The Right of States to Use Force against Non-State Actors
- Is the “Unwilling or Unable” Test Customary International Law?

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Abstract

The practice of States using force against non-state actors operating from within the territory of other States is widespread. History has provided many examples of such extraterritorial use of force, from the US incursions into Cambodia in 1970 to counter the Vietcong to the Colombian strikes against FARC camps in Ecuador in 2008. The recent US and coalition airstrikes in Syria is another example. These uses of force have, at times, been referred to by States as acts of self-defense. However, this kind of self-defense is not clearly provided for by the UN Charter. It puts the national security interests of the States targeted by an attack of a non-state actor in conflict with the territorial States’ right to territorial sovereignty. Targeted States have from time to time justified their actions by invoking the unwillingness or inability of the territorial States to restrain or prevent the actions of the non-state actors. In the academic literature, this legal ground is known as the “unwilling or unable” test. This Paper asks if the post-Charter state practice and opinio juris regarding the test has been extensive enough to earn it the status of a rule of customary international law. It finds that although the practice of extraterritorial use of force against non-state actors has been repeatedly employed, this practice has not been sufficiently uniform or consistent. Nor have the targeted States provided uniform legal arguments in defense of their actions. Many targeted States have also criticized the practice of other States while defending their own similar practice. Consequently, neither of the two requirements for the formation of norms of customary international law – state practice and opinio juris – have been met. This Paper thus concludes that these circumstances have undermined the development of the “unwilling or unable” test as a rule of customary international law.

Keywords

Self-defense, use of force, extraterritorial self-defense, non-state actors, victim State, territorial State, “unwilling or unable” test, customary international law, opinio juris, state practice, UN Charter, Security Council, Art. 2(4), Art. 51, CIL, ILC, ILA, ICJ, Cambodia, Vietnam War, PKK, FARC, Georgia, Russia, Pankisi Gorge, Uganda, DRC, ADF, Syria, IS.
Introduction

When the nations of the world came together in 1945 to sign the Charter of the United Nations, they did so with the purpose of maintaining international peace and security.\(^1\) They sought to base the new organization on the principle of “sovereign equality of all its members.”\(^2\) To this end, the use of force between states was outlawed.\(^3\) The only exception allowed to this general prohibition was the right of states to act in self-defense against armed attacks.\(^4\) The UN Charter was written with the First World War fresh in the global memory and with the Second World War still raging.\(^5\) These wars had been clashes between the nations of the world and therefore it is only natural that the drafters of the UN Charter aimed at preventing similar conflicts between states in the future. However, as history has shown, international conflicts are not exclusively waged between States. Occasionally, non-state actors such as terrorist groups, guerillas or separatists attack States.\(^6\) Sometimes these attacks are launched or planned from within the territory of a State other than the State targeted by the attack. In such cases, the right of self-defense can potentially conflict with the principle of State sovereignty when a targeted State wishes to enter the State from which the attack was launched to strike at the non-state actor. When States conduct this form of extraterritorial self-defense they sometimes justify the accompanying violation of the other State’s sovereignty with reference to the fact that the State is either unwilling or unable to prevent the use of its territory by the non-state actor. This justification has become known as the “unwilling or unable” test and it was recently applied by the United States to justify its bombings of Islamic State (IS) targets within Syria. In a letter to the Secretary-General of the UN on 23 September 2014, the United States Permanent Representative to the UN, Samantha Power wrote:

“States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence … when … the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks.”\(^7\)

\(^2\) Ibid. Art. 2(1)
\(^3\) Ibid. Art. 2(4)
\(^4\) Ibid. Art. 51
\(^5\) The UN Charter was opened for signature on 26 June 1945. The war ended with the surrender of Japan on 14 August the same year.
\(^6\) Contemporary examples of such non-state actors include: the Islamic State (IS), Boko Haram and the Lord’s Resistance Army (LRA)
However, the “unwilling or unable” test remains controversial. Whether or not it has the status of a rule of international law is disputed.

**Purpose**

The purpose of this Paper is to investigate the status of the “unwilling or unable” test in public international law. States invoke the test from time to time, yet there is a lack of consensus about its legal nature. A number of scholars hold the test, or variations of it, to be part of customary international law. Others, like Australian scholar Gareth D. Williams, have concluded that the test is an emerging norm of customary international law. This Paper will build on the research of scholars like Williams and further investigate the historical practice of States and this practice’s legal significance for the “unwilling or unable” test. The study conducted in this Paper will take an in-depth look at several cases where extraterritorial use of force against non-state actors has been employed. Many of these cases have previously been cited by scholars studying the “unwilling or unable” test. Hopefully the more thorough analysis of each case, as presented in this Paper, will increase the understanding of the legal status and development of the test, as well as facilitate the study of the test by future scholars.

As long as the question about the legality of the “unwilling or unable” test remains unresolved, it will leave a troubling gap in the international use of force regime. States that have been the victims of terrorist attacks or any other forms of armed attack by a non-state actor will undoubtedly continue to seek, and should naturally be entitled to, a remedy. At the same time, the States within whose territory a violent non-state actor is operating need to know what, if any, actions they are expected to take in order to avoid having their sovereignty violated by a targeted State. By contributing to the debate on the “unwilling or unable” test, this Paper will hopefully help to further clarify the nature of the test, its legality and its possible application.

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8 *Ibid.* Power’s letter is one example. Other cases will be presented in more detail below.
Research Question

This Paper studies the scenario where a State (the victim\textsuperscript{11} State) is attacked by a non-state actor which is based in a second State (the territorial State). In such a scenario the question arises whether the victim State has the legal right to use force to defend itself against the non-state actor. Absent the consent of the territorial State, the victim State would have to violate the territorial State’s territorial sovereignty in order to act against the non-state actor. There are several plausible ways to justify a violation of State sovereignty of that nature.\textsuperscript{12} One of the most predominant theories is that of the “unwilling or unable” test. The test provides that if the territorial State is either unwilling or unable to prevent the use of its territory by a non-state actor, the victim State has the legal right to act unilaterally against that actor. However, a literal reading of the UN Charter does not explicitly support a doctrine of that nature, which is why the “unwilling or unable” test would have to seek its legality in customary international law. This Paper will investigate whether the “unwilling or unable” test is in fact customary international law or not.

Method and Outline

Since customary international law develops over time, this study applies a historical-chronological method. The concluding analysis is based on a series of case studies. Each case is chosen on the basis of its factual circumstances. All cases are examples of situations where a State has used force against a non-state actor within the territory of another State. The emphasis is placed on cases that have occurred after the entry into force of the UN Charter’s rules on the use of force in 1945.

Part I of this study offers a brief introduction to the concept of customary international law. Different academic theories about the concept of customary international law are discussed. The theory applied to the analysis in this Paper is described in greater detail. Part I also includes a critical analysis of the source material relied on for the present study. Part II gives a general overview of the current legal regime on the use of force. The purpose of this overview is to highlight the difficulties in finding legal grounds for the “unwilling or unable”

\textsuperscript{11} The use of the word “victim” refers solely to the fact that the State has been the victim of an attack by a non-state actor. Naturally, the territorial State is also a victim of the victim State’s subsequent use of force. The term “victim State” has been used by other authors and for the purpose of consistency, it will be used in this Paper.

test in treaty law. Part III contains the case studies. The implication of the cases is then analyzed in Part IV and the conclusion is presented in Part V.

The sources relied on for this study are primarily academic literature and articles, reports, statements by governments and ICJ judgments. Since this Paper studies the development of a rule of customary international law, the use of treaties, other than the UN Charter, is limited. A more detailed enumeration of the sources that are relevant to the identification of a rule of customary international law is presented in the section below (see Part I).
Almost every discussion about customary international law uses Art. 38.1(b) of the ICJ Statute as a start-off point. The article describes customary international law as “international custom, as evidence of a general state practice accepted as law”. Customary international law (hereinafter: CIL) is the unwritten law that governs the actions and interactions of States. Since this Paper seeks to determine the existence or non-existence of a CIL rule it is imperative that a coherent definition of CIL is applied throughout the analysis.

Although there is an ongoing debate about how to define CIL, the prevailing view appears to be that such laws contain two required elements: state practice and opinio juris. This view is endorsed by the United Nations’ International Law Commission (ILC). The Commission is currently conducting a study into the identification of CIL. It has so far released two reports, with a third one expected later this year (2015). The second report resulted in a set of draft conclusions dealing with methodological questions of identifying CIL. In the second report the ILC affirmed that, what they dubbed the “two-element approach”, was “generally adopted in the practice of States and the decisions of international courts and tribunals” and that it was “widely endorsed in the literature.” Since the Commission relied on a substantial amount of source material in reaching its conclusions and because of the Commission’s representative and independent status, its findings about the formation of CIL will be the primary source applied in the legal analysis in this Paper for identifying CIL.

The two elements of CIL will be presented in more detail below. Before going into this discussion, something should be said about the relative weight to be accorded to each element as evidence of CIL. This has been the crux of a lot of the historical debates on CIL. The ILC report does not offer a clear suggestion as to the distribution of weight between the two elements. However, the ILC does maintain that both elements are required for the formation of CIL. The ILC rests this view on, among other things, the broad support that the two-element approach enjoys in the literature and the fact that the ICJ has repeatedly applied it in its rulings.

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15 Ibid. at para 21.
16 The ILC is a body of experts. The ILC Statute states that members shall be “persons of recognized competence in international law” (Art. 2(1)). They are nominated by governments and elected by the UN General Assembly for five year terms (Art. 3, Art. 4 and Art. 5). No two candidates may come from the same country (Art. 2(2)). All members sit in their individual capacity and not as representatives of Governments (A/CN.4/325 para. 4).
18 Ibid. at para 21 and 26.
The ICJ judgments referenced by the ILC include the *North Sea Continental Shelf* case\textsuperscript{19}, the *Continental Shelf* case between Libya and Malta\textsuperscript{20} and the *Jurisdictional Immunities of the State* case.\textsuperscript{21} In fact, international judicial support for the two-element approach even predates the ICJ. As early as 1927, The Permanent Court of International Justice (the predecessor of the ICJ) applied the two-element approach in its ruling in the *Lotus Case*.\textsuperscript{22}

A different view is advocated by the International Law Association’s Committee on the Formation of Customary (General) International Law. In 2000, this Committee published a report\textsuperscript{23} in which it downplayed the relative importance of the *opinio juris* element. The Committee held the view that if “States generally believe that a pattern of conduct [fulfilling the requirements for state practice] is permitted or required by law, this is sufficient for it to be law; but it is not necessary to prove the existence of such a belief.”\textsuperscript{24}

Some scholars have taken a middle-road approach to the issue of the two elements. One such scholar is Professor Frederic Kirgis of Washington and Lee University. He has proposed a view of the requirements for the formation of CIL as falling on a “sliding scale” between state practice and *opinio juris*. In some cases, there could be a strong enough *opinio juris* to markedly reduce the need for state practice and vice versa.\textsuperscript{25} This is an appealing approach and one that, absent any clear guidelines for the relative weight of the two requirements, will inevitably be applied in any analysis of CIL. However, Professor Kirgis envisions a sliding scale that would allow a complete disregard of one of the two elements under such circumstances where the other one alone would be proof enough of a customary rule. This view is clearly incompatible with the ILC’s position.

For the purposes of this Paper, the two-element approach to the formation of CIL as advocated by the ILC will be applied. The relative weight to be accorded to each of the two elements will be determined in a way that avoids giving one element so much weight as to nullify the importance of the other.

\begin{itemize}
  \item \textsuperscript{19} *North Sea Continental Shelf, Judgment, I.C.J, Reports 1969*, p. 3, at 44, para 77.
  \item \textsuperscript{20} *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at 29 para 27.
  \item \textsuperscript{21} *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports, 2012*, p. 99, at 122 para 55.
  \item \textsuperscript{22} *The Case of the Lotus (France v. Turkey)*, P.C.I.J, 1927, Series A, No. 9, at 28.
  \item \textsuperscript{24} Ibid at 30 para 4.
\end{itemize}
State Practice

For state practice to be considered a formative element of CIL, such practice needs to be general and consistent.26 There is little disagreement on this definition between the ILA and the ILC. The ILA speaks of “a sufficiently extensive and representative number of States [participating] in such a practice in a consistent manner.”27 The ILC report defines the elements of state practice in Draft Conclusion 9:28

1. To establish a rule of customary international law, the relevant practice must be general, meaning that it must be sufficiently widespread and representative. …
2. The practice must be generally consistent.

This two-prong definition also has wide support in ICJ precedent. The essence of the definition is further supported in the literature.29

A state practice is general if it is the practice followed by an overwhelming majority of the States which have had the opportunity of applying the practice.30 There is no legal requirement for exactly how large this “overwhelming” majority needs to be. It is at least clear that it needs to be sufficiently larger than a mere simple majority of the States that have had the opportunity of applying the practice.

The state practice also needs to be consistent. This means that the general practice in question has been applied consistently by the States and that there ought not to be any contradictions or discrepancies in the practice from one relevant instance to another.31 Some deviations from the practice may naturally occur. In its judgment in the case of Military and Paramilitary Activities in and against Nicaragua, the ICJ held that inconsistent state practice should generally be treated as breaches of an existing rule and not as indications of the recognition of a new rule.32 This stance was adopted by the ILC in their second report. Deviations can further serve as proof of an existing rule of international law if other States object to the inconsistent practice of another State.

The ILC report devotes a few lines to the question of the required duration of state practice. The Commission concludes that it is “widely acknowledged that there is no specific

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27 London Report, supra note 23 at 8: working definition (ii)
29 Ibid. at para 21.
requirement with regard to how long a practice must exist. Some rules grow more slowly than others. In 1900, the US Supreme Court relied on five hundred years of state practice to determine whether fishing vessels were exempt from capture as prizes of war. By contrast, the law of freedom of movement in outer space was recognized as a rule of CIL after only a few years of practice.

The last essential aspect of determining if the state practice requirement is met is the question of which acts have the ability to manifest state practice. The ILC report provides a non-exhaustive list, derived mostly from ICJ judgments and advisory opinions. The manifestations enumerated in the ILC’s Draft Conclusion 7, and which will be primarily applied in this Paper, are:

a. Conduct of States “on the ground”
b. Diplomatic acts and correspondence
c. Legislative acts
d. Judgments of national courts
e. Official publications in the field of international law
f. Statements on behalf of States concerning codification efforts
g. Practice in connection with treaties
h. Acts in connection with resolutions of organs of international organizations and conferences

It is also worth mentioning that inaction can also count as state practice.

Opinio Juris

The second element relevant to the formation of a norm of CIL is opinio juris. As shown above, this element is not uncontroversial. Some voices, like the ILA, want to downplay its importance, while others, like Professor Kirgis is willing to ascribe it greater or no importance depending on where it falls on the “sliding scale” in a particular case. One of the stronger arguments against allowing opinio juris to be a requirement for the formation of CIL is that it produces a paradox. How can a new rule of CIL ever emerge if the relevant practice must be accompanied by a

34 The Paquete Habana, 175 U. S. 677 (1900)
37 Ibid. at para 42.
conviction that such practice is already law? Both the ILA and the ILC, however, view the discussions about the nature of *opinio juris* more as a headache for academics than an actual problem of application. As mentioned above, the two organizations draw different conclusions from this position, where the ILC decides to keep the subjective element in their draft conclusions. The definition of *opinio juris* settled upon by the ILC is presented in the Commission’s Draft Conclusion 10, which reads:

1. 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.
2. Acceptance as law is what distinguishes a rule of customary international law from mere habit or usage.

In order to apply the requirement of *opinio juris* in practice, it is essential to know where to find evidence of it. In the ILA’s view, *opinio juris* can sometimes be proven and sometimes inferred from state practice, but as long as all requirements for a legally valid state practice are met, there is no need to prove the existence of *opinio juris*. In its second report, the ILC shares the view that *opinio juris* can be inferred from practice, but goes further and enumerates several other materials in which evidence of *opinio juris* may be found. Besides clear statements by a State that a rule is obligatory as CIL, the ILC emphasizes the following source materials:

a. Intergovernmental (diplomatic) correspondence
b. The jurisprudence of national courts
c. The opinions of government legal advisors when they say that something is or is not in accordance with customary international law
d. Official publications in fields of international law
e. Internal memoranda by State officials
f. Treaties (and their *travaux préparatoires*)
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

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42 *Ibid.* at para 76.
Critical Analysis of the Source Material

Anyone conducting a case study, such as the one in this Paper, will be faced with a number of difficulties. Presented below are the three main concerns that have to be taken into account when reading this Paper.

1. The availability of sources of CIL.

To prove the existence of CIL any study will have to rely on certain sources. As explained above, this study uses the ILC’s non-exhaustive list of sources as a guide for determining which sources to study. However, the availability of sources can be unevenly distributed geographically. Some States, such as Sweden or the US have a long and well-established tradition of documenting things like statements by government officials, legal advisers and other public officials, which are all essential sources in identifying CIL. Other States might not have the same tradition. This could be for a number of reasons: lack of transparency, insufficient means of documentation or simply a lower priority for such efforts. The result is that some States will be less able show evidence of their *opinio juris* or state practice. This in turn may lead to their contribution to the identification and formation of CIL being regarded less than that of a State with a stronger tradition of preserving the sources relevant to a CIL analysis. This problem is difficult to remedy, but it should be kept in mind when considering the nature and formation of norms of CIL.

2. Pro-belligerent bias

It is only natural that the academic and public interest for questions about the legality of the use of force would be greater in States that more frequently engage in the use of force than other States. This would result in a greater academic and public debate on the topic, generating a wealth of sources which would then inform further debates, domestically as well as internationally. Therefore, there is a risk that the general perspective on the issue of the use of force is disproportionately influenced by certain States. For instance, the American contribution in the field of the use of force is immense. This Paper is no exception. Many of the sources relied on are American, either in the form of academic articles or of public statements and documents. This has been hard to avoid, but the potential bias in the sources can be taken into account when reading this Paper.
3. Language barrier

For the purpose of providing a diverse case study and to present as many different perspectives on the research question as possible, this Paper has studied cases from different corners of the world. This has presented the problem of the language barrier. Some primary sources have not been cited directly but reliance has instead had to be placed on second hand accounts in English. While this is perhaps a minor issue, the bigger problem is the risk that some sources might have been accidentally disregarded because they were written in a foreign language and as such could not be identified as relevant to the study. To overcome the language barrier, it would have required knowledge of at least nine different tongues. Fortunately, many of the sources used have been letters of diplomatic correspondence via the UN, where they have been translated into English.

In sum, these problems are difficult to overcome. Great care has been taken to minimize their impact on the study, but they will nonetheless have an inescapable impact to some extent. They are mentioned here so that the reader can bear them in mind while reading this Paper.

**Persistent Objector**

Since the state practice required for a rule of CIL to develop does not need to be universal without exception, there will always be States that are bound by a rule without ever having engaged in the practice that formed it. If a State does not wish to be bound by a developing rule of CIL, it can object. If the State objects persistently during the formation of the rule, the rule will not apply to that State. Such States are known as “persistent objectors.”

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43 Khmer, Vietnamese, Swahili, French, Georgian, Turkish, Arabic, Spanish and Russian, only for the victim and territorial States studied.

PART II: The Use of Force

Background to the Current Use of Force Regime

The current use of force legal regime is marked by the war wariness that was felt by the world community after the end of World War II. The countries of the world agreed on strict rules for the use of force when they drafted the UN Charter. However, the UN Charter was written with the traditional concept of warfare in mind, namely war between sovereign states. The scope of the Charter’s provisions did not come to include non-state aggressors.

UN Charter Art. 2(4) and Art. 51

The two articles of the UN Charter of greatest importance to this study are Article 2(4) and Article 51. Art. 2(4) prohibits States from the use of force or the threat of the use of force in their relations with each other. Art. 51 provides for an exception to the prohibition by allowing States to use force in self-defense against an armed attack.45 While the article does not specifically state that the armed attack has to be carried out by another State, Art. 2(4) would effectively prohibit a State from violating the sovereignty of another State if that State was not responsible for the armed attack that triggered the right to self-defense.

It has been suggested that one way of circumventing this problem would be to give Art. 2(4) a more flexible reading. Any such wide reading of Art. 2(4) would, however, be inconsistent with the object and purpose of the UN Charter which is to require States to solve their disputes by peaceful means.46

The rules on the use of force in the UN Charter thus pose a problem. The fact remains that non-state actors occasionally carry out attacks on States other than the ones in which they operate. This fact has sparked the debate about how to deal with these non-state actors when such an attack occurs. The “unwilling or unable” test has been promoted as a legal solution for filling the obvious gap left by the above-mentioned provisions of the UN Charter.

45 The term “armed attack” is not defined in the UN Charter and has long been the subject of scholarly debate. Since an attempt to define the term would require a dissertation of its own, for the purposes of the present discussion, the existence of an “armed attack” that meets universally accepted criteria will be presupposed.

46 Williams, supra note 10 at 630.
The “Unwilling or Unable” Test

The “unwilling or unable” test, in its simplest form applies in the following scenario. State A has been the victim of an armed attack (State A is the victim State). The perpetrator of the attack was the non-state actor Group X. The attack was planned in and carried out from Group X’s bases in State B (State B is the territorial State). Had it been State B that carried out the attack against State A, State A would have had the undisputed legal right under Art. 51 of the UN Charter to defend itself by attacking State B. If State A is to have a right to defend itself by striking Group X targets within the borders of State B, thus violating State B’s territorial integrity, it must be proven that State B is either unwilling or unable to take action against Group X.

As shown above, the UN Charter does not clearly provide for a doctrine such as the “unwilling or unable” test. Different scholars have found the test’s legal origins in different sources. Ashley Deeks in her article about the test in the Virginia Journal of International Law, suggests that the test has its origin in neutrality law.47 According to the Hague Convention V, the territory of a neutral State is inviolable and belligerents in a conflict are forbidden from moving troops on the territory of a neutral.48 The convention further states that “the fact of a neutral Power resisting, even by force, attempts to violate its neutrality, cannot be regarded as a hostile act."49 Deeks also cites several sources claiming that another belligerent, to whose detriment a belligerent is violating a neutral State’s territory, may resort to the use of force in the neutral’s territory to stop the violation.50 In the present context, the territorial State would be regarded as the neutral State and the non-state actor as the belligerent violating neutral territory. Gareth D. Williams rejects Deeks’ theory since the Law of Neutrality both predates the UN Charter and only applies to international armed conflicts between belligerent States.51 Instead 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.” As he puts it: “If the host state is willing and able to deal with the threat posed to the victim state by the non-state actor,

48 International Conference (The Hague), Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 October 1907. Art. 1 and Art. 2.
49 Ibid. Art. 10
51 Williams, supra note 10 at 631.
then it will be *unnecessary* [emphasis added] for the victim to use force in self-defense.\(^{52}\)

Another view has been presented by, among others, Tom Ruys and Sten Verhoeven of the Catholic University of Leuven. They seek to trace the origins of the test\(^{53}\) to the international law principle of state responsibility, as crystallized in the ILC’s Draft Articles on State Responsibility for Internationally Wrongful Acts.\(^{54}\)

Since the general rule on the use of force, as set forth in Art. 2(4) is one of strict prohibition, reading exceptions to this rule into other, currently existing, rules of international law is a doubtful approach. If the “unwilling or unable” test is to provide an exception to Art. 2(4), it will have to build on the one exception that is already recognized, namely the right to self-defense in Art. 51. Thus, the test should be understood as a justification of self-defense in accordance with Art. 51. The test only expands the scope of the current rule.

The “unwilling or unable” test is to be referred to as a last resort. Before unilateral use of force against a non-state actor in violation of the territorial State’s territorial sovereignty can be contemplated, all other peaceful means must have been exhausted. The victim State can refer the issue to the UN Security Council as the United States did following the 9/11 attacks. However, not all States could expect such a speedy and unanimous process as the one afforded the US in 2001. Sometimes the nature of the attack and the threat of further attacks can make resort to international bodies impractical or unavailing.\(^{55}\) The veto power of the permanent members of the Security Council has also given that body a documented proneness to gridlock.

In order to assess the territorial State’s willingness to deal with the non-state actor, the cooperation or consent of that State must be requested. The territorial State must be asked to take action, either alone or in cooperation with the victim State. It is also possible that the territorial State would consent to allow the forces of the victim State to enter its territory and act against the non-state actor. If the territorial State would not cooperate or give its consent, this would be an indication of its unwillingness.\(^{56}\) The priority for consent and cooperation is also a way of ensuring that victim States do not resort to force too hastily, thus respecting the general prohibition in Art. 2(4).

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\(^{52}\) *Ibid.* at 640.

\(^{53}\) Note: the authors do not make outright reference to the “unable or unwilling” test in their article. However, the problem dealt with in their study is the degree of state involvement in the hostile acts of non-state actors against other states. Their analysis is thus applicable to the discussion about the “unwilling or unable” test.


“depending on the level of control a state exercises over a non-state actor, armed attacks by the actor may be attributable to that state, which could itself become a legitimate target of self-defence.”


\(^{56}\) Deeks, *supra* note 47 at 519.
Even if the territorial State would be willing to deal with the non-state actor, this might not always be enough for it to avoid intervention by the victim State. If the territorial State, despite its willingness, does not have the capacity to pacify the non-state actor it could be deemed “unable” according to the test. Such inability could stem from a lack of control over the territory from which the non-state actor operates and/or a lack in law enforcement capacity. The victim State would then have a right to take action against the non-state actor to accomplish what the territorial State lacked the means to do.

So far, the function of the test seems rather straightforward. If a victim State is attacked by a non-state actor operating from a territorial State, it should first try to find a non-violent solution to the problem, respecting the territorial integrity of the territorial State. If the territorial State is found to lack the willingness, territorial control or law-enforcement capacity to deal with the non-state actor, the victim State is entitled to self-defense. However, the details of how it should be applied remain a little unclear. This substantive indeterminacy is recognized by both supporters and opponents of the test. Some of the uncertainties, as laid out by Ashley Deeks in her article, include the questions of who has the burden of proof for the territorial State’s unwillingness or inability and how situations such as when a State is only able to deal with three quarters of the problem should be determined. In her article, Deeks seeks to develop and enhance the test by providing it with requirements and fleshing out its factors. She recognizes that “the ‘unable or unwilling’ test … currently lacks sufficient content to serve as a restrictive international norm.” Despite this indeterminacy, States have still referred to the test when justifying their acts of extraterritorial self-defense against non-state actors. The practice of States will be investigated in the CIL analysis below.

57 Ibid. at 525 and 527.
58 Dinstein, supra note 9 at 216.
59 Compare: Deeks, supra note 47: “…one is left with certainty that the test exists, but puzzlement about how states should apply it.” and Williams, supra note 10 at 631-633, 640: “The nebulous parameters of the ‘unwilling or unable’ test undermine its consistent application.” Also, Stahn, Carsten. “Terrorist Acts as ‘Armed Attack’: The Right to Self-Defense, Article 51 (1/2) of the UN Charter, and International Terrorism.” Fletcher Forum of World Affairs 27.2 (2003): 35-54. Web. 47: “If it becomes evident that the host state is unable or unwilling to act, the injured may, as an ultima ratio measure, take military action to stop the persisting threat. […] The problem of this doctrine is that it raises difficult issues with respect to the permissible scope of self-defense.”
60 Deeks, supra note 47 at 505.
61 Ibid. at 546.
PART III: Case Studies

As shown above, the nature “unwilling or unable” test is a contested subject. There is disagreement about its origins, substantive provisions and scope. However, the situation to which the test applies is not an uncommon occurrence. States have, rather frequently, used force against non-state targets in other States. The following is a study of several such cases throughout the 20th and 21st centuries. The question that this Paper seeks to answer is whether or not the test has grown into a rule of CIL. Thus, the case studies will focus on the two required elements, as set forth by the ILC in its second report on the formation of customary international law (see Part I).

USA, Cambodia and the Vietcong

In a televised address to the nation on 30 April 1970, US president Richard Nixon announced that US and South Vietnamese forces would start pursuing North Vietnamese targets in Cambodia.62 At that time, the North Vietnamese army (NVA) and the South Vietnamese guerilla (the Vietcong), which is the non-state actor in this case, had been using Cambodian territory to establish sanctuaries. From these sanctuaries, the North Vietnamese had attacked Cambodian targets,63 as well as US and South Vietnamese targets across the border.64 The president stressed that the US and South Vietnamese incursions into Cambodia did not constitute an attack, since the areas where the attacks would be carried out were “completely occupied and controlled by North Vietnamese forces.65”

Except for highlighting the fact that Cambodia no longer controlled part of her border with South Vietnam, the president did not venture to provide a legal justification for the operations in his speech. The legal grounds were instead elaborated on, somewhat, in a letter to the UN Security Council on 5 May 1970. The letter argued that the US and South Vietnam were acting in collective self-defense and that the measures taken were limited in extent to “the

64 UN Doc. S/9692. Letter from the Deputy Permanent Representative of the United States Addressed to the President of the Security Council. 10 March 1970: The letter referenced a communiqué sent to Phnom Penh, recounting a cross border incident between US and North Vietnamese forces.
border areas over which the Cambodian Government has ceased to exercise any effective control. A more thorough legal analysis was delivered later in May, by Department of State legal adviser, John R. Stevenson. In his statement to the New York City Bar Association, the legal adviser traced the legal basis for the incursions back to the Law of Neutrality. Cambodia, despite itself being the target of Vietnamese attacks, was seen and respected as a neutral country. Thus, instead of trying to bring Cambodia into the ongoing conflict as a cobelligerent with the US and South Vietnam, the decision had been made to act on Cambodian territory but without the military involvement of Cambodia itself.

At its core, the decision to attack targets in Cambodia was made as an act of collective self-defense. The US relied on the UN Charter’s rules on self-defense as a basis for its actions. However, in justifying the use of force in self-defense within the territory of a neutral nation, the legal adviser relied on further sources. The source of treaty law cited was the Fifth Hague Convention. As shown above (see Part II), the Convention can be read to require neutral states to take positive action to stop the violation of their territory by a belligerent. The legal adviser argued that since Cambodia, despite its government’s increased efforts had not been able to prevent the use of its territory by the Vietnamese, the US and South Vietnam had the legal right to act.

In further support of this position, the legal adviser cited several precedents of situations where a State had entered the territory of a neutral in pursuit of a belligerent or a non-state actor. Although all precedents cited pre-dated the UN Charter, the legal adviser claimed that they still had authority for the proposition that a belligerent may take action on the territory of a neutral if that neutral “cannot or will not” prevent another belligerent’s violation of its territory. This would, however, require that the action taken was taken in self-defense and that the Charter’s standards were met.

68 Ibid. at 2.
69 Ibid. at 6.
70 Hague Convention, supra note 48 Art. 5: “A neutral power must not allow any of the acts referred to in Articles 2 to 4 to occur on its territory. It is not called upon to punish acts in violation of its neutrality unless the said acts have been committed on its own territory.” See also: Deeks, supra note 46 at 498.
71 Stevenson, supra note 67 at 4.
72 Ibid. at 5-6: including, the US incursions into Spanish Florida to battle the Seminole Indians (1817-1818), the US pursuit of Pancho Villa in Mexico (1916-1919), the German shelling of allied troops in Salonika, Greece, in World War I, and the British attack on the German ship Altmark in neutral Norway (1940).
73 Ibid. at 6.
The US position is thus strikingly reminiscent of the “unwilling or unable” test. As shown above (see Part II) some scholars do derive the test from the Law of Neutrality and Stevenson’s argument would support that idea. The US practice however, diverged from the test’s standard in one regard. The consent or cooperation of the Cambodian government was not sought. Although the legal adviser conceded that it would have been possible to receive an express request for assistance from Cambodia, such a request would have “compromised the neutrality of the Cambodian Government.”\textsuperscript{74} The legal adviser did note, however, that that the Cambodian government had made some statements implying its consent for the US plans to use force within its territory.\textsuperscript{75}

The US and South Vietnamese incursions were met with international criticism. Unsurprisingly, the USSR condemned the operations as an invasion with “imperialistic and aggressive objectives.”\textsuperscript{76} The Djakarta Conference (a constellation of eleven East Asian countries) urged that all foreign forces be withdrawn from Cambodia and that that country’s sovereignty, independence and neutrality be respected.\textsuperscript{77} The government of Cambodia however, did not object to the same extent. It had previously sent several letters to the Security Council voicing its complaints about US and South Vietnamese cross-border attacks and incursions. After 30 March, however, the Cambodian complaints were redirected to focus on the North Vietnamese violations of its territory.\textsuperscript{78} This shift was most likely related to the fact that on 18 March, the head of state of Cambodia, Norodom Sihanouk, had been ousted. The lack of criticism against the US-initiated cross-border operations could therefore be taken as a sign of the new government’s more favorable view of the US. In the context of the present analysis, the silence of the Cambodian government could, if nothing else, be interpreted as a tacit approval of the strikes.

\begin{footnotes}
\item[74]\textit{Ibid.} at 2: The legal adviser also pointed out the risk that the US then would have “moved closer to a situation in which the United States was committing its armed forces to help Cambodia defend itself against the North Vietnamese attack”.
\item[75]\textit{Ibid.} footnote 8: the government of Cambodia stated, inter alia, that: “…the Government of Cambodia (GOC) wishes to announce that it appreciates the views of President Nixon in his message of April 30 and expresses to him its gratitude.” And further: “The Government of Salvation renews … its appeal for assistance made April 14, noting that it will accept from friendly countries all unconditional and diplomatic, military and economic assistance.”
\end{footnotes}
Turkey, Iraq and the PKK

The Kurdish people is an ethnic group inhabiting in a region of the Middle East primarily encompassing parts of Turkey, Syria, Iraq, Iran and Armenia. The Kurds do not have a state of their own and their struggle to achieve greater autonomy and protection of their minority rights has many times resulted in armed clashes with the States in the area. In the 1990s, the activities of the Kurdistan Worker’s Party (PKK) triggered several armed responses from Turkey. Some of these responses took the form of attacks on Kurdish targets across the border in Northern Iraq. This section will take a closer look at some of these instances of extraterritorial use of force by Turkey.

Turkey carried out a number of strikes against PKK targets in Northern Iraq throughout 1995. The most significant operation was one conducted from March to May. This operation was followed by another one in early July. Turkey offered little in the way of legal justification before the commencement of the operations. However, when Libya voiced its concerns about the incursions in a letter to the UN Security Council on 12 July the same year Turkey responded with a letter of its own, providing a justification. The letter read:

“As Iraq has not been able to exercise its authority over the northern parts of its country since 1991 for reasons well known, Turkey cannot ask the Government of Iraq to fulfill its obligation, under international law, to prevent the use of its territory for the staging of terrorist acts against Turkey.” … “No country could be expected to stand idle when its own territorial integrity is incessantly threatened by blatant cross-border attacks of a terrorist organization based and operating from a neighbouring country, if that country is unable to put an end to such attacks.”

Although Turkey did not make an explicit reference to the “unwilling or unable” test in its response to the Libyan letter, it seemed at least to be making an implicit one. The references to Iraq’s inability to control its northern provinces was held by Turkey to be the legal grounds for their incursion. Interestingly, the US State Department had voiced its support of the Turkish incursion in a press briefing on 7 July using a clear reference to the test. The State Department’s spokesman R. Nicholas Burns explained the US stance on Turkey:

“…a country under the United Nations Charter has the right in principle to use force to protect itself from attacks from a neighboring country if that neighboring state is

79 UN Doc. S/1995/540. Letter from the Permanent Representative of Iraq to the United Nations Addressed to the Secretary-General. 6 July 1995: Iraq alleged in this letter that Turkish forces, despite official Turkish statements to the contrary, remained after the official withdrawal on May 2.
82 These “well known reasons” refer to the then effective no-fly zone which covered the Northern part of Iraq and was enforced by the US, UK and France (France withdrew in 1996).
unwilling or unable [emphasis added] to prevent the use of its territory for such attacks. That is a legal definition that gives a country under the UN Charter the right to use force in this type of instance. 83

While the State Department’s statement is undoubtedly valuable in assessing the United States’ opinio juris with regard to the test, the fact that Turkey neglected to rely on the same legal grounds of justification could indicate that country’s disinterest in providing legal justifications for its incursions. In their article in the Finnish Yearbook of International Law, Christine Gray and Simon Olleson point out that the Turkish authorities never once during the 1990s referred to self-defense or tried to rely on Art. 51 to justify its actions. 84 Nor did they report to the Security Council, 85 as is required, according to Art. 51, of any state which purports to use force in self-defense.

In 1996, Turkey expanded on its legal justifications. In response to a letter of complaint from the government of Iraq to the Security Council, 86 Turkey again emphasized the fact that the Iraqi government could not exercise authority over the northern parts of its country. Turkey referred to Iraq’s failure to live up to the obligation on States under the UN Friendly Relations Declaration not to acquiesce in terrorist activities on its own soil. 87 The Turkish letter then made an explicit reference to the “unwilling or unable” test, stating that: “As of this very principle, it becomes inevitable for a country to resort to necessary and appropriate force to protect itself from attacks from a neighbouring country, if the neighbouring State is unwilling or unable [emphasis added] to prevent the use of its territory for such attacks. 88”

In 1997, Turkey responded to a number of letters submitted by Iraq by pointing out the nature of the threat posed by the PKK against Turkey and the country’s need to respond to that threat. 89 The letter appears to imply self-defense, without using that exact terminology. Worth noting is that Turkey stressed the fact that it had “informed Iraq in time” about the operation. However, “informing” is not equal to seeking consent.

84 Gray & Olleson, supra note 80 at 383.
85 Ibid. at 391.
Later that year, the discussion between Iraq and Turkey moved to the UN General Assembly. The Iraqi delegation objected to a Turkish incursion in September of that year. The Turkish delegation continued to claim Iraq’s inability to exercise authority over the northern parts of the country as the main justification for its actions. The delegation also noted that “Iraq has never complained about the presence of armed terrorist groups operating from Iraqi soil against Iraq’s neighbours.”90 In this exchange, no explicit mention was made of either self-defense or the “unwilling or unable” test.

The objections against the Turkish incursions into Northern Iraq were voiced by many different states. The loudest and most frequent criticism has naturally come from Iraq. The object of Iraq’s criticism mainly focused on the violation of its territorial integrity that the Turkish incursions constituted. The League of Arab States condemned the Turkish incursions on the same grounds in a letter in September 1996.91 The Gulf Cooperation Council issued a similar statement to the General Assembly in 1997.92 The Non-Aligned Movement also condemned the Turkish practice of cross-border offensives. In its statement the organization especially rejected the doctrine of “hot pursuit” as a legal ground for the incursions, which Turkey had asserted in defense of its actions.93

What makes the study of the Turkish operations against the Kurds difficult is the extraordinary security situation that Iraq found itself in following its defeat in the Gulf War. The no-fly zone set up by the US, UK and France in northern Iraq made it difficult if not impossible for Iraq to control the PKK in that region, regardless of how willing the government might have been to do so. This helps explain why Turkey put so much emphasis on Iraq’s inability to control its territory and barely mentioned its unwillingness when justifying its own incursions into northern Iraq. This raises the question whether the actions taken by Turkey against the PKK in Iraq in the 1990s can be said to have reflected a state practice evidencing the existence of the “unwilling or unable” test at all, since one of the test’s two prongs was all but wholly disregarded.

Turkey did act in accordance with the test in one regard. It tried to seek the Iraqi government’s consent as a first resort. From 1984 to 1989, the so called Protocol of Security

90 UN Doc. A/52/PV.22. United Nations General Assembly, 52nd Session. 22nd plenary meeting. Thursday, 2 October 1997, 3 p.m. New York. 32.
had governed the use of force by the two States on each other’s territory. The protocol expired in 1989 and when Turkey offered to renew it in 1990, Iraq refused.94

However, Turkey’s inconsistent legal arguments work to undermine the potential value of its actions for the formation of CIL. While the situation “on the ground” did not change drastically throughout the 1990s, Turkey’s choice of legal grounds did. In 1995 they relied solely on Iraq’s inability, in 1996 they invoked the Friendly Relations Declaration and, arguably, the “unwilling or unable” test and in 1997 they again referred to Iraq’s inability and made implicit arguments about self-defense. The lack of a consistent legal argument could easily be interpreted as a lack of opinio juris. This view is further supported by the fact that Turkey never reported its actions to the Security Council as would be required of a State acting, or claiming to act, in self-defense according to Art. 51.

To summarize, Turkey’s position throughout the 1990s was characterized by changing legal arguments to justify the same practice. The arguments generally focused on the inability of Iraq to prevent the PKK from operating on its territory but they lacked any explicit reference to Art. 51. Turkey did act in accordance with the “unwilling or unable” test inasmuch as it prioritized the consent of Iraq before resorting to force.

Uganda, the Democratic Republic of the Congo and the ADF

In 1995/1996 a rebel group, hostile to the government of Uganda, was formed in the mountainous border region between Zaire (present day Democratic Republic of the Congo) and Uganda. It took the name Allied Democratic Forces (hereinafter: ADF) and was primarily made up of Ugandan Muslims who had felt marginalized following the fall of Idi Amin in 1979. The ADF joined forces with an older rebel group called the National Army for the Liberation of Uganda and together the groups carried out their first joint attack on Ugandan soil in November 1996.95

Due to the lack of government control over the territory on the Congolese side of the border, the ADF could establish their own areas of control and operate relatively freely.96 During the years following its formation, the ADF continued to carry out attacks on Ugandan targets from their bases in Zaire. Among their targets were Kichwamba Technical School,

94 Grey & Olleson, supra note 80 at 63: Turkey itself had refused to renew the protocol when it expired in protest against the Iraqi use of chemical weapons against civilian Kurds in March 1988.
where 33 were killed and 106 abducted and a church in Kiburara where the ADF abducted 19 seminarians.\textsuperscript{97}

In 1997, the president of Zaire, Mobutu Sese Seko, was overthrown by the Rwanda- and Uganda-backed Laurent-Désiré Kabila. The new president renamed the county “the Democratic Republic of the Congo” (hereinafter: the DRC) and allowed Uganda to deploy troops on its territory. The purpose of the troop presence was to secure the border region by, among other things, combatting the ADF.\textsuperscript{98} Rwanda also maintained a troop-presence in the DRC after the fall of Mobutu.

Uganda operated with the DRC’s consent from 1997 until the summer of 1998. On 28 July 1998, president Kabila made a statement declaring “the end of the presence of all foreign military forces in the Congo.” However, only Rwandan forces in the DRC were mentioned specifically in the statement. Uganda took this to mean that its troops were still allowed to remain and kept its military presence. The DRC clarified its position at a meeting in Victoria Falls, Zimbabwe in August 1998 when it accused Rwanda (which in spite of the July statement had also retained its forces in the country) and Uganda of invading its territory.\textsuperscript{99} At that point there could have been no doubts about the absence of the DRC’s consent to Ugandan troop deployments on its soil. Despite the DRC’s clear opposition to further Ugandan presence, Uganda kept its troops in the DRC after Victoria Falls and even expanded the scope of its military activities.

Only a few days before the meeting in Victoria Falls (2 August 1998), a rebellion against president Kabila had broken out in the eastern DRC, where the country borders with Uganda.\textsuperscript{100} The ensuing conflict lasted for years and drew in several African countries and non-state actors and is known today as the Second Congo War. The DRC later brought a case about Uganda’s conduct during the war to the ICJ, which rendered a judgment in 2005.\textsuperscript{101} The present study will rely largely on the Court’s findings.

The case before the ICJ dealt with, among other things, the legality of the Ugandan troop presence in the DRC from early August 1998 (when the DRC accused Uganda of invading its territory) and July 1999 (when a ceasefire agreement was signed in Lusaka, Zambia).\textsuperscript{102} That

\textsuperscript{98} Ibid. at 196-197.
\textsuperscript{99} Ibid. at 196-199.
\textsuperscript{101} Armed Activities Case, supra note 97.
\textsuperscript{102} Ibid. at 169.
part of the case before the ICJ is relevant to the question in this Paper, because Uganda attempted to justify its military activities in the DRC as acts of self-defense.103

In the context of the “unwilling or unable” test, the ICJ case has been seen as an unfortunate missed opportunity to bring clarity to the debate about the test’s legality.104 The grounds relied on by Uganda in the proceedings before the court were such that the court could conclude that: “The court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defense against large scale attacks by irregular forces.”105 The ICJ found that Uganda had not acted in self-defense. However, the way that Uganda had argued its case was based on the claim that it acted in self-defense against forces supported and/or controlled by the DRC and the Sudan. Thus, the ICJ did not have to decide on the legality of a potential Ugandan self-defense against unaffiliated non-state actors.

Since the ICJ dodged the question of the “unwilling or unable” test, Uganda’s arguments and actions in the period from August 1998 to July 1999 are still relevant to the question in this Paper. Although its claim of self-defense was rejected by the ICJ, it is worth considering if Uganda’s actions might have been consistent with the requirements of the “unwilling or unable” test or if its legal arguments could indicate a notion of the test as being legal.

First of all, the Ugandan practice differed in several ways from the practice of the US in Cambodia or Turkey in Iraq. The Court noted that in August 1998, Ugandan forces had changed their modus operandi in the eastern DRC compared to the earlier period when they operated with the DRC’s consent. Uganda was no longer “engaging in military operations against rebels who carried out cross-border raids” but was instead capturing towns and airfields.106 During the autumn and winter of 1998, Uganda pressed deeper into the territory of the DRC, capturing towns several hundred kilometers from the Ugandan border.107 The Court also found that the Ugandan military presence in the border district of Ituri was of such a nature as to qualify it as a military occupation.108

103 Ibid. at 194-196.
104 Deeks, supra note 47 at 493: See footnote 25: “see Armed Activities on the Territory of the Congo … (suggesting that the Court has not yet decided the issue [of uses of force against non-state terrorists in another state’s territory when a state is not supporting them])”; Williams, supra note 10 at 633: “the ICJ in the Armed Activities case declined the opportunity to address the legality of extraterritorial self-defense”.
105 Armed Activities Case, supra note 97 at 223 para 147.
106 Ibid. at 214: the Court cites the taking of the towns and airfields of the cities of Beni, Bunia and Watsa in the border region.
107 Ibid. at 208: the Court recounts towns and dates of capture as reported by the Parties. Many are contested, but both Parties agree for instance that the city of Bumba (roughly 800km from the border) was captured on 17 November 1998.
108 Ibid. at 231.
As for Uganda’s legal justifications for their actions in the DRC, it declared its position in a document entitled “The Position of the High Command on the Presence of the UPDF\textsuperscript{109} in the DRC.” The document provided the basis for the military operations described above, which were all part of operation “Safe Haven\textsuperscript{110}.” The document begins by recounting that the territory of the DRC had “been used by the enemies of Uganda as a base and launching pad for attacks against Uganda” and that “successive governments of the DRC [had] not been in effective control of all the territory of the Congo.\textsuperscript{111}” Both of these circumstances would appear to set the stage for an argument of self-defense against the “enemies of Uganda” using the “unwilling or unable” test. However, the document then concludes that Uganda would maintain a troop presence in the DRC, not explicitly as a measure of self-defense, but rather to “secure Uganda’s legitimate security interests.\textsuperscript{112}” The document then lists the five following security interests:

1. To deny the Sudan opportunity to use the territory of the DRC to destabilize Uganda.
2. To enable UPDF\textsuperscript{113} to neutralize Uganda dissident groups which have been receiving assistance from the Government of the DRC and the Sudan.
3. To ensure that the political and administrative vacuum, and the instability caused by the fighting between the rebels and the Congolese Army and its allies do not adversely affect the security of Uganda.
4. To prevent genocidal elements, namely, the Interahamwe,\textsuperscript{113} and ex-FAR,\textsuperscript{114} which have been launching attacks on the people of Uganda from the DRC, from continuing to do so.
5. To be in a position to safeguard the territorial integrity of Uganda against irresponsible threats of invasion from certain forces.\textsuperscript{115}

So, while Uganda did raise the argument of self-defense before the ICJ, such an argument was lacking in 1998. The Court noted, and rightly so, that most of the security interests listed above were of a preventative nature and not in response to attacks that had occurred.\textsuperscript{116} The Court held that only the second point on the list was an example of a response to an occurred attack. That point was nonetheless found insufficient since Uganda could not

\textsuperscript{109} UPDF = Uganda People’s Defense Force, i.e. the Armed forces of Uganda.
\textsuperscript{110} Armed Activities Case, supra note 97 at 215.
\textsuperscript{111} Ibid. at 213-214.
\textsuperscript{112} Ibid.
\textsuperscript{113} Interahamwe was the Hutu militia that perpetrated the Rwandan Genocide of 1994.
\textsuperscript{114} Ex-FAR was the remnants of the Rwandan Government’s Forces that also took part in the Genocide of 1994.
\textsuperscript{115} Armed Activities Case, supra note 97 at 214.
\textsuperscript{116} Pre-emptive self-defense is a contested doctrine which enjoys limited support.
prove that the dissident groups (primarily the ADF) had received assistance from the DRC. Whether Uganda could or could not prove that the DRC had assisted the ADF is not of primary importance for the purposes of this Paper however. The fact that Uganda relied on that circumstance (perceived or real) could be seen as a sign of their conviction that attacks by non-state actors could trigger the right to self-defense, but only if the non-state actor received support from a State. The fact that Uganda tried hard to prove that the activities of the ADF could be attributed to the DRC and the Sudan, supports this view. Had Uganda believed that there was a legal right to act militarily against a non-state actor which had no ties to a State sponsor, such an argument would naturally have been closer at hand. Especially if the evidence Uganda had to rely on to prove that the acts of the dissident groups were attributable to the DRC were insufficient. Another factor undermining the credibility of an assertion that Uganda genuinely believed it had the legal right to act in self-defense is the fact that they did not submit a report to the Security Council. The Court held this to be evidence against the Ugandan position in the Armed Activities case.

On the other hand, there is the fourth point on the list. This security interest appears to both make a reference to attacks that had occurred and to non-state actors acting alone, without the assistance of either the DRC or the Sudan. This would indicate a belief in the legality of self-defense against unaffiliated non-state actors. Such a belief could further be seen as implied in the first Ugandan counter-claim to the DRC’s allegations before the Court. In that claim, Uganda presented its view that States have “not only a duty to refrain from providing support to groups carrying out subversive or terrorist activities against another State, but also a duty of vigilance to ensure that such activities are not tolerated.” Nevertheless, Uganda still held that “the DRC not only tolerated the anti-Ugandan rebels, but also supported them very effectively in various ways”. Giving Uganda the benefit of the doubt, the phrasing “not only” in the quotes above could be understood as proof that Uganda indeed viewed the mere acquiescence by the DRC of non-state actors like the ADF operating on its soil as a breach of international law.

117 Armed Activities Case, supra note 97 at 222-223.
118 Ibid. at 222.
119 Ibid. at 262. Uganda based this view on a principle upheld by the Court in the Corfu Channel case. The principle states 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” (ICJ Reports 1949 pp. 22-23)”.
120 Ibid.
121 Ibid. at 268. It is worth noting that the ICJ understood the Ugandan claim as also covering mere acquiescence of the presence of non-state actors. However, the court rejected that part of the counter-claim and held that it could not: “conclude that the absence of action by [the Congolese] Government against rebel groups in the border area is tantamount to ‘tolerating’ or acquiescing in their activities.”
Uganda’s actions were met by condemnation from the international community. The EU issued a statement on 11 August 1998 in which it expressed its concern about “the possibility of foreign interference” in the DRC and reaffirmed its support for the territorial integrity and sovereignty of the DRC. In a communiqué dated 17 August 1998, the Organization for African Unity (the predecessor of the African Union) “[c]alled for the immediate cessation of all hostilities in the territory of the Democratic Republic of the Congo condemned all external interventions in the internal affairs of that country under any pretext whatsoever [emphasis added].” On 9 April 1999, the Security Council adopted a resolution in which it said that it deplored “the continuing fighting and the presence of forces of foreign States in the Democratic Republic of the Congo” and called “upon those States to bring to an end the presence of these uninvited forces”.

In conclusion, Uganda’s legal rationale for maintaining a troop presence in the DRC after it became clear that the DRC had withdrawn its consent can only be understood as, at best, implicitly supporting the notion of an “unwilling or unable” test. Furthermore, Uganda did not report to the Security Council as required by a State acting in self-defense under Art. 51 and it did not invoke that article until the proceedings before the ICJ. The self-defense argument that Uganda made before the ICJ was rejected by the court. Additionally, the measures taken by Uganda went well and beyond what would have been called for to respond to the attacks by the ADF and similar groups. The Ugandan military penetrated deep into Congolese territory and its intervention closer to the border resulted in a lasting military occupation. Lastly, the broad condemnation of the foreign involvement in the DRC indicate a lack of international acceptance of the legal grounds relied on and the means of force used by Uganda.

Russia, Georgia and the Chechen Separatists

In the early morning of 23 August 2002, OSCE observers in northern Georgia, close to the border with Russia, observed a number of aircraft flying north to south. Several minutes later, the same observers saw flashes and heard detonations. The Georgian government attributed

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the bombing raid to Russia and called the incursion a “barefaced aggression by Russia against sovereign Georgia.” The Russian military denied that it was behind the raid and the OSCE observers had been unable to identify the nationality of the aircraft they had spotted. However, it was assumed at that time that the strikes had in fact been carried out by Russian aircraft. This has become a widely accepted account of the event since then. Already the next day, 24 August 2002, the White House Press Secretary, Ari Fleischer issued a statement expressing the United States’ deep concern “about the credible reports that Russian military aircraft indiscriminately bombed villages in northern Georgia.”

The suspicions that the aircraft had been Russian had not come from nowhere. Beside the fact that they were flying on a north-south baring close to the Russian border with Georgia, an incursion would not have been unexpected in the international security context of the time. The raid targeted the Pankisi Gorge which is situated in a part of Georgia that is home to a Chechen population. In 2002, Russia was fighting a Chechen insurgency in what is now known as the Second Chechen War. The porous border between Russia and Georgia allowed for Chechen militants to retreat into Georgia to seek refuge there. Russia assessed that Chechen fighters used the Gorge as a haven during the winter lull in the fighting in Russian Chechnya. At the outset of the Second Chechen War, the Pankisi Gorge area was reported to have welcomed around 1500 Chechen fighters. Russian media sources estimated the number of combatants in the Gorge to 450. Thus, if the assessments were correct that the Chechen militants fighting Russian forces in the Second Chechen War did use Georgian territory as a safe haven and/or a staging ground for attacks against Russia, then Russia would have an interest in fighting those militants.

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129 Nygren, Bertil. The Rebuilding of Greater Russia: Putin’s Foreign Policy Towards the CIS Countries. New York, NY: Routledge, 2008. 120.
130 Ibid.
132 Nygren, supra note 129 at 125.
133 Kipp, supra note 131.
The August 23 raid was not unprecedented. In 2001, the Georgian Minister of Foreign Affairs reported two intrusions into Georgian airspace by alleged Russian aircraft on October 28 and 29 respectively.\textsuperscript{134} Later on November 27 and 28 the same year, Georgia reported further aerial incursions and bombings.\textsuperscript{135} Additional raids were reported to have been carried out on July 29 and 30 of 2002.\textsuperscript{136} Despite these frequent reports, Russia persistently denied having intruded into Georgian airspace.\textsuperscript{137}

Before continuing the analysis of Russian-Georgian actions and legal arguments, a few words should be said about the legal status of the Chechen militants. Although the Chechens fought to achieve sovereignty and independence for their Chechen Republic, the Second Chechen War should be viewed as a non-international armed conflict. The ICRC’s proposed definition of a non-international armed conflict states that those are: “protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups … arising on the territory of a State. The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organization.”\textsuperscript{138} Since the Chechen Republic was not a recognized State at the time of the war, its armed forces and those fighters associated with them must consequently be viewed as non-state actors.

To summarize the military-political situation in and around the Pankisi Gorge in August 2002: Russia was fighting a Chechen insurgency across the border from Georgia in Chechnya. Some Chechen fighters had infiltrated into Georgia and allegedly used its territory as a safe haven. Some air-raids, allegedly carried out by Russia, had targeted areas in Georgia. Russia had denied all allegations of its implication in the attacks.

Russia and Georgia had been engaged in an intense diplomatic exchange throughout 2002. The Russian Defense Minister Sergey Ivanov had claimed in late 2001 that Georgia did not exercise any control over the Pankisi Gorge and that their inaction in that area should be

\textsuperscript{137} Bercovitch, Jacob, and Judith Freter. \textit{Regional Guide to International Conflict and Management}. Washington, D.C: CQ Press, 2004. 256: “Russia has denied [that the conflict] even exists, saying that their planes have never crossed the Russian-Georgian border or bombed the Pankisi Gorge.”
regarded as “an unfriendly act” against Russia. In February 2002, Ivanov repeated the claim that Georgia was unable to control Pankisi Gorge. In a letter to the UN in July 2002, Russia again pointed out that Chechen fighters were trying to penetrate Russian territory from the Pankisi Gorge. In the letter, Russia also accused the Georgian authorities of their “unwillingness to take practical measures to halt terrorism” and held that “[t]o all appearances, [Georgia] are unable and really do not wish to do that there.” The letter ended with a rather ominous remark, warning that “[t]he responsibility for the consequences of armed incursions by bandits into the territory of the Russian Federation lies fully with Georgia.”

Georgia, for its part, continued to voice its outrage about the airspace violations. They called the incursions “a blatant infringement of the internationally accepted basic principles of peaceful coexistence of neighbouring countries” and called for a joint investigation into the incidents. Joint action was nothing new. There had been attempts to deal with the situation in Pankisi bilaterally in September 2000, but no cooperation had been long lasting. Some of the Russian criticism of Georgia was also aimed at that country’s alleged unwillingness to cooperate with Russia “in conducting an anti-terrorist operation.”

After the bombings of August 23, on the anniversary of the 9/11 attacks, Russian president Vladimir Putin made a statement outlining the legal grounds for possible future Russian military actions in Georgia. Mr. Putin recounted that Russia had “patiently and persistently attempted to arrange cooperation with the official authorities in Tbilisi on issues related to combating terrorism.” He also lamented the fact that Georgian authorities had not conducted any unilateral anti-criminal or anti-terrorist operations. He concluded that Russia could rely on the right of self-defense in Art. 51 of the UN Charter to attack targets on Georgian soil. Such attacks could include the “carrying out [of] strikes against reliably identified terrorist bases during pursuit operations.” The Art. 51 right to self-defense could, Mr. Putin argued, be invoked if the Georgian leadership was “unable to establish a security zone in the area of the Georgian-Russian border” and if it “continue[d] to ignore … Security Council resolution 1373” and did “not put an end to bandit sorties and attacks” on Russia.

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143 Nygren, supra note 129 at 126.
President Putin’s statement was a legal argument clearly in line with the “unwilling or unable test.” First of all, the president asserted that any potential Russian military actions against the Chechen non-state actors in Georgia would be acts of Art. 51 self-defense. Second, he conditioned the right of self-defense on the unwillingness of Georgia to live up to the provisions of the Security Council resolution 1373 or its inability to prevent cross-border movements of fighters.

The Georgian reaction came two days later in a statement by the Ministry of Foreign Affairs. Georgia expressed that it was “extremely alarmed” by Putin’s statement and decried any possible Russian military action in Georgia, stating that such actions did “not in any way fall under the universally accepted international norms of inter-State relations.” Georgia made clear that it saw the Russian president’s statement as “a threat of aggression.” Furthermore, Georgia strongly rejected the self-defense argument, holding that the Russians had made a “liberal, if mildly put, interpretation of article 51.”

Assuming that the Russian account of events was true, that none of the reported bombings of Georgian territory was carried out by the Russian military, the Russian approach to the Pankisi Gorge issue evidences their opinio juris support for the “unwilling or unable” test. President Putin’s argument of 11 September 2002 was consistent with how the test has been generally formulated. If, however, Russia was in fact behind the bombings preceding the statement by the president, the Russian legal conviction becomes more doubtful. Then the question is why the Russian authorities, which believed they had legal grounds for intervention in Georgia, as evidenced by President Putin’s statement, felt the need to deny their raids. The exact reasons are probably better left to a military-political scientist. However, the dubious circumstances of the cross-border incursions into the Pankisi Gorge are relevant to the present research question in that they bring the Russian opinio juris into question. In this regard, it is worth noting that President Putin’s statement was not followed by any Russian military action. Instead, at a meeting of the CIS countries in Chişinau, Moldova on 6 October 2002, the Georgian and Russian leaders decided to de-escalate the situation and agreed to increased cooperation to deal with the cross-border terrorist threat.

The bilateral cooperation that followed President Putin’s statement could also be interpreted as a sign of Russia’s respect for the “unwilling or unable” test. As explained above

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147 Commonwealth of Independent States

148 Bercovitch & Fretter, supra note 137 at 256.
(see Part II) seeking the territorial State’s consent and/or cooperation should be the first course of action before using force. The assessment of a State’s willingness can also be achieved by asking for that State’s consent and/or cooperation. Thus, the Russian practice of prioritizing consent and cooperation as well as their legal arguments for the existence of the “unwilling or unable” test could both be considered valuable to the analysis of whether or not the test has acquired the status of customary international law.

In sum, Russia made a clear statement of the “unwilling or unable” test in 2002. They invoked Art. 51 and apparently prioritized cooperation before the use of force. However, the uncertainty about responsibility for the bombings of targets in the Pankisi Gorge casts a shadow of doubt over the credibility of the Russian legal arguments.

**Colombia, Ecuador and FARC**

The events described below, that took place in 2008, have been examined at length by Ashley Deeks. For a deeper analysis of the case and how a clearer normative framework for the “unwilling or unable” test would have potentially altered the actions and legal arguments of the Parties involved, see her article cited above.149

The Revolutionary Armed Forces of Colombia, or FARC, is a Colombian criminal guerilla movement. It has been designated as a terrorist organization by the US Department of State150 and has for a long time been engaged in an armed struggle with the Colombian authorities. Although the main focus of its activities has been targets in Colombia, it has on several occasions crossed the border into neighboring Ecuador and set up bases there.151 On 1 March 2008, the Colombian military launched an attack on one such camp.152 The attack began with an aerial bombardment and was followed by an infiltration of ground forces to retrieve equipment and bodies of casualties.

Initial reports of the events from the Colombian government stated that Colombian helicopters had been fired upon from FARC-positions on the Ecuadorean side of the border and that they had returned fire.153 Colombian officials labeled the incursion into Ecuador as an act

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149 Deeks, *supra* note 47 at 533-546.
153 Deeks, *supra* note 47 at 537.
of “hot pursuit”\textsuperscript{154}. The incursion being an act of hot pursuit in self-defense would explain why the government of Ecuador was not informed beforehand of the attack. The Ecuadorean president Rafael Correa was informed by his Colombian counterpart, Alvaro Uribe, as late as nine hours after the attacks.\textsuperscript{155}

The incursion, though limited in scope, sparked strong reactions from countries in the region. Ecuador severed its diplomatic ties with Colombia and deployed troops to the border.\textsuperscript{156} Ecuador alleged that the incursion was a violation of its sovereignty and territorial integrity as well as the international law framework which requires cooperation between states on issues such as the one in question.\textsuperscript{157} Ecuador also disputed the claim that the attack was made in immediate self-defense, alleging instead that it was preplanned.\textsuperscript{158}

The incident also caused the Organization of American States to pass a resolution on 5 March 2008, condemning the attack, calling it “a violation of the sovereignty and territorial integrity of Ecuador and the principles of international law.”\textsuperscript{159} The same resolution also reaffirmed that: “the territory of a state is inviolable and may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever.”\textsuperscript{160} This resolution was followed on 7 March by a declaration of the heads of state and government of the Río Group echoing the OAS condemnation of Colombia’s actions and the above-mentioned principle of non-intervention.\textsuperscript{161} The declaration also commended president Uribe for pledging that the events would “not be repeated under any circumstances.”\textsuperscript{162}

The diplomatic exchange following the 1 March attack raises a lot of interesting questions relating to the question of the “unwilling or unable” test’s status as CIL. The rather vague Colombian legal arguments about hot pursuit (and assuming that the Colombian version of the events is true) would undermine the \textit{opinio juris} element. After the events, Colombia

\begin{itemize}
\item[\textsuperscript{155}] Deeks, \textit{supra} note 47 at 538.
\item[\textsuperscript{158}] Deeks, \textit{supra} note 47 at 537.
\item[\textsuperscript{160}] Ibid.
\item[\textsuperscript{162}] Ibid. para 4
\end{itemize}
made accusations, based on information they had retrieved from laptops found in the camp, that the government of Ecuador might have had ties to FARC.\textsuperscript{163} This accusation might be interpreted as an argument that Ecuador was at least unwilling to deal with FARC. However, this argument would not be relevant if the attack was carried out in hot pursuit, since such an attack per definition leaves little room for other considerations; asking Ecuador for help, for instance.

Hot pursuit is a recognized rule of the law of the sea.\textsuperscript{164} The rule gives a State the right to pursue a ship that the State has “good reason to believe … has violated the laws and regulations of that State.” The ship may be pursued onto the high seas. However, whether or not there is a similar right for pursuit on land remains debated, since there is no territorial equivalent of the high seas on land.

In light of the previously cited cases, the Ecuadorean response does not appear surprising. It resembles the critique voiced against the US incursions in Cambodia and the Turkish operations in Iraq. However, the Ecuadorean response highlighted one novel aspect, namely that Colombia also had an “obligation under international law to prevent the effects of its conflict from spilling over its borders and affecting the societies and territories of neighbouring countries”.\textsuperscript{165} This theory of a shared responsibility for a shared problem would speak more strongly for a cooperation between the two countries and against unilateral action by one or the other. However, in its correspondence following the incident, Ecuador did not imply that it would allow Colombia to conduct cross-border operations in the future.

Probably the most far-reaching legal consequence of the reactions to Colombia’s incursion is the OAS resolution, the Rio Group Declaration and Colombia’s official apology. The unambiguous language used in the resolution and the declaration leaves scarce room for any interpretation allowing for an application of the “unwilling or unable” test.

\textbf{Iraq and Coalition, Syria and IS}

The most recent example of the “unwilling or unable” test being invoked is the case of the US and coalition strikes against IS\textsuperscript{166} targets in Syria. These cross-border airstrikes into Syria have

\textsuperscript{163} SFRC Report, \textit{supra} note 151 at 2.
\textsuperscript{166} The group Islamic State has been known by several names throughout the past year. For the sake of simplicity, this case study will use the name IS unless another term is used in a quote. Other names include: ISIS (Islamic State in Iraq and Syria), ISIL (Islamic State in Iraq and the Levant) and Daech (the Arabic abbreviation).
spurred a considerable amount of debate about extraterritorial self-defense against non-state actors that will doubtless contribute to the future academic developments on the issue. While the operations are still ongoing and the last word probably has not yet been said about the legality of the intervention, the arguments that have been made can already inform the analysis of the legal status of the “unwilling or unable” test. Since this Paper is primarily concerned with the legal grounds for initiating the type of military action currently being undertaken in Syria, the actions most relevant to the present analysis have already been taken.

The background to the air-campaign against IS targets in Syria was the increasing activity of that group in Iraq. The IS offensive in Iraq reached an unprecedented level of severity in early June 2014 when the group captured Mosul - Iraq’s second largest city. In a letter to the UN dated 25 June 2014, Iraq requested “urgent assistance from the international community” pointing out, among other things, that the acts of IS (at that time referred to as ISIL) was “an international problem” and required “a collective response.” Iraq did receive international assistance. When IS forces approached the city of Erbil and threatened the Yazidi religious minority with genocide, US president Barack Obama ordered airstrikes to be carried out to stop the group’s advance.

While many Yazidis were saved by the combined effort of Iraq, the US, and the Kurdish Peshmerga militia, the threat posed by IS persisted. In the letter to the UN, quoted above, Iraq had also pointed out that IS had repeatedly launched attacks from the eastern parts of Syria. This fact received increasing attention during the late summer of 2014. In an address to the nation on 10 September 2014, president Obama announced that he had extended the scope of US airstrikes to include IS targets in Syria. The next day, on 11 September, the States of the Gulf Cooperation Council, Egypt, Jordan, Iraq, Lebanon and the US signed a document in which they resolved to “discuss a strategy to destroy ISIL wherever it is, including in both Iraq and Syria [emphasis added].” In the document, known as the “Jeddah Communiqué” the signatories agreed to support the States facing the threat of IS by, “as appropriate, joining in the

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many aspects of a coordinated military campaign.”173 In another letter to the UN, dated 20 September 2014, Iraq expressed its gratitude to the international community for its support and declared that it had requested that the US lead the international efforts against IS.174

Thus, beginning in September 2014, the US-led coalition of States began their campaign of airstrikes against the non-state actor IS in the territorial state of Syria. The legal justification for the campaign was delivered to the Secretary-General of the UN in a letter from the Permanent Representative of the US, Samantha Power, on 23 September 2014. The core of the argument is quoted above (see 1. Introduction), but it is worth repeating:

“States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence, 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.”175

The legal justification delivered by the US government is definitely one of the most eloquent and detailed enunciation of the “unwilling or unable” test to date. The requirements of the test, as put forth by Ms. Power, also largely appear to have been met by the conditions on the ground and the practice of the US and its coalition partners.

Ms. Power labelled the actions taken against IS in Syria as measures of self-defense. Provided that self-defense under Article 51 can be exercised against a non-state actor at all, the bombings of IS targets in Syria could hardly have been seen as anything else. Although the American casualties of IS violence numbered only in the single digits,176 Iraq had suffered substantially worse. Ms. Powers referred to the inherent right of collective self-defense, which would allow other States to aid Iraq in exercising its self-defense.

As for the unwillingness or inability of the territorial State. The willingness of Syria to deal with IS could not be doubted, at least in the long term. It is safe to assume that the government of Syria wished and still wishes to get rid of one of the many rebel groups fighting to overthrow it. However, in the short term, the Syrian willingness might be doubted. A report from the Washington Institute for Near East Policy concludes that the Syrian government is pragmatic in its fight against the rebels in its territory, currently devoting more resources to


175 UN Doc. S/2014/695, supra note 7.

176 In his address to the nation, president Obama cited only two: the journalists Jim Foley and Steven Sotloff. See supra note 172.
targets in western Syria. Syria’s inability, however, was less doubtful. In the summer of 2014 it had lost the eastern province of Raqqa to IS, despite efforts to hold it.\textsuperscript{177}

Another significant aspect of the bombing-campaign against IS in Syria is the broad international support that those campaigns, and consequently the legal justifications for them, have received. In addition to the Arab signatories of the Jeddah Communiqué, the UK announced that it was joining the effort against IS in a letter to the UN dated 25 November 2014. It declared that it was taking part “in support of the collective self-defence of Iraq as part of international efforts led by the United States”\textsuperscript{178}. Interestingly, support for the legal grounds relied on by the US also came from the Secretary-General of the UN, Ban Ki-Moon. The Secretary-General stated that: “I am aware that today’s strikes were not carried out at the direct request of the Syrian Government, but I note that the Government was informed beforehand. I also note that the strikes took place in areas no longer under the effective control of that Government.”\textsuperscript{179}

There have, of course, been critical voices as well. Ecuador decried the intervention saying that it is unacceptable for a country to “invade” another country that has internal problems without the consent of that country.\textsuperscript{180} The Russian foreign minister stated that airstrikes in Syria without the consent of the Syrian government or without a Security Council resolution “would be an act of aggression, a gross violation of the norms of international law.”\textsuperscript{181} While the Russian statement was made before the submission of Samantha Power’s letter, the restrictive legal approach taken by Russia would preclude an application of the “unwilling or unable” test. A similar position was taken by Iran. The Iranian president stated

\begin{footnotesize}
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\item \textsuperscript{178} UN Doc. S/2014/851. \textit{Letter from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General and the President of the Security Council}. 26 November 2014.
\item \textsuperscript{180} Ecuadorian Foreign Minister Ricardo Patiño. “Press Conference” \textit{UN Web TV} 24 Sep. 2014. Web. 30 April 2015. \textless \url{http://webtv.un.org/search/ricardo-pati%C3%B1o-aroza-ecuador-ecuador-press-conference/3806104847001?term=ricardo%20pati%C3%B1o}\textgreater
\end{itemize}
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that strikes in Syria that lacked a UN mandate or consent from the government of that country lacked any legal standing.\textsuperscript{182}

In conclusion, the air-campaign against IS in Syria provides the most recent, clear invocation of the “unwilling or unable” test. The broad support for the incursions into Syria could be indicative of a growing support for the test. The apparent support for the test pronounced by the UN Secretary-General is especially noteworthy. The opposition to the airstrikes by Russia should not be disregarded, but it should be viewed in light of that country’s stated support of the test in 2002. The same could be said about Iran’s stance. That country conducted armed operations in self-defense against non-state actors on Iraqi soil in 1996\textsuperscript{183} absent a UN mandate and, judging by Iraq’s harsh reactions,\textsuperscript{184} without consent. Ecuador’s opposition is understandable considering the unambiguous prohibition on unilateral extraterritorial military action against non-state actors laid down in the above-mentioned OAS resolution from 2008.\textsuperscript{185}

While Russia and Iran changed their positions to oppose the “unwilling or unable” test, the Arab States that are taking part in the coalition evidently changed their position in favor of the test. It shall be recalled that the Gulf Cooperation Council condemned Turkey’s incursions into Iraq in 1996.

Finally it bears repeating that the last word might not yet have been said about the air-campaign in Syria. The case will undoubtedly be interpreted by many as a sign of growing support for the “unwilling or unable” test, especially considering the support it received from the Secretary-General of the UN. While it is one of the best applications of the test, and one which has garnered the most support, it is nonetheless lacking in some regards. For one thing, the consent of the Syrian government was not sought. Additionally, the change of legal positions of States such as Iran, Russia and the Arab coalition members creates an uncertainty about the consistency of the international recognition of the test.


\textsuperscript{183} UN Doc. S/1996/602. Letter from the Permanent Representative from the Islamic Republic of Iran to the United Nations addressed to the Secretary-General. 29 July 1996.

\textsuperscript{184} UN Doc. S/1996/617. Letter from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General. 1 August 1996.

\textsuperscript{185} CP/RES.930 (1632), supra note 159.
PART IV: Analysis

This section will now consider to what degree the cases studied above correspond with the requirements in the ILC draft conclusions on the formation of customary international law. This will help to determine whether or not the “unwilling or unable” test can be considered an established norm of CIL.

The State Practice Element

First of all, in the comment to Draft Conclusion 9, the ILC concluded that, for a practice to be “general”, it must have been employed by an overwhelming majority of States that have had the opportunity of applying it186 (see Part I). The States studied in this Paper were chosen because they all had an opportunity of applying the “unwilling or unable” test. They had all been targeted by attacks by non-state actors operating from within another State. This includes Uganda, even if the ICJ found that the goals of that State’s operations had been to prevent attacks, not to respond to them. However, the conditions on the ground in the DRC fit the requirements for the “unwilling or unable” test to be applied. For the purpose of limiting the page count of this study, some States that have had the opportunity of applying the test and have used force have nevertheless not been included. These States include Israel187 and Rwanda.188

It has been difficult to determine how many, if any, States have had the opportunity to invoke the test but chosen not to. In many areas of the world, countries have scarce need for the test, either because of the absence of non-state actors carrying out cross-border attacks or because of the prior existence of well-functioning security cooperation between neighboring States.189

In more volatile regions that suffer from a certain level of regional and/or political instability, the opportunity to invoke the “unwilling or unable” test will arise more often. It is

187 Deeks, supra note 47 at 486: Deeks cites Israel’s justification for using force in Lebanon against Hezbollah and PLO targets.
188 Ruys & Verhoeven, supra note 12 at 296: “Rwanda invoked the DRC’s failure to prevent attacks by Hutu rebel groups as a ground for military operations of the Rwandese army in Eastern Congo.”
189 There is also a theoretical possibility that a State has been targeted by an armed attack by a non-state actor but has chosen not to invoke the test because it assessed the nature of the attack as not meeting the international law standard of an armed attack, which is required to justify self-defense according to Art. 51. In such a situation, the State would objectively have had the opportunity to invoke the test, but would not, subjectively, have regarded itself as having that opportunity.
safe to assume that non-state actors with the military capacity to carry out cross-border armed attacks are more likely to emerge under such circumstances. This Paper has studied the practices of States in a number of such volatile regions: Syria, Kurdistan, South East Asia, the rainforests of South America, the mountains of East Africa and the Caucasus. In all those regions, the likelihood of a non-state actor having the capacity and the political will to attack States is higher than in more tranquil parts of the world and the response of the victim States has been to use force. Considering the diversity of the cases studied, the conclusion can be drawn that States, when faced with the circumstances to which the “unwilling or unable” test is applicable, have used force or at least asserted their right to resort to force (as was, arguably, the case with Russia in 2002).

The next question to consider is whether the use of force or the assertion of the right to use force employed by the States has actually constituted an application of the “unwilling or unable” test. Have some, or even all, States that have had the opportunity to invoke the test in fact relied on other grounds to use force or assert their right to use force?

As the case study has shown, only three of the States explicitly referred to the “unwilling or unable” test: Turkey in 1996, Russia in 2002, and the US in 2014 (see Part III). Each of those three States acted in a way that was largely consistent with the nature of the test as well. As concluded in Part II, the test is supposed to provide the right to use force in self-defense as a last resort. Before any State can rely on the test to justify self-defense, the consent and cooperation of the territorial State should, as far as possible, be sought. Turkey operated on Iraqi soil with the consent of that government until 1989, when the agreement that had governed the Turkish use of force expired. When Turkey proposed to renew it in 1990, Iraq refused. Russia invoked the “unwilling or unable” test but managed to reach an agreement of cooperation with the Georgian government before resorting to the use of force. This analysis of the Pankisi Gorge case assumes, of course, that the Russian version of events was true. There will be reason to return to that question later. The US, however, did not seek the cooperation or consent of the Syrian government in 2014. Instead it merely informed the Syrian government of its plans to initiate the air-campaign, leaving Syria with little or no say in the matter. The same was true for the Turkey-Iraq case in 1997.

The US actions in 1970 could also be counted among the cases where an explicit reference to the test has been made. While not using “the magic words” – unwilling or unable – the US did act in self-defense against targets on Cambodian soil on the grounds that Cambodia

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190 The attack by the non-state actor might leave no room for diplomatic appeals to the territorial State but require an immediate armed response.
was unable to expel the Vietcong and the NVA from its territory. The reason why the cooperation of Cambodia was not sought should be understood in light of the fact that the US and South Vietnam were not only fighting a non-state actor in Cambodia (the Vietcong) but also a State actor (the NVA). Thus, a cooperation with Cambodia would mean drawing that country into the ongoing Vietnam War, which was something the US wanted to avoid.

The other States studied in Part III above have, to varying degrees, invoked the “unwilling or unable” test by implication. Turkey will have to be considered again in this regard, since that State’s legal justifications for its actions in Iraq changed throughout the 1990s. As shown above, in 1994, Turkey only referred to Iraq’s inability to control the northern parts of its territory, and, as Grey and Olleson pointed out, failed to invoke Art. 51 self-defense. Since the “unwilling or unable” test is a justification for self-defense and should be seen as a complement to, and not an exception from, Art. 51, the fact that a State neglects to invoke self-defense should be interpreted as that State not acting in conformity with the test. The same should be noted about Uganda’s actions in 1998 and 1999. While otherwise living up to the test, in that they prioritized the DRC’s consent and cooperation as a first resort, the fact that the ICJ in the Armed Activities case rejected the Ugandan argument that they had acted in self-defense speaks strongly against an application of the “unwilling or unable” test on Uganda’s part.

The Colombia case also stands out. While the Colombian president defended the attack in Ecuador as a measure of self-defense, the Colombian government relied on the debatable principle of hot pursuit to justify its actions. Furthermore, Colombia had not sought the consent or cooperation of Ecuador. The reason for this, as delivered by Colombian defense minister Juan Manuel Santos in an interview with the newspaper Semana, was, mildly put, unsatisfactory. The minister stated bluntly that Colombia “didn’t trust Ecuador.” Distrust should not be a justifiable ground for not seeking consent or cooperation. In conclusion, the fact that Colombia did not seek the consent or cooperation of Ecuador as a first resort and provided an unsatisfactory explanation for its right to act in self-defense makes their action lack in conformity with the “unwilling or unable” test.

To summarize, since the function of the “unwilling or unable” test is to justify self-defense, it is essential to determine whether the force used by the States in the case study above

191 Stevenson, supra note 67 at 4.
was used in self-defense. If it was not, then that would speak against the existence of a general state practice, which would be required for the test to have developed into a norm of CIL. Of the five States studied in the six cases in Part III, all five have responded to attacks by non-state actors operating from within the territory of another state with either the use of force or an assertion of their legal right to resort to force. Out of these five, four – the US, Russia, Colombia and Turkey - have justified their right to use force as a measure of self-defense. One of these three – Turkey – has invoked different legal grounds for their use of force at different times, but in response to the same threat. Colombia, while defending their actions as self-defense, based this claim on the principle of hot pursuit, which is applicable to pursuit at sea. One of the five States –Uganda – did not invoke self-defense at the time of their use of force. Uganda later attempted to justify their incursions into the DRC as actions of self-defense, but the ICJ rejected that claim.

Furthermore, the “unwilling or unable” test is supposed to provide a justification for the right to use force in self-defense as a last resort. To the extent possible, the consent or cooperation of the territorial State should first be sought before it can be determined whether that States unwillingness or inability gives the victim State a right to self-defense. Out of the five States studied in the case studies above, three States appeared to have prioritized consent and cooperation: Russia, Turkey and Uganda. It could be argued with some merit that the US had acquired the tacit consent of the Cambodian government before initiating their incursions in 1970. It could also be argued that Russia employed force as a first resort in the Pankisi Gorge. This conclusion could only be drawn if the bombings of the Pankisi Gorge preceding president Putin’s statement of 11 September 2002 could be attributed to Russia. Thus, a generous interpretation of the Cambodian case would mean that four out of five victim States sought the consent or cooperation of the territorial States. Similarly, a more damning interpretation of the Georgian case would mean that only two out of five victim States did so.

Regarding the Cambodia case, it should be noted that regardless of whether or not the US acquired the consent of the Cambodian Government, tacitly or otherwise, the bombings in 1970 were not unprecedented. On 9 May 1969, the New York Times published an article revealing clandestine US bombings of targets in Cambodia.193 These bombings had not been acknowledged by the US Government or approved by Cambodia.194 With these circumstances

taken into account, the US incursions studied in the case above no longer appear as a last resort, but rather as the continuation, publicly, of a previously initiated use of force as a first resort. Thus, the most accurate assessment of how many of the States prioritized consent or cooperation would bring the number down to two: Turkey and Uganda.

In conclusion, the limited regard, among the States studied, for the consent and cooperation element of the “unwilling or unable” test brings the generality and consistency of the State practice element of the formation of CIL into question. The use of force explicitly as a measure of self-defense has been slightly more widespread. However, three out of five countries hardly constitute an “overwhelming majority”, especially considering that one of those States (Turkey) used the self-defense argument inconsistently. Thus the requirement of a general and consistent state practice can hardly be considered to have been sufficiently met.

**Opinio Juris**

As presented in Part I, the ILC’s Draft Conclusion 10 on the formation of customary international law, describes the *opinio juris* element as: “The requirement … that the practice in question must be accompanied by a sense of legal obligation.” In the context of the law on the use of force, the use of the word “obligation” is a little unfortunate. No State should have to feel obliged to use force. The draft conclusion is instead best understood as requiring a conviction that a certain practice is legal. It can be difficult to determine what goes on in the minds of “States”, which is why the ILC compiled a non-exhaustive list of sources where proof of *opinio juris* can be found. In this Paper the sources relied on have primarily been documents of diplomatic correspondence, such as letters to the UN, and statements by government officials, such as ministers and legal advisers. In determining the existence or absence of *opinio juris*, the following analysis will focus on two essential questions: 1) did the States studied believe that the unwillingness or inability of a territorial State justified their unilateral use of force and 2) did those States believe that such use of force constituted self-defense?

1. Unwillingness or inability as justification for use of force

Almost all of the States that have been studied in Part III of this Paper have cited the territorial State’s inability as a reason for their use of force. In 1970, the US State Department legal adviser Stevenson stated that “it was impossible for the Cambodian Government to take action itself to
prevent [the North Vietnamese] violations of is neutral rights.\footnote{Stevenson, \textit{supra} note 67 at 4.} In the 1990s, Turkey frequently pointed to Iraq’s inability to exercise authority over the Northern parts of its territory (see Part III). In the preamble to the High Command document, outlining the reasons for its incursions into the DRC, the Ugandan authorities emphasized the fact that “the successive governments of the DRC [had] not been in effective control of all the territory of the Congo.”\footnote{\textit{Armed Activities Case}, \textit{supra} note 97 at 214.} Vladimir Putin asserted Russia’s right to use force in self-defense in the Pankisi Gorge if Georgia proved “unable to establish a security zone” in the border area.\footnote{UN Doc. S/2002/1012, \textit{supra} note 145.} Finally, the US permanent representative to the UN explicitly cited the “unwilling or unable” test when justifying its bombings of Syria, clearly indicating its belief that Syria itself was unable to deal with IS (see Part III).

While Colombia did not refer to Ecuadorean inability in direct connection to its attack of 2008, it had periodically complained about Ecuador not doing enough to combat FARC in its territory.\footnote{Deeks, \textit{supra} note 47 at 540.} This could just as easily be interpreted as an argument about unwillingness, or be rejected as an argument altogether since it was not brought up to justify the specific attack.

The unwillingness-prong of the test paints a slightly more complex picture. In the case of Cambodia, the US did not doubt the Cambodian government’s willingness to expel the Vietcong.\footnote{At least not the willingness of the new government under Lon Nol. The statement of legal adviser Stevenson expressed some doubts about the previous government’s willingness to do “all that, under international law, it should have done”, Stevenson, \textit{supra} note 67 at 3.} It is only natural then, that they did not rely on Cambodia’s unwillingness to justify its operations. As shown in Part III, Turkey eventually invoked the “unwilling or unable” test in 1996. However, when doing so, they concluded that since Iraq could not exercise authority over the north of its country, Turkey could not ask the Iraqi government to take action.\footnote{UN Doc. S/1996/479, \textit{supra} note 88.} The Turkish government must have seen the willingness of Iraq as rather irrelevant since such a willingness could not result in effective action. Nevertheless, Turkey’s reference to the “unwilling or unable” test shows that they recognized the existence of the prong even if they considered it inapplicable to the circumstances present in 1996.

Uganda never voiced any express support for the “unwilling or unable” test. Their perception of the DRC’s unwillingness could be understood as being implied by their argument in the High Command document and subsequent arguments before the ICJ about Congolese support for the rebels. If a State acquiesces or even supports a non-state actor, no matter how
insignificant its contribution, it can be safely assumed that such a State is unwilling to act against the non-state actor. However, as pointed out in the case study, the Ugandan legal approach gave little support for the “unwilling or unable” test. Its main legal argument was an attempt to attribute the actions of the ADF to the DRC and the Sudan. Thus, Uganda did not seek to justify its use of force as an effort to target an unaffiliated non-state actor.

Even before the statement by Vladimir Putin on 11 September 2002, in which he invoked the “unwilling or unable” test, the Russians had voiced their concerns about Georgian unwillingness to take action against the Chechen militants in the Pankisi Gorge. President Putin’s expression, in clear language, of the test shows a conviction that the unwillingness and not only the inability of a territorial State can be a legal ground for the use of force. The problem with the Georgia case, as pointed out above is the uncertainty about which State bore the responsibility for the bombings in the Pankisi Gorge. It is probable, or even very likely, that the bombings were carried out on Russian orders. If that was the case, the Russian legal conviction is in doubt. The question must then be asked, why the Russians felt the need to deny responsibility for the incursions if they thought that they had support in international law for such actions. In sum, the statement by Putin, taken on its own, would suggest a convincing Russian opinio juris for the “unwilling or unable” test. However, judged in the light of the, probable, Russian prior military actions, the Russian position on the test’s legality loses much of its credibility.

It has already been argued in this Paper that Colombia did little in the way of invoking the “unwilling or unable” test. But the fact that most undermines the opinio juris of Colombia in the 2008 case was its subsequent acquiescence to the terms of the OAS resolution and the Río Group Declaration. The strong terms of those documents left no room for the “unwilling or unable” test. However, it is possible that the documents were only meant to apply to the region and to the international relations between the signatory States. In support of this view, it shall be noted that the US is a member of the OAS, but, as shown in Part III, it nevertheless invoked the “unwilling or unable” test in unambiguous terms to justify its violation of Syria’s territory in 2014. Thus, the US actions in Syria could either be interpreted as an inconsistent practice or as proof of the regional limitations to the scope of the OAS resolution. Considering the resolution’s far-reaching prohibition on the use of force – Ashley Deeks understands it as entirely rejecting the concept of self-defense – it would benefit from a restrictive interpretation. The resolution should therefore be understood as codifying the opinio juris

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201 Deeks, supra note 47 at 539.
among the OAS States that the principles enunciated in it only apply to the relations between the signatory States.

At first glance, the cases in this Paper show a general acceptance as law of the unwillingness or inability of States as a justified ground for the use of force. The inability element has been frequently cited and in some cases been combined with the unwillingness element. Gareth D Williams holds the inability-prong of the test to be the most important, arguing that if a State is willing but unable to deal with a non-state actor it will inevitably consent to the victim State’s use of force on its territory.202 With this view, it could be argued that there is no need to explicitly refer to the unwillingness of a State that has not given its consent to the victim State, since the refusal to give consent would suffice as proof of unwillingness. However, Williams’ presumption is questionable. A State could still have strong reasons not to consent to foreign troop presence on its territory, even if it were unable to deal with a non-state actor on its own. The territorial State might not consider the non-state actor to be an urgent problem and thus preferring to deal with it in the long term, while in the meantime building up its own capacity. As shown in Part III, this description could fit Syria. Syria might also have particular qualms about a US military presence on its territory for political and historical reasons.203 Therefore, the unwillingness of a territorial State would have to be explicitly invoked by a victim State for the opinio juris element of the “unwilling or unable” test to be met. The only possible exception to this is Turkey, where the existence of a no-fly zone over the northern parts of Iraq rendered Iraqi willingness irrelevant, since they would not have had the ability or the right to act on that willingness. But as pointed out above, despite this, Turkey still made reference to the “unwilling or unable” test in 1996.

There are, however, as has been noted throughout the case study and this analysis, some incriminating circumstances that undermine the credibility of the expressions of opinio juris of several of the States studied. The US in 1970 and, probably, Russia in 2002 both used force covertly before expressing any legal convictions. It is possible that their covert actions were motivated by foreign or domestic political concerns or were motivated by military expediency. Those questions are interesting and deserve a closer look in a different study, but in the context of this legal analysis, the discrepancy between practice and opinio juris is essential, regardless of how it was motivated.

202 Williams, supra note 10 at 627.
In conclusion, considering the above-mentioned circumstances, as well as Uganda’s vague legal argumentation and Colombia’s signing of the OAS resolution, the general trend of invoking unwillingness or inability appears insufficient to prove the existence of *opinio juris*. Of all the cases studied, the US actions in Syria come closest to providing a clear cut assertion of *opinio juris*. However, as noted above, its failure to seek the consent of the Syrian government diminishes the value of their actions to the formation of a CIL norm.

2. The use of force as constituting self-defense

This question has largely been answered previously in this analysis, in the discussion on state practice. The invoking of Art. 51 self-defense has been fairly widespread. It is again worth noting that both Uganda and Turkey did this after the facts to which they were referring. According to Art. 51, any measure taken in self-defense “shall be immediately reported to the Security Council.” This language is unambiguous. Therefore it is reasonable to conclude that any failure to live up to this requirement is proof of a lack of certainty on behalf of the victim State that what it is doing is in fact self-defense. Only the US actions in Syria stand out as a good example of how a State should act when taking measures of self-defense justified by the “unwilling or unable” test.

**International Criticism**

As previously mentioned, not all States have the opportunity to invoke the “unwilling or unable” test. This being the case, they still have the opportunity to express their views on the test’s legality. The case study looked at several international reactions to the actions taken and arguments made by the States involved in each case. It has been shown that a State’s act of extraterritorial self-defense has never enjoyed universal support. The world community’s reactions will not be studied at any greater length in this analysis. Instead, focus will be placed on the reaction of some of the States studied to acts of extraterritorial self-defense by other States. The purpose of this is to show that even though these States might have made convincing legal arguments about their own right to use force in accordance with the “unwilling or unable” test, their *opinio juris* has proven inconsistent when they have criticized other States. Basically, a State that argues for its own right to use force in a situation should not be expected to object to another State using force in a similar situation.

The two most striking such examples are the US and Russia. Both States made elaborate and eloquent arguments for their rights to use force in Syria and Georgia, respectively. The US
even made the same argument on behalf of Turkey to support that State’s incursions into Iraq. However, the US took a rather different approach to the Iranian incursions into Iraq during that same period of time. Grey and Olleson point out that the American response to the Iranian military actions contrasted sharply with their response to Turkey’s operations against the PKK. For instance, they cite a US State Department statement, saying that: “There can be no justification for Iran crossing the border into northern Iraq. No justification whatsoever…”

It is understandable that the US would not want to see Iranian troops on Iraqi soil, considering the sour relations between those two States. However, such political concerns cannot justify State-specific exceptions to general norms of international law when the requirements of that norm are met. Grey and Olleson point out that the Iranian justification was similar to that used by Turkey and was even more explicit in its reference to Art. 51. Therefore, there is no other way of looking at the comment cited above than as proof of an inconsistency in the US attitude to the legality of the “unwilling or unable” test. It should also be recalled that Iran’s position proved inconsistent when it condemned the US airstrikes in Syria in 2014.

Russia, for its part, made a strong principled argument against the US’ right to use force in Syria, claiming that, absent Syrian consent or a Security Council mandate, the US had no such right. This line of reasoning is incompatible with the position that president Putin took in 2002. Mr. Putin made no mention of Georgian consent being a precondition for a Russian use of force. The only reference to a Security Council resolution was an accusation that Georgia ignored resolution 1373 (2001), which calls on States to work together to prevent and suppress terrorist acts and to refrain from supporting terrorists. That resolution is still in effect and would naturally apply to Syria as well as Georgia. For this reason, the Russian position is as inconsistent as the American position described above.

204 Grey & Olleson, supra note 80 at 399: Citing a Department of State Daily Press Briefing from 30 July 1996.
205 Ibid. at 396
PART V: Conclusion

Judging by the disparate state practice and *opinio juris* in the field of extraterritorial self-defense against non-state actors, the “unwilling or unable” test has not attained the status of a rule of customary international law.

Merely the fact that States have engaged in the use of force against non-state actors in territorial States is not enough to evidence sufficient state practice. When such uses of force are carried out in secret, as in Cambodia and Georgia, or do not follow the required procedure of self-defense, such as reporting to the Security Council, they cannot be regarded as practices supporting the “unwilling or unable” test.

There appears to be a slightly broader *opinio juris*. At least to the extent that the inability of territorial States trigger some sort of right on the part of the victim State to act. However, as the analysis in this study has shown, this *opinio juris* is not consistent among the States that have engaged in the extraterritorial use of force. Additionally, several States have undermined their own credibility by acting in a way that would appear inconsistent with their alleged *opinio juris*.

The test does not appear to be growing in universal recognition. Rather, the last ten years has seen two different philosophies standing against each other. The OAS resolution and Río Group Declaration of 2008 are examples of the more restrictive approach, while the US rationale for its incursions into Syria is an example of the more permissive one. The prohibition of the use of force by a State on another State’s territory “on any grounds whatever” as codified in the OAS and Río Group documents, is closer to the letters of the UN Charter. As Ashley Deeks would argue, it even goes beyond the UN Charter in apparently prohibiting the use of force in self-defense as well. None of the States studied in this Paper, except Colombia and Ecuador, have shown support for this restrictive approach. But the fact that it has been endorsed by the member States of the OAS shows a rather widespread international opposition to the “unwilling or unable” test. This widespread opposition would raise the threshold for the establishment of the test as a norm of CIL. It would increase the required amount of state practice and strength of *opinio juris* needed in support of the test.

The theory adopted by the US in justifying its airstrikes in Syria is the most clear-cut example of the “unwilling or unable” test to date. To some extent it appears that this permissive approach to the use of force is gaining international recognition. Especially notable is the apparent support that it received from the Secretary-General of the UN. But what the US legal argument enjoyed in clarity it lacked in historical support. As has already been concluded, the
case study in this Paper does not show a consistent support for the test among the States that have had the opportunity to invoke it. It has also shown a tendency among States to radically change their positions on the legality of the test. The Syria case has shown this very well. Iran and Russia, both previous supporters of the test opposed the US course of action. The Arab States that took part in the coalition against IS opposed the Turkish incursions into Iraq in 1996.

In sum, many factors coalesce to show that the “unwilling or unable” test is not a norm of customary international law. No case has been free of incriminating circumstances. States have either been inconsistent in their legal argumentation or provided insufficient or vague justifications for their actions. In some cases States have acted in contradiction with their stated legal convictions. Other times they have failed to live up to the test’s requirement of prioritizing the consent of the territorial State. The tendency among States to change positions on the legality of the test further weakens the case for its existence as CIL.

Williams considers the “unwilling or unable” test to be an emerging norm of CIL. However, there is insufficient evidence to reach even such a modest conclusion. This study has shown that there are few, if any, signs that the test enjoys more international recognition now than it did in 1970, 1996 or 2002. It has been invoked in different forms throughout the last 50 years, but the above-mentioned factors have undermined its development as a norm of international law at every turn. For the test to actually emerge as a norm of CIL it would have to be invoked and applied consistently, by States that are also willing to recognize the right of other States to invoke and apply it.
Afterword

In this Paper it has been concluded that not only is the “unwilling or unable” test not part of CIL, it is still far from becoming law. Nevertheless, the real world circumstances that give rise to situations where the test would apply still exist. They have existed before and they will occur in the future. Non-state actors will continue to conduct cross-border attacks from the territory of States that are either unwilling or unable to deal with them. The Security Council will continue to suffer occasional gridlock, preventing it from mandating the use of force by victim States. Therefore, it is worth dedicating a few paragraphs to the question: should the “unwilling or unable” test be public international law?

There can be no doubt about the necessity of providing victim States with a right to defend themselves against foreign non-state actors. Without such a right, many States will find themselves in situations where they are doomed to fail in their most essential duty as States, namely to protect the lives and well-being of their citizens. No State can be expected to stand idly by while its territory is being violated and its citizens threatened or killed by a foreign actor. That is why, regardless of whether or not the “unwilling or unable” test is CIL, States will continue to engage in extraterritorial self-defense.

Therefore, it is necessary to allow this kind of use of force. As things stand today, every time a State engages in self-defense against non-state actors without a Security Council resolution or the consent of the territorial State, that State is in violation of the UN Charter. But because these violations are necessary, they will continue. This poses another risk, namely that the UN Charter’s inability to provide States with the necessary tools to defend themselves will ultimately undermine the Charter’s credibility.

Furthermore, by making the “unwilling or unable” test a part of international law, it will be clearer to the States engaging in self-defense against non-state actors what procedures they need to follow. Ashley Deeks has argued that the test’s lack of content undermines its legitimacy. She has a point. For this reason the best course of action would be to codify the test in treaty law. That would make the test subject to international negotiation that could produce carefully drafted articles. This would bring clarity to the questions of when and how States may use force in self-defense against non-state actors. Finally, as noted above, such an addition to international law would increase the credibility of the legal regime on the use of force as a whole.
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