The Unwilling or Unable Doctrine
- The Right to Use Extraterritorial Self-Defense Against Non-State Actors

Madeline Holmqvist Skantz

Thesis in International Public Law, 30 HE credits
Examiner: Said Mahmoudi
Stockholm, Spring term 2017
Abstract

In the aftermath of the global conflicts with the World War II (WWII) still raging, the world came together to sign the Charter of the United Nations (UN Charter) in order to maintain international peace and security.\(^1\) The scope of the UN Charter was written with the single vision of war between sovereign states, the principle of territorial integrity, and the prohibition to the use of force.\(^2\) This addressed a much different political and legal landscape that has taken shape in modern times. The prohibition of force, and its exceptions, of the 1940’s would not stand the test of time, as it did not address the issue of self-defense when an armed attack has been committed separately from a sovereign nation.\(^3\) Essentially, the drafters of the UN Charter did not anticipate the existence of the type of non-state actors that are relevant today, such as al-Qaeda and Da’esh, acting from within a host state’s territory. This raises concern since the UN Charter does not clearly provide a right to extraterritorial self-defense against non-state actors. However, the victim states in these unique situations have occasionally invoked the lawful right to use extraterritorial force in the name of self-defense to deal with these threats in the cases in which the host states are unwilling or unable to deal with the threat possessed by the non-state actors. In literature, this has come to be called the Unwilling or Unable Doctrine. In this thesis, a case study has examined whether the Doctrine has reached the status of customary international law, although neither the state practice or opinio juris has reached the level needed in order to create a new legal rule in international law. The acts by the victim state have not been consistent or sufficient and the legal arguments have not been uniform. Also, a numerous host states have criticized the conduct carried out by the victim state. In conclusion, the requirements needed for a norm to emerge to customary international law has not been fulfilled and thus there exists no valid legal basis to use extraterritorial self-defense against a non-state actor. Ultimately, a well-defined Doctrine would solve a major international legality that needs to be addressed.

\(^1\) Charter of the United Nations, 24 October 1945, 1 U.N.T.S. XVI [UN Charter]; UN Charter, Article 1(1).
\(^3\) UN Charter supra note 1 at Article 51.
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5.1 Analysis

5.2 Final Conclusion

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Acknowledgement and Dedications

First and foremost, I would like to thank my mentor, Jur. Dr. Mark Klamberg for his feedback and guidance during the process of writing this thesis. I have been forced to expand my perspective and think critically about a vital debate in current international law. With Jur. Dr. Klamberg’s support, I have been granted an invaluable educational experience.

I would also like to thank my former teacher at the Swedish Defence University, Mr. Ola Engdahl (nowadays at the Ministry of Foreign Affairs), for his great support and reflections on my work. He has pushed me to think outside of the box and has played an important role in my professional and educational growth.

The idea of this paper came to fruition during my work as an Assistant Attaché at the Swedish Mission to the United Nations in New York. I would not have had the possibility to leave Stockholm for New York without the support of my family. Hereby, I would like to thank my family and friends- especially my mother Lucie, my father Johan and my sister Celina for their great support during my studies at the Faculty of Law at Stockholm University and my time in New York. My family has been my inspiration and motivation for continuing to improve my knowledge and further my career aspirations.

This paper is dedicated to my grandfather, Jan-Peter, whom I wish was here to experience this great pinnacle of my educational journey. I hope that he can see me and that he is proud of my achievements.
## Abbreviations

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<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>ADF</td>
<td>Allied Democratic Forces</td>
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<tr>
<td>ANC</td>
<td>African National Congress</td>
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<td>ASIL</td>
<td>American Society of International Law</td>
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<td>AU</td>
<td>African Union</td>
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<td>CTC</td>
<td>Counter-Terrorist Committee</td>
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<td>ARSIWA</td>
<td>Draft Articles on Responsibility of States for Internationally Wrongful Act</td>
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<td>DRC</td>
<td>Democratic Republic of Congo</td>
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<td>FARC</td>
<td>Revolutionary Armed Forces of Colombia</td>
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<td>FLN</td>
<td>National Liberation Front (French: Front de Libération Nationale)</td>
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<td>GCC</td>
<td>Gulf Cooperation Council</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICISS</td>
<td>International Commission on Intervention and State Sovereignty</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICJ Statute</td>
<td>Statute of the International Court of Justice</td>
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<td>ILA</td>
<td>International Law Association</td>
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<td>ILC</td>
<td>International Law Committee</td>
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<td>MKO/MEK</td>
<td>Mujahedeen-e-Khalq</td>
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<tr>
<td>MONUC</td>
<td>United Nations Organization Mission in the Democratic Republic of the Congo</td>
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<td>MONUSCO</td>
<td>United Nations Organization Stabilization Mission in the Democratic Republic of the Congo</td>
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<td>NAM</td>
<td>Non-Aligned Movement</td>
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<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
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<td>OAS</td>
<td>Organization of American States</td>
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<td>PJAK</td>
<td>Partiya Jiyana Azad a Kurdistanê</td>
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<td>PLO</td>
<td>Palestine Liberation Organization</td>
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<td>Rome Statute</td>
<td>Statute of the International Criminal Court</td>
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<td>SWAPO</td>
<td>Southwest Africa People’s Organization</td>
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<td>UN Charter</td>
<td>Charter of the United Nations</td>
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<td>UIC</td>
<td>Islamist Forces of the Union of Islamic Courts</td>
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<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>U.K.</td>
<td>United Kingdom of Great Britain and Northern Ireland</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNGA</td>
<td>United Nations General Assembly</td>
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<td>UNIFIL</td>
<td>United Nations Interim Force in Lebanon</td>
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<td>UNSC</td>
<td>United Nations Security Council</td>
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<td>UNSG</td>
<td>United Nations Secretary-General</td>
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<td>UPDF</td>
<td>Uganda People’s Defense Force</td>
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<td>U.S.</td>
<td>United States of America</td>
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<tr>
<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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<td>WWII</td>
<td>Second World War</td>
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1. Introduction

1.1 Background

Non-state actors, such as terrorist groups, have caused the world a tremendous amount of pain in the last decades. As a result of their attacks, states in which they victimize (“victim states”) have been placed in an unprecedented political and legally predicament- how to deal with and apprehend non-state actors in a foreign territory. A complicated layer to this issue is the unpredictable nature to which the non-state actor and the state where they operate from (“host state”) interact with one another. In some cases, the host state may actively support the aims of the organization, as seen in the relationship between the Taliban regime of Afghanistan and al-Qaeda. In others, like the use of force by Chechen militants of the Pankisi Gorge in Georgia, the non-state actor may be in a geographically remote region outside the effective control of the host state. What is difficult in both of these situations is the legal extent to which the victim state is able to defend itself. When the host state is not legally responsible for the attack, the use of force by the victim state against non-state actors within the host’s territory is contrary to and may violate the sovereignty and territorial integrity of the host state alongside the prohibition of the use of force. As a result, non-state actors are essentially able to use the host state’s sovereignty as a shield to protect themselves. These situations can lend themselves to scenarios in which a victim state are taking forcible measures conducted without the consent of the host state. The victim states who seek to respond with force to the attack are therefore required to decide if they shall use force on the territory of a state which they may not even be in conflict with. However, even if consent should exist, the question of its legitimacy would still remain, but there would be less need to discuss whether the use of force by the victim state had violated the sovereignty and territorial integrity of the host state.

The question whether a state has the right to use force on the territory of another state to protect itself in the aftermath of an armed attack by a non-state actor has been asked several times. According to international law, under Article 2 (4) of the Charter of the United Nations (UN Charter), it is prohibited to use force. However, there are three exceptions to which the use of force on another states’ territory is lawful. The first, Article 51 of the UN Charter, gives a state the right to self-defense. If the conditions in the Article are fulfilled, the victim state has the right to use force in self-defense within the territory of another state. In parallel

to Article 51, customary international law can be stipulating the same rights and obligations as a treaty, but it often tend to be more specific.\(^5\) For instance, a growing number of states acts like there is a possibility to use extraterritorial self-defense against non-state actors in accordance to the Unwilling or Unable Doctrine, within the frame of Article of the 51 UN Charter, which could indicate that it has become a part of international customary law. The second exception from the prohibition to use force is pursuant to authorization by the Security Council (UNSC) under Chapter VII of the UN Charter.\(^6\) The third, and last, exception is through consent by a state to accept the presence of another state on its territory. Consent is seen by many as the foundation of international law itself.\(^7\)

1.2 Purpose and Research Question

The purpose of this thesis is to shed light on the development of use of force in the name of self-defense against non-state actors on a host states’ territory as justified by the Unwilling or Unable Doctrine. According to this Doctrine, the self-defense against non-state actors on a host state’s territory is lawful if the non-state actor has undertaken an armed attack against the victim state and the host state is unwilling or unable to deal with the threat possessed by the non-state actors. In short, if the host state is unwilling or unable to suppress the threat itself, the victim state may lawfully use self-defensive force. For example, on May 1\(^st\), 2011, the United States of America (U.S.) entered Pakistan without Pakistani consent in the aftermath of the 9/11 attacks to “capture or kill” Osama bin Laden.\(^8\) Soon after, President Barack Obama announced that the notorious founder and leader of the al-Qaeda organization had been killed. In response, Pakistan vehemently cited a “violation of sovereignty” as the U.S. had also carried out drone strikes within its territory to impede bin Laden’s influence while in hiding.\(^9\) The U.S. defended its actions by citing international law- arguing that Bin Laden’s group posed an imminent threat against their country, and it was therefore lawful to use force in Pakistan since it was not willing or able to deal with al-Qaeda. Thus, the legitimacy of the Unwilling or Unable Doctrine and whether it has become a part of customary international law.

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\(^6\) UN Charter supra note 1 at Article 42.


law has been widely debated. Ongoing operations against non-states actors have forced states to clarify their views of the Unwilling or Unable Doctrine, which gives critics the chance to analyze its status in international law.

This thesis will examine whether the Unwilling or Unable Doctrine has become a part of international law (de lege lata) and identify if the Doctrine demonstrates a legitimate way to use extraterritorial self-defense against non-state actors. The examination will be conducted by answering the question:

- Has the Unwilling or Unable Doctrine reached the status of customary international law?

1.3 Method and Material

The approach to answer the research question will be conducted by an examination of the Doctrine’s content and a survey of incidents dating back to the signing of the UN Charter in 1945.\(^{10}\) This thesis evaluates current international law regarding the use of extraterritorial self-defense against non-state actors under the Unwilling or Unable Doctrine (jus ad bellum). In order to do so, different types of legal sources and other relevant materials will be analyzed. The study will employ a legal positivist and a traditional legal dogmatic methodology, although the latter lacks a general definition.\(^{11}\) The traditional legal dogmatic methodology demands that the sources are authorities which decides which of the sources set precedent if a dispute should occur.\(^{12}\) The legal positivism methodology has been chosen for two reasons. First, it is the the dominant legal theory and it represents a general authoritative description of the legal order and its content. Second, its perspective of law is useful for the purpose of answering the research question since its purports is to determined de lege lata.\(^{13}\)

International law is described by international legal positivists as the regulation of conduct and the ruling body which binds states in their relations with each other. The basis of the international legal system is in the common consent of the members of the international

\(^{10}\) State practice accordingly to states that have used force against non-state actors on the territory of a host state without the latter’s consent.


\(^{13}\) Amnéus, Diana. \textit{Responsibility to Protect by Military Means – Emerging Norms on Humanitarian Intervention?}. Department of Law, Stockholm University, Stockholm (2008), pp. 22-23. [Amnéus].
community. Article 38 (1) of the Statute of the International Court of Justice (ICJ Statute) specifies the sources of international law which the court has to take into account in its adjudication and is therefore the best tool to find de lege lata. It has traditionally been accepted as a list of sources of international law, although it is not the purpose of the provision.14 The first source mentioned is international conventions, or in other terms, bilateral or multilateral treaties. These law-making treaties create general norms in terms of legal propositions that impose the same obligations.15

This paper will especially focus on the norm in Article 38 (1) (b) of the ICJ Statute, customary international law, considering its examination of the same as it’s the most important source of an emerging norm. Customary international law consists of a combination of two elements: the objective element, usus, which is the practice of states and the subjective element, opinio juris, which is the conviction of that the state practice reflect a legal obligation.16 To examine the existence of a norm based on customary international law, the study needs to rely on lists of sources as a guide for determining which once to study (see Chapter 2.2). In addition, although jurisprudence from the ICJ (International Court of Justice) has an important role in international law, one needs to be aware of the lack of stare decisis stipulated in Article 59 of the ICJ Statute (see Chapter 3.2.2).

There are some concerns and difficulties about the material when conducting a case study that has to be taken into account, such as pro-belligerent bias (American contribution in the use of force and self-defense area of law is massive) as well as the availability of sources as evidence of customary international law (for example, Sweden has a tradition of transparency while other states does not have the same ability or prioritization). Also, language barriers need to be taken into account. However, the writer of this thesis has tried to minimize their impact. In addition, jurisprudence from inter alia ICJ will be a part of this thesis.

As mentioned, this thesis will deal with the UN Charter and its prohibition to use force and the right to self-defense. All the work within the UN is imprinted by the UN Charter, which is the primary source of the UN and is the governing text of the organization’s purpose.

16 Jennings & Watts, *supra* note 14 at p. 28.
qualification, and action. The verbal acts and decisions by intergovernmental organizations, such as the UNSC and the General Assembly (UNGA), is another alternative source of law.\textsuperscript{17} Both entities can adopt resolutions, but only the former has the authorization to adopt binding resolutions. The resolutions are not generally accepted as independent sources of law and does not ipso facto create new rules of customary international law, but rather as representing the positions of states. However, one can speak only of legal pronouncements when a resolution claims to enunciate binding rules.\textsuperscript{18} Resolutions adopted by the UNSC under Chapter VII of the UN Charter are immediately binding for all the member states. In contrast, UNGA resolutions, serve as aims, targets, or recommendations, but are not legally binding despite their political authenticity.\textsuperscript{19} Other official documents from the UN, for example such statements made by the President of the UNSC, will be considered as secondary legal sources. The legal sources to be used are to be understood as de lege lata.

In order to answer the research question, the study will also examine some sources outside the traditional ones. These include official state documents and statements as well as reports from international organizations in the purpose to see if the Unwilling or Unable Doctrine constitutes customary international law.

### 1.4 Delimitation and Definitions

Only questions relating to the lawfulness of the use of force will be considered (\textit{jus ad bellum}), and not the conduct of the parties while within an armed conflict (\textit{jus in bello}). The actions examined are those taken by the victim states within a host state’s territory without the latters’ consent. Therefore, the prohibition to use force and the right to self-defense will be described.\textsuperscript{20} Thus, the principle of sovereignty and territorial integrity will be an issue. This thesis will only consider whether customary international law can be used as a legal basis in the determination as to whether the Doctrine can be considered as current international law.


\textsuperscript{19} UN Charter supra note 1 at Article 25; Amnéus supra note 13 at p. 78.

\textsuperscript{20} Consent is only relevant to the Doctrine when it is lacking. The international law supremacy of consent to the use of force of a host states territory is outside the narrative of this thesis. See also Deeks (2013) \textit{supra} note 7 at pp. 3-4.
The cases study will be such in which a state has been a victim of an armed attack committed by a non-state actor. In response, the victim state has taken action in self-defense against the non-states actor outside its own borders. Acts outside the state’s border will be referred to as extraterritorial. Situations in which a state exercises effective control of a territory that is not its own, such as occupied territory, will not be examined. The focus will hereby be on such occasions where the action took place outside the borders and effective control of the victim state. The state taking extraterritorial measures will be referred to as victim state and the state where the non-state actor acts from will be referred to as host state. The definition of a non-state actor is individuals or groups acting without the control or by the behalf of a state (see below). Cases where self-defense may be employed on an anticipatory or pre-emptive basis are excluded. Only intervention including the use of force will be considered. The Doctrine relates to self-defense, which leaves humanitarian intervention outside the parameter of this thesis.

The primary concern and subsequent area of debate needs to ensure that states become responsible and that private actors, like non-state actors, do not impede human rights. There are questions over whether it is best to achieve this is by directly imposing human rights obligations and accountability on the non-state actors, or by ensuring an effective mechanism by which the state will have oversight and thereby will be held accountable for the conduct of the non-state actor.²¹ However, these questions are not of great concern in the context of this thesis. The focus is not of actions conducted by the non-state actor, but on the regulations and applicable rules to the actions taken by victim states against non-state actors on foreign soil. Thus, the accountability for illegal use of force against non-state actors will not be discussed in this thesis, nor will situations where there exist legitimate reasons of self-defense, but the use of force has included weapons prohibited by international humanitarian law (jus ad bello).

The key is that the non-state actor is not part, de facto or de jure, of any state and its identity and existence is independent of the host state. However, a link can exist between the host state and the non-state actor.²² The focus will be on the actions by non-state actors in legal terms and not how the actors may be characterized in political terms. Such characterization could

²² When determining if a groups act can be attributable to a state, see International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November (2001), Supplement No. 10 (A/56/10), chp.IV.E.1, Articles 4-11 [ARSIWA]. However, one needs to be aware that ARSIWA not is a binding treaty.
distract the focus from the legal issues at hand. The nationality of non-state actors is of no concern. In addition, the term “terrorism” will be used repeatedly as it runs through many of the states’ justifications for use of force. However, the definition is open to interpretation. Hereby, the term “non-state actor” includes terrorist organizations as well as other individuals or groups.

1.5 Outline
After the Introduction, five chapters follow, each ending with a conclusion. Chapter Two aims to describe relevant legal principles, the scope of the prohibition to use force in the UN Charter and its exceptions. Customary international law will be explained, which is necessary in order to examine whether the Doctrine has reached a legal status. The content and legality of the Unwilling and Unable Doctrine will be presented in Chapter Three. The case study in Chapter Four is divided into chronological sub-chapters. Finally, the research question will be answered in the last chapter. Chapter Five will contain an analysis and concluding remarks.
2. The Prohibition of the Use of Force and Its Exceptions

The role of non-state actors in international law is a growing subject for debate, as it encompasses numerous areas of the law and challenges therein. In essence, the question at hand is how states are able to take forcible measures against a non-state actor whose conduct cannot be attributed to a state. Forcible actors of this time are not new. Nevertheless, their role is not adequately addressed in international law. External military intervention has always been controversial and of various difference of opinion in regards to the principles of sovereignty and territorial integrity. Some of the approaches to allow states to use force in self-defense against non-state actors risk destabilizing the very foundations of the desired stability.23

Although there may be different perspectives on the matter, there are still basic principles that need to be explained to understand the self-defense agenda. The principle of sovereignty is understood in jurisprudence as “the right and power of the governing body to be the only and exclusive power, without any interference, to make decision on its territory.”24 This principle also demands every state to be equal according to Article 2 (1) of the UN Charter. A suggestion of a new definition was given in a report from the International Commission on Intervention and State Sovereignty (ICISS), which included “obligations by the state to respect its citizens in order to have a sovereign state”, but were never adopted.25 The principle of territorial integrity has support from various of articles in the UN Charter, for example Article 2 (4) and 2 (7). In essence, the principle holds that a sovereign state has exclusive and total jurisdiction within its territory.

2.1 The UN Charter

The UN Charter of 1945 was established at the conclusion of WWII with the objective “to save succeeding generations from the scourge of war”26 and strict rules regarding the use of force were created and agreed upon by the member states of the United Nations (UN) in the aftermath of the global conflict. During these negotiations, the parties had an easy time

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23 Lubell supra note 21 at pp. 15, 17-18.
26 See UN Charter supra note 1 at the Preamble.
agreeing on the prohibition of the use of force in Article 2 (4) of the UN Charter, but were rather occupied by its exceptions in Article 51.\textsuperscript{27} The rights and obligations which follow the Article are now accepted as international customary law and are equally applicable to all states irrespective of whether they are members of the UN.\textsuperscript{28}

The scope of the UN Charter was displayed with a different scenario in mind, as it was written with the single vision of war between sovereign states.\textsuperscript{29} Essentially, the drafters of the UN Charter did not anticipate the existence of the type of non-state actors in modern times. In order to understand how to legally deal with non-state actors and how to interpret current international law, it is necessary to understand the existing regulations to give guidance as how to compromise and set limits between non-state actors and sovereign states.

The methods of interpretation of the UN Charter, and other subsequent international conventions and treaties, are upheld in the Vienna Convention on the Law of Treaties of 1969 (VCLT). Article 31 (1) and (2) stipulates that such interpretation shall be in accordance with the ordinary meaning and the text be understood in its context with the light of its object and purpose including its preambles, annexes and succeeding agreements between parties.\textsuperscript{30} Article 32 of the VCLT allows one to take the legal preparatory work into consideration if the interpretation is still unclear or if it produces unreasonable outcome.

In addition, the International Court of Justice (ICJ) has expressed that interpretation must be text-based and the words have to “be understood as they were when the text was enacted”.\textsuperscript{31} However, the court has made some exceptions to this rule, stating that a dynamic interpretation could be utilized and argued that one might have to consider “developments in international law”.\textsuperscript{32}

\textsuperscript{28} Nicaragua Case (1986) \textit{supra} note 5 at paras. 187-201.
\textsuperscript{29} Weller \textit{supra} note 2 at p. 168.
\textsuperscript{31} Legality of the Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, ICJ Reports (2004), para. 100. See also Islands of Palmas Case (or Miangas), (United States v Netherlands), 1928 II RIAA 829, Permanent Court of Arbitration, volume II p. 829-871 (1928), p. 845.
2.1.1 The Prohibition of the Use of Force, Article 2 (4)

The fundamental principle of the prohibition to the use of force is found in the UN Charter. Article 2 (4) of the UN Charter prohibits states from the use of force or the threat of use of force in their relations with each other. According to the article,

“All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other matter inconsistent with the purposes of the United Nations”.

In 1945, the primary goal of the article was simply to prevent further war and to cease all international suffering. Although, as previously described, the UN Charter does not recognize an absolute ban of the use of force since such would not be able to stand the test of time or reality. More flexible readings of the article have been suggested, but in doing so, they tend to be inconsistent with the object and purpose of the Charter, which simply urges states to solve their disputes by peaceful means.

The prohibition to use force has come to be recognized as *jus cogens*, a category of norms defined in the VCLT as a “peremptory norm of general international law”. In addition, the norm is accepted and recognized by the whole international community and can only be modified by a subsequent norm of general international law having the same character. A *jus cogens* norm is considered as “a special class of general rules made by custom” with a special legal status. The ICJ stated in the *Nicaragua Case* (1986) that the prohibition in Article 2 (4) of the UN Charter in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*. However, the court emphasized the necessity to distinguish between the use of force constituting an armed attack from other less grave forms of force. Nevertheless, it did not make a pronouncement on the scope of the *jus cogens* aspect of the prohibition on the use of force. Further, the whole norm stipulating the  

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33 UN Charter *supra* note 1 at Article 2 (4).
36 *Jus cogens* is controversial. More authority exists for the just cogens norm than its content, see Brownlie *supra* note 15 at pp. 489-490. There are also disagreements on whether it is an autonomous source of international law or not, see Amnéus *supra* note 13 at p. 78.
37 VCLT *supra* note 30 at Article 53; Amnéus *supra* note 13 at pp. 77-78.
prohibiting the use of force in Article 2 (4) of the UN Charter or in customary international law does not constitute *jus cogens*. The *jus cogens* status of the prohibition could be illustrated as a core of prohibiting the most aggressive form of the use of force.\(^{40}\)

### 2.1.2 The Threat to the Peace, Breach of Peace, or an Act of Aggression, Article 39

If force is used, or threatens to be used, it is a violation of Article 2 (4) of the UN Charter. Such violation would be treated as a threat to the peace, breach of peace, or an act of aggression stipulated in Article 39 of the UN Charter. The UNSC has been given the power to determine if such case has occurred and make decisions regarding measures to be taken. Although, the terms mentioned in the article have been left undefined and it is not clear what the relation and difference between “threat or use of force” in Article 2 (4) and “breach of the peace” in Article 39. Logically, when the use of force has taken place, a breach of the peace has also occurred.\(^{41}\)

The most serious breach of the use of force, prohibited in Article 2 (4), is the act of aggression. This is considered to be more offensive than simply a breach of peace, stipulated in Article 39 of the UN Charter. This general definition for the unlawful use of force was adopted in 1974 in the UNGA Resolution 3314 (Resolution 3314). Within its scope, the preamble makes clear that “aggression is the most serious and dangerous form of illegal use of force”.\(^{42}\) However, the definition of aggression has been widely discussed. In fact, the existing definition is more than politically binding and has its legal foundations shown by ICJ in its judgment in the *Nicaragua Case* (1986).\(^{43}\) In Article 3 of Resolution 3314, the act of aggression is defined as “an armed attack by the forces of a state of the territory of another state”. Such armed attacks are described as “bombardment and blockades on land, sea or air force, or marine and air fleets of another state.”. It also includes sending armed bands by or behalf of a state which carries out acts of armed force against another state of such gravity as to amount of the acts covered by the definition.\(^{44}\) The ILC suggested a definition where the “threat” of aggression was included, but this was never adopted.\(^{45}\)

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\(^{40}\) Amnéus *supra* note 13 at p. 137.


\(^{42}\) UN General Assembly, Definition of Aggression, The Preamble, UN Doc. A/RES/3314, 14 December 1974. [Resolution 3314].


\(^{44}\) Resolution 3314 *supra* note 42.

\(^{45}\) Sturchler, *supra* note 27 at pp. 30-32.
The purpose of unlawful use of force and aggression became an issue with the establishment of the International Criminal Court (ICC) and the Rome Statute of 1998 (Rome Statute).\textsuperscript{46} The Rome Statute’s Article 5 (2) postponed the jurisdiction of the court of the crime of aggression until a definition “consistent with the relevant provisions of the Charter of the United Nations is determined and adopted by state parties”.\textsuperscript{47} An act of aggression is defined in the new Article 8\textit{bis} paragraph 2 of the Rome Statute as “the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations”. However, there was some initial discussion whether the list in the article should be considered exhaustive or not due to its interpretation. However, in accordance with Article 22 of the Rome Statute, the principle of \textit{Nullum Crime sine Lege} needs to be respected.\textsuperscript{48} The jurisdiction for this crime is yet to be activated.\textsuperscript{49}

In Article 8\textit{bis} paragraph 2 of the Rome Statute, the Resolution 3314 is mentioned but there have been questions as to how to interpret the insertion of the resolution.\textsuperscript{50} However, the examples listed in the Rome Statute as well as the Resolution 3314 have previously been criticized for not being consistent with the definition of aggression under customary international law. It seems to be clear that bombardment of another state’s territory constitutes aggression under customary international law. Other situations seem more uncertain such as allowance of a state’s territory to be used for act of aggression against a third state.\textsuperscript{51} The determination by the UNSC and the ICJ of an act of aggression can serve as a guidance for the ICC, even though it is not binding upon the court when asserting whether such act has been committed.\textsuperscript{52} Determinations made by UNSC and the ICJ are made in the context of \textit{jus ad bellum} why it is necessary for the ICC to remain careful when interpreting the judgments and decisions. In fact, UNSC appears to avoid the phase “aggression”. For example, it did not

\begin{itemize}
  \item[47] Sturchler \textit{supra} note 27 at p. 33.
  \item[49] Art. 8 \textit{bis} is the product of Review Conference of the Rome Statute of the International Criminal Court 2010 in Kampala. The Kampala amendment on aggression has by 1 Dec 2016 been ratified by 33 states. The jurisdiction might be activated at the UNGA of state parties’ session in New York December 2017.
  \item[50] Aronsson-Storrier \textit{supra} note 48 at para. 158.
  \item[52] Rome Statute \textit{supra} note 46 at Article 15\textit{bis} (9) and 15\textit{ter} (4).
\end{itemize}
describe Iraq’s invasion in Kuwait in 1990 as an act of aggression, but instead as a breach of peace in Resolution 660 (1990). However, it is sufficient for the UNSC to determine that is has been a threat or breach to the peace in accordance with Article 39 of the UN Charter for the spectrum of measures stipulated in Chapter VII of the UN Charter to be available. It is therefore not necessary for the UNSC to determine whether there has been an act of aggression. The fact that the UNSC or the ICJ has labeled an act as unlawful use of force or threat or breach of peace instead of an act of aggression should not be interpreted as a determination of whether an act of aggression has been committed.

2.1.3 The Right to Self-Defense, Article 51

The inherent right (French: droit naturel) to self-defense and the international precedent set for such issue dates all the way back to the Caroline Incident of 1837 (“Caroline Case”) between the United Kingdom (U.K.) and the U.S. In fact, the modern interpretation of self-defense holds equal importance to this day, as it derives from its position as the principal exception to the general prohibition of the use of force enshrined in Article 2 (4) of the UN Charter. The use of force in self-defense is allowed according to the Article 51, which declares:

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

Self-defense is, according to the ILC, “a circumstance which precludes the wrongful of an act which would otherwise be illegal”. Article 21 of the Draft Articles on Responsibility of States

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53 Aronsson-Storrier supra note 49 at paras. 158-159.
54 Ibid. at para. 158.
56 UN Charter supra note 1 at Article 39 and 42.
57 Ibid. at Article 51.
for Internationally Wrongful Act (ARSIWA) stipulates “the wrongfulness of an act of a state is precluded if the act constitutes a lawful measure of self-defense taken in conformity with the Charter of the United Nations”. The consequence is that the resort to force by a state does not violate the prohibition in Article 2 (4) UN Charter if the state is entitled to take action in self-defense and if the action which it takes remains within the limits of the right of self-defense.58

Article 51 undoubtedly upholds the right of both individual and collective self-defense. The Article does not draw any distinction between them, but case law has identified certain differences that will be explained below (see Chapter 2.1.3.2).

2.1.3.1 Individual Self-Defense and Its Elements

It is generally considered that in order to constitute lawful use force in self-defense, it must meet the following criteria:

(i) it must be a response to an armed attack
(ii) the use of force, and the degree of the used force, must be necessary and proportional; and
(iii) it must be reported to the UNSC and must cease when the UNSC has taken “measures necessary to maintain international peace and security”.59

2.1.3.1.1 Armed attack

The term “armed attack” can be interpreted in many ways. Aspects of an armed attack that need to be considered are the scale and effect of the attack, the source of the attack, and the target of the attack. What makes the matter tricky is the absence of a definition of an “armed attack” in the UN Charter. In order to find guidance whether there has been an armed attack to give the right to self-defense, the ICJ has referred to Resolution 3314 (1974) in both the Nicaragua Case (1986) and in Armed Activities Case (2005).60

The court stated in its judgment in the Nicaragua Case (1986) that the use of force does not amount to an armed attack for the purpose of the right to self-defense unless it was of a particular scale and effect. It was found that different size attacks should be handled and

59 Ibid. at para. 8.
viewed as different offenses, based on the severity of damage and categorized as either “armed attacks” or “mere frontier incidents.” According to the ICJ, if use of force in violation of Article 2 (4) occurs, but it does not raise above the level of “mere frontier incident”, then the victim is not entitled to respond in self-defense since it is not considered as severe. However, the victim is legally at right to take “countermeasures.” The court did not take any further standing whether such countermeasures could include the use of force and the Nicaragua Case (1986) gives little guidance as what the distinction is between “armed attack” and “mere frontier incident.” This confusion becomes especially important when considering whether a modern day terrorist attack could be considered an “armed attack.” For example, the UNSC treated the 9/11 terrorist attack on the US as an armed attack. This attack was therefore considered to be of such severity that it crossed the threshold established in the Nicaragua Case (1986) without true definition as to why. Further, the creation of the threshold by ICJ results in a gap between the right to use force in the name of self-defense in response to an armed attack and the prohibition to use force according to Article 2 (4) of the UN Charter. With the definition of aggression in mind, it can be considered a sub-category of the prohibition against the use of force in Article 2 (4) in the UN Charter. In addition, it should be noted that the relationship between an act of aggression and an armed attack is contested. Some scholars consider the difference to be contextual while others think that an armed attack triggers a right to self-defense, but does not necessarily constitute an act of aggression.

According to the UN Charter, the right to use self defense is preserved if any member of the UN is the target of an armed attack. The only requirement for a state to use force in self-defense is that an armed attack has been committed against that state, while there is no dispute if the attack is against the territory of a state. Also, attacks on islands and overseas territories may be considered attacks from the metropolitan territory. For example, most states viewed

61 Nicaragua Case (1986) supra note 5 at paras. 191, 195 and 196.
62 Greenwood supra note 58 at para. 12.
67 UN Charter supra note 1 at Article 51.
the Argentinian use of force in 1982 against the Falkland Islands/Islas Malvinas as an armed attack against the United Kingdom, seeing as though they were considered British colonial territory.  

There is nothing in Article 51 of the UN Charter that requires that the armed attack is committed by a state entity. This fact raises the question against what entities that a state can use its right to self-defense.  

The ICJ held that an armed attack could include “the sending by or behalf of a state of armed bands, groups, irregulars or mercenaries, which carries out acts of armed force against another state of such gravity as to amount to (inter alia) an actual armed attack conducted by regular forces, or its substantial involvement therein”. This interpretation of Article 51 is based on Article 3 (g) of the Definition of Aggression annexed to Resolution 3314 (1974) in which the same phrase is used. This interpretation opens up the possibility for self-defense against non-state actors, but only when the host state has “control” over them.

The legal basis for the right to self-defense if there is no direct state responsible for the use of force (which crosses the threshold discussed above) is unclear. In fact, Article 51 of the UN Charter leaves no mention of such limitation, but only references the need of an armed attack against a member of the United Nations. This does not make any comment or requirement of the source of the attack to be a state according to a text-based interpretation. The question whether a state must be the source of an armed attack, or if an attack must be attributable to a state, in order to justify a response in the name of self-defense has been continuously raised over the past decades as the world has witnesses multiple responses to terrorist attacks (see Chapter Four). In order to ascertain whether a state has the right to

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intervene on another state’s territory against non-state actors, it is important to find out which party is legally responsible for the armed attack.

According to the courts advisory opinion in the Israeli Wall Advisory Opinion (2004), the right of self-defense is available only when an armed attack is conducted by an organized state. However, judges Buergenthal and Higgins both separately uphold that Article 51 of the UN Charter does not explicitly distinguish the need the attacker to be a state. Similarly, Judge Koojiman stresses that Article 51 of the UN Charter has no requirement concerning the attacker and that the position made in the Nicaragua Case (1986) should be reconsidered. Koojiman further argues that the Resolution 1368 (2001) and 1373 (2001) recognizes the right to self-defense against terrorist groups without making any sort of reference to an armed attack by a state (see Chapter 3.2.3).

In Armed Activities Case (2005), the court argued that Uganda did not have the right to self-defense since the armed attack could not be attributable to the Democratic Republic of the Congo (DRC), but rather to the Allied Democratic Forces (ADF), a Ugandan-based rebel group widely considered to be a terrorist organization. This conclusion was based on the definition of “aggression” in Article 3 (g) of Resolution 3314, which limits the right to self-defense to attacks by private individuals or organizations sent “by or on behalf” of a state. Judge Koojiman, Judge Simma, and Judge Kateka expressed their separate opinions on the matter. Judge Koojiman repeated his position that Article 51 of the UN Charter did not require any specific source of the attack, and also asserted that “it would be unreasonable to deny the attacked state the right to self-defense merely because there is no attacker state, and the UN Charter does not so require”. Judge Kateka interpreted the original intention of Article 51: to ensure the ability to defend oneself when others break the prohibition against the use of force. This interpretation upholds that the right to self-defense should be applicable regardless of the attacker.

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74 Ibid., Separate Opinion of Judge Koojiman at paras. 6, 33, 35 and 36.
75 Armed Activities Case (2005), supra note 51 at paras. 146-147.
76 Ibid., Separate Opinion of judge Simma, paras. 7-15.
77 Ibid., Separate Opinion of judge Koojiman, para. 30.
78 Ibid., Separate Opinion of judge Kateka, paras. 30 and 34.
Article 8bis paragraph 2 of the Rome Statute defines an act of aggression as “the use of an armed force by a state (...) inconsistent with the Charter of the United Nations”. A text-based analysis suggests that an official only can be criminally liable for an armed attack if there has been an act of aggression by that state. On one hand, the capacity of non-state actors to use extreme violence outside the responsibility of states suggests that limitation of the right to self-defense against such entities would be unreasonable. On the other hand, there is a concern that victim states of an attack by non-state actors should not inevitably be free to take actions on another state’s territory. This concern could be met with self-defense limited by necessity and proportionality (see Chapter 2.1.2.3.2).

### 2.1.3.1.2 The Limits of Self-Defense

The right to self-defense does not mean that the defensive use of force can be used without limits. The aforementioned Caroline Case of 1837 is often considered a part of customary international law with reference to self-defense. In the Caroline Case, the correspondence between the U.S. Minister of Foreign Affairs, Daniel Webster, and his British colleague Lord Ashburton, stipulates that in order for the right to use self-defense, there must be “a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment of deliberation”. A state must therefore consider three factors when deciding to exercise the right of self-defense: necessity, proportionality, and imminence.

Despite no mention of limits in Article 51 of the UN Charter, the ICJ has recognized that such are applicable to self-defense under the article’s provision. The court rules that there is “a specific rule whereby self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it”. The degree to which methods of warfare are utilized in self-defense are directly determined by the necessity and proportionality deemed appropriate. In regards to necessity and proportionality, both are considered aspects of customary international law and play an undoubtedly important role in the scope of self-

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79 Rome Statute supra note 46 at Article 8bis.
80 Greenwood supra note 58 at para. 12.
81 Nicaragua Case (1986) supra note 5 at para. 194; Dinstein supra note 64 at pp. 207-212.
84 Nicaragua Case (1986) supra note 5 at para. 176.
defense ruling. However, they are considered separate criteria. The requirements of these principles were set out in the *Nicaragua Case* (1986) *Oil Platforms Case* (2003) and the *Armed Activities Case* (2005).\(^{86}\)

The principle of necessity is tied to the degree of the force that is to be used in the name of self-defense in order to prevent future attacks.\(^{87}\) In the Caroline Case, necessity were described as “instant, overwhelming, leaving no choice of means, and no moment of deliberation”.\(^{88}\) Essentially, this formula views the requirement of necessity as a last-resort, non-debatable option- a response that is essential but does not exceed what is reasonable for the purpose. In addition, the quote form the Caroline Case is also applicable to the criterion of imminence. The imminence concept has to be considered in the circumstances of the threat and consider factors as the gravity of the attack, the capacity of the attacker among others. In a study from the Chatham House, the requirement of imminence stipulated that there is a need of belief that any delay in countering the upcoming attack will result in the inability of the victim state to defend itself against the attack.\(^{89}\) With other words, the degree of “imminence” means that it must be decided whether the response is warranted sufficiently close to the moment of the initial attack.\(^{90}\)

However, proportionally can only be cited if there is an imminent danger that requires an action of self-defense to suppress.\(^{91}\) The principle of proportionality is viewed as an equal and proportional response to the initial armed attack.\(^{92}\) Circumstances, in this case, must also be considered. For example, the requirement can be seen differently if an armed attack has occurred or if a state strikes pre-emptively to avoid potential danger.\(^{93}\) There is no ruling or definition in regards to proportionality by the ICJ in neither the *Nicaragua Case* (1986) nor


\(^{90}\) *Nicaragua Case (1986)* supra note 5 at para. 194; *Dinstein supra* note 64 at pp. 207-212.

\(^{91}\) Lubell *supra* note 21 at pp. 64-65.

\(^{92}\) Ibid. at pp. 64-65.

\(^{93}\) *Gardam supra* note 88 at pp. 156-186.
the Nuclear Weapons Advisory Opinion (1996). Although, one trace of proportionality found in the aforementioned cases is from Judge Higgins dissenting opinion, who stated that “one should not focus on the nature of the attack and the question of proportionality but rather what’s necessary to halt or repulse a future attack.”

2.1.3.1.3 The Role of the UN Security Council

There are two steps in which Article 51 of the UN Charter alters the process of legitimizing right to self-defense. First, the state must inform the UNSC of the planned measures of self-defense taken. Then, as the Article states, the UNSC has to take the necessary measures before the state can carry out an act of self-defense. This second step has taken on greater global attention since the Iraqi invasion of Kuwait in 1990. It was the first time after the Cold war the UNSC used an unprecedented amount of its powers as defined in Chapter VII of the UN Charter.

In its Resolution 660 (1990), the UNSC condemned the Iraqi invasion of Kuwait and issued a binding demand for Iraq to withdraw from Kuwait’s territory. Only when the UNSC has taken such actions that is “necessary to maintain international peace and security” will the right to self-defense lapse. Still, there is much debate as to what governing body may determine whether such measures automatically trump the right to self-defense and to what extent self-defense is warranted. Some argue that measures taken by the UNSC do not suspend the right of self-defense and that a victim state may lawfully exercise its self-defense despite the UNSC’s ruling. Others hold that the mere placing of an item on the UNSC agenda renders self-defense dormant and only if the SC is prevented by the veto from functioning could the right be revived. However, Iraq did not comply with the demand by the UNSC and Kuwait’s right to self-defense was hereby not removed. Further, UNSC

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96 UN Charter supra note 1 at Article 51.
99 Greenwood supra note 58 at para. 34.
empowered member states to use “all necessary means” to force Iraq out of Kuwait in its Resolution 678 (1990).101

2.1.3.2 Collective Self-Defense

Collective self-defense has been given more attention after the judgment in the Nicaragua Case (1986) and the approach has generally been followed ever since. ICJ identified three manners in which collective self-defense could be legally employed. First, the right to collective self-defense applies only if there is at least one state entitled to take action by way of individual self-defense. Second, the victim state has to declare itself to be the victim of an armed attack before allied states use force as assistance. The court did not require any pre-existing alliance between states engaging in collective self-defense in its judgment. Third, a victim state must specifically and intentionally request aid from a non-victim state before that third party state may legally use force.102

An unorthodox approach regarding collective self-defense can be found in Judge Sir Robert Jennings’ dissenting opinion. Judge Jennings viewed collective self-defense as permissible only if the armed attack upon the victim state also posed a threat to the security of the state that sought to rely upon collective self-defense.103

Conversely, the states do not have the same obligation under Article 51 of the UN Charter when an armed attack is reported to the UNSC. According to customary international law, the absence of a report may be one of the factors indicating whether the victim state is itself convinced that it is acting in self-defense.104

2.2 Customary International Law

Treaties and customary international law as sources of international law have a strong link to each other which was stipulated in the judgment of the ICJ in the Nicaragua Case (1986). In circumstances where both a treaty and customary international law stipulates the same rule-they exist in parallel. In areas of the relevant law, the two sources may not exactly overlap and the substantive rules may not be identical in content. For instance, the right of self-

102 Greenwood supra note 58 at paras. 35-40.
104 Nicaragua Case (1986) supra note 5 at paras. 200, 232-236.
defense is established in the UN Charter, while its characteristics are governed by customary international law.\footnote{Ibid. at paras. 175, 181 and 194.} Hereby, customary international law is recognized as a complementary of legal basis and could constitute a legal exception from the prohibition to the use of force, as the Unwilling or Unable Doctrine, the basics and principles of customary international law needs to be understood in order to examine the status of the Doctrine.\footnote{Statute of International Court of Justice, 18 April 1946 at Article 38.1 (b) [ICJ Statute]; Nicaragua Case (1986) \textit{supra} note 5 at paras. 175, 181, 194 and 195.} Therefore, the creation of customary international law as a source of international law will be conducted in this chapter.

Customary international law is unwritten facultative international law emerging from general and consistent state practice accepting the practice as it was legally binding.\footnote{Amnéus, \textit{supra} note 15 at 88.} Article 38 (1) (b) in the ICJ Statute stipulates that customary international law has to be “evidence of a general practice accepted as law” in order for a certain practice to be recognized as such rule.\footnote{ICJ Statute \textit{supra} note 106 at Article 38 (1) (b).} The prevailing view, which is endorsed by the ILC, is in order for a norm to be customary international law a combination of two element needs to be fulfilled: the objective element, \textit{usus}, which is the practice of states (see Chapter 2.2.1), and the subjective element, \textit{opinio juris}, which is the conviction that the state practice reflects a legal obligation (see Chapter 2.2.2).\footnote{International Law Commission, \textit{Second Report on Identification of Customary International Law}, UN Doc. A/CN.4/672, by Special Rapporteur Michael Wood), para. 21 [ILC Second Report]; Amnéus \textit{supra} note 13 at p. 76.} The objective element consists of government statements, judicial statements, meetings of international organizations etc. Thereby, proof of state practice can be gathered from published materials.\footnote{Amnéus \textit{supra} note 13 at p. 76.} The subjective element can be derived from different sources. In several cases, the ICJ has assumed the existence of \textit{opinio juris} on the basis of evidence of a general practice, a consensus in the literature or previous judicial decisions.\footnote{Ibid. at p. 76.}

In 1927, the Permanent Court of International Justice (the predecessor to ICJ) applied the two-element approach.\footnote{S.S. Lotus (France. v. Turkey.), 1927, Permanent Court of International Justice (Serie A) Number 10 (September 7) [The Lotus Case].} The ICJ judgments have leaned on the stand taken by its predecessor since its conception and the court has made great contributions to the
understanding of customary international law and its elements.\textsuperscript{113} For example, in the *North Sea Continental Shelf Cases* (1969), the court expressed its view on several criteria’s for a customary international rule to consolidate: the duration, generality, extensiveness and uniformity of state practice, the opinion of affected states and the existence of the subjective element.\textsuperscript{114}

Case law has also specified that customary international law must be "in accordance with a constant and uniform usage practiced by the state by the states in question".\textsuperscript{115} In 2015, the ILC described customary international law as the primary practice of states, and international organizations in the form of resolutions, treaties, tribunals etc. Again, ILC noted that the relevant practice had to be general and consistent in meaning to be most applicable and representative. However, if the practice in general, no particular duration was required.\textsuperscript{116}

The crux of the debate about customary international law is the weight of the element as evidence. For example, International Law Association’s Committee (ILA) advocated a different view than others in its Report from 2000. The report downplayed the importance of the subjective element, *opinio juris*, and the ILA stated, “…if states generally believe that a pattern of conduct is permitted or required by law, this is sufficient for it to be law; but not necessary to prove it existence of such a belief”.\textsuperscript{117} Neither does the ILC offer any clear suggestion on how to distribute the weight, but it clearly asserts that both elements are required.\textsuperscript{118}

In addition, the identity of states (*ratione personae*) should be taken into account to certain amount to the formation of customary international law. Some argue that the practice and opinions of states directly concerned have a greater influence and importance than others.\textsuperscript{119}

\textsuperscript{114} North Sea Continental Shelf Cases (1969) supra note 113 at para. 74.
\textsuperscript{115} Colombian-Peruvian Asylum Case, Judgment of November 20th 1950: p. 266 ICJ Reports (1950), p. 276. [Asylum Case (1950)].
\textsuperscript{117} ILA Report supra note 18 at pt. III p. 31, para. 4.
\textsuperscript{118} ILC Second Report supra note 109 at para 21.
\textsuperscript{119} Jennings and Watts supra note 14 at p. 29; Anglo-Norweigan Fisheries Case (United Kingdom v. Norway), Judgment of December 18th, 1951: ICJ Reports, 1951, p. 116, p. 139 [Fisheries Case].
2.2.1 The Objective Element, *usus*

The ILC defines state practice in Draft Conclusion 9. It states that in order to establish a rule of customary international law, the relevant practice must be sufficiently widespread and representative, and the practice must be generally consistent. However, it does not need to be universal.\textsuperscript{120} In the *Nicaragua Case* (1986), the ICJ held that inconsistent state practice should be treated as a breach of an existing rule and not as an indication of the recognition of a new rule.\textsuperscript{121} ILA describes the element as “a sufficiently extensive and representative number of States in such a practice in a consistent manner”.\textsuperscript{122}

The ILC considers the required duration of state practice as “widely acknowledged that there is no specific requirement with regard to how long a practice must exist.”\textsuperscript{123} Further, the ILC provides a non-exhaustive list of which acts have the ability to manifest state practice. Although, it is worth noting that inaction can also count as state practice.\textsuperscript{124} The manifestations specifies in its Draft Conclusion 7 the following:

a. Physical actions of States (or with other words, conduct of states “on the ground”)
b. Acts of the executive branch (such as official statements and proclamations)
c. Diplomatic acts and correspondence (such as diplomatic notes)
d. Legislative acts
e. Judgments of national courts
f. Official publications in the field of international law (such as instructions to diplomats or manuals for the military)
g. Internal memoranda by State officials
h. Practice in connection with treaties
i. Practice in connection with adoption of resolutions of organs of international organizations and conferences (such as the voting record).\textsuperscript{125}

In short, to reach harmony within the element of state practice, consistent and general state practice must be fulfilled.\textsuperscript{126} State practice is considered general if the practice is followed by an overwhelming majority of states.\textsuperscript{127}

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\textsuperscript{120} ILC Second Report *supra* note 111 at para. 59.
\textsuperscript{121} *Nicaragua Case* (1986) *supra* note 5 at para 186.
\textsuperscript{122} ILA Report *supra* note 18 at p. 8.
\textsuperscript{123} ILC Second Report *supra* note 109 at para. 58.
\textsuperscript{124} Ibid. at para. 41.
\textsuperscript{125} Ibid.
2.2.2 The Subjective Element, opinio juris

Opinio juris, as the second formative element, has been widely contested. The ILA believes in devaluing its influence. In the opinion of ILA, opinio juris can be proven and inferred in state practice as long as all requirements for a legally valid state practice are met. Therefore, there is no need to prove the existence of opinio juris.\(^\text{128}\) However, other legal bodies believe in considering the subjective elements relevance on a case-by-case basis model. For example, ILC highlights the fact that some questions whether a state is capable of having a belief and if such ever can be proved. However, the subjective element has been a bigger problem in theory than in reality.\(^\text{129}\)

The definition of the subjective element, according to ILC, follows from Commission’s Draft Conclusion 10, which follows: “The requirement, as an element of customary international law, that the general practice be accepted as law means that the practice in question must be accompanied by a sense of legal obligation. Acceptance as law is what distinguishes a rule of customary international law from mere habit or usage”.\(^\text{130}\)

ILC upholds the sentiment as that opinio juris can be inferred from practice and enumerate several materials in which evidence of opinio juris can be found. Besides clear statements by states, the ILC emphasizes the following sources in its report:

a. Intergovernmental (diplomatic) correspondence
b. The jurisprudence of national courts
c. The opinions of governmental legal advisors when they say that something is or is not in accordance with customary international law (and the opinion is mandated by the government)
d. Official publications in fields of international law
e. Internal memoranda by State officials (instructions to diplomats from its Ministry of Foreign Affairs)
f. Treaties (and their travaux préparatoires)

\(^{126}\) ILC Second Report supra note 109 at paras. 52 and 55.
\(^{128}\) ILA Report, supra note 18 at p. 31.
\(^{129}\) ILC Second Report, supra note 109 at para. 66.
\(^{130}\) ILC Second Report supra note 109 at para. 70.
g. Resolutions of deliberative organs of international organizations, such as the General Assembly and Security Council of the United Nations, and resolutions of international conferences.\textsuperscript{131}

### 2.2.3 Persistent Objector

Although all customary international law is potentially universal, there exists a possibility for states to exclude themselves from the ambit of the rule. If a significant actor persistently rejects the developing practice, it can not become a customary international rule. This means that even if all specially affected states were to engage in the certain practice- it would not be sufficient practice to the formation of a rule if states indirectly affected supported an inconsistent practice.\textsuperscript{132}

ILA has confirmed that if state has expressed its objection (verbally or as contrary practice) persistent and openly dissenting to the emerging rule- the persistent objector will not be bound by the rule.\textsuperscript{133} According to the ILA, there is no requirement of a state to take physical action to preserve its right to object.\textsuperscript{134} Jurisprudence has held that even if a customary rule exists, if a state is the first to introduce it, or if the state always had opposed any attempt to apply it or always had refrained from it, it is not binding for the state in question. For instance, ICJ did not set out any criteria to determine if a state is a persistent objector in neither the \textit{Asylum Case} (1950) or the \textit{Anglo Norweigan Fisheries Case} (1951).\textsuperscript{135} However, the court appears to support the idea that an existing customary law rule would not apply to a state if it objected to any outside attempts to apply the rule at the initial stages, in a consistent manner, and if other states did not object to its resistance.\textsuperscript{136}

### 2.3 Authorization by the UN Security Council and Consent

Besides Article 51 and customary international law, there are two exceptions that could justify the use of force: If UNSC gives it authorization or if the host state gives its consent to the victim state to use force on its territory. These exceptions will be description briefly in order to give a complete picture of the area of self-defense.

\footnotesize
\begin{itemize}
  \item \textsuperscript{131} Ibid., at para 76.
  \item \textsuperscript{132} Amnéus \textit{supra} note 13 at p. 98.
  \item \textsuperscript{133} ILA Report \textit{supra} note 18 at p. 10.
  \item \textsuperscript{134} ILA Report \textit{supra} note 18 at commentary (15).
  \item \textsuperscript{135} Asylum case (1950) \textit{supra} note 115 at p. 39; Anglo Norweigan Fisheries Case (1951) \textit{supra} note 119 at p. 131.
  \item \textsuperscript{136} Ibid.
\end{itemize}
UNSC’s primary responsibility is to maintain international peace and security. The ICJ held in the *Israeli Wall Advisory Opinion* (2004) that the UNSC authority was primary, but not exclusive. As mentioned, the UNSC can take binding measures on member states which they have agreed to accept and carry out in accordance with the UN Charter.

Article 42 in Chapter VII of the UN Charter stipulates the UNSC’s mandate to take military actions necessary when non-military actions not is enough and to maintain or restore international peace and security. UNSC has a responsibility to prioritize and handle the question about military intervention fast. An authorization shall always exist before troops are entering the territory. Although, there might exist a possibility to give authorization afterwards which was the case for example in Liberia (1992) and Sierra Leone (1997).

The last exception, which is only relevant for the Doctrine when its lacking, is consent. Although it is seen by many as the foundation of international law itself, some have found that it is has diminished in importance in international law over time. When treaties are created between various states in consent, the parties involved are thereupon bound in the terms set forth. This means when the UNSC authorizes a group of states to use force in another state, the UNSC technically grants consent to the intervention by attaining the UN Charter. A state may invoke consent to justify violation of an international agreement. The VCLT provides an option for two states to modify an obligation in a treaty as long as it does not affect the rights of other parties (and does not defeat the treaty’s purpose). In addition, a state can invoke consent to justify a violation of an agreement. For example, when the U.S. used force in Yemen against al-Qaeda, the U.S. could have invoked Yemen’s consent as a

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137 UN Charter *supra* note 1 at Article 24.
139 UN Charter *supra* note 1 at Article 25.
140 Ibid. at Articles 39, 40 and 41.
141 ICISS Report *supra* note 25 at pp. 49-51.
142 Ibid. at pp. 49 and 54.
144 VLCT *supra* note 30 at Article 26.
145 UN Charter *supra* note 1 at Article 24.
146 See for example, UN Security Council, 7871st meeting, UN Doc. S/PV.7871, 26 January 2017.
defense against Yemini allegation that the U.S. had violated its legal obligation under the UN Charter.\textsuperscript{147}

ARSIWA recognizes the role of consent as follows, “Valid consent by a state to the commission of a given act by another state precludes the wrongfulness of that act in relation to the former state to the extent that the act remains within the limits of that consent”.\textsuperscript{148} A state that receives consent permits it to act in a manner inconsistent with its existing legal obligation to the consenting state without committing a legal wrong.\textsuperscript{149} The form of consent to the use of force does not necessarily has to have the form of an international agreement. In some cases, it might take the form of a formal, written international agreement. However, it could also be unpublicized document such as an informal letter or meeting, which also is binding according to the ICJ in the \textit{Maritime Delimitation and Territorial Questions Between Qatar and Bahrain Case (1994)}.\textsuperscript{150}

However, it is worth noting that consent has a more complicated function. Rather than viewing a state’s consent to the treaty as an \textit{ultra vires} act without legal consequence, international law allows the state’s treaty partner/partners to insist on performance. Hereby, international law does not require states to look behind its parties consent to an international agreement.\textsuperscript{151}

2.4 Conclusions

The right to self-defense in the UN Charter is a well-known right. However, its scope is still under consistent process through customary international law. Based on the text in Article 51 of the UN Charter, it can be possible for a dynamic interpretation flexible to fit the world’s challenges today. Hereby, the text itself in the article does not close the door for the right to use self-defense against non-state actors, but since the UN Charter was written with WWII in mind, it seems like the drafters envisioned self-defense against other states. In addition, the ICJ has had multiple possibilities in several cases to open up for expanding the right to self-defense against non-state actors. However, even after the 9/11 attacks, the court has not. An

\textsuperscript{147} Deeks (2013) \textit{supra} note 7 at p. 10.
\textsuperscript{148} ARSIWA \textit{supra} note 22 at Article 20.
\textsuperscript{149} Deeks (2013) \textit{supra} note 7 at p. 10.
\textsuperscript{150} Ibid. at p. 19. See also Maritime Delimitation and Territorial Questions Between Qatar and Bahrain, Jurisdiction and Admissibility (Qatar v. Bahrain), Judgment, 1994, ICJ, 112, para. 29.
\textsuperscript{151} Deeks (2013) \textit{supra} note 7 at p. 10.
increasing number of judges have expressed their positive view of opening up this possibility and have broadened the scope of self-defense in their separate/dissenting opinions. For example, several judges had dissenting opinions in 
Armed Activities Case (2005) regarding the term with respect to non-state actors. However, these remain the minority and the ICJ itself does not recognize non-state actors covered in Article 51 of the UN Charter.\textsuperscript{152} Although, one should note that the court does not seem to be as unison in the understanding of the term “armed attack” as they were in 1986 given the Nicaragua judgment.

Scholars have argued that the concept of an armed attack is covered when committed by non-state actors. For example, Dinstein argues that the reactions after the 9/11 attacks should have dispelled all doubts concerning the applicability of Article 51 of the UN Charter to non-state actors.\textsuperscript{153} According to Lubell, the term “armed attack” includes attacks committed by non-state actors, but such attacks could require a higher threshold than an armed attack by a state. Also, it is worth considering whether the host state is taking effective measures against the non-state actor and if not, it is due to either a lack of unwillingness or inability.\textsuperscript{154}

The principles of necessity and proportionality bring more challenge when interpreting the right to use self-defense against non-state actors. It can be hard to ascertain whether the force used in self-defense prevents or deter following armed attacks from the non-state actor. The principle of necessity is complex in these types of situations since the achievement of the victim state after the self-defense actions remains unclear. Concerning the principle of proportionality, the risk of civilian casualties is of great concern and the principle is tested when the danger of killing civilians increases dramatically. If the armed attack were committed by a state, the victim state would be given the opportunity to use self-defense against its military targets. However, the structure of the perpetrators in non-state actor groups is not as firm as comparing to a state, especially when it comes to groups operating from locations like villages or schools with no clear boundaries between combatants and civilians.

The role of the UNSC concerning the right to use self-defense is of great importance. It seems that the UNSC has been more willing to accept self-defense against non-state actors where an

\textsuperscript{152} Nicaragua Case (1986) \textit{supra} note 5; Israeli Wall Advisory Opinion (2004) \textit{supra} note 72; Armed Activities Case \textit{supra} note 51.

\textsuperscript{153} Dinstein \textit{supra} note 64 at p. 227.

\textsuperscript{154} Lubell \textit{supra} note 23 at p. 81.
armed attack has already occurred and where the attack has been of large scale which will be discussed below (see Chapter 3.2.3).

As for now, I must conclude that the right to extraterritorial self-defense against non-state actors is not covered by Article 51 of the UN Charter itself, but its characteristics could be expanded though customary international law which will be examined in following chapters. It is clear that the article is written in a way that its application to these types of situations was not predicted, and does therefore not include additional requirement such as “unwilling or unable”. However, the article does not explicitly exclude such interpretation, nor does it explicitly include non-state actors.
3. The Unwilling or Unable Doctrine

The Unwilling or Unable Doctrine is generally described as “the right of a victim state to engage in extraterritorial self-defense where the host is either unwilling or unable to take measures to mitigate the threat posed by domestic non-state actors, thereby circumventing the need to obtain consent from the host state”. In its simplest form, the Unwilling or Unable Doctrine, is as follows: State A (the victim state) has been a victim of an armed attack. The attack was conducted by Group Z (the non-state actor). The attack was carried out by/planned from Group Z on the territory of State B (host state). According to the Unwilling or Unable Doctrine, State A must have proven that State B is unwilling or unable to take action against Group Z in order to have the right to strike against Group Z within the borders of State B. Note that if State B had carried out the attack, State A would have an undisputable right to self-defense under Article 51 of the UN Charter. Thus, a tension is created between two fundamental principles of international law. First, the host state’s territorial integrity “precludes any non-consensual penetration of another sovereign’s territory”. Second, the victim state has an inherent right to self-defense to protect itself.

The Unwilling or Unable Doctrine is to be seen as a last resort, to be employed when all peaceful means have been exhausted before the use of force against a non-state actor in violation of the host state’s sovereignty and territorial integrity. If the Unwilling or Unable Doctrine is to provide an exception from the strict rule in Article 2 (4) UN Charter of the UN Charter, it should be understood as an expansion of the scope of the current rule in Article 51 of the UN Charter and as a justification of self-defense through customary international law.

3.1 Unwilling and/or Unable?

It is debatable whether the host state must be considered as both unwilling and unable, or if the Doctrine is applicable to situations where the host state is either unwilling or unable. Scholars seem to have a difference of opinion in this distinction. For example, Deeks and

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155 Williams supra note 35 at p. 625.
158 UN Charter supra note 1 at Article 51.
Williams read the interpretation as “unwilling or unable” while Schmitt and Arimatsu uphold the notion of both “unwilling and unable”.\(^{160}\) However, when looking at official documents, most of the relevant material refers to “unwilling or unable” (see Chapter Four), which leads one to interpret that either the unwillingness or the inability of a host state is enough for the Doctrine to be invoked. For instance, the Permanent Representative of the US to the United Nations, ambassador Samantha Power, referred to the Doctrine as “unwilling or unable” in order to justify their use of force in Syria (see Chapter 4.1.1).\(^{161}\)

### 3.1.1 The Unwilling or Unable Test

The UN Charter does not provide any guidance for the Doctrine.\(^{162}\) Many scholars, such as Deeks\(^{163}\) and Williams\(^{164}\), refer to “the Unwilling or Unable Test,” as a set of criteria and requirements that need to be fulfilled in order for the Doctrine to be used legitimately. Unfortunately, even these guidelines lack a certain degree of clarity needed to settle the debate.\(^{165}\)

In a language view, the meaning of the word “unwilling” means “not ready, eager, or prepared to do something”.\(^{166}\) The term “unable” is defined as “lacking the skill, means, or opportunity to do something”.\(^{167}\) Finding an exact legal criteria to satisfy the requirement of unwilling or unable may be elusive, and a victim state will most likely find it hard to point at an explicit statement from the host state saying it is not willing to remove the threat.\(^{168}\)

The most likely situation in which the Doctrine is to be invoked seems to be when the host state is unwilling to police its own territory, whether or not it has the resources to do so. Therefore, if the host state is willing to remove the non-state actor, it is unlikely for the Doctrine to be invoked. This is also the case when a state is willing, but unable to police non-state actors launching attacks from its territory. In this case, the host state will most likely

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161 Letter from Samantha J. Power, the Permanent Representative of the US to the UN addressed to the Secretary-General to the UN, U.N. Doc. S/2014/695, 23 September 2016.
162 Williams supra note 35 at p. 625.
163 Deeks (2012) supra note 83. Deeks uses the word “test” frequently in her article.
164 Williams supra note 35. Williams, just as Deeks, uses the word “test”.
165 Ibid. at p. 625.
168 Can’t be found in any key works from scholars like Deeks or Williams.
consent to the victim state using force within its borders. It is therefore the *unwillingness* of the host state that is central to the interpretation of the Doctrine rather than the inability to deal with the threat.\(^{169}\)

As previously mentioned, the host state’s consent or cooperation must be considered in assessing its unwillingness or inability to handle the non-state actor. The state must be asked to take actions with or without help from other states, opening the possibility of allowing entry of the victim state’s forces into their territory. If the host state does not consent or cooperate to this, it could be judged as, “unwillingness”.\(^{170}\) However, this might not be enough to avoid military presence by the victim state. If the host state does not have the capacity to deal with the non-state actors, it could be considered unable despite its willingness.\(^{171}\)

The situation becomes more complex when the host state tries to actively suppress the violence by exercising governance authority with ineffective results. This Doctrine is controversial since it risks favoring the victim state without the sufficient interest of the host state. The broader prospect of peace and security should also be taken into account when discussing this balance.\(^{172}\) The inability can depend on factors as a lack of control over the territory from which the non-state actors operates or/and a lack of capacity of the law enforcement.\(^{173}\) In harmony with the Doctrine, the victim state would then have a right to act against the non-state actor in order to accomplish what the host state could not.\(^{174}\) In summary, the details of the application of the test remains unclear and is difficult to determined. Both proponents and opponents of the test agree on the substantive indeterminacy. Deeks, a major supporter of the Doctrine, points out, “(…) one is left with the certainty that the test exist, but puzzlement about how states should apply it”.\(^{175}\)

The test’s legal origin has also been debated. Deeks argues that the test originates in neutrality law, specifically the Hague Convention V.\(^{176}\) This Convention stipulates that the territory of a


\(^{171}\) Williams *supra* note 35 at pp. 525 and 527.

\(^{172}\) Ibid. at p. 148.

\(^{173}\) Ibid. at pp. 525 and 527.

\(^{174}\) Dinstein *supra* note 64 at p. 216.

\(^{175}\) Deeks (2012) *supra* note 83 at p. 505. See also Williams *supra* note 37 at 640.

neutral state is inviolable and that belligerents in a conflict are prohibited to move troops to the territory of a neutral state. Even such attempt can not be seen as a hostile act.\textsuperscript{177} Moreover, Deeks refers to situations where another belligerent, to whose detriment a belligerent is violating a neutral state’s territory, may resort to the use of force in the territory of a neutral state to stop the violation.\textsuperscript{178} On the contrary, Williams argues that the origins of the test can be found in the customary international law requirement that the use of force in self-defense be “necessary”. Further, Williams asserts that if the host state is willing and able to handle the threat against the victim state by the non-state actor, it should be deemed unnecessary to use self-defense for the victim state.\textsuperscript{179}

When putting aside the issue of the absence of a legal definition, the victim state invoking the Doctrine also faces the evidentiary burden of proving that the requirements in Article 51 are fulfilled.\textsuperscript{180} This includes the question of whom has the burden to prove the unwillingness and inability of the host state. The test is undoubtedly vague, lacks sufficient explanation, and needs to be bolstered with requirements and criteria.\textsuperscript{181} Despite this, states have referred to the Doctrine when justifying their use of force in extraterritorial self-defense against non-state actors (see Chapter Four).

Despite the test’s weaknesses, scholars like Deeks, Williams and Dinstein have attempted to suggest some parameters that would be satisfied in order for a victim state to lawfully invoke the Doctrine. The following suggestions has been made in order to make the Doctrine more sufficient, which would deal with the imbalance issue:

1. The Doctrine must be based upon valid self-defense under Article 51,
2. The extraterritorial use of force must be the response to an armed attack (which is imminent or just occurred). The armed attack in question must have been launched from, or assisted by bases, from the territory of the host state which territorial integrity will be violated,

\textsuperscript{177} International Conferences (The Hague), \textit{Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land}, 18 October 1907, Articles 1, 2 and 10.
\textsuperscript{178} Deeks (2012) \textit{supra} note 83 at p. 499.
\textsuperscript{179} Williams \textit{supra} note 35 at p. 640.
\textsuperscript{180} The burden of proof to substantiate an armed attack is on the party invoking the right to self-defense, Oil Platforms Case (2003) \textit{supra} note 86 at pp. 170-172.
\textsuperscript{181} Deeks (2012) \textit{supra} note 83 at p. 546. Deeks seeks to develop and enhance the test.
3. The use of force must be in accordance with Article 51 and customary international law. Hereby, it must be necessary, proportionate and immediate. The target must be the non-state actor in order to stop an armed attack. The UNSC must be notified in accordance with Article 51. This would lead to some sort of oversight of the conduct by the victim state, and
4. The use of force must be the last resort where consent and less remedies already have been taken. In addition, the victim state must assure that the host state is unwilling or unable to remove the threat itself. The victim state (together with its allies if its a situation for collective self-defense) must have used all diplomatic solutions possible.
5. In addition, Deeks adds a requirement that the host state must address the threat within reasonable time.\textsuperscript{182}

\subsection*{3.2 The Legality of the Unwilling or Unable Doctrine}
Different scholars have debated the content of the Doctrine (see Chapter 3.1.1) This leads to the question of the Doctrine’s legality and whether a state’s territorial integrity and sovereignty can be breached in circumstances that the Doctrine stipulates. The opinions, however, are nonetheless conflicting.\textsuperscript{183} One side argues that there can only be a violation of such principles where a previously listed exception applies to the host state itself, by virtue or by Chapter VII authorization, consent from the host state or if the armed attack is attributable to the host state (and therefore trigger Article 51). According to this side, the Doctrine can not be considering as a part of existing international law.\textsuperscript{184} Conversely, the other perspective argues that sovereignty and territorial integrity gives room for an exception in addition to the listed exceptions in such circumstances where the host state is unwilling or unable to police its territory by itself.\textsuperscript{185} As showed, the Doctrine is not contained in the UN Charter or other treaties or by virtue of judicial interpretation by the ICJ.\textsuperscript{186} However, there are some treaties, judgments by the ICJ and resolutions by the UNSC and UNGA that needs some extra attention when discussing the Doctrines’ legality.

\textsuperscript{182} Deeks (2012) \textit{supra} note 83 at pp. 483-550; Williams \textit{supra} note 35 at p. 623; Dinstein \textit{supra} note 64 at pp. 101-116.
\textsuperscript{183} Aramatsu and Schmitt \textit{supra} note 160 at p. 21.
\textsuperscript{185} Dinstein \textit{supra} note 64 at p. 247; Lubell \textit{supra} note 21 at p. 42.
\textsuperscript{186} See discussion in Williams \textit{supra} note 35 at pp. 627-639.
3.2.1 Treaties

The African Union (AU)\(^{187}\) has specified in Article 1(c) in the African Union Non-Aggression and Common Defense Pact that the term “aggression” also includes acts carried out by non-state actors.\(^{188}\) The treaty was signed by forty four member states of the AU and has been ratified by twenty.\(^{189}\)

An interesting aspect is that the words “unwilling or unable” are used in Article 17 (1) in the Rome Statute.\(^{190}\) Although the Statute concerns a different area of law, it is worth asking if one could find guidance or inspiration in the *jus ad bellum* question. Article 17 (1) stipulates as follows:

“The court shall determine that a case is inadmissible where the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable to genuinely to carry out the investigation or prosecution”.

According to the article, when a state is unwilling or unable to investigate or prosecute an alleged crime which is covered by the Rome Statute, the court can take jurisdiction over it.

3.2.2 Decisions of ICJ

Since the *Nicaragua Case* (1986) the ICJ has interpreted “armed attack” in Article 51 of the UN Charter to not include non-state actors as they are not operating “on behalf” of a state.\(^{191}\) In the *Corfu Channel Case* (1949) the ICJ further stated that it is “(…) every state’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states”.\(^{192}\) However, there is no corresponding right to breach the host state’s sovereignty and territorial integrity if that state fails to uphold its obligation. In the *Tehran Consular Case* (1980), the

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\(^{187}\) International organization founded as the Organization of African Unity to promote cooperation among the independent nations of Africa.  
\(^{189}\) List of Countries which have signed, ratified/acceded to the AU Non-aggression and common defense pact.  
\(^{190}\) Rome Statute *supra* note 46.  
\(^{192}\) *Corfu Channel Case* (United Kingdom v. Albania); Merits, International Court of Justice (ICJ), 9 April 1949, p. 22. [Corfu Channel Case (1949)]
ICJ held that if a state has an obligation, it needs to take appropriate measures in order to protect the interests of another state while the state has the means to do so. If the state completely fails to comply with its obligations, the state has an international responsibility.\(^{193}\) ICJ highlighted the obligation stated in the *Tehran Consular Case* (1980) as customary international law in its judgment in the *Armed Activities Case* (2005).\(^{194}\) Further, ICJ held in both the *Israeli Wall Advisory Opinion* (2004) as well as in *Armed Activities Case* (2005) that if an attack by non-state actors can not be attributable to a host state, the use of force in self-defense by the victim state without consent by the host state is illegal and therefore can not be justified by arguing that the host state is unwilling or unable to assist.\(^{195}\)

The lack of the concept of binding precedent (*stare decisis*) in regard to the court is stipulated in Article 59 of the ICJ Statute which provides that the decisions of the court has no binding force except between parties and in respect of the particular case.\(^{196}\) Although the jurisprudence is not imbued with the force of *stare decisis*, the judgment of the ICJ are regarded and carefully considered by states, scholars, legal advisers, foreign ministries, and among others. Moreover, the court itself relies on its own jurisprudence when adjudication disputes and often give references to former cases in its judgments.\(^{197}\)

### 3.2.3 UN Security Council Resolutions

In the aftermath of the 9/11 attacks, the UNSC and UNGA passed three resolutions, UNSC Resolution 1368 (2001) and 1373 (2001) and UNGA Resolution 56/1 (2001) condemning the attacks on the U.S.\(^{198}\) North Atlantic Treaty Organization (NATO)\(^{199}\) and the Permanent Council of Organization of American States (OAS)\(^{200}\) invoked their right to self-defense,

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\(^{193}\) Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), ICJ Reports (1980), paras. 56-68 [*Tehran Consular Case* (1980)]; Dinstein *supra* note 64 at 206.


\(^{198}\) Resolution 1368 (2001) *supra* note 63; Resolution 1373 (2001) *supra* note 63; UN General Assembly Resolution 56/1, UN General Assembly Condemnation of terrorist attacks in the USA, UN Doc. A/56/1, 12 September 2001 [Resolution 56/1].

\(^{199}\) The organization currently has 28 member states including European countries and the U.S.


\(^{200}\) OAS is the world’s oldest regional organization which promotes social and economic development in the Western hemisphere through cooperation.

which was given support by several states. Iraq was the only state explicitly to challenge the legality of a military response.²⁰¹

The two UNSC Resolutions, 1368 (2001) and 1373 (2001), stated that the attack was considered as a threat to international peace and security. The latter also stipulated that states shall take certain measures acting under Chapter VII of the UN Charter. All states shall “deny safe havens to those who finance, plan, support, or commit terrorist acts, or provide safe havens” and states shall prevent such as mentioned from using their territory for the purpose against other states. According to Gray, the resolutions stipulate the first time UNSC affirmed the right to self-defense in response to a terrorist attack.²⁰² However, Murphy does not agree stating that the two resolutions did authorize the use of force in Afghanistan by member states. Interestingly, both resolutions affirmed the right to self-defense against terrorist acts.²⁰³

Following the 9/11 attacks until the conflict in Syria, there were actions deemed to threaten international peace, but there was no explicit reference to Chapter VII of the UN Charter.²⁰⁴ For example, Israel claimed self-defense against non-state actors in the Middle East several times. However, the international community has not given the same acceptance as it did in 2001. For example, Israel responded to a suicide bombing in Haifa with an air strike on Syrian territory. The majority of the UNSC condemned the action taken by Israel and considered it as a violation of international law. Hereby, there was no general support for the right to use of force against terrorist camps in a host state.²⁰⁵

The situation relating to attacks committed by Da’esh/ISIL have made the question of extraterritorial self-defense against non-state actors even more relevant and several resolutions have been adopted under the Chapter VII provision. In UNSC Resolution 2249 (2015), attacks in 2015 on June 26th in Sousse, October 10th in Ankara, October 31st over the Sinaï Peninsula, November 12th in Beirut and on November 13th in Paris, and others committed by Da’esh are condemned and concluded that the non-state actor has the intention

²⁰¹ Gray supra note 87 at p. 159.
²⁰² Ibid.
²⁰⁴ Gray supra note 87 at pp. 186-187.
²⁰⁵ Ibid. at p. 175.
to carry out further attacks.\textsuperscript{206} Two days after the Paris attack, which President Francois Holland referred to as “an act of war”, France launched their biggest raids in Syria (carried out in coordination with U.S. forces) targeting Da’esh in Raqqa.\textsuperscript{207} However, there is no reference to Chapter VII of the UN Charter neither Resolution 2249 (2015) or previous resolutions and can therefore not be equated with resolution 1373 (2001).

3.3 Conclusions

In order for a norm to constitute customary international law, the requirement of “evidence of a general practice accepted as law” in order for a certain practice to be recognized as such rule in Article 38 (1) (b) in the ICJ Statute needs to be kept in mind (see Chapter 2.2). Different legal sources have been presented and will now be asserted in the attempt to conclude if they constitute a legitimate Doctrine which could be used as a legal basis for extraterritorial self-defense against non-state actors. State practice, as an element of customary international law, will be examined in Chapter Four.

A rule of international law must have a certain degree of foreseeable and a specified content in order to function and multiple scholars have indicated that the Doctrine is in need of more specified and detailed content. For example, Deeks concluded that the Doctrine is presently lacking sufficient content in order to serve as a restrictive international norm.\textsuperscript{208}

A first step to make the Doctrine less vague is to understand the terms “unwilling” and “unable”. With the definitions from the Oxford Dictionary in mind, “unwilling” can be interpreted as a requirement of a conscious choice by the host state from where the non-state actor operates to not use force, or take necessary measures, to prevent or stop the non-state actor to attack the victim state. “Unable” suggests that the host state lacks skills and resources to be able to remove or disarm the threat. It may be elusive to find criteria to be proven in order to satisfy the Doctrine, as a victim state may find it hard to point to an explicit statement from the government of the host state that its not willing or able to remove the threat.


\textsuperscript{208} Deeks (2012) supra note 83 at p. 546.
possessed by the non-state actor which opens up for the possibility for subjective interpretation. In addition, if a host state is willing but unable to police non-state actors, it would likely accept the assistance from the victim state (but political and historical factors can effect the host states willingness to consent to foreign military presence, see Chapter 5.1). If that is not the case, it seems absurd if the victim state was precluding from the right to use self-defense simply because the host state already tried but failed. It would limit the benefits of the Doctrine if the host state had to be both unwilling and unable. This is why the key objective is achieved with the Unwilling or Unable Doctrine.

In addition, although the Unwilling or Unable Doctrine may be vague, at least two main components can be identified:

1. The non-state actor is located on the territory of a host state, and
2. The host state is either unwilling or unable to taken necessary measures to prevent or stop an imminent armed attacks towards a victim state.

Article 17 in the Rome Statute expresses a ruling that a state cannot dodge responsibility. If the state is unwilling or unable to comply with its obligation, the ICC will comply with the states responsibility by taking jurisdiction over the case. Since the terms “unwilling or unable” are used in the Statute, it is interesting to ask if it could be used as an analogy for where a host state is unwilling or unable to deal with non-state actors whom constitute a threat to another state. However, there are several counterarguments for this interpretation. One objection is that the Article applies to a different area of law (criminal international law). Another is that self-defense is already a regulated area, and therefore there is no room to draw certain conclusions. Finally, the Rome Statute is limited to crimes listed in the statute itself and thus the rules are not well suited for such analogy.

However, in January the AU decided to mandate its Open-Ended Committee on the ICC to develop a strategy which includes withdrawal from the ICC by countries in the AU. One of the main topics is the AU countries fight for impunity, while its current decision seems counterproductive to withdraw from “the court of last resort”. In addition, the AU has

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taken a different approach and explicitly included the right to self-defense against non-state actors in the African Union Non-Aggression and Common Defense Pact (see Chapter 3.2.1).

One must also consider the ICJ’s view concerning state responsibility if the state fails to comply with its obligations such as in the Tehran Consular Case (1980). However, there is nothing shown that supports the view that such international responsibility extends to enabling, for instance, the victim state to violate the sovereignty of the host state in order to protect or defend itself against non-state actors. Moreover, for as long as the vast majority keeps dismissing the possibility of an interpretation of including non-state actors in Article 51, there would be a need for an overwhelming amount of legal sources pointing clearly in the direction of the existence of such right in order to draw a different conclusion. Although, it is interesting that the separate/dissenting opinions regarding the right to use self-defense against non-state actors are increasing.

As mentioned, the UNSC passed Resolutions 1368 (2001) and 1373 (2001) after the 9/11 attacks.210 Only the latter resolution explicitly invokes Chapter VII of the UN Charter which includes Article 51. This could be viewed as condoning the use of force in self-defense, since that type of reference most likely does not come from the UNSC without consideration. The logic of Murphy’s statement is hard to understand since he condones the right to self-defense against al-Qaeda, but not the use of force on Afghan territory.211 Considering that the terrorist organization had its stronghold in Afghanistan, it would be meaningless to not act against it in the self-defense regime.

Resolution 1373 (2001) could be seen as a de facto authorization of the right to extraterritorial self-defense against non-state actors. It is interesting when comparing Resolution 1373 with the UNSC Resolution 2249 (2015) where the UNSC condemned attacks committed by Da’esh. The latter does not refer to Chapter VII of the UN Charter and is therefore not equated. Although other resolutions have pointed out the threat that non-state actors are to the international peace and security, the use of force has not been sanctioned. Hereby, only one single resolution by the UNSC has explicitly referred to Chapter VII of the UN Charter in a situation of self-defense against non-state actors.

210 Resolution 1368 supra note 63; Resolution 1373 supra note 63.
211 Murphy, Sean D., supra note 203 at pp. 44 and 88.
4. Case study of State Practice

The remaining basis by which the Unwilling or Unable Doctrine could be part of international law is via customary law.\(^{212}\) As explained in Chapter 2.2 and its sub-chapters, customary international law consists of two elements - one objective, state practice, and one subjective, \textit{opinio juris}. Deeks asserts that more than a century of state practice suggests that it is lawful for State A (the victim of an armed attack) committed by Group Z (the non-state actor), to use force in State B if State B is unwilling or unable to suppress the threat itself. Deeks points out that the Doctrine is frequently cited and used by states which indicates the objective element. In addition, this suggests that states believe it is a binding rule and thus an indicator of \textit{opinio juris}.\(^{213}\) However, Williams is of the view that the required element of \textit{opinio juris} appears to be largely absent, despite the fact there is a growing state practice in support of the Doctrine, and that state practice is increasing. He further argues that there are no such cases in which states have cited using the Doctrine out of legal obligation.\(^{214}\) In the following chapter, the existing state practice will be examined.

In modern times, only a few states have specifically invoked the Unwilling or Unable Doctrine, yet there have been many instances in which nations have used force against non-state actors in foreign territories.\(^{215}\) In 2004, Gray concluded that the right to use force in self-defense against non-state actors was controversial before the 9/11 attacks. Before this, actions in foreign territories were claimed as self-defense but were mostly all condemned in different UN resolutions.\(^{216}\)

Until the 1990’s, the victim state’s use of force in an ineffective host state’s territory against non-state actors was generally denounced. Since the end of the Cold War, the UNSC has not been as active at condemning these actions, and some states have given the victim states

\(^{212}\) ICJ Statute \textit{supra} note 106 at Article 38(1)(b). As discussed in Chapter Two and Three, there is an objective requirement relating to the behavior of states (state practice) as well as a subjective element which relates to the belief that such behavior is in line with the law (\textit{opinio juris}).

\(^{213}\) Deeks (2012) \textit{supra} note 83 at pp. 486 and 640.

\(^{214}\) Williams \textit{supra} note 35 at pp. 634 and 639.

\(^{215}\) Lubell \textit{supra} note 21 at p. 34; Deeks (2012) \textit{supra} note 83 at p. 549; Dawood, Ahmed I., Defending Weak States against the Unwilling or Unable Doctrine of Self-Defense, Journal of International Law and International Relations, Toronto, Volume 9, Number 1 (2013) pp. 22-23 [Dawood]

\(^{216}\) Gray \textit{supra} note 87 at pp. 161-164.
However, the use of extraterritorial self-defense against non-state actors without substantial involvement or consent of the host state is still not universally accepted.  

A fair conclusion is that the Unwilling or Unable Doctrine is contested and highly debated amongst scholars and nations. There are not only different opinions concerning legality of the Doctrine, but also its origin, substantive provision, and scope. Unfortunately though, the situation where the Doctrine could be applicable is still present and relevant in modern times. The following case study contains cases throughout the 20th and 21st centuries in order to answer the question whether the Doctrine has become a valid source for extraterritorial self-defense as a part of international customary law.  

4.1 -1970’s

Before and during the 1970’s there were three states that explicitly endorsed the Unwilling or Unable Doctrine. First on April 30th 1970, the President of the U.S., Richard Nixon, announced a bilateral agreement between U.S. and South Vietnam to start pursuing North Vietnamese targets in Cambodia. In short, the South Vietnamese guerilla, Viet Cong, had been using Cambodian territory to establish sanctions targeting within, *inter alia*, U.S. and South Vietnamese borders. The president highlighted that its incursions into Cambodia did not constitute an attack since Cambodia had lost control over parts of its border. State Department Legal Adviser John Stevenson made a statement on May 28th of that same year arguing that if the neutral state should be unable or fail for any reason to prevent violations of its neutrality by forces of one belligerent entering/passing through its territory, the other belligerent attacks on the enemy forces on this territory would be justified.

The second case in this decade was the Israeli invasion of Lebanon in 1978-1982 to clear out the Palestine Liberation Organization (PLO). The trigger for the invasion was the March 11th

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217 Dawood *supra* note 215 at p. 17.
219 The case study is to a large extent based on Chachko, Elena, Deeks, Ashley, *Who is on Board with “Unwilling or Unable”?*, Lawfare Blog, 10 October, 2016. [Chachko and Deeks]
220 The Department of State Bulletin, Volume LXII, Number 1612, 18 May 1970.
URL: [https://babel.hathitrust.org/cgi/pt?id=mdp.39015077199597;view=1up;seq=693](https://babel.hathitrust.org/cgi/pt?id=mdp.39015077199597;view=1up;seq=693). Visited 19 May 2017.
attack on the northern part of Israel which the PLO claimed responsibility for.\textsuperscript{222} Lebanon protested the invasion and turned to the UNSC, claiming zero responsibility for the attack. However, Israel’s ambassador to the UN, Haim Herzog addressed the UNSC two days later, arguing that Israel’s action was in line with international law and the UN Charter. He further cited Fawcett, who refers to the Unwilling or Unable Doctrine under Article 51, as a legitimate way for intervention to remove or destruct threats on another state’s territory.\textsuperscript{223} Interestingly enough, UNSC adopted two resolutions, 425 (1978) and 426 (1978), demanding the removal of Israeli forces from Lebanese territory and established the United Nations Interim Force in Lebanon (UNIFIL).\textsuperscript{224}

The third case to be examined resulted in a judgment from ICJ: \textit{Case concerning United States Diplomatic and Consular Staff in Tehran} (1979) between the U.S. and Iran. The non-state actor, the Muslim Student Followers of the Imam’s Line, entered the U.S. Embassy in Tehran and held fifty-two American diplomats and consular staffs as hostages for 444 days. No actions were taken from the Iranian government despite multiple requests from the U.S., prompting a military action by U.S. President Jimmy Carter. On April 26\textsuperscript{th}, 1980, the president wrote in a letter, addressed to the Speaker of the House and the President Pro Tempore of the Senate Reporting on the Operation, that the U.S. military operation was conducted pursuant to the power of the president and to the Constitution. The U.S. acted within its right, according to Article 51 of the Charter, protecting and rescuing its citizens when the host state is unwilling or unable to protect them.\textsuperscript{225} Although the U.S. military action was ultimately unsuccessful, the hostages were released in 1981 following the Alger Agreement.\textsuperscript{226}

The Doctrine was implicitly invoked twice by South Africa concerning the non-state actor Southwest Africa People’s Organization (SWAPO) during the years 1979-1980 in Zambia

\textsuperscript{223} UN Security Council, 2071st meeting, UN Docs. S/PV.2071, 17 March 1979.
and 1978-1984 in Angola. The Minister of Foreign Affairs and Information, Pik Botha, addressed the UNSC highlighting the presence of armed SWAPO terrorists attacking South Africa from bases in Angola and Zambia. South Africa was left with no other alternative but to take protective actions against aggression committed from Zambian territory. In addition, South Africa’s actions were in direct response to the threat posed by these terrorist activities and Zambia was to bear full responsibility for allowing terrorists to establish sanctuaries in and operate from its territory.  

In the case concerning Angola, the South African Minister of Foreign Affairs sent a letter addressed to the UNSG pointing out that governments providing sanctuary to perpetrators of terrorism were just as guilty as if they were accessories. Unless the governments took a resolute stand against allowing their territories to serve as launching sites for aggression against a neighboring state- the entire sub-continent was headed for a turbulent era with potentially catastrophic dimension.  

During the 1950’s, the end of 1960’s, and at beginning of the 1970’s, there are two ambiguous European cases from France and Portugal in which the Doctrine could be applied. In a letter from the French ambassador to the UN addressed to the UNSC, the French government argued that the Franco-Tunisian border was vulnerable to Algerian Rebels, National Liberation Front (French: Front de Libération Nationale, FLN) activity and the Tunisian government was incapable to maintain order on the frontier. Moreover, the FLN was given a right to establish a complete organization within Tunisian territory, enabling them to carry out numerous border violations and incursion into French territory where they had committed heinous crimes.  

From 1969-1971, during the Portuguese Colonial War, Portugal made statements concerning Anti-Portuguese Rebels in Senegal, Guinea and Zambia. Portugal claimed that it had a right to self-defense and had justification for whatever force was to be carried out in response to attacks in Portuguese Guinea.  

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establish bases on its territory and had permitted frequent armed attacks on the adjoining Portuguese territories. Zambia should have assumed responsibility for attacks by elements proceeding from its territory and fleeing back for sanctuary.231

4.2 1980’s

During the 1980’s, only two countries, Israel and South Africa, invoked the Doctrine. While Israel’s citation of the Doctrine seemed quite explicit, South Africa invoked it implicitly in three cases concerning the African National Congress (ANC) in Mozambique, Lesotho and Botswana. In a letter from the South African Minister of Foreign Affairs to the UN addressed to the UNSG, it was written: “(…) A country actively or passively supporting those who plan and commit terrorism and subversion, and which, in addition, harbors them, will have to bear the consequences”.232 South Africa highlighted Lesotho’s consistent unwillingness to commit itself to co-operation regarding terrorist violence emanating from Lesotho’s territory against South Africa. Lesotho gave ANC sanctuary and welcomed and harbored people who planned violence and killings indiscriminately in South Africa. Therefore, South Africa objected to the charges of unprovoked armed aggression against Lesotho.233 Regarding Botswana, South Africa had repeatedly warned Botswana to curtail the activities of ANC on its territory while South Africa had no choice but to protect itself from increasing terrorist attacks.234

In 1981, the Israeli ambassador to the UN, Yehuda Blum, addressed the UNSC to remind states that “if a state is unwilling or unable to prevent the use of its territory to attack another state, that latter state is entitled to take all necessary measures in its own defense”. Blum further argued that Israel was using its inherent right to self-defense in response to the PLO terror.235 In 1985, Israeli ambassador to the UN, Benjamin Netanyahu, addressed the UNSC


citing many instances in which member states of the UN had claimed the right to act in self-defense to curb armed attacks from other countries. The question posed was whether other remedies were available. In this case, Tunisia had not shown any intention to prevent Palestinian Liberation Organization (PLO) from planning and initiating terrorist activities from Tunisian territory. Meanwhile ambassador Netanyahu had support, as the U.S. supported the legality of a victim state if the host state was unwilling or unable to stop terrorist from using its territory for that kind of purpose.

4.3 1990’s and the 9/11 attacks

During the 1990’s until the 9/11 attacks, the Unwilling or Unable Doctrine was invoked an unprecedented number of times. In 1993, Israel again invoked self-defense in general terms against Hezbollah, Popular Front of the Liberation of Palestine, and others on Lebanese territory. Subsequently, in 1996, the Israeli ambassador to the UN addressed the UNSC stating that the Lebanese Government did not have the ability or the will to control Hezbollah activities, thus allowing Israel the right to defend its national security by all necessary means.

In 1996, the Turkish Foreign Minister addressed a letter to the UNSG and UNSC concerning the PKK in Iraq explicitly referring to the Doctrine, stating that every nation has the duty to refrain from aiding in organized activities within its territory directed towards the commission of terrorist act in another state. It is inevitable for a country to resort to necessary and appropriate force to protect oneself from attacks if the host state is unwilling or unable to prevent the use of its territory for attacks. In addition, U.S. State Department Spokesman Nicholas Burns highlighted the Unwilling or Unable Doctrine when responding to a question on Turkey’s use of force against the PKK in Iraq. However, South Africa (within the Non-
Aligned Movement (NAM) framework) criticized the incursion by Turkey on Iraqi territory.\footnote{Annex to the letter dated 6 June 2000 from the Permanent Representative of South Africa to the United Nations addressed to the Secretary-General, Final document of the Thirteen Ministerial Conference of the Non-Aligned Countries, UN Doc. A754/917, para. 137.}

In the aftermath of the bombings of U.S. embassies in Nairobi and Dar Es Salaam in 1998, U.S. President Bill Clinton initiated military actions against al-Qaeda in Afghanistan and Sudan. The president justified this act by stating that the host states had been warned for years to stop harboring and supporting the terrorist organization, but the countries had persistently hosted safe havens. The attacks by the U.S. were carried out after repeated efforts to convince Sudan and the Taliban regime in Afghanistan to stop the terrorist organization operating from their territory.\footnote{William J. Clinton, "Remarks in Martha's Vineyard, Massachusetts, on Military Action Against Terrorist Sites in Afghanistan and Sudan," August 20, 1998. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. URL: http://www.presidency.ucsb.edu/ws/?pid=54798. Last visited 19 May 2017.; Letter dated 20 August 1998 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/1998/780, 20 August 1998.}

The U.S. continued its efforts in and after 2001 against al-Qaeda primarily in Afghanistan. The response which followed from the U.S. on Afghan soil after the attack can be justified in two ways. The first solution is to argue that the action carried out by the U.S. reflected customary international law. This would mean that international law recognized the use of force as a response to an attack by a non-state actor. A less provocative argument would be that the Afghan government \textit{de facto} was responsible for the attacks.\footnote{Klamberg (2015) \textit{supra} note 55 at p. 133.} For example, State Department Legal Adviser John Bellinger expressed that the U.S. was justified in using military force in self-defense against the Taliban since it had allowed al-Qaeda to use Afghan territory to plot attacks and host training facilities. Afghanistan was unwilling to prevent al-Qaeda’s actions, and the U.S. took military action after the state was refused the opportunity to surrender harboring terrorist. Bellinger explicitly highlighted that where a harboring state is unwilling or unable to take action to quell the attacks, it may be lawful for the victim state to use military force in self-defense, which over a century of state practice supports.\footnote{Legal Adviser Bellinger speech, “Legal Issues in the War on Terrorism”, 21 October 2006. URL: https://www.state.gov/s/l/2006/98861.htm. Visited 19 May 2017.} This position was reaffirmed in 2007.\footnote{Bellinger, John, \textit{Armed Conflict with Al Qaida?}, 15 January 2007. URL: http://opiniojuris.org/2007/01/15/armed-conflict-with-al-qaida/. Visited 19 May 2017.}
Iran implicitly invoked the right to extraterritorial self-defense against the non-state actor Mujahedeen-e-Khalq (MKO/MEK) various times. In 1993 and 1994, Iran emphasized its right to self-defense and warned Iraq against the use of its territory for launching armed attacks on Iran and an incursion committed by the MKO/MEK.\textsuperscript{246} Again in 1996 the nation emphasized its inherent right enshrined in Article 51. At the time, Iraq was not in position to exercise effective control over its territory while terrorist groups had committed armed attacks originating from Iraqi territory against Iranian borders.\textsuperscript{247} From 1999 to 2001, Iran reiterated its position again, stating that it had exercised its right of self-defense under Article 51 of the Charter when it had targeted a well-known active terrorist camp located in the territory of Iraq, further aiming to prevent recurrence of similar terrorist operations.\textsuperscript{248} Iraq should have taken appropriate measures in conformity with international law to put an end to its territory for cross-border attacks and terrorist operations against Iran, which would render unnecessary measures in self-defense.\textsuperscript{249}

Uganda held an ambiguous view concerning its acts against Ugandan rebels, Allied Democratic Forces (ADF) on the DRC’s soil during 1998 and 1999 (the post-consent period). The situation led to ICJ’s judgment in \textit{Armed Activities Case} (2005) where the court argued that Uganda did not have the right to self-defense since the armed attack could not be attributable to the DRC, but rather to the ADF. An official statement was made by the High Command of Uganda People’s Defense Force (UPDF) in the DRC stated that it had not been in effective control of the territory of the Congo.\textsuperscript{250}

**4.4 After the 9/11 attacks**

Since the 9/11 attacks, all but one permanent member to the UNSC have made some kind of statement concerning the Doctrine. Russia, U.S. and U.K. have all made explicit references, while France has held an ambiguous.


\textsuperscript{250} \textit{Armed Activities Case} (2005) supra note 51 at para. 109.
In 2002, the Russian Federation was fighting a Chechen insurgency, now known as the Second Chechen War. Russia raids targeted a Chechen population in the Pankisi Gorge, situated in a part of Georgia.\textsuperscript{251} Although the Chechens fought in order to achieve sovereignty and independence, the Chechens must be viewed as non-state actors since they were not recognized as a unified state at the time of the conflict. Russian Federation then-Prime Minister Vladimir Putin made reference to the Doctrine stating, “The continued existence in separate parts of the world of territorial enclaves outside the control of national governments (...) are unable or unwilling to counteract the terrorist threat is one of the reasons that complicate efforts to combat terrorism effectively” and gave the Pankisi Gorge as one example.\textsuperscript{252} Russia’s Minister of Foreign Affairs, Igor Ivanov, addressed the UNSG and pointed out that Georgian authorities had repeatedly assured the world community of their readiness to restore by themselves order in the Pankisi Gorge, had “(...) acknowledge their unwillingness to take practical measures to halt terrorism. To all appearances, they are unable and really do not wish to do that there”.\textsuperscript{253}

In 2006, Israel expressed its great concern for the acts of war carried out by Hezbollah launched from Lebanese territory. Thereby, the responsibility for the belligerent acts lay on the shoulders of Lebanon. Israel pointed out that the ineptitude and inaction from Lebanon had led to a situation in which it had not exercised jurisdiction over its own territory, thus giving Israel the right to act in accordance with Article 51 of the UN Charter and exercising its right to self-defense.\textsuperscript{254} However, it is worth noting that there are a few incidents where

\textsuperscript{251} Nygren, Bertil, The rebuilding of Greater Russia: Putin’s Foreign Policy Towards the CIS Countries. New York. NY: Routledge, New York (2008), p. 120.
\textsuperscript{254} Identical letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2006/515, 12 July 2006.
Israel have used force against non-state actors, against Hezbollah in Syria\textsuperscript{255} and in Sudan to curb the flow of weapons to Hamas in Gaza,\textsuperscript{256} without providing any legal justification.

One of the most observed and debated intrusions of military force on a host state’s territory is the infamous Bin Laden Operation of 2011. The U.S. entered Pakistani soil in order to “capture or kill” the al-Qaeda leader Usama Bin Laden. Legal Adviser of the Department of State, Harold Koh, explained that the operation was carried out in accordance with the principles (the Unwilling or Unable Doctrine included) he earlier outlined in a speech made at the American Society of International Law (ASIL). In regards to the Doctrine, Koh stated:

“Whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses.”

Koh reinforced his support for the legality of targeted killings of high-level al-Qaeda leaders responsible for planning attacks.\textsuperscript{257} This view has been widely debated.\textsuperscript{258}

In 2004, 2006 and 2008, the three states of Rwanda, Colombia and Ethiopia presented an equivocal approach to the Doctrine. In August of 2003, Paul Kagame became the first elected Rwandan President since the horrendous genocide. Although Rwanda officially pulled its forces out of DRC in 2002, reports of Rwandese involvement in the DRC conflict continued.

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\textsuperscript{258} See for example Posner supra note 9. URL: http://www.slate.com/articles/news_and_politics/view_from_chicago/2012/10/obama_s_drone_war_is_probablyIllegal_will_it_stop_.html. Visited 19 May 2017.
despite Rwandan denials. In a letter from the Rwandan ambassador to the UNSC, it was pointed out that the Rwandan people had lived with the “specter of genocide on their doorstep” and Rwanda had repeatedly called on the Congolese authorities to deal with the situation. Cognizant of stated incapacities of DRC and the lack of effective response from the international community, the DRC still rejected Rwandan willingness to help with placing troops under Congolese command and control to deal with the Hutu rebels. Further, Rwanda invoked the DRC’s failure to prevent attacks by Hutu rebels as a ground for military intervention. Rwanda argued that Congo and United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) had not complied with their obligations under UNSC Resolution 1565 (2004) to disarm the non-state actors. Rwanda would therefore take necessary means to protect its borders, even if it meant attacking rebels in the DRC.

Ethiopia made an indistinct statement for its troops being present to combat Islamist Forces of the Union of Islamic Courts (UIC) on Somalian soil in 2006. The Ethiopian Prime Minister Meles Zenawi declared that the country had taken self-defensive measures and counter-attacking extremist forces of the UIC. The leaders of UIC had issued a call for jihad against Ethiopian troops, which was accused for invading Somalia and appealed foreign fighters to join the jihad.

In the case with the Revolutionary Armed Forces of Colombia (FARC) in Ecuador, Colombia did not clearly articulate the legal justification for its use of force on Ecuadorian territory,

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262 Ruys and Verhoeven supra note 218 at p. 296.

263 UN Security Council, 5614th meeting, UN Doc. S/PV.5614, 26 December 2006, p. 3. See also Gray supra note 192 at pp. 250-251 for the legal basis for Ecuador’s incursion.
although its action could be seen as a use of the Doctrine per se. The Permanent Council of OAS also condemned the incursion by Colombia on Ecuador’s territory, calling it a violation of sovereignty and territorial integrity. Ecuador strongly objected to Colombia’s actions. In a letter to the UNSC, Ecuador stated the following:

“(…) The Government of Ecuador reiterates its strong determination not to allow the nation’s territory to be used by third parties for the conduct of military operations or as a base of operations in the context of the Colombian conflict. (...) No military force, whether regular or irregular, may take action in Ecuadorian territory”.

In addition, there have been a handful of instances in which the intentions of a country using force against a non-state actor are elusive and it is unclear whether the basis for the acts are based on the Doctrine or not. Iran used force against the Partiya Jiyana Azad a Kurdistanê (PJAK) on Iraqi territory several times in the years between 2007-2011. However, the records of the UNSC indicate that Iran did not notify the UNSC of the attacks (as required in Article 51 of the UN Charter) nor did they articulate any legal basis for them. Since 2013, France has been using force in Mali against al-Qaeda affiliated Islamist groups and here has been some debate on the legal basis for France actions. For example, a convoy moving weapons to Mali was attacked on the territory of Niger. On several occasions in 2014, Egypt and the United Arab Emirates attacked Islamist-allied militias in Libya but neither state acknowledge the strikes and no legal justification was therefore provided. According to some scholars, incidents carried out by Turkey against PKK during 2006 to 2008 have

269 Hakimi supra note 169 at p. 11.
reflected the Unwilling or Unable Doctrine rationale, although there was no official statement of the basis for the use of force against the PKK in the aftermath.  

4.4.1 The Fight Against Da’esh/ISIL

The Arab Spring seemed to be a revolution of freedom. The revolutionary wave in North Africa and the Middle East began in Tunisia in 2010, but its effects spread fast to other countries such as Syria and Iraq. The U.S.-led coalition has conducted more than 11,500 air strikes targeting Da’esh/ISIL in Iraq since August 2014 and, the air strikes began in Syria in the following month. Since then, more than 8,000 air strikes have been carried out by coalition forces. Although Russia is not a part of the conflict, it began its air strikes against “terrorists” in Syria in September 2015. Below is a picture showing the strikes carried out by the coalition.

Non-state actors often seek safe haven in weak states, which came to be the case here with Da’esh. In June 2012, Herve Ladsous, the UN peacekeeping chief in Syria, stated that the

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272 The air strikes from the U.S. against Da’esh in Iraq are legal since they have occurred at the request of Iraq. However, the U.S. does not recognize the government of Syria as legitimate why U.S. air strikes have been conducted without a request of consent by Syria. See Farrell supra note 206.

country had entered a period of civil war. This situation has led to many countries showing support for the Doctrine including European as well as Nordic countries.

In 2016, the U.S. once again employed the Unwilling or Unable Doctrine, this time concerning the situation with Da’esh in Syria. U.S. State Department Legal Adviser Brian Egan held a speech at ASIL stating that the U.S. could act in self-defense without Syrian consent, as indicated in Article 51 of the UN Charter, because the U.S. had determined that the Syrian regime was “unwilling or unable” to prevent the use of its territory for armed attacks. He defined the term “unable” as the “inability perhaps can be demonstrated most plainly, for example, where a state has lost or abandoned effective control over the portion of its territory from which the non-state actor is operating”. The Permanent Representative of the U.S. to the UN, Samantha Power, addressed the UNSG later that year, where the U.S. strongly supported the Doctrine and the right to use self-defense against non-state actors. Power wrote:

“States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defense, as reflected in Article 51 of the Charter of the United Nations, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks. The Syrian regime has shown that it cannot and will not confront these safe havens effectively itself. Accordingly, the United States has initiated necessary and proportionate military actions in Syria in order to eliminate the ongoing ISIL threat to Iraq. In addition, the United States has initiated military actions in Syria against al-Qaida elements in Syria known as the Khorasan Group to address terrorist threats that they pose to the United States and our partners and allies.”

The U.K., Germany, Netherlands, Czech Republic, Canada and Australia have made explicit statements concerning the Unwilling or Unable Doctrine concerning Da’esh in 2014 and 2015

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and the U.K. Prime Minister David Cameron has since made two references to the Doctrine. First, in his statement before the Parliament, he held that there is a direct link between the presence and activities of Da’esh in Syria, and their ongoing attacks in Iraq and that “the Assad regime is unwilling and/or unable to take action necessary to prevent ISIL’s continuing attack on Iraq- or indeed attack on us”. Later in 2015, Prime Minister Cameron once again promoted the Doctrine stating:

“There is a solid basis of evidence on which to conclude, firstly, that there is a direct link between the presence and activities of ISIL in Syria and their ongoing attack on Iraq and, secondly, that the Assad regime is unwilling and/or unable to take action necessary to prevent ISIL’s continuing attack on Iraq”.

A letter to the UNSC from the Chargé d’affaires of the Permanent Mission of Germany noted that Da’esh had occupied a certain part of Syrian territory that was not being effectively controlled by the Syrian regime. Further, it was claimed that states that have been subject to armed attacks by a non-state actor operating from a host state and are therefore justified under Article 51 of the UN Charter to take necessary measures of self-defense without the consent of the host state. In addition, in an application of the German Federal Government to the Bundestag, Germany was seeking the approval a proposal to deploy armed forces to prevent and suppress terrorist acts by Da’esh. Germany and its allies then received a request by Iraq to exercise its right to collective self-defense within the meaning of the article. The Germans among others opted to give military assistance to Iraq in response to military attacks launched from Syrian territory by Da’esh onto Iraqi territory. They further stated that military actions

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on Syrian territory were carried out because it was not able and/or unwilling to stop Da’esh attacks that were being launched from Iraq.279

The Dutch government has been consistent with its support of the Doctrine, as seen in a statement on July 1st, 2015:

“The existence of a mandate in conformity with international law to act against a non-state entity in the territory of a third country requires that (1) there is an armed attack by that group; (2) the territory of that third State is used to carry out this attack; and (3) the third State is unable or unwilling to put an end to the activities of non-state entities in its territory.”280

Later that month, the Dutch Foreign Minister to Parliament stated that the legal basis to the use of force in Syria consisted in the right of collective self-defense, as enshrined in Article 51 of the UN Charter. It was also evident that the Syrian authorities were incapable of stopping these armed attacks.281

The same approach was adopted by the Czech Republic, which stated that if a host state is unable to act against a non-state actor, that state must be prepared to limit its own sovereignty in order to allow a victim state to address the situation. If a host state were to be unwilling, the consequences may differ as such situation could be interpreted as indirect support to the non-state actor. It is acknowledged that state sovereignty should not serve as a protection of a state if such is unwilling or unable to exercise its sovereignty within its territory.282 Further, both


URL: https://www.icct.nl/wp-content/uploads/2015/05/ICCT-Dorsey-Paulussen-Towards-A-European-Position-
Canada and Australia have highlighted the Unwilling or Unable Doctrine as a part of the inherent rights of individual and collective self-defense reflected in Article 51 of the UN Charter. States must be able to act in self-defense when the government of a host state is unwilling or unable to prevent attacks emanating from its territory where a threat is located. The Prime Minister of Australia, John Howard, made a remark years before the fight against Da’esh in an interview highlighting the Doctrine in 2004 saying that if the use of force is needed in order to protect oneself, such measures would also be taken.

Turkey’s representative made a statement regarding the situation in Iraq before the UNSC as follows:

“If the Iraqi Government claims that it has full sovereignty over all its territory, then it is our right to expect that it will prevent the use of Iraqi soil for terrorist attacks against our own territory. However, both Daesh and the PKK continue to pose significant threats to Turkey’s safety and security from areas beyond the reach of the Iraqi Government, and it is our right to exercise self-defense.”

In a later statement, Turkey pointed out that the regime in Syria was neither capable nor willing to prevent the threats emanating from its territory, which clearly jeopardized the security of Turkey. Individual and self-defense is an inherent right according to the UN Charter.

After the Paris attacks, France whom earlier had an ambiguous approach to the Doctrine, implicitly increased its support when President Francois Holland referred to as France launched their biggest raids in Syria targeting Da’esh in Raqqa. Further, Norway has

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287 Identical letters dated 8 September 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2015/745, 9 September 2015; Doherty supra note 207.
expressed its view on this matter stating that there is a legal basis for acts of self-defense against non-state actors.  

As shown above, the Unwilling or Unable Doctrine as a legal basis in the fight against Da’esh has been used by numerous states around the globe. In 2016, the Permanent Representative of Belgium to the UN, Bénédicte Frankinet, implicitly invoked the Doctrine when addressing the UNSC. Belgium especially noted that the Syrian Government did not exercise effective control over its territory. In light of this unique situation, victim states are justified under Article 51 of the UN Charter to take necessary measures of self-defense. Belgium stressed that the military measures taken in collective self-defense were directed against Da’esh and not Syria.  

Ambiguous support for the Doctrine as a part of Article 51 in the fight against Da’esh has been shown by Denmark. Also, the members of the Gulf Cooperation Council (GCC), Egypt, Iraq, Jordan, Lebanon and the U.S. declared their shared commitment in the Jeddah Communiqué to stand united against terrorism. However, the members of GCC are also members of the Arab League, which in December of 2015, adopted its Resolution 7987 condemning Turkey for using force in Iraq. In addition, Egypt attacked Da’esh targets in Libya in 2015 in the response of an attack against the Egyptian Coptic minority. Egypt appeared to argue that Libya had given its consent to the use of force on its territory at the following UNSC session. Considering the different approaches from the countries, the communiqué can not be seen as anything but an ambiguous support.

294 UN Security Council, 7387th meeting, UN Doc. S/PV.7387, 18 February 2015.
Russia has been a strong supporter of the Doctrine in its conduct against the Chechen Rebels in 2002 but has rescinded its public support for the Doctrine in the context of U.S.-led coalition operations in Syria. A Russian spokesman from the Foreign Ministry stated that the U.S. had used force without the consent of Syria and such move without a decision from the UNSC was an act of aggression within the norms of international law. 295 Shortly after, the Russian ambassador to the UN addressed the UNSC reaffirming the country’s position. 296 Similarly, Iran objected to the U.S. use of force against Da’esh in Syria and claimed that the actions carried out by the U.S. were illegal due to its absence of a UN mandate or the lack of consent by Syria. 297

There are four countries, Syria, Venezuela, Ecuador and Cuba, which have objected to the actions taken by U.S.-led coalitions in the fight against Da’esh and have publicly supported the sovereignty and territorial integrity of Syria. Syria claims that the U.S., U.K., France, Canada, and Australia have sought to justify their intervention in Syria by citing the fight against Da’esh. They have invoked Article 51 of the UN Charter, but have not consulted the Syrian Government, which manipulated international law and the course of action distorts the provision of the UN Charter. 298 A letter from the Permanent Representative of the Syrian Arab Republic to the UN addressed to the UNSG and UNSC states:

“(…) Any attempt to invoke Article 51 of the Charter to justify military action on Syrian territory without coordination with the Syrian Government manipulates, distorts and misinterprets the provisions of that Article. The international community recognizes that the exercise of legitimate defence is subject to conditions that were put in place in order to uphold international law and the principles of sovereignty and non-interference, and to prevent the threat or use of force. Among the conditions required by Article 51 are that there should be an ongoing and effective act of aggression on the part of an armed

296 UN Security Council, 7271st meeting, UN Doc. S/PV.7271, 19 September 2014.
force against a Member State, that the response should be temporary, and that it should respect the authority and responsibility of the Security Council”.

Cuba and Venezuela are of the opinion that there is no legal basis of the use of force against Da’esh and such actions are a manipulation of the UN Charter. Both states reject any attempt to undermine sovereignty, independence, and the territorial integrity of Syria. Similarly, Ecuador condemned a bombing carried out by the U.S. and its allies on the September 24th, 2014. These actions were carried out in contravention of law, and there was no authorization by UNSC. Moreover, no consent had been given by the Syrian government, which had offered to cooperate with the international community to address the threat by Da’esh. Therefore, they view the military actions as a violation of the sovereignty of Syria and threat to its territorial integrity.

4.5 Conclusions

The ILC defines state practice in Draft Conclusion 9 and stipulates that the relevant practice must be general in order to become customary international law. It must be sufficiently widespread and representative, and the practice must be generally consistent. State practice, as shown in the case study, has been quite variable and it is clear that only a few states have explicitly invoked the Unwilling or Unable Doctrine.

It has been difficult to determine how many states have had the opportunity to invoke the test but chosen not to. As the case study shows, many countries have felt the need of a Doctrine for the legitimate use of extraterritorial self-defense against non-state actors. One example of such situation is Iran’s justification for the incidents in 1993 and 1994 to the extent to which Iran attributed MEK’s actions to Iraq. It is consequently difficult to tell whether Iran advanced a state responsibility argument or an implicit Unwilling or Unable Doctrine.

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argument (as Chachko and Deeks views the situation). The same concern could be applied to the U.S. response in the aftermath of the 9/11 attacks (as presented in Chapter 4.3).

There is also a theoretical possibility that a victim state has been targeted by an armed attack by a non-state actor but has chosen not to invoke the Doctrine because they do not feel the nature of the attack met the requirement in international law for what technically constitutes an armed attack (as required in Article 51 of the UN Charter). In such situation, the victim state would have had the opportunity to invoke the test de facto, but would not have regarded itself as having that opportunity. In addition, the case study shows that it is fair to say that a non-state actor with military capacity to carry out cross-border armed attacks are more likely to emerge in regions suffering from a certain level of instability. Although there are more than ten states that have explicitly invoked the Unwilling or Unable Doctrine, not all of these states have acted consistently with the Doctrine.

In the study, the letter from the ambassador to the Permanent Mission of the U.S. Samantha Powers was examined. The letter explicitly referred to the Doctrine and highlighted the complex situation within jus ad bellum and the scope of self-defense. Thus, two issues need further clarification in international law: 1. If an armed attack by non-state actor can trigger Article 51, and 2. if extraterritorial force can be used in self-defense against a non-state actor which have safe haven in the host state which is unwilling or unable to deal with the threat and police its territory.

In addition, the consent or cooperation of the host-state should be examined so it can be determined if the host state is unwilling or unable to the extent in which the victim state has the legal right to use self-defense. For example, in the 1970’s the U.S. made a reference to the Unwilling or Unable Doctrine but did not use the exact term when they acted in self-defense against non-state actors on Cambodian territory, when they argued that Cambodia was unable to expel the Viet Cong within its borders. However, the cooperation was not sought out in a proper way as one may have wished. Since the aim of the Doctrine is to provide a lawful justification to the use of force as a last resort, it could be argued that the U.S. had acquired the tacit consent by Cambodia before initiating an incursion. The bombings though were not

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303 Chachko and Deeks supra note 219.
unprecedented since they had not been acknowledged by the U.S. or approved by Colombia.  

The Doctrine is supposed to provide a last-resort option to use force in self-defense. However, as the case study shows, one could say that the Doctrine has not been used as a last resort by several states, but rather as a first resort to the use of force. For example, it could be argued that Russia used force as a first resort in the Pankisi George.

As mentioned, some states have shown a varying degree of support to the Doctrine. Since the Doctrine aims to provide a legal ground for self-defense, it should be seen as a complement, and not as an exception from Article 51. If a state neglects to invoke self-defense, it should be interpreted as the state not acting in conformity with the Doctrine. For example, Uganda’s action during the 1990’s should be considered as a failure to invoke the right to self-defense in accordance with the article and therefore also the Doctrine. The fact that ICJ rejected the Ugandan argument that it had acted in self-defense in Armed Activities Case (2005) speaks strongly against an application of the Doctrine.

With the ILC’s definition of state practice in mind, the examined state practice cannot be regarded as extensive and uniform as requested for a norm to become international customary law. Also, the lack of clarity concerning the criteria for the Doctrine to be applied presents a difficult situation to show a sufficient uniformity of state practice.

It is essential to determine if the force has been used in self-defense or if it’s a violation of a states sovereignty and territorial integrity and therefore a shield that needs to be pierced. If it is such violation, that would speak against a general state practice which would be needed in order for the Doctrine to emerge into a customary international law norm. As the case study has shown, the used self-defense can hardly constitute a “general” practice. Hereby the requirement of a general and consistent state practice is not sufficiently met.

Some of the current state practice, like in the case of Syria in the fight against Da’esh, may contribute to the development of an emerging norm, but at this very moment, such rule has not yet emerged. If one accepted the current definition of the Doctrine, there is a risk which

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would open the door to a potential flood of forcible interventions in the territory of host states- especially if the Doctrine kept its vague definition.
5. Analysis and Final Conclusion

This paper has addressed the question whether the Unwilling or Unable Doctrine has become a part of customary international law. The genesis of the Doctrine is rooted in a state’s right to self-defense which otherwise would have constituted a violation of the prohibition to the use of force.\textsuperscript{305} Although Article 51 of the UN Charter does not specify from whom an armed attack must be committed by, there is a debate whether a non-state actor could be seen as the perpetrator of such attack \textit{de jure}. Difficulty arises when a victim state needs to take extraterritorial measures in self-defense against non-state actors on a host states territory, like Da’esh in Syria. According to the Doctrine, such attack should trigger the self-defense article. Given the inherent right to self-defense, one could argue that a wide interpretation of the term “inherent” could open up for the article to cover the Unwilling or Unable Doctrine. The French version uses the phase “droit naturel” which is translated to “natural right” and can be linked to natural law what Wacks describes as “what naturally is, ought to be”. If one makes such interpretation, the right to self-defense is a fundamental rule and can not be removed.\textsuperscript{306}

As seen in previous Chapters, there are arguments for an emerging norm through, for example, state practice and UN resolutions that would give victim states a chance to use the right to self-defense against such acts committed by non-state actors. The ICJ has not recognized this approach and even if the court did shed clarity over the debate, the problem relating to extraterritorial use of force would still remain until the international community came together. In addition, there is a difference of opinion regarding the Doctrine’s status in international law. Deeks suggests that it is lawful and gives various examples of state practice as evidence.\textsuperscript{307} Contrarily, Williams recognizes that there is a growing state practice that supports the Doctrine, but the \textit{opinio juris} element is still lacking.\textsuperscript{308}

5.1 Analysis

It is clear that the right to self-defense and the principles of sovereignty and territorial integrity clash in situations described in this thesis. The Doctrine “seeks to balance the rights of the victim state with those of the host state, as the latter’s territorial integrity will only be

\textsuperscript{305} See for example UN Charter \textit{supra} note 1 at Article 2 (4) and 51.
\textsuperscript{307} Deeks (2012) \textit{supra} note 81 at 486.
\textsuperscript{308} Williams \textit{supra} note 35 at p. 620.
infringed where it is unwilling or unable to deal with the threat”. It is therefore fair to say that the Doctrine prioritizes the right to self-defense above the principles of sovereignty and territorial integrity. For example, the ICISS suggested a new definition for sovereignty, which would force the state to comply with its obligations in order to remain its right to sovereignty. If such definition had been adopted, it would have been beneficial for legitimacy of the Doctrine since its function is based on the premise that states have an obligation to ensure that their territory is not used to the detriment of other states and thus it balances the right to sovereignty with self-defense. As shown in Chapter Four, the Czech Republic explicitly and strongly advocated this approach, stating that a host state must be prepared to limit its own sovereignty in order to allow a victim state to address the situation. A state’s sovereignty should not serve as a shield of a state if such is unwilling or unable to deal with its internal instability which possesses a threat to another state. However, if it is legally acceptable to use force against non-state actors on another state’s territory, one needs to consider the effects of such right. Indeed, if such right exists for the victim state, this would also lead to an armed attack on the host state’s territory where the non-state actor is located. This raises the question whether the host state also has a right to use self-defense against the victim state that is attacking the non-state actors. This could lead to a continuous circle of armed attacks.

According to the Doctrine it is acceptable to prioritize the right to self-defense in the limited case where a victim state is a subject to an armed attack from a non-state actor and the victim state has used all reasonable endeavors to obtain consent by the host state. One should ask the question: If the host state is not willing or able to control parts of its territory, why should it enjoy unimpeded sovereignty at the detriment of the victim state’s security or peace?

At first glance, the case study shows a general acceptance by victim states when a host state is unwilling or unable to use force in self-defense (but one needs to keep in mind that the victim state’s opinion is not sufficient to create a new customary rules). Some scholars like Williams hold the inability element as the factor that should be subject to most consideration and argues that if a host state is willing but unable to deal with a non-state actor, it will inevitably consent

309 Arimatsu and Schmitt supra note 160 at p. 21; Williams supra note 35 at p. 626-627.
310 ICISS Report supra note 25 at p. XI.
311 Dorsey and Paulussen supra note 282 at p. 12.
to the use of force by the victim state on its territory. This presumption should be questioned since a host state, such as Syria, could have other reasons to not consent to the will of foreign troops by the victim state on its territory (even if it was unable to deal with the non-state actors by itself). For example, the host state might not consider the non-state actor to be such a big concern as the victim state and the host state might prefer to deal with the conduct of the non-state actor over a long period of time in parallel to building its own capacity. In addition, if Williams’ argument were accepted, there would not be a need for the unwillingness element to be examined since the refusal of consent could be interpreted as a proof of unwillingness, which leads to other problems. For example, Syria has been listed by the United States as a sponsor of terrorism since 1979, which could be one of many reasons why Syria would not consent to US presence. Political and historical factors could hereby play tremendous roles.

Although the objective element of state practice is not fulfilled (as presented in Chapter Four), the subjective element of opinio juris should also be analyzed in order to give a complete picture of the status of the Doctrine (even though the elements are cumulative in order to constitute customary international law). ILC stipulates in its Draft Conclusion 10, that “the requirement, as an element of customary international law, that the general practice be accepted as law means that the practice in question must be accompanied by a sense of legal obligation. Acceptance as law is what distinguishes a rule of customary international law from mere habit or usage.” In this sense, the term “obligation” is unfortunate considering that no state should feel the obligation to use force. Hereby, the definition of opinio juris should be understood in this context where states have a sense of whether if its legal or not. In the case study, various governmental and organizational correspondence have been presented. In order to decide the status of opinio juris, one must ask if the victim state had a belief that it did so on a legal ground using the Doctrine. However, it cannot be determined that the Doctrine is used by states solely for the sake of legal obligation.

As mentioned above, political and historical factors play an important role when a state shall determine if it is willing to let another state use force on its territory. Therefore, the unwillingness element by a host state needs to be explicitly invoked by a victim state in order

312 Williams supra note 35 at pp. 626-627.
314 ILC Second Report supra note 109 at paras. 52 and 55.
to fulfill the criterion of the Unwilling or Unable Doctrine for the opinio juris element to be met. In summary, the existence of the opinio juris element to prove the existence of customary international law is insufficient. The U.S.-led coalition in Syria could be seen as a step closer for an emerging norm to be developed. However, they have failed to seek consent by Syria and therefore its value is diminished. Further, there is little proof of opinio juris when it comes to the Doctrine. Thus, the Doctrine cannot be said to exist de lege lata.

The benefit of the Doctrine is clearly for the victim state since it ensures that the victim state can defend and/or protect itself from ongoing or immediate attacks in a lawful way. However, a subject of concern is that powerful states (often the victim state) may invoke the Doctrine to further their interests at the detriment of weaker states. William fears that it “may lead to the erosion of sovereignty and the world order on which it is based”. It hereby seems to be an imbalance when using the Doctrine. However, this can be explained by the fact that non-state actors often find sanctuary in states that fail to have the same amount of control or that are subject to internal conflicts compared to a democratic, well-functioning, state. It is unlikely that a stabilized state with effective policing would provide safe haven for a non-state actor. And, even if this were the case, it remains unlikely that such state would be unwilling or unable do deal with the threat in an effective way. The issues of imbalance could however be solved if the Doctrine was more adequately defined.

Some states have raised the matter of (in)effective control of the host states territory, as seen in the situation in Iraq in 1996 and in Syria in present day (2017). However, placing too much weight on the lack of effective control by a state on its territory is not without peril since the term is defined in the law of occupation. For example, if effective control were a primary determinant to the Doctrine, the U.S. would have had a legal right to intervene in Syria against Da’esh, which threatened to launch attacks, since the Syrian government had lost parts of its territory. Such interpretation would not be beneficial, since it could be used liberally based on a vague assumption. Failing to give objective definition for “unwilling” and ambiguous reference to loss of effective control for “unable” leaves the already fragile Doctrine open to much criticism. Even if the right to self-defense can be abused, there can be no definite conclusion that states should not have a right to self-defense when it de facto

315 Williams supra note 35 at p. 640.
316 For definition of effective control, see Ferraro, Tristan, Determining the beginning and end of an occupation under international humanitarian law, International Review of the Red Cross, Volume 94, Number 885, Spring (2012), p. 139.
füllt die Kriterien, die internationaler Recht unterstellt. Jedoch ermöglicht eine Wirkung effective Control die Möglichkeit, die Doctrine's Contours zu definieren. 


Aufgrund neuerer Ereignisse wird es weiterhin ein Problem der Internationalen Recht bleiben, wie die Extraterritorialitätsschutzmaßnahmen gegen non-state Actors im Territorium eines Gaststaats umgesetzt werden sollen. Im Nicaragua Case (1986), führte das ICJ zu der Meinung, dass nicht-konsistente Staatspraktiken als Verstoß gegen ein bestehendes Regelwerk und nicht als Indikator für die Anerkennung eines neuen Regelwerks zu sehen sind. Dies kann als weiterer Grund für die Meinung dienen, dass die Doctrine nicht als ein Customary Regelwerk betrachtet werden kann. 

Um eine Lösung zu erreichen, wäre es vorteilhaft, die Anforderungen auszuarbeiten und somit zu einer konsistenteren Staatspraxis zu kommen. Idealerweise sollte der Nationalstaat, der die Doctrine einsetzt, sich bewusst sein, was er von sich erwartet, und der Gaststaat sollte wissen, ob der Nationalstaat korrekt die rechten zum Schutz des Territoriums ausgenutzt hat. Die Doctrine könnte hier eine Einschränkung für den Nationalstaat darstellen, und der Gaststaat würde für Polizeiaktivitäten im Territorium verantwortlich sein. Offensichtlich würde eine Eingliederung der Doctrine in das Internationaler Recht für die internationale Gemeinschaft konstruktiv sein. 

Es gibt große Herausforderungen in der Annahme, dass die Doctrine nicht Bestandteil der aktuellen Internationalen Recht ist. Die Frage bleibt, ob Artikel 51 oder ein Customary Internationalen Recht regulieren die Extraterritorialitätsschutzmaßnahmen gegen non-state Actors, was nicht? Die einfache 

317 Dawood *supra* note 215 at p. 19; Posner *supra* note 9. 
answer is that such use of self-defense is unlawful. However, is not the fact that a state is a victim of an armed attack and is left with no options for defense absurd?

In a *lex ferenda* perspective, another solution is the presence of an external mechanism that could ultimately judge whether the victim state has a right to use force on the host states soil against non-state actors. Dawood suggests the UNSC as an appropriate body for such a task. A state that invokes the Doctrine would thus have to appear to the UNSC and give its arguments for why they consider the host state to be ineffective and unable to deal with the threat by itself.\(^{319}\) Such solution would be in conformity with the responsibility of maintaining international peace and security and also its authorization that the UNSC has been given in the UN Charter. However, such arrangement could be subject to vetoes by one of the P5, which shadows the UNSC and the whole UN-system. Another option is involving the Counter-Terrorist Committee (CTC) in fact-finding or in an ideal world, to have an effective and trustworthy fact-finding mechanism in the host state. However, this brings other challenges that lie outside the limits of this thesis.

A final solution is to create a legal rule through a new treaty. However, to avoid a “catch 22” situation, every single state would have to agree on the treaty and achieving agreement amongst all parties seems to be an unlikely scenario. At this stage, there does not seem to be any options left than to improve the Doctrine with well-defined and objective requirements so it protects host states (which usually is weak states) and makes it more difficult to abuse by victim states (which usually are power states), all whilst making it possible to protect oneself from armed attack carried out by non-state actors on a host state’s soil.

### 5.2 Final Conclusion

The key finding of this thesis is that the Doctrine cannot be seen as a valid exception from the prohibition to use force in Article 2 (4). Hereby, at the current moment (2017), international law does not justify such violation of the host states sovereignty and territorial integrity in order to defend a victim state from attacks committed by a non-state actor.

However, it is clear that a victim state must be able to respond to attacks launched by a non-state actor. Although international law *de lege lata* does not permit extraterritorial self-

\(^{319}\) Dawood *supra* note 215 at pp. 26-36.
defense where a host state is unwilling or unable to deal with the threat, there is still a need for regulation in this area of law (as discussed in Chapter 5.1).

The non-state actor continues to be a difficult entity for international law that is traditionally constructed for state-entities. The case study has shown that the Doctrine is an uncertain and uneasy topic for the international community as the law essentially handcuffs a victim state if it is attacked by a non-state actor from foreign soil. The victim state are left with a Sophie’s choice: Breach international law by using extraterritorial force or take protective measures within its borders while waiting for the UNSC to act (in parallel with seeking diplomatic solutions). As shown in Chapter 4.1.1, both choices are insufficient. Since Syria is not able to remove the threat itself and the members of the UNSC are not able to agree on a lasting solution how to deal with the situation and take the responsibility they have been given, victim states are given no other options than to breach the international law and use extraterritorial force. The Doctrine would clearly fill the current gap in international law and it is fair to say that the international law needs to develop in order to allow victim states to act in self-defense when its needed.

In conclusion, there is a need for a well-defined Doctrine, which is a part of international law. Whilst the Doctrine is not a part of international law, it still seems clear that the current vague definition will be continually invoked by powerful states in order to justify the extraterritorial use of force in self-defense against non-state actors. However, at this moment state practice and *opinio juris* is not sufficiently general and consistent in order to create a legal ground by customary international law for the Doctrine, and are hereby not a valid legal ground for extraterritorial self-defense against non-state actors.

At best, the Doctrine could be described as an emerging norm. The general lack of criticism of the U.S.-led coalition actions in Syria (besides from the persistent objectors and Russia, see Chapter 4.1.1) could be regarded as evidence of an emerging state practice associating with the Unwilling or Unable Doctrine. However, the U.S.-led coalitions air strikes in Syria are illegal, but still widely recognized as legitimate. In fact, many states welcome the necessity of the actions carried out and will continue to stay silent on the question of legality. The Doctrine needs further elaboration for permitting a victim state to violate the host state shield in the form of principles stipulated in international law and needs to be cautiously developed to ensure that the appropriate requirements are placed upon the Doctrine and its test. This is
needed in order to ensure that the Doctrine does not undermine fundamental principles as sovereignty and territorial sovereignty. The situation in Syria has shown the dangerous void in international law caused by the clash between the aforementioned principles and self-defense. This thesis concludes that the Unwilling or Unable Doctrine is not and cannot yet be considered part of customary international law since it lacks sufficient state practice and *opinio juris* due to the ambiguity of its application. The final answer to the research question if the Unwilling or Unable Doctrine reached the status of customary international law is hereby negative.
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