of international law and the UN plays an important role here as a forum.

In her Advisory Opinion the ICJ has stated furthermore that UN General Assembly Resolutions can play an important role for providing evidence of opinio juris and to show the emergence of a new rule. However this cannot be equated with state practice and each case should still be analyzed separately, especially since votes in UN General Assembly Resolutions generally do not show a states’ intention to be bound and do not show their underlying motivation.

Because of the aforementioned, development of international custom is not as clear cut as the North Sea Continental Shelf Cases might imply, moreover Simma and Alston have stated that customary law making has now become a “self-contained exercise in rhetoric”, while they point at the practice of

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182 Idem, p. 402 and 403.
183 Cassese 2005, p. 165
184 Idem, p. 169 and ICJ 8 July 1996 (Legality of the Threat or Use of Nuclear Weapons), § 70.
185 Meron 2006, p. 388.
taking UN General Assembly Resolutions as a starting point for possible custom development.\textsuperscript{186} UN General Assembly Resolutions which turn into customary law certainly robs \textit{opinio juris} of its independent content as d’Amato also states.\textsuperscript{187} Even though the role of custom is declining, Cassese states that custom still plays a role in the development of international law in the area of \textit{“major political and institutional conflicts”}, since states are not likely to come to agreement through treaties here.\textsuperscript{188} This is certainly true in the area of state responsibility which, even after the extensive work of the ILC and the Articles on State Responsibility, remains uncodified.\textsuperscript{189} Therefore also the field of attribution is open for influence of customary law making.

Meron states that it has gained momentum that not only actual state practice, through actions, is state practice but also acts of denial, concealment of conduct prohibited by law and also verbal acts. These verbal acts include acts such as diplomatic statements, policy statements, press releases and comments by governments on draft treaties.\textsuperscript{190}

In recent years it has been acknowledged that it is not \textit{opinio juris} which transforms state practice into customary law, but it actually is \textit{vice versa}. There first needs to be \textit{opinio juris} which is then invoked by state practice.\textsuperscript{191} This practice is built on the practice of three major decisions, the first being the Nuremberg Trials, the second the \textit{Nicaragua Case} and the third is the judgment in \textit{United States v. von Leeb}.\textsuperscript{192} The ICTY in \textit{Tadic} also relied on verbal statements which it used as \textit{opinio juris} but also as state practice.\textsuperscript{193} This development fits neatly in the \textit{“self-contained exercise in rhetoric”} practice that Simma and Alston described. \textit{Usus} and \textit{opinio juris} are intertwined very much, and \textit{opinio juris} is even often derived from the consistency of state practice\textsuperscript{194}, as the aforementioned has shown a distinction between sources confirming \textit{usus} or \textit{opinio juris} is sometimes hard to make, especially since they can be derived from the same sources.

\textsuperscript{186} Simma & Alston 1992, p. 89.
\textsuperscript{187} d’Amato 1987, p. 102.
\textsuperscript{188} Cassese 2005, p. 166
\textsuperscript{189} Meron 2006, p. 400.
\textsuperscript{190} Idem, p. 361.
\textsuperscript{191} Idem, p. 366.
\textsuperscript{192} Nuremberg 1948, 12 LRTWC (\textit{United States v. Wilhelm von Leeb et al}).
\textsuperscript{193} Meron 2006, p. 367.
\textsuperscript{194} Idem, p. 366.
It can be concluded from the foregoing that the role of customary law as we know it is certainly declining, conventions are becoming more and more important. Nevertheless, rules of attribution fall under state responsibility and therefore also fall under the area of major political and institutional conflicts. One of the last areas wherein custom has any influence. Nevertheless, in the of area state responsibility, with its rudimentary character, it is hard for custom to develop, especially for the Harboring Doctrine which has a significant impact on a state’s sovereignty.

5.2. Recent State Practice and Opinio Juris

For the evolvement of the Harboring Doctrine in customary law it must fulfill the requirements stated above. In general there should thus be opinio juris and usus. Whether or not the Harboring Doctrine has achieved status as international customary law will be assessed below.

First of all it needs to be stated that the Harboring Doctrine has emerged out of the United States’ foreign policy, and normally most foreign policy doctrines are “short lived”, meaning that they are only relevant for a certain moment in time and for a particular set of circumstances, let alone that most foreign policies are highly influenced by political and policy purposes, making them unfit for opinio juris. Since it is mostly opinio juris which forms before the actual state practice and which is then invoked by states, this will be discussed primarily.

Travalio and Altenburg state that there has developed a practice for the UN General Assembly to condemn states that support or harbor terrorism, moreover they argued that the United States’ retaliatory actions against Iraq in 1993 and Afghanistan and Sudan in 1998 did not meet a vast amount of objections, nor did the UN Security Council or the General Assembly take any action. The lack of objections to the multiple speeches in which the Harboring Doctrine had been pronounced, to Travalio and Altenburg, is the “strongest manifestation” of evolving customary law regarding the use of force against terrorism, however a lack of objections is not sufficient in itself for the formation of customary law, there has to be more.

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After the attacks of September 11 the UN General Assembly did condemn the attacks and stated that those responsible for aiding, supporting or harboring the perpetrators, organizers or sponsors would be held accountable, afterwards the UN Security Council adopted the same text unanimously, but it must be noted that this support was influenced by the horrible acts of 11 September and therefore a clear form of *opinio juris* cannot be derived from it, states have reacted to a certain event in time instead of reacting to a clear doctrine.

5.2.1. *Articles on State Responsibility*

There has been a very interesting moment for states to comment on the rules of attribution in the drafting process of the Articles on State Responsibility. Notably, Article 4 and 8 are the most important for attribution and they are also used by the ICJ in the *Bosnian Genocide Case*. Nevertheless states have not benefitted from this opportunity to give guidance on what their interpretation is of the rules of attribution. Only France, Mongolia, the United Kingdom, Switzerland, the United States and Germany have commented on these articles. Of those states only Germany and France showed interest in a broader form of attribution, unfortunately the comments with their reasoning are little more than a small paragraph. These Draft Articles on State Responsibility are now adopted by the ILC and the General Assembly has taken note of them. States have not taken full or no advantage at all, intentionally or due to negligence, of this opportunity to regulate the field of attribution of non-state actors to states. However this drafting process occurred before the acts of September 11 and states might have chosen to do otherwise after the Harboring Doctrine came into effect.

5.2.2. *the Israel/Lebanon Conflict*

There is also other state practice which has no connection to the attacks of September 11 which could point to the formation of the Harboring Doctrine as a new customary rule. One of the most well-known is the conflict between Israel and Lebanon of July 2006, in this conflict Hezbollah operated from the southern region of Lebanon from where it attacked Israel, which in return attributed those

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attacks to Lebanon. Hezbollah even had ministers in the Lebanese government, Lebanon was a fragile democracy, the Lebanese government was powerless and could not control the Hezbollah militias at the southern border with Israel.\textsuperscript{200} On a certain moment Hezbollah kidnapped several soldiers and killed others, in return Israel reacted through a major ground offence, air strikes and a naval and air blockade of Lebanon.\textsuperscript{201} More importantly for the doctrine of attribution, the Israeli Permanent Representative at the United Nations declared that “Responsibility for this belligerent act of war lies with the Government of Lebanon, from whose territory these acts have been launched into Israel. Responsibility also lies with the Government of the Islamic Republic of Iran and the Syrian Arab Republic, which support and embrace those who carried out this attack”. This statement shows that Israel acknowledged that the attacks of Hezbollah were the attacks of a sovereign state\textsuperscript{202}, Lebanon, and that the “ineptitude and inaction of the Government of Lebanon has led to a situation in which it has not exercised jurisdiction over its own territory for many years”. The result is the following; Israel sees the attacks of Hezbollah as a “clear declaration of war” of Lebanon,\textsuperscript{203} hence Israel reserves the right of self-defense and attacks Lebanon.

Nevertheless, after Lebanon complained at the UN Secretary-General and Security Council President that it did not know about the attacks on Israel nor did it endorse them Israel withdrew its assertions of attributing Hezbollah acts to Lebanon.\textsuperscript{204} Even though Hezbollah is a part of the government there is no evidence that the Lebanese Government had direct or indirect control over the Hezbollah militia in the South which was seen as a legitimate resistance group.\textsuperscript{205} The conflict between Israel and Lebanon is interesting from a legal perspective because it is very well documented and a significant amount of states as well as international and regional organizations have given an opinion on the situation, however not always necessarily relevant for the legal concept of attribution. Unfortunately it is also a conflict which is politicized more than others, therefore a state’s statements are often influenced by other interests and it is difficult to deduce a clear \textit{opinio juris}.

\begin{footnotes}
\item[200] Reinold 2011, p. 263.
\item[201] Schmitt 2008, p. 127.
\item[202] Idem, p. 136.
\item[203] Permanent Representative of Israel 2006.
\item[204] Schmitt 2008, p. 138.
\item[205] Idem, p. 142.
\end{footnotes}
When looking at the statements on the Israeli attacks most states reluctantly acknowledge Israel’s right of using force, even though most states’ reactions were blurred by their worries about the excessive force being used. The United Kingdom’s minister of the Foreign Office, Kim Howells, criticized Israel for attacking the entire Lebanese nation and not just Hezbollah. This is criticism heard from more states as well.

Among the other countries criticizing the legality of attacks on Lebanon were Egypt, Tajikistan, Pakistan, and Venezuela. The European Union criticized the naval and air blockade as well. Mixed results came from Germany, the Netherlands, Japan, Russia and Spain, most of them condemned Hezbollah but also Israel for its excessive violence, however most of them were very cautious on the subject of self-defense. It seems that the only state clearly defending Israel’s use of force was the United States, there are other states which state that Israel has the right of self-defense, however as the United Kingdom noted, this should be proportional.

Looking at the conflict between Lebanon and Israel it is hard to make up a rule of attribution that confirms the Harboring Doctrine in a jus ad bellum environment, even though this was a situation with very clear attribution elements, such as a non-state actor with ties to a government. Especially since Israel withdrew it assertions to Lebanon.

There were enough complaints on attributing the actions of Hezbollah to the Lebanese state that it could safely be stated that no opinio juris emerged from this case which allowed such an attribution. Israel is mostly supported in its self-defense claims, however there does not seem to have evolved a confirmation of the rule of attribution derived from the Harboring Doctrine. Attributing Hezbollah’s acts to Lebanon was not supported by a lot of states. This shows there is no consensus between states and therefore also no customary rule, at least it did not emerge from this conflict. Most states did support the Israeli self-defense, however only against Hezbollah and not against Lebanon.

206 “Minister condemns Israeli action”, BBC July 22 2006.
207 “In quotes: Lebanon reaction”, BBC July 13 2006.
210 “Venezuela: We support Lebanon, Palestine”, Ynetnews.com August 8 2006.
211 “In quotes: Lebanon reaction”, BBC July 13 2006.
212 “In quotes: Lebanon reaction”, BBC July 13 2006.
215 “Spain urges Israel, Lebanon to calm border conflict”, July 14 2006, People’s Daily Online.
According to Judge Simma in his Separate Opinion in the Armed Activities Case\textsuperscript{218}, attribution to a state is not needed anymore to react against Hezbollah by Article 51 of the UN Charter, this might have been a reason for Israel to drop it after a complaint of Lebanon, even though armed attacks still need to be more than mere “frontier incidents”.\textsuperscript{219} The Israel-Lebanon conflict does not provide sufficient evidence of opinio juris since most state’s reactions were blurred because of the excessive violence and eventually Israel withdrew its attribution of Hezbollah’s acts to Lebanon based upon the Harboring Doctrine.

5.2.3. \textit{Other Indications of Evolvement into Customary Law}

There are nevertheless signs that other countries as well were picking up the Bush Doctrine. Australia’s former Prime Minister John Howard stated in 2002 that he would strike preemptively against terrorist attacks, this was stated after the terrorist attacks on the Indonesian island Bali which killed more than 180 people, 82 of them being Australian. The terrorists were later found to be Indonesian Muslims. In return John Howard’s statements were criticized by an Indonesian official stating Howard was acting above the law.\textsuperscript{220} A year after the attacks of September 11 the Russian government also warned its neighboring state Georgia to “root out” terrorists which it was allegedly “harboring” on its territory or else face attacks based upon self-defense. After Russian attacks on Georgian soil an United States’ spokesman condemned those attacks, by stating that the United States "strongly supports Georgia's independence and territorial integrity".\textsuperscript{221} Nevertheless, the more recent 2008 military campaign of Russia against Georgia had other motivations than the harboring of Chechen rebels.\textsuperscript{222} These two examples show that acts of attribution of non-state actors will receive sever criticism from the state to which is attributed.

In 2008 a conflict arose between Ecuador and Colombia, Colombia attacked the FARC with which it has an ongoing conflict for several decades and which operates from neighboring countries, such as Ecuadorean. The attack was based upon self-defense, even though there was no specific prior

\textsuperscript{218} ICJ 19 December 2005 (Case Concerning Armed Activities on the Territory of the Congo), Separate Opinion Judge Simma, §11.
\textsuperscript{219} Schmitt 2008, p 145 and 150.
\textsuperscript{220} “Startling His Neighbors, Australian Leader Favors First Strikes”, the New York Times December 2 2002.
\textsuperscript{221} “Vigilance and Memory: Russia; Putin Warns Georgia to Root Out Chechen Rebels Within Its Borders or Face Attacks”, New York Times September 12 2002.
\textsuperscript{222} Allison 2008, p. 1145.
justification. Nevertheless, the Organization of American States (hereinafter the OAS) condemned the Colombian attacks on Ecuadorean soil\textsuperscript{223}, which is a stark contrast with the reaction to the September 11 attacks where the OAS stated that “\textit{those that aid, abet or harbor terrorist organizations are responsible for the acts of those terrorists}”\textsuperscript{224}. It was later found that the FARC did have ties with the Ecuadorean government.\textsuperscript{225} Unfortunately for the evolvement of international legal doctrine on attribution the conflict failed to produce a legal response from other states,\textsuperscript{226} the reaction does show that the OAS thinks very differently on attribution now than that it used to.

\textbf{5.3. Concluding Remarks}

These state reactions towards each other’s attribution of acts to another state shows that among states there is no consensus on when attribution is just. Langille has stated in 2003 that the Harboring Doctrine has formed instant custom, however in his assessment he has only looked at General Assembly and Security Council Resolutions.\textsuperscript{227} Practice after 2003 has shown that there is no consensus on attributing acts of non-state actors to states, not even when they are mere terrorist acts to which the Harboring Doctrine specifically directs. Some usus might exist, but there is certainly no \textit{opinio juris} which is shared by states to say that states act because of a “\textit{belief that this practice is rendered obligatory}”.

\textsuperscript{223} OAS 2008. \\
\textsuperscript{224} OAS 2001. \\
\textsuperscript{225} Reinold 2011, p. 275. \\
\textsuperscript{226} Idem, p. 273. \\
\textsuperscript{227} Langille 2003.
Chapter 6  Conclusion

The Harboring Doctrine is the offspring of the Bush Doctrine which emerged after the 2001 terrorist attacks on the New York Twin Towers. It is a doctrine which has not evolved out of the legal profession but has emerged out of the policy and political choices of the United States.

The Harboring Doctrine aims at imputing conduct of non-state actors to states based upon the harboring or supporting of terrorism. Because the Harboring Doctrine is on attributing acts to a state it forms the subjective element that is needed for state responsibility. The Harboring Doctrine is not the first test of attribution which has emerged, the most well-known tests in legal doctrine are the Nicaragua test and the Tadic test, even though other courts have developed some tests of their own as well.

The distinction of jus in bello and jus ad bellum is essential for the evolvement of the Harboring Doctrine into customary law. It is therefore important to note that the Harboring Doctrine is a test of attribution that deals explicitly with jus ad bellum situations. If certain terrorist activities of non-state actors can be imputed to a state then the Harboring Doctrine grants the affected state the right to self-defense, the well-known and also the only situation wherein it has been applied with global support was that of Afghanistan. There are no situations of attribution known wherein the Harboring Doctrine has been used for a jus in bello situation. It is also clear from the doctrine itself that it is intended for jus ad bellum situations. The tests of the ICJ and the ICTY have until so far only been used in situations of jus in bello violations and not in a situation wherein actions of non-state actors were attributed to a non-state actor which led the attacked state to invoke self-defense, there is no ICJ case covering attribution in a jus ad bellum situation even though the ICJ had the opportunity to do so in Armed Activities Case.

The distinction and the autonomy of both jus in bello and jus ad bellum is a well-established part of international law. The distinction of both branches of law has led to different interpretations of certain definitions, such as proportionality. Because of the distinction between both branches it is not necessary to research the evolvement of the Harboring Doctrine in the area of jus in bello. The autonomy of both bodies of law allows a rule of attribution to develop autonomously in either one of
those bodies of law without it affecting the rules of attribution in the other. This leads to the conclusion that if the Harboring Doctrine were to alter the rules of attribution it would only be likely that it would do so in the field of *jus ad bellum*, this does not mean it actually has reached the necessary *opinio juris* and *usus* to do so.

The foregoing Chapter has shown that the relevance of international custom is in decline and it is especially hard for rules in the field of international state responsibility to change through customary law, the necessary consensus is hard to achieve. Moreover, the drafting process of the Articles on State Responsibility have shown that states are not willing to create hard law in this area and like to maintain the rudimentary character of state responsibility even though there have been incentives to regulate this area of law. International state responsibility is a difficult environment for the Harboring Doctrine to achieve the status of international customary law.

Moreover there is no clear process for the development of rules or doctrines into customary law, the requirements that the ICJ set the *North Sea Continental Shelf Cases* became more or less obsolete in their next cases, while the ICJ is criticized for not following their own case law. The fact that the main requirements; *usus* and *opinio juris*, have become intertwined, makes their distinction vague.

Another factor that impedes state sovereignty and state responsibility is that the ICJ has acknowledged, in the case concerning the *Legality of the Threat or Use of Nuclear Weapons*, that states will always use all force necessary when their fundamental right of survival is at stake, this is what the United States might have thought after September 11. States might in such situations feel forced to use rules of attribution to justify their actions, even though these rules are not in accordance with international law.

A tendency has emerged of allowing self-defense to be used against non-state actors without attributing the armed attack itself to the states. Judge Simma and Kooijmans in their separate opinions in the *Armed Activities Case* contended that this represented current international custom. Nevertheless, whether this actually is true remains controversial. The Israel-Lebanon conflict is a good example of this new tendency to use self-defense with attribution, in the first instance Israel

228 ICJ 8 July 1996 (*Legality of the Threat or Use of Nuclear Weapons*), § 96.
230 Okimoto 2012, p. 60.
attributed Hezbollah’s actions to Lebanon, however after Lebanon complained at the UN, Israel withdrew its legal justification and based its acts of self-defense directly against Hezbollah, without attribution to Lebanon. This indicates that in some situations related to terrorism attribution of non-state actors to a state has become irrelevant for a state to react to these non-state actors. The Israel-Lebanon conflict could have been a text book case showing the relevance of the Harboring Doctrine. However Israel faced significant critique on the proportionality of force it used and in general there could be no clear *opinio juris* extracted from the state’s reactions. Therefore the conflict could as well be a proof of an *opinio juris* that states feel there is a legal obligation which demands a higher threshold for attributing acts of non-state actors to states, especially since Israel withdrew its allegations.

On different accounts the Harboring Doctrine faced mixed reactions as well. For example when Australia and Russia contended they as well would apply the Harboring Doctrine in terrorist situations, this led to criticism, notably from the United States. The broad and vague definition of terrorism of the Harboring Doctrine impedes the acceptation of this doctrine as well, especially since earlier attempts combatting terrorism failed due to covering national liberation movements as well.

When looking at the legal rationale behind the Harboring Doctrine it seems it is only reserved for a hegemon and its allies. The Harboring Doctrine is part of a National Security Strategy of the United States which can be said to be pure international power play. The Harboring Doctrine is not a doctrine which can be used by all states, since not all states have the power to act unilaterally and therefore the doctrine is bound to receive criticism from states which will be negatively affected. This criticism could be due the unilateral character that has always been inherent to the Harboring Doctrine. It is exactly the unilateral character of the Harboring Doctrine which makes it hard, or one could say impossible to develop into *opinio juris*, states could be reluctant to support a doctrine which could infringe their own territorial integrity and sovereignty.

Looking at the criticism it is hard to acknowledge that the Harboring Doctrine has created *opinio juris*, especially since the doctrine is based upon political and policy choices. *Opinio juris* is an essential element of international custom and often stated to be needed even before actual state practice. If the
Harboring Doctrine ever changed the subjective feeling states have when applying a certain doctrine, this subjective feeling would not have reached further than *opinio necessitatis*, and this is not sufficient for customary law.

When looking at state statements there is no coherent state practice which supports the Harboring Doctrine, when a state indicates it attributes based upon this doctrine it is bound to get a huge amount of criticism. There is therefore only one clear situation wherein a state used the Harboring Doctrine and that remains that of Afghanistan. There can be no other conclusion than that the Harboring Doctrine has not emerged as the modern test of attribution of acts of non-state actors to states in situations of *jus ad bellum* and terrorism.
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