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Lucy V. Jordan

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I. INTRODUCTION

The prohibition of the use of force is a cornerstone[1] of modern international law and is widely regarded as a peremptory norm of customary international law.[2] Nevertheless, debate exists as to the scope of the prohibition and its exceptions in certain circumstances.[3] Nowhere is this more controversial than the use of force in the exercise of self-defense against non-State actors (NSAs) on the territory of another State when justified on the basis of the "unwilling or unable" doctrine. Despite States having invoked the right to use force extraterritorially in self-defense against NSAs for centuries,[4] concerns continue to be articulated by both States[5] and scholars[6] about the increasing reliance on the doctrine since the terrorist attacks of September 11, 2001 (9/11) to explain such uses of force.

The doctrine provides that a victim State may use force in self-defense against an NSA on the territory of another State in circumstances where the preconditions for self-defense are met and where the territorial State is unwilling or unable to address the threat posed by the NSA. Critics of the doctrine argue that judgments of the International Court of Justice (ICJ) support the assertion that an armed attack must be attributable to a State before giving rise to the right to use force in self-defense,[7] that associated

1. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 148 (Dec. 19) [hereinafter Armed Activities].

2. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 190 (June 27) [hereinafter Paramilitary Activities].

3. Oliver Dörr & Albrecht Randelzhofer, *Purposes and Principles, Article 2(4)*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY (Bruno Simma et al. eds., 3d ed. 2012).

4. THE WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS (Dec. 2016), https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.pdf.

5. *See, e.g.*, Chair's Summary of the Arria Formula Meeting on Upholding the Collective System of the Charter of the United Nations: The Use of Force in International Law, Non-State Actors and Legitimate Self-Defence, U.N. Doc. A/75/993–S/2021/247 (Mar. 16, 2021) [hereinafter Arria Formula Summary] (views expressed by Mexico, Venezuela, and China).

6. *See, e.g.*, Craig Martin, *Challenging and Refining the "Unwilling or Unable" Doctrine*, 52 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 387 (2019).

7. Kimberley N. Trapp, *Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors*, 56 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 141, 141 (2007).

attempts to clarify the principles that govern the use of force against NSAs are effectively seeking to legalize practices that represent a violation of international law,[8] and that any such use of force represents an infringement of territorial sovereignty and a forcible intervention.[9] Notwithstanding, it is indisputable that international law is not static and is capable of being adapted and reinterpreted by the international community to respond to "modern developments and new realities."[10] The purpose of this article is to ascertain whether State practice and *opinio juris* are such that the rules governing the use of force have adjusted to the degree that the unwilling or unable doctrine has crystallized to form a new rule of customary international law.

This article will focus on the use of military force through the prism of *jus ad bellum*, which dictates the conditions under which a State may resort to the use of force, rather than *jus in bello* and international humanitarian law, which govern the conduct of belligerents in ensuing hostilities. Although discussions concerning the doctrine are frequently accompanied by those relating to anticipatory or pre-emptive self-defense, the issue of pre-emptive self-defense is beyond the scope of this article.

8. Mary Ellen O'Connell, *Dangerous Departures*, 107 AMERICAN JOURNAL OF INTERNATIONAL LAW 380, 380–82 (2013).

9. Federicai I. Paddeu, *Use of Force Against Non-State Actors and the Circumstances Precluding Wrongfulness of Self-Defence*, 30 LEIDEN JOURNAL OF INTERNATIONAL LAW 93, 95 (2017).

10. Jeremy Wright, *The Modern Law of Self-Defence*, EJIL:TALK! (Jan. 11, 2017), https://www.ejiltalk.org/the-modern-law-of-self-defence/.

II. THE UNWILLING OR UNABLE DOCTRINE

In 1905,

> Oppenheim concluded that if a State learned that on a neighbouring territory a "body of armed men" was being organized for a raid into its territory and the danger could be removed through an appeal to the authorities of that country, there was no need to act in self-defense. However, if such an appeal proved to be fruitless or impossible, or if there was an increased danger in delaying defensive action, the threatened State was justified in resorting to self-defense.[11]

Notwithstanding this apparently straightforward assessment by Terry Gill and Kinga Tibori-Szabó, some question whether a State's responsibility to protect its own citizens, its right to territorial integrity, and its inherent right of self-defense are effectively overridden by its duty to respect the territorial sovereignty of other States. This is supported by a reading of the United Nations Charter, such that a State is not entitled to act in self-defense against an NSA on the territory of another State in the absence of that State's consent, where the acts of the NSA cannot be attributed to the territorial State.

Set out below is a selection of representative views showcasing the contrasting opinions of scholars on the issues surrounding the unwilling or unable doctrine.

A. The Doctrine Explained/Advocates of Unwilling or Unable

Ashley Deeks has explained that, at its most basic, the unwilling or unable test requires a victim State that has suffered an extra-territorial armed attack by an NSA to evaluate, using the preconditions of necessity, proportionality, and imminence, what action it can take in response.[12] In the context of a use of force on the territory of a third State against an NSA, the necessity criterion's second prong then requires, in the absence of consent, an assessment of whether the territorial State is willing *and* able to suppress

11. *See* Terry D. Gill & Kinga Tibori-Szabó, *Twelve Key Questions on Self-Defense Against Non-State Actors*, 95 INTERNATIONAL LAW STUDIES 467, 473 (2019) (where this example by Oppenheim is described as "a self-explanatory example of legitimate self-defense" and not an "illustration of a controversial issue").

12. Ashley S. Deeks, *"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VIRGINIA JOURNAL OF INTERNATIONAL LAW 483, 487–88 (2012).

the threat. As per Article 51 of the United Nations Charter, that determination is made, as a matter of practicality, by the victim State.[13] Where a territorial State is unwilling *or* unable, the victim State may consider its use of force to be necessary and lawful. As with any other use of force in self-defense under Article 51, the United Nations Security Council may determine the legality of the victim State's use of force after the event.

Deeks identifies the roots of the test within the law of neutrality. She outlines the rights and obligations of neutral and belligerent States, with neutral States being expected to use due diligence to prevent violations of their neutrality and belligerent States being permitted to use force on a neutral State's territory if that State is *unwilling or unable* to prevent violations of its territory by another belligerent. Deeks observes that some commentators believe this rule is customary international law and notes that, whether or not it is customary international law, State practice affirms it as a "well-entrenched norm," notwithstanding the fact that its parameters are not well-articulated.[14] Using the example of the *Caroline*, Deeks describes how the norm "migrated into the world of nonstate actors" as States sought to preserve their status as neutrals by enacting legislation to prohibit the use of their territory as a base of operations.[15] In a similar fashion, she accepts that despite it being clear that the unwilling or unable "test exists as an internationally-recognized norm governing the use of force" (and it being "possible that the test has become" customary international law[16]), it is recited by both scholars and States with little discussion as to its meaning.[17]

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13. That is to say, in the absence of a determination by the UN Security Council. Unless the victim State makes the determination that the use of force in self-defense is required, but that it does not need to act with "no moment for deliberation," in which case the UN Security Council may make the unwilling or unable determination. *Id.* at 496.

14. Deeks, *supra* note 12, at 498–501. With regard to the norm, Deeks refers to the military manuals of the United States, UK, and Canada, who all refer to the test in the law of neutrality. She discusses efforts to caveat the belligerents' rights, e.g., by the *San Remo Manual on International Law Applicable to Armed Conflict at Sea*, which asserts that a belligerent must notify the neutral State of violations by an opposing belligerent and give the neutral State a reasonable time to terminate that belligerent's violation. If the violation continues and represents a serious and immediate threat to the belligerent, in the absence of an alternative the belligerent may use such force as strictly necessary to respond to the threat. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA r. 22 (Louise Doswald Beck ed., 1995).

15. Deeks, *supra* note 12, at 503.

16. *Id.* Deeks states that "states frequently cite the test in ways that suggest that they believe [the rule] is binding," but acknowledges that she was unable to find cases in which they "clearly assert that they follow the test out of a sense of legal obligation (i.e., the *opinio*

Deeks acknowledges that certain issues complicate the application of the test, such as: what a victim State is to do when a territorial State is unaware of a threat; where a territorial State requires time to suppress a threat that the victim State does not believe will be sufficiently timely; where a territorial State is willing to act, but the victim State believes the territorial State is unable to act or its actions are insufficient;[18] or where the victim State is concerned that officials within the territorial State may alert the NSA. In raising these questions, Deeks acknowledges that the test does not provide the guidance that it should. She, therefore, seeks to provide further substance, stating that a victim State should prioritize consent in the first instance, which would obviate the need for an unwilling or unable inquiry.

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juris aspect of custom)." At the same time, she has not "located cases in which states reject the test." *Id.* at 503 n.70. She did, however, identify State practice in which one State used force in another State's territory where the armed attacks were attributable entirely or primarily to an NSA or third State, and the territorial State did not consent to the victim State's presence. Between 1817–2011, thirty-nine cases were listed, involving a use of force by twelve different States. In ten of the cases, the victim State had specifically invoked the unwilling or unable doctrine. These specific invocations were by five States: the United States, the UK, Russia, Israel, and Turkey, with only two of those instance pre-dating the UN Charter. *See id.* at 549–50. A later (2016) study by Chachko and Deeks, detailed ten countries that had explicitly endorsed the test (U.S., UK, Germany, Netherlands, Czech Republic, Canada, Australia, Russia, Turkey, and Israel), three that had implicitly endorsed it (Belgium, Iran, and South Africa); ten ambiguous cases (France, Denmark, Norway, Portugal, members of the GCC (Egypt, Iraq, Jordan and Lebanon, which were counted collectively as one), Colombia, Uganda, Rwanda, Ethiopia, and India) and just six objectors (Syria, Venezuela, Ecuador, Cuba, Brazil, and Mexico; albeit, Ecuador objected to the application of the doctrine in Syria, rather than a rejection of the doctrine itself). *See* Elena Chachko & Ashley Deeks, *Which States Support the "Unwilling and Unable" Test?*, LAWFARE (Oct. 10, 2016), https://www.lawfareblog.com/which-states-support-unwilling-and-unable-test#Russia.

17. Examples are provided by reference to the works of Ian Brownlie, Carten Stahn, and Philip Alston (UNHRC Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), who all cite and support the test without providing detail as to their understanding of its content.

18. Deeks acknowledges that the victim State's assessment of whether a territorial State is "able" may be controversial; citing the examples of the U.S. action in Cambodia during the Vietnam War, and Turkey's action in Iraq in 1996, as instances where this assessment was made and was acknowledged by the territorial States. In contrast, she cites Russia's use of force in Georgia against Chechen rebels in 2002, when Georgia had informed Russia of action it was taking (and assistance it was receiving from other States). *Caroline* is cited as an example where the United States argued that failure to "root out" every member of an NSA does not equate to being unwilling or unable. A victim State's prior interactions with the territorial State would inform any decision. Deeks, *supra* note 12, at 527–32.

Absent consent, the victim State should request the territorial State address the threat, with an analysis of the response informing the unwilling or unable determination. Citing the practice of France in Mali and the United States in Pakistan,[19] Deeks states that, in limited situations where there is a threat of tangible harm to the victim State's national security, the territorial State need not be given the opportunity to suppress the threat itself.[20]

Michael Scharf expands on the neutrality analogy when discussing the response to 9/11, explaining how the "Bush doctrine" was "rooted in historic provenance."[21] He asserts that the application of the concept to terrorism was confirmed by UN Security Council Resolution 1373, which (by its simultaneous reference to the right of self-defense and the prohibition on States from allowing their territory to be used as a safe haven for terrorists) suggests that allowing terrorists to operate freely in one's territory triggers the right to self-defense against those terrorists. Applying the law of self-defense, Scharf links the "extent of permissible military action used to combat terrorists in a country unwilling or unable to control them" to "the level of support provided by the harbouring State."[22] Distinguishing between using force *in* and *against* a State, he suggests that where a State does nothing other than allow terrorists to operate from its territory, only the terrorist/NSA itself is a permissible target. However, where a territorial State is "implicated" in the attack, the victim State may have the right to use force against the NSA *and* the State.[23]

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19. Where France did not request consent of the government before attacking Al-Qaeda, and the United States operation against Bin Laden in Pakistan. *Id.* at 523–24.

20. *Id.*

21. During President Bush's speech to a joint session of Congress on September 20, 2001, he said that no distinction would be made between the "terrorists who committed these acts and those who harbor them," and that nations that "harbor or support terrorism" will be regarded as a "hostile regime." This came to be known as the "Bush doctrine." Scharf highlights the fact that not one objection was voiced to this new policy during a five-day debate in the UN General Assembly. He also discusses its provenance with reference to *Corfu Channel*, where the ICJ held that Albania must have known about the existence of mines in its territorial waters, which was, due to its obligation to not knowingly allow its "territory to be used for acts contrary to the rights of other States," sufficient to establish Albania's liability. Michael P. Scharf, *How the War Against ISIS Changed International Law,* 48 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 16, 29–30 (2016).

22. *Id.* at 31.

23. *Id.* at 31–32.

Despite his analysis of the response to 9/11, which demonstrated not insignificant State practice in support of the unwilling or unable doctrine,[24] Scharf concluded that the Bush doctrine's failure to differentiate between NSAs and harboring States (and between degrees of support offered by those States), combined with the assertion of a right to use force in anticipatory self-defense, prompted the ICJ's pushback in the *Wall* and *Armed Activities* cases. While distinguishing those cases from States using force against NSAs in other States, Scharf concluded that the law had not settled prior to the U.S. military action in Syria in 2014 but that UN Security Council Resolution 2249—which provided no authorization for the use of force in Syria, but which represented Security Council confirmation that the use of force in Syria was permissible—and subsequent State practice (support to the coalition campaign) represented the "tipping point necessary to crystallize the new approach to the right of self-defense."[25]

In contrast, Kimberley Trapp focuses upon the preconditions to self-defense. She suggests that doubt as to whether Article 51[26] can qualify as an exception to the prohibition on the use of force where the actions of the NSA are not attributable to a State can be overcome by the application of the customary requirements of necessity and proportionality.[27] For instance, when a State is actively countering the activities of the NSA and "doing all that can be done to prevent . . . terrorists from using its territory to organize or launch attacks," it would not be necessary for the victim

24. Scharff discusses not only the increased articulation of, and reliance on, the doctrine by the United States, but also the "little protest" as other States have cited the U.S. response to 9/11 (and the unwilling or unable doctrine) to justify their own actions against terrorists. Here, he cites examples involving Russia, Turkey, Colombia, Ethiopia, and Kenya. *Id.* at 36–37.

25. *Id.* at 41–56.

26. Trapp, *supra* note 7 at 146 (due to it being an exception to the prohibition on the use of force against the territorial integrity or political independence of a State).

27. Trapp asserts that the response to 9/11 was a reflection of an acceptance that NSAs can be the subject of force in self-defense under Article 51, when necessary, given an "inability to rely on the host State's cooperation in counter-terrorism." *Id.* at 150. *See also* Nico Schrijver & Larissa van den Herik, *Leiden Policy Recommendations on Counter-terrorism and International Law*, 57 NETHERLANDS INTERNATIONAL LAW REVIEW 531, 545 n.94 (2010) (recognizing the right of a victim State to act in self-defense in response to an armed attack by an NSA, including on the territory of another State, subject to the limits of necessity and proportionality, and that it is said that being an inherent right, self-defense does not require that the attacks be attributable to the territorial State, but that consent should be sought other than where the territorial State is unwilling or unable).

State to use force against the NSA.[28] However, where a host State is "unwilling (or, in some cases, unable)"[29] to prevent its territory from being used as a base for operations, a victim State is left with the choice of respecting the host State's territorial integrity at risk to itself or violating it "in a limited and targeted fashion, using force against (and only against) the very source of the terrorist attack."[30]

B. Dissenting Voices

Critics of the doctrine argue that the freedom that it provides victim States (the ability to decide when a territorial State is "unable" to counter a threat and when it is "necessary" to use force) undermines the sovereignty and territorial integrity of the host State, and the UN's collective security system as a whole.[31] It is suggested that this tips the balance too far in favor of

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28. Trapp acknowledges one of the concerns raised by those who object to the doctrine when raising the issue of the victim State substituting its views "on how to deal with the terrorist threat emanating from the host State's territory for those of the host State." Referencing General Assembly Resolution 2625, she suggests that action following such a substitution would amount to an unlawful intervention, suggesting that criminal law enforcement or cooperative agreements would be appropriate. Trapp, *supra* note 7, at 147. In contrast, Gill and Tibori-Szabó state that it is for the victim State, "as in all self-defense situations," to make the decision as to necessity, which is then subject to approval or rejection by the Security Council and international community. Further, there is "no duty to seek consent when the necessity of self-defense is overriding or if doing so would significantly hamper the effectiveness of the defensive measures." Gill & Tibori-Szabó, *supra* note 11, at 501.

29. Trapp suggests that this might be the case where the territorial State is unable to meet its "terrorism prevention obligations," and that in such instances it is "arguably under an obligation to accept offers of counter-terrorism assistance, or even to seek such assistance." Trapp, *supra* note 7, at 147. This assertion contradicts the findings of the International Group of Experts who prepared the *Tallinn Manual 2.0* when they concluded that a State does not have a duty to seek external assistance. TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 50 (Michael N. Schmitt gen. ed., 2017).

30. Trapp, *supra* note 7, at 147. Similarly, Schmitt argues that where a State is unwilling or unable to comply with its responsibilities vis-à-vis terrorists, a victim State is permitted to enter its territory (subject to the preconditions of self-defense) "for the limited purpose of conducting self-defense operations." *See* Michael N. Schmitt, *Counter-Terrorism and the Use of Force in International Law*, 79 INTERNATIONAL LAW STUDIES 7, 40 (2003).

31. For example, Corten concludes that acceptance of the test as reflected in the U.S. Article 51 letter of September 2014 would provide States with the ability to bypass the collective security system—allowing them to "launch a military campaign" on the territory of another State on the "sole pretext of the 'inability' of [a] state to put an end to the activ-

the victim State.[32] Further, they question the legal reasoning behind the doctrine. Since Article 2(4) does not prohibit the use of force against an NSA, critics argue that invocation of the self-defense exception is irrelevant. They also argue that the use of force by a victim State on the territory of another State constitutes "aggression," and that the assertion that "necessity" allows the use of force against a State not responsible for an armed attack is contrary to the ICJ's jurisprudence.[33]

Not only is the doctrine itself criticized, but the suggestion that it has or indeed could attain customary international law status is rejected by some. For example, Olivier Corten asserts that the greater number of States (the States of the non-aligned movement) do not subscribe to a broad reading of the right to use force in self-defense and believe that Article 51 is restrictive and should not be reinterpreted.[34] Unlike Scharf, Corten does not find the actions of the international community in Syria to be indicative of a crystallization of customary international law. To the contrary, he questions the United States' "overly extensive" interpretation of the doctrine, which he asserts has not been accepted "by the international community of states as a whole" and argues that the actions and words of the States involved in the coalition are incompatible with the existence of "sincere and genuine *opinio juris*."[35] He explains that just five (four explicitly

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ities of a terrorist group." Olivier Corten, *The "Unwilling or Unable" Test: Has It Been, and Could It Be, Accepted?*, 29 LEIDEN JOURNAL OF INTERNATIONAL LAW 777, 797 (2016). Additionally, O'Connell argues that the doctrine would allow the "victim state to decide something as amorphous as another state being 'unable' to control violence on its own territory," and states that Security Council authorization is the extant method within international law by which a State can address security concerns. O'Connell, *supra* note 8, at 384.

32. *See* Monica Hakimi, *Defensive Force Against Non-State Actors: The State of Play*, 91 INTERNATIONAL LAW STUDIES 1, 12–13 (2015) (discussing the particularly controversial situation where a State "exercises governance and authority and actively tries to suppress the violence—but is, simply, ineffective").

33. *See* Corten, *supra* note 31, at 794–97.

34. Olivier Corten, *A Plea Against the Abusive Invocation of Self-Defence as a Response to Terrorism*, EJIL:TALK! (July 14, 2016), https://www.ejiltalk.org/a-plea-against-the-abusive-invocation-of-self-defence-as-a-response-to-terrorism/ (referencing the statement made on behalf of the non-aligned movement during an open debate before the UN Security Council).

35. Corten suggests that by permitting the use of force under the unwilling or unable doctrine in Syria, the "US version" departs from existing legal requirements—that the U.S. objective determination that, despite years of fighting NSAs, Syria had failed to achieve results, ignored the fact that the duty of due diligence is an obligation of conduct, not re-

and one implicitly) of the fifteen[36] States within the coalition invoked the unwilling or unable test in their Article 51 letters (which he suggests is sufficient to raise doubt as to the existence of common *opinio juris* in favor of the standard) and casts doubt on whether Australia's[37] and Canada's articulations were indicative of a genuinely held legal conviction. Additionally, he cites differences in details of the various Article 51 letters, the UK's failure to reference the test at all in any of their three letters, and the absence of endorsement of the doctrine by any Arab State. Corten also observes that Syria "never accepted any argument based on self-defence" (albeit he notes that it took a year for them to protest the coalition's airstrikes) and that Russia, Venezuela, Ecuador, Iran, and Cuba rejected the legality of the coalition's actions and "more generally condemned any infringement of the sovereignty of a state."[38]

Similarly, Jutta Brunnée and Stephen Toope question the unity of agreement within the coalition as to the extent of unwilling or unable doctrine. They cite the link between the Article 51 justifications and Resolution 2249 in the case of Denmark, the Netherlands, Norway and the UK, and question whether the link between Germany's and Belgium's Article 51 letters and Resolution 2249 was such as to provide a narrower justification (based on territorial gains by the Islamic State of Iraq and the Levant (ISIL)) than the United States invocation of unwilling or unable.[39] After analyzing further State practice,[40] they go on to point out that the test

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sult. He also referenced the failure to seek Syria's consent. Corten, *supra* note 31, at 779–86.

36. The United States, Canada, Australia, and Turkey invoking the unwilling and unable doctrine, and Germany implicitly, whereas the UK, France, the Netherlands, Denmark, Saudi Arabia, Jordan, Qatar, Bahrain, UAE, and Morocco did not reference it. *Id.* at 780.

37. Corten referenced Australian Prime Minister Abbot's distinction between the legalities of operating inside Iraq and inside Syria and implied that later endorsement of the unwilling or unable test was to justify strikes that they viewed as morally acceptable. *Id.* at 781. Countering this, it is legally accurate to describe the bases for operations within the two countries as different.

38. *Id.* at 789.

39. Jutta Brunnée & Stephen J. Toope, *Self-Defence Against Non-State Actors: Are Powerful States Willing But Unable to Change International Law?*, 67 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 263, 272 (2018).

40. Specifically, they suggest that the 2016 work of Chachko and Deeks overstated support for the doctrine and, like Corten, question the support for the doctrine by Canada and the UK, and pointing to the statements of the non-aligned movement, the ambiguous position of China, and Russia's withdrawal of support for the doctrine. They conclude that

(which is primarily promoted by Western States) has only been applied to States in the Global South; they question how it was applied against Syria and whether it would ever be invoked against a Western State.[41]

Brunnée and Toope conclude that the test has not reached customary international law status. In support they point to the lack of clarity in the doctrine's application, the "inherent contradiction between an expansive right to self-defence and the prohibition on the use of force," and the fact that the standard currently makes it impossible for "States that are willing but unable to take sufficient measures against terrorist attacks from their territory to avoid foreign military intervention." However, unlike Corten, they acknowledge that its strongest advocates (the United States and Israel) are the two States that have been subject to recurrent terrorist attacks and recognize a perceived need for the test in the face of increased terrorist attacks by NSAs.

III. STATE PRACTICE

Outlined below is a chronological summary of relevant State practice.

A. Pre-1945

Amelia Islands 1818: The Seminole tribe wrested Amelia Island, on the border of Spanish-Florida and the United States, from Spanish forces. The Spanish government had been unable to recover it, and Spain's authority was described by President Monroe as "almost extinct." U.S. forces were ordered to the United States border with Florida to defend against cross-border raids. Whether or not Spain's authority had been complete, and whether or not attacks had been made by Spain "or by those who abuse her power," deeming self-defense to be a sacred right that never ceases, President Monroe permitted U.S. forces to pursue "the savages" beyond U.S. borders, noting that it would have been the "height of folly to have suffered that [the border] protect them."[42] In this instance, the United

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only the United States, Australia, Israel, Turkey, and the UK have supported the doctrine without caveat. *Id.* at 273, 282.

41. Like Corten, they point to actions taken by Syria, including support proffered by Russia, and question whether France would have invoked the test within Belgium after the Paris attacks of November 2016. *Id.* at 285.

42. James Monroe, President of the United States, Second State of the Nation Address (Nov. 16, 1818), *reprinted in* AMERICAN HISTORY, http://www.let.rug.nl/usa/presi

States effectively asserted its right to self-defense against NSAs, notwithstanding the consequent violation of the territorial sovereignty of Spain.

Caroline 1837: The correspondence that followed the *Caroline* incident focused upon the lawfulness of the entry by British forces into the United States to use force in self-defense against Canadian rebels. The two States agreed on the "inviolable character of the territory of independent nations" and the exception to it in cases where the "necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[43] However, whereas the UK contended that the incident fell within that exception, it being necessary due to the lack of effective action by U.S. authorities, referenced in the context of the U.S. obligations as a neutral State, the U.S. Government "acknowledge[d] no delinquency in the performance of its duties."[44] Effectively, and indeed in so many words,[45] the UK asserted a right to take action against an NSA on U.S. territory where the United States was unwilling or unable to prevent NSAs from arming themselves and invading British territory.

B. 1946–2001

Israel: Israel, by way of both physical and verbal practice, has been a consistent proponent of the unwilling or unable doctrine. It has repeatedly used force in self-defense against NSAs, in particular the Palestine Liberation Organisation (PLO) and Hezbollah, on the territory of other States (Lebanon and Tunisia) without consent. When discussing its actions, Israel

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dents/james-monroe/state-of-the-nation-1818.php (last visited Mar. 1, 2024).

43. *British-American Diplomacy: The Caroline Case*, AVALON PROJECT (2008), https:// avalon.law.yale.edu/19th_century/br-1842d.asp#web2.

44. The United States contended that it had acted in good faith, taken all proper means of prevention and would punish offenders that could not be "prevented." *Id.* (encl. 1).

45. *See* CRAIG FORCESE, DESTROYING THE CAROLINE: THE FRONTIER RAID THAT RESHAPED THE RIGHT TO WAR 237 (2018) (referencing Henry Stephen Fox, British Ambassador to the United States, who stated: "If the Americans either cannot, or will not, guard the integrity of their own soil, or prevent it from becoming the common arsenal and recruiting ground of outlaws and assassins . . . have they a right to expect that the soil of the United States will be respected by the destined victims of such unheard of violence?").

has implicitly[46] and explicitly[47] referred to the unwilling or unable doctrine and confirmed that it believes it reflects international law.

Israel's actions have frequently elicited criticism from the international community.[48] However, whether such condemnation is a rejection of Israel's legal justification for their actions, is out of concern for undermining the ability to achieve peace in the Middle East, or is a response to the scale of Israel's responses is unclear.[49] Accordingly, such criticisms should not be categorized as dissenting practice or *opinio juris*.

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46. *See, e.g.*, Permanent Rep. of Israel to the U.N., Letter dated Jan. 15, 1970 from the Permanent Rep. of Israel to the President of the Security Council, at 3, U.N. Doc. S/9604 (Jan. 15, 1970) (referencing the "patent refusal or inability of the Government of Lebanon to comply with its international obligations"); Permanent Rep. of Israel to the U.N., Letter dated July 26, 1993 from the Permanent Rep. of Israel to the United Nations addressed to the President of the Security Council, ¶ 3, U.N. Doc. S/26152 (July 26, 1993) (referencing the escalation of terrorist attacks by Hezbollah and the Israeli Defence Force's operations in response, carried out in the exercise of "its legitimate right of self-defence").

47. U.N. SCOR, 2071st mtg. ¶¶ 53, 54, U.N. Doc. S/PV.2071 (Mar. 17, 1978) ("What Israel did is what any self-respecting sovereign State would do in the circumstances. What Israel did is fully in accordance with the norms of international law and the Charter of the United Nations. International law is quite clear on the subject . . . 'where incursion of armed bands is a precursor to an armed attack, or itself constitutes an attack, and the authorities in the territory, from which the armed bands came, are either unable or unwilling to control and restrain them, then armed intervention, having as its sole object the removal or destruction of their bases, would— it is believed—be justifiable under Article 51.' . . . [T]he aforementioned legal passages reflect international law on the subject and support Israel's legal position."). *See also* 1979 YEARBOOK OF THE UNITED NATIONS 322, U.N. Sales No. E.82.1.1 (summarizing Security Council discussions regarding the UN Interim Force in Lebanon, "Israel said it was exercising its inherent right of self-defence. If States were unwilling or unable to prevent terrorists from operating out of their countries, they should be prepared for reprisals.").

48. U.N. SCOR, 2611th mtg., U.N. Doc. S/PV.2611 (Oct. 2, 1985) (condemning the Israeli attack on the PLO HQ in Tunisia). *E.g.*, *id.* ¶ 23 (Chinese delegate stated that the "Chinese Government and people strongly condemn this most savage act of aggression"); *id.* ¶ 31 (Peruvian delegate referenced a "primitive settling of accounts"); *id.* ¶ 35 (Turkish delegate referenced the violation of "Tunisian sovereignty and territorial integrity"). *See also* S.C. Res. 573, ¶ 1 (Oct. 4, 1985) (UN Security Council condemning "vigorously the act of armed aggression perpetrated by Israel against Tunisian territory in flagrant violation of the Charter of the United Nations, international law and norms of conduct").

49. *See* U.N. Doc. S/PV.2611, *supra* note 48, ¶ 17 (statement of the Danish delegate: "Denmark . . . vigorously condemned the bombing by the Israeli air force. . . . That action violates the sovereignty and territorial integrity of Tunisia in contravention of the principles of the Charter of the United Nations and the rules of international law. It also represents a further stage in the continuing violence and counter-violence in the Middle East."). At the same meeting, Peru rejected the "act of aggression against the sovereignty and terri-

South Africa: Although not specifically citing the unwilling or unable doctrine, South Africa's February 6, 1981, letter to the Secretary-General of the Security Council regarding its attacks on "A.N.C. terrorists" on Mozambique's territory could be viewed as an implicit endorsement of the doctrine. The letter stated that "[a] country actively or passively supporting those who plan and commit terrorism and subversion, and which, in addition, harbours them, will have to bear the consequences."[50] Reportedly, South Africa's use of force against the A.N.C. on territories of other States was subject to opposition; however, it is quite possible that such opposition was politically motivated.[51]

United States: Like Israel, the United States has been a proponent of the unwilling or unable doctrine for some time. Arguably, its first invocation post-1945 came during the Vietnam War. Just as the *Caroline* incident involved a violation of neutral territory, the United States referred to violations of Cambodian neutrality when justifying its use of force in self-defense on Cambodian territory. Having called upon the Cambodian Government to take all necessary measures to prevent the use of its territory by the Viet Cong, the United States claimed it was acting in self-defense when attacking enemy positions on Cambodian territory, having concluded that Cambodian forces "could not have been unaware of the presence of Viet Cong/North Viet-Namese artillery positions."[52] A later notification confirmed that attacks were confined to areas where the Cambodian Government had ceased to exercise effective control.[53] These actions reflect a willingness to take action in self-defense where a territorial State is unwilling (the Cambodian forces were not "unaware") or unable (it "ceased to exercise effective control") to do so.

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torial integrity of a Member State" and questioned the purpose of the "disproportionate escalation" of the attack. *Id.* ¶¶ 28, 30.

50. Deputy Permanent Rep. of South Africa to the U.N., Letter dated Feb. 6, 1981 from the Deputy Permanent Rep. of South Africa to the United Nations addressed to the Secretary-General, U.N. Doc. S/14367, annex at 2 (Feb. 6, 1981).

51. *See* Schmitt, *supra* note 30, at 41.

52. Deputy Permanent Rep. of the United States to the U.N., Letter dated Mar. 9, 1970 from the Deputy Permanent Rep. of the United States to the United Nations addressed to the President of the Security Council, at 4, U.N. Doc. S/9692 (Mar. 10, 1970).

53. DUSTIN A. LEWIS, NAZ K. MODIRZADEH & GABRIELLA BLUM, QUANTUM OF SILENCE: INACTION AND JUS AD BELLUM 119 (2019) (entry 118 in Chronological Order column).

Again, while not explicitly referencing the unwilling or unable doctrine, the U.S. Article 51 letter of August 20, 1998, reported the exercise of its right to self-defense in connection with attacks on a reported chemical weapons facility in Sudan and terrorist training camps in Afghanistan.[54] It was said that the attacks had been carried out only after repeated efforts to persuade the Governments of Sudan and Afghanistan to shut down the terrorist activities. As Michael Schmitt observed, the differences in reaction to the two strikes indicate concern as to the legitimacy of the target in Sudan rather than a questioning of the U.S. right to conduct the attacks.[55] The League of Arab States Secretariat condemned the Sudanese strike but not the strikes in Afghanistan, and the Group of African States, the Group of Islamic States, and the League of Arab States requested the Security Council send a fact-finding mission to Sudan, but not to Afghanistan.

Iran: Despite Iran having condemned the U.S. attacks on Sudan and Afghanistan, it has itself conducted attacks against NSAs in Iraq, which it justified on the basis of Iraq being unable to control its territory and claiming to be in compliance with its inherent rights under Article 51.[56] Similarly, Iran cited Iraq's failure to comply with its international obligations when explaining that it had undertaken a "limited and proportionate" operation on April 18, 2001, to stop cross-border attacks by the "MKO terrorist organization harboured in Iraq" which "should not be construed as infringing the territorial integrity of Iraq."[57]

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54. Permanent Rep. of the United States of America to the U.N., Letter dated Aug. 20, 1998 from the Permanent Rep. of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/1998/780 (Aug. 20, 1998). The United States reported that the action was in response to a "series of armed attacks" for which the "organization of Usama Bin Ladin [was] responsible." *Id.* at 1.

55. Schmitt, *supra* note 30, at 65–66.

56. *See* Permanent Rep. of the Islamic Republic of Iran to the U.N., Letter dated July 29, 1996 from the Permanent Rep. of the Islamic Republic of Iran to the United Nations Addressed to the Secretary General, paras. 2, 3, U.N. Doc. S/1996/602 (July 29, 1996) ("[T]he Government of Iraq is not in a position to exercise effective control over its territory. . . . Consequently . . . transborder armed attacks . . . by terrorist groups against Iranian border towns, originating from Iraqi territory, have been intensified and escalated. In response . . . and in accordance with its inherent right of self-defence enshrined in Article 51 of the Charter, the Islamic Republic of Iran took immediate and proportional measures, which were necessary for curbing and suppressing such aggressive activities.").

57. Permanent Rep. of the Islamic Republic of Iran to the U.N., Letter dated Apr. 18, 2001 from the Permanent Rep. of the Islamic Republic of Iran to the United Nations ad-

Turkey: Turkey has repeatedly used force against "terrorists" on Iraqi territory. By a letter dated July 24, 1995, Turkey referenced Iraq's inability to exercise control over parts of its territory as a reason for not asking Iraq to fulfill its obligation to prevent the use of its territory as a staging post for terrorist attacks on Turkey. It argued that its actions in self-defense, "which are imperative to its . . . security cannot be regarded as a violation of Iraq's sovereignty." Further, "[n]o 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."[58] Turkey's letter to the Security Council had been prompted by Libya's letter of July 12, 1995, in which it had described Turkish actions as an act of aggression and a violation of State sovereignty. Libya also criticized the inaction of the Security Council and the articulation by the U.S. Department of Defense that Turkey had been acting in self-defense.

Response to 9/11: On October 7, 2001, the United States notified the Security Council that it had launched armed attacks against both Al-Qaeda training camps and Taliban military installations in Afghanistan. In its Article 51 letter, the United States stated:

> The attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used . . . as a base of operations. Despite every effort by the United States and the international community, the Taliban regime has refused to change its policy. From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad.[59]

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dressed to the President of the Security Council, para. 2, U.N. Doc. S/2001/381 (Apr. 18, 2001).

58. Deputy Permanent Rep. of Turkey to the U.N., Letter dated July 24, 1995 from the Deputy Permanent Rep. of Turkey to the United Nations addressed to the President of the Security Council, para. 2, U.N. Doc. S/1995/605 (July 24, 1995).

59. Permanent Rep. of the United States of America to the U.N., Letter dated Oct. 7, 2001 from the Permanent Rep. of the United States of America to the United Nations addressed to the President of the Security Council, para. 3, U.N. Doc. S/2001/946 (Oct. 7, 2001).

Notwithstanding the reference to the threat being posed by Al-Qaeda having been "made possible by" the Taliban, there was no evidence or allegation to suggest that the attacks could be ascribed to the Taliban.[60] Demands were made by the Taliban to hand over bin Laden and to allow access to terrorist training bases to prove that they were no longer operable. In the absence of compliance—that is, with the Taliban being *unwilling* to accede to ending the threat posed by Al-Qaeda—U.S. (and UK[61]) actions in self-defense were effectively based on the unwilling or unable doctrine. Just ten days later, Australia, relying on Article 51 (and the ANZUS Treaty), similarly notified the Security Council that it was taking measures in self-defense.

While silence should not be interpreted as acquiescence, it is reasonable to view assistance to coalition operations as affirmative State practice. Assistance could certainly be interpreted as tacit approval of the use of force against an NSA and perhaps an indication of a willingness to consider the unwilling or unable doctrine. In terms of numbers, White House information reveals that within a year of 9/11, twenty-seven countries had forces in Afghanistan and thirty-nine had representatives in the U.S. Central Command Headquarters from where Operation Enduring Freedom was launched.[62] Additionally, both NATO and the Organization of American

60. To the contrary it had been suggested that Al-Qaeda supported the Taliban. In his September 20, 2001, address to Congress, President Bush stated: "[t]he leadership of al Qaeda has great influence in Afghanistan and supports the Taliban regime in controlling most of that country." George W. Bush, President of the U.S., *Address to a Joint Session of Congress and the American People*, THE WHITE HOUSE (Sept. 20, 2001), https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html. See also Schmitt's discussion of the application of the law of State responsibility to Al-Qaeda and the Taliban in Schmitt, *supra* note 30, at 51–54, in which he concludes that the evidence does not support a conclusion that Al-Qaeda was under the direction or control of the Taliban, or that the Taliban could not be deemed responsible under the principle of attribution.

61. Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the U.N., Letter dated Oct. 7, 2001 from the Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, para. 2, U.N. Doc. S/2001/947 (Oct. 7, 2001) ("forces have now been employed in exercise of the inherent right of individual and collective self-defence, recognized in Article 51").

62. Those countries included: Australia, Bahrain, Belgium, Canada, Czech Republic, Denmark, Egypt, Finland, France, Germany, Greece, Italy, Japan, Netherlands, New Zealand, Norway, Poland, Portugal, Republic of Korea, Romania, Russia, Spain, Turkey, United Arab Emirates, United Kingdom, and Uzbekistan. *International Contributions to the War Against Terrorism and Operation Enduring Freedom*, THE WHITE HOUSE, https:// georgewbush-whitehouse.archives.gov/march11/coalitioncontributions.html (last visited Mar. 1,

States categorized the attacks as "armed attacks," which justified the exercise of force in self-defense.

C. Post-2001

Russia: Not only did Russia support U.S. actions after 9/11, but it has made repeated explicit references to the doctrine in formal communications with the Security Council post-2001. For example, in the annexes to the Russian Federation's letters of July 31, 2002, and September 11, 2002,[63] Georgian authorities were described as unwilling and unable to take practical steps to halt terrorism and the threat posed by Chechen fighters based in Georgia. In the September 2002 letter, Russia demanded the immediate extradition of terrorists by Georgia and reserved the right to act "in accordance with Article 51 of the Charter of the United Nations" in the event that Georgia did not "put an end to the bandit sorties."[64] Notably, Russia's use of force was criticized by the United States and Israel, who accused Russia of violating Georgia's sovereignty.[65] Whether this was because Georgia was actively taking steps, with the assistance of the international community, or due to the indiscriminate targeting that reportedly occurred is unclear.[66]

Israel: Israel's invocation of the doctrine continued post-2001. One particularly notable incident was the 2006 response to attacks by Hezbollah and their abduction of two Israeli soldiers.[67] Again, the widespread condemnation of Israel's actions during a meeting of the Security Council on July 14,

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2024).

63. Permanent Rep. of the Russian Federation to the U.N., Letter dated July 31, 2002 from the Permanent Rep. of the Russian Federation to the United Nations addressed to the Secretary General, U.N. Doc. A/57/269-S/2002/854, annex, para. 3 (July 31, 2002); Permanent Rep. of the Russian Federation to the U.N., Letter dated Sept. 11, 2002 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, U.N. Doc. S/2002/1012, annex, para. 3 (July 31, 2002).

64 *See* Permanent Rep. of the Russian Federation to the U.N., Letter dated Sept. 11, 2002, *supra* note 63, annex, para. 6.

65. *U.S. Criticizes Russia for Georgian Bombing*, CNN (Aug. 24, 2002), http://www.cnn.com/2002/WORLD/europe/08/24/russia.georgia/.

66. *Id.*

67. Permanent Rep. of Israel to the U.N., Identical letters dated July 12, 2006 from the Permanent Rep. of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. A/60/937-S/2006/515 (July 12, 2006).

2006, related to the Israel's excessive use of force. The majority of States recognized Israel's right to self-defense.[68]

Rwanda: In 2004, Rwanda reserved the right to "respond as she deems fit in defence of her people, her sovereignty, and territorial integrity" in the event that the Democratic Republic of the Congo failed to remove the threat of the genocidal ex-Armed Forces of Rwanda/Interahamwe forces from their territory.[69] In the absence of any further explanation, this could be viewed as akin to invocation of the unwilling or unable doctrine.

Turkey: Following repeated attacks by the Kurdistan Workers' Party (PKK) in 2007 and 2008, Turkey undertook military operations against the PKK in northern Iraq. Despite requests that a diplomatic solution be sought, when Turkey responded with military force States "took a muted stance"; the United States offered limited logistical support to the attacks, and it wasn't until the aerial bombing increased that the EU called upon Turkey to exercise restraint and respect the territorial integrity of Iraq.[70] Tom Ruys analyzed the situation, concluding that the Turkish intervention and the "condoning attitude of the international community adds to the evidence in state practice of an evolution towards a more flexible . . . interpretation of self-defence in response to attacks by non-state actors which a state has been unwilling or unable to prevent."[71]

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68. *See* U.N. SCOR, 61st Sess., 5489th mtg., U.N. Doc. S/PV.5489 (July 14, 2006). Russia condemned the "disproportionate and inappropriate use of force that threatens the sovereignty and territorial integrity of Lebanon and peace and security throughout the region." *Id.* at 7. China denounced the "armed aggression" on the basis that the use of force was disproportionate and caused "massive destruction of infrastructure in Lebanon." *Id.* at 11. Qatar rejected Israel's right to self-defense on the basis that the UN Security Council had taken steps to maintain international peace and security. *Id.* at 11. Argentina, Japan, the UK, Peru, Denmark, Slovakia, Greece, and France all recognized Israel's right to act in self-defense, but criticized the excessive use of force and damage to civilian infrastructure. They reminded Israel that actions must be proportionate and measured.

69. *See* Permanent Rep. of Rwanda to the U.N., Letter dated Dec. 6, 2004 from the Permanent Rep. of Rwanda to the United Nations addressed to the President of the Security Council, Annex, ¶ 2, U.N. Doc. S/2004/951 (Dec. 6, 2004).

70. Tom Ruys, *Quo Vait Jus Ad Bellum?: A Legal Analysis of Turkey's Military Operations Against the PKK in Northern Iraq*, 1 MELBOURNE JOURNAL OF INTERNATIONAL LAW 334, 340 (2008).

71. *Id.* at 355–56. Ruys concludes this while acknowledging that Turkey did not clearly articulate the legal basis for the use of force. He cites Turkey's reference to their right to intervene in northern Iraq, the fact that it was not possible to impute the PKK's actions to

Colombia: Although not reported to the Security Council, Colombian forces crossed into Ecuador to attack *Fuerzas Armadas Revolucionarias de Colombia* (FARC) guerrillas in 2008. The incursion was condemned by the Organization of American States, which stated that "the territory of a State is inviolable" and may not be subject to force by another State on any grounds.[72] Despite Colombia subsequently apologizing to Ecuador for its actions, this has been cited[73] as another example of relevant State practice.

United States: The 2011 killing of Osama bin Laden is an oft-cited example of the United States' reliance on the unwilling or unable doctrine.[74] It follows President Obama's 2008 promise that the United States should act if it had "actionable intelligence against bin Laden or other key al-Qaida officials . . . and Pakistan is unwilling or unable to strike against them."[75] Pakistan criticized the actions of the United States, arguing it violated their sovereignty and represented an "unauthorized unilateral action."[76]

Operations against ISIL in Syria: On September 20, 2014, Iraq referenced the safe haven that ISIL had established outside its borders and informed the Security Council that it had requested that the United States "lead international efforts to strike ISIL sites and military strongholds, with our express consent."[77] In response, on September 23, 2014, the United States in-

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Iraq, and that Iraq was aware of the PKK's activities and failed to act with due diligence to prevent them. Ruys specifically cites the response of the Dutch Foreign Minister who, on March 3, 2008, stated that Turkey could invoke the right to self-defense.

72. *See* Organization of American States [OAS] Commission, *Report of the OAS Commission that Visited Ecuador and Colombia*, OEA/Ser.F/II.25 RC.25/doc.7/08 (Mar. 16, 2008).

73. *See* Panel on the Use of Force Against Non-State Actors, *2018 American Society of International Law Annual Meeting*, YOUTUBE (Apr. 15, 2018), https://www.youtube.com/watch?v=fi66g4Jg0pA [hereinafter *2018 ASIL Meeting*] (comments by Katrina Cooper at 6:40); Chachko & Deeks, *supra* note 16 (albeit described as "ambiguous" State practice).

74. *See, e.g.*, Deeks, *supra* note 12; Charlie Dunlap, *Yes, the Raid that Killed Osama Bin Laden was Lawful*, LAWFIRE (Jan. 31, 2019), https://sites.duke.edu/lawfire/2019/01/31/yes-the-raid-that-killed-osama-bin-laden-was-lawful/.

75. *See* Deeks, *supra* note 12, at 485 (quoting presidential candidate Obama during a debate).

76. Owen Bowcott, *Osama bin Laden Death: Pakistan Says US May Have Breached Sovereignty*, THE GUARDIAN (May 5, 2011), https://www.theguardian.com/world/2011/may/05/osama-bin-laden-pakistan-us-sovereignty.

77. Permanent Rep. of Iraq to the U.N., Letter dated Sept. 20, 2014 from the Permanent Rep. of Iraq to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2014/691 annex, para. 5, (Sept. 20, 2014).

formed the Security Council that it had "initiated necessary and proportionate military actions in Syria in order to eliminate the ongoing ISIL threat to Iraq."[78] It explicitly referenced Article 51 and the need for States to be able to defend themselves 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." The United States had not previously sought Syria's consent.[79] In turn, Syria referenced the support being provided by Russia in response to a request by the Government of Syria as being "fully consistent with international law." It informed the Security Council that despite its repeated calls that the international community "cooperate and coordinate with it . . . . some States have perverted the substance of Article 51 of the Charter of the United Nations in order to violate the sovereignty of Syria."[80] Similarly, Russia criticized[81] the stated intention to strike ISIL positions in Syria without the cooperation of the Government of Syria, stating that it would not only be a "gross violation of the fundamental norms of international law, but could also have destructive practical consequences, including for the humanitarian situation in Syria."[82]

78. Permanent Rep. of United States of America to the U.N., Letter dated Sept. 23, 2014 from the Permanent Rep. of the United States of America to the United Nations addressed to the Secretary-General, para. 2, U.N. Doc. S/2014/695 (Sept. 23, 2014).

79. Scharf, *supra* note 21, at 9.

80. Permanent Rep. of the Syrian Arab Republic to the U.N., Identical letters dated Oct. 14, 2015 from the Permanent Rep. of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, paras. 2, 3, U.N. Doc. A/70/429-S/2015/789 (Oct. 14, 2015).

81. In light of the clarity with which Russia articulated their support for and reliance on the doctrine, and the likely political basis for their criticism of the actions of the United States, one could contend that this does not amount to inconsistent internal State practice.

82. U.N. SCOR, 69th Sess., 7271st mtg., at 19, U.N. Doc. S/PV.7271 (Sept. 19, 2014).

The actions of other States are set out below:

State	**Date/Action**	**Detail**
Saudi Arabia, UAE, Jordan, Bahrain	Sept. 2014	Joined the United States in Operation Inherent Resolve in Syria. No legal justification offered for use of force; no Article 51 letter(s) submitted to the Security Council.[83]
Netherlands	Sept. 24, 2014[84]	The Dutch Ministry of Foreign Affairs and Ministry of Defence informed the House of Representatives of the decision to conduct airstrikes against ISIL in Iraq.
UK	Nov. 25, 2014 U.N. Doc. S/2014/851	Cited the taking of measures in support of the collective self-defense of Iraq and of the international efforts in Syria "as necessary and proportionate measures." Such verbal State practice could be viewed as implicit acceptance of the unwilling or unable doctrine, notwithstanding the fact that, at that stage, attacks were limited to Iraqi territory.
Canada	Mar. 31, 2015 U.N. Doc. S/2015/221	"States must be able to act in self-defence when the Government of the State where the threat is located is unwilling or unable to prevent attacks emanating from its territory."
Turkey	July 24, 2015 U.N. Doc. S/2015/563	"It is apparent that the regime in Syria is neither capable nor willing to prevent these threats from its territory." (Cited individual self-defense due to threats imperiling Turkey.)

83. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 241 (4th ed. 2018).

84. *Artikel 100-brief deelneming aan international strijd Tegan ISIS* [*Article 100 Letter Participation in the International Fight Against ISIS*], MINISTERIE VAN BUITENLANSE ZAKEN [NETHERLANDS, MINISTRY OF FOREIGN AFFAIRS] (Sept. 24, 2014) (Neth.), https://open.overheid.nl/documenten/ronl-archief-17a47169-7b34-4d74-b516-0f569e62804d/pdf.

France	Aug. 9, 2015 U.N. Doc. S/2015/745	Referenced the request for assistance by Iraq, Security Council resolutions describing ISIL's terrorist acts as a threat to international peace and security, and stated, "[i]n accordance with Article 51 of the Charter of the United Nations, France has taken actions involving the participation of military aircraft in response to attacks carried out by ISIL from the territory of the Syrian Arab Republic." It appears that strikes were, at that stage, limited to Iraqi territory.
UK	July 9, 2015 U.N. Doc. S/2015/688	In accordance with Article 51, notified the Security Council that the UK conducted a precision airstrike against an ISIL vehicle in Syria. Traveling inside Syria was a target planning an attack on the UK. Necessary and proportionate act of self-defense.
Australia	Sept. 9, 2015 U.N. Doc. S/2015/693	Referenced the undertaking of "necessary and proportionate military operations against ISIL in Syria . . . not directed against Syria or the Syrian people." "States must be able to act in self-defence when the Government of the State where the threat is located is unwilling or unable to prevent attacks originating from its territory."

On November 20, 2015, following further attacks by ISIL,[85] the Security Council unanimously adopted Resolution 2249. The Security Council determined ISIL to be "a global and unprecedented threat to international peace and security" and called upon member States to "take all necessary measures, in compliance with international law . . . on the territory under

85. The October 31, 2015, bombing of a Russian airliner and November 13, 2015, attack at a rock concert in Paris.

the control of ISIL also known as Da'esh, in Syria and Iraq . . . and to eradicate the safe haven they have established."[86]

A number of States (UK,[87] Germany,[88] Denmark,[89] Netherlands,[90] Norway,[91] and Belgium[92]) referenced Resolution 2249 in their subsequent communications to the Security Council. The fact that some of these States only participated in the campaign against ISIL on Syrian territory after the adoption of Resolution 2249 has led to questions about whether their actions truly constitute State practice indicative of invocation of the unwilling or unable doctrine, particularly in the absence of direct reference to the doctrine in some of the Article 51 letters.[93] One could counter such arguments with the observation that Resolution 2249, which does not mention Article 42 or Chapter VII of the UN Charter, does not provide a new

86. S.C. Res. 2249 (Nov. 20, 2015).

87. Permanent Rep. of the United Kingdom of Great Britain and Northern Island to the U.N., Letter dated Dec. 3, 2015 from the Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/928 (Dec. 3, 2015).

88. Permanent Rep. of Germany to the U.N., Letter dated Dec. 10, 2015 from the Permanent Rep. of Germany to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/946 (Dec. 10, 2015) (Germany referencing ISIL's occupation of parts of Syrian territory, over which the Government does not "exercise effective control"; the fact that Resolution 2249 had confirmed ISIL constituted a threat to international peace and security; and that ISIL continued to carry out attacks and that actions (against ISIL, not Syria) are justified under Article 51 even without the consent of the Syrian Government).

89. Permanent Rep. of Denmark to the U.N., Letter dated Jan. 11, 2016 from the Permanent Rep. of Denmark to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2016/34 (Jan. 11, 2016).

90. Permanent Rep. of the Netherlands to the U.N., Letter dated Feb. 10, 2016 from the Permanent Rep. of the Netherlands to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2016/132 (Feb. 10, 2016) (confirming that measures were being taken against ISIL/Da'esh in accordance with Article 51 of the UN Charter).

91. Permanent Rep. of Norway to the U.N., Letter dated June 3, 2016 from the Permanent Rep. of Norway to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2016/513 (June 3, 2016) (stating that measures taken were directed against ISIL, not Syria).

92. Permanent Rep. of Belgium to the U.N., Letter dated June 7, 2016 from the Permanent Rep. of Belgium to the United Nations addressed to the President of the Security Council, para. 3, U.N. Doc. S/2016/523 (referencing the Government of Syria's lack of "effective control" over parts of its territory).

93. *See 2018 ASIL Meeting*, *supra* note 73 (comments by Monica Hakimi); GRAY, *supra* note 83, at 239 (drawing the distinction between the intervention in Iraq and Syria).

stand-alone legal basis or authorization for the use of force in Syria[94] and by pointing out that States are not required to articulate the reasoning for their actions in the Article 51 letters; an absence of detail cannot, therefore, be used to imply a lack of support for the doctrine. Absent Syria's consent and Security Council authorization, the question would have to be asked what the practice is evidence of if not the unwilling or unable doctrine. Additionally, it is possible to look to *opinio juris* to ascertain what counts as State practice.[95] In this regard, statements by the UK Prime Minister[96] and Attorney General[97] made clear their view that (absent Resolution 2249), as recognized by Article 51, with the ISIL campaign having reached the level of an armed attack and with the Assad regime being unwilling or unable, the use of force on Syrian territory was lawful. Accordingly, the UK State practice does constitute relevant practice. It also appears that the views of the Netherlands developed such that actions post-2016 would constitute

94. Scharf, *supra* note 21, at 51. The fact that Resolution 2249 does not use the "acting under Chapter VII" formula, does not "authorize" or "decide" that "all necessary measures" should be taken, and calls for all such measures to be "in compliance with international law, in particular the United Nations Charter" has been said to neither add to, nor subtract from, States' existing authority. *See* Dapo Akande & Marko Milanovic, *The Constructive Ambiguity of the Security Council's ISIS Resolution*, EJIL:TALK! (Nov. 21, 2015), https://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/.

95. *See generally* INT'L LAW ASS'N, FINAL REP. OF THE COMM. ON FORMATION OF CUSTOMARY (GENERAL) INT'L LAW, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW (2000) [hereinafter ILA CUSTOMARY INTERNATIONAL LAW REPORT]. While it has traditionally been held that both State practice and *opinio juris* are required in the formation of customary international law, the "alleged necessity" of the subjective element, i.e., the *opinio juris*, was explored by the committee, and is discussed in their *Final Report*. *See id.* at 7. The committee concluded that the main function of the subjective element during the formation of a rule of customary international law was to indicate "what practice counts . . . or does not count." *Id.* at 10.

96. Prime Minister Cameron discussed the issue of the airstrikes in Syria, explaining that it was his "first responsibility as Prime Minister . . . to keep the British people safe" and that there "is a solid basis of evidence on which to conclude . . . that there is a direct link between the presence and activities of ISIL in Syria and its ongoing attack on Iraq, and . . . that the Assad regime is unwilling and/or unable to take action necessary to prevent ISIL's continuing attack on Iraq, or indeed attacks on us." *See* David Cameron, UK Prime Minister, *Oral Answers to Questions. Syria: Legality of Airstrikes*, HC Deb (Nov. 26, 2015) (602) col. 1489, https://publications.parliament.uk/pa/cm201516/cmhansrd/cm151126/debtext/151126-0001.htm#15112625000002.

97. Jeremy Wright, UK Att'y Gen., *Remarks During the Debate on Syria: Legality of Airstrikes in the UK Parliament*, HC Deb (Nov. 26, 2015) (602), https://hansard.parliament.uk/Commons/2015-11-26/debates/15112625000012/SyriaLegalityOfAirstrikes.

relevant State practice,[98] as would those of Denmark sometime around 2018.[99] Finally, as Corten, Brunnée, and Toope concede, notwithstanding the reference to Resolution 2249, the content of the Article 51 letters themselves indicates that the State practice of Germany and Belgium comprises invocation of, at the very least, a narrow form of the doctrine.

Although Qatar did not file an Article 51 letter with the UN, and while not otherwise detailed as partaking in coalition airstrikes,[100] the nature of the supportive role that Qatar has played in Operation Inherent Resolve, providing a base of operations, could reasonably be viewed as relevant State practice.

Of the States participating in the coalition campaign, one could conclude that it is really only France's State practice that remains ambiguous. Whereas they did partake in airstrikes on Syrian territory "not entirely controlled by the Syrian government,"[101] this may have been an exception on the basis of Da'esh/ISIL being a quasi-State. France may not, in fact, support the doctrine[102] or may only do so in exceptionally narrow circumstances.

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98 *See* Chachko & Deeks, *supra* note 16 (referencing the June 26, 2015, Dutch Foreign Minister's letter to Parliament, stating that it is "now sufficiently established that there are continuous armed attacks from Syria against Iraq"; that the Syrian authorities are incapable of stopping the attacks; and that action is being taken in collective self-defense pursuant to the rights enshrined within Article 51).

99. *See 2018 ASIL Meeting*, *supra* note 71 (comments by Asif Amin); discussion *infra* Part IV; *infra* notes 110–16 (where it is implied that at the time of their Article 51 letter the relevant *opinio juris* was not held, however, that has developed with time, making later actions in Syria relevant State practice).

100. For example, Qatar's support for operations is not part of the detailed strike information released by the Combined Joint Task Force that includes a list of the coalition nations that conducted strikes in Syria and Iraq. *See* Combined Joint Task Force, Operation Inherent Resolve, Press Release # 20161202-01 (Dec. 2, 2016), https://www.inherentresolve.mil/Portals/14/Documents/Strike%20Releases/2016/12December/20161202%20Strike%20Release%20FINAL.pdf?ver=2017-01-13-131031-623 (last visited Mar. 1, 2024).

101. *See France May Launch Strikes in Syria "In Self-defence": Fabius*, RADIO FRANCE INTERNATIONALE (Sept. 11, 2015), https://www.rfi.fr/en/americas/20150911-france-may-launch-strikes-syria-self-defence-fabius.

102. *See* Press Release, Security Council, Security Council "Unequivocally" Condemns ISIL Terrorist Attacks, Unanimously Adopting Text that Determines Extremist Group Poses "Unprecedented" Threat, U.N. Press Release SC/12132 (Nov. 20, 2015) (statement of the French Representative). *See also* Michael Schmitt, *France's Major Statement on International Law and Cyber: An Assessment,* JUST SECURITY (Sept. 16, 2019), https://www.justsecurity.org/66194/frances-major-statement-on-international-law-and-cyber-an-assessment/

Post-2015, Iran, Turkey, and the United States[103] have all continued to use force in self-defense in the exercise of the implicit and/or explicit exercise of the unwilling or unable doctrine.

D. Summary

Starting with the actions of the United States[104] and the United Kingdom in the nineteenth century, the above review demonstrates an increasing reliance on the unwilling or unable doctrine by a growing number of States from across the political and geographic spectrum. Thirteen States (United States, United Kingdom, Israel, Turkey, Russia, Canada, Australia, Netherlands, Denmark, Norway, Germany, Belgium, and Qatar) have conducted relevant State practice with the Netherlands and Germany, appearing to restrict their actions to the use of force against ISIL (i.e., the NSA) and not the territorial State. Just as Germany and Belgium made specific reference to the territorial State's lack of effective control over its territory, a similar reference had been made by Iran in respect of its use of force in Iraq. One could reasonably conclude that Iran's actions also constitute relevant State practice, bringing the total to fourteen.

In addition, in the absence of another legal basis for their actions, Saudi Arabia, UAE, Jordan, and Bahrain participated in coalition operations in Syria and could reasonably be viewed as having implicitly endorsed the doctrine in the circumstances of their early support to U.S. operations.

The State practice of Colombia, South Africa, and Rwanda could also arguably be viewed as an invocation of the doctrine. However, whether Colombia's subsequent apology to Ecuador was a political decision or an example of inconsistent internal practice is not clear.

(analysis of September 2019 statement by France regarding international law applicable in cyberspace).

103. *See* Permanent Rep. of the Islamic Republic of Iran to U.N., Letter dated Oct. 3, 2018 from the Permanent Rep. of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2018/891 (Oct. 3, 2018); Permanent Rep. of Turkey to the U.N., Letter dated Nov. 13, 2018 from the Permanent Rep. of Turkey to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2018/1022 (Nov. 13, 2018); Permanent Rep. of the United States of America to the U.N., Letter dated Aug. 26, 2022 from the Permanent Rep. of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2022/647 (Aug. 26, 2022).

104. Noting that early invocations by the United States referenced an "unwilling or unable" State in the context of neutrality.

Whether there has been "significant dissent" is hard to answer definitively. Relevant physical State practice is binary—either a State acts in self-defense against an NSA in the territory of another State without that State's consent, or it does not, in which case its "practice" is dissenting. Perhaps somewhat tellingly, there are no obvious examples of situations where a State was faced with an actual or imminent armed attack by an NSA, the preconditions for self-defense were met, the territorial State took no, or insufficient, action to address the threat, and yet the victim State chose not to act.

Dissenting State practice in the form of verbal acts (i.e., condemnation of invocation of the doctrine) are considerably easier for a State to make (there being no balancing of the State's own security and/or sovereignty and the sovereign rights of another State) but are harder to analyze, that is, to determine whether they are "relevant." Where instances of explicit or implicit invocation of the doctrine have been criticized, it is difficult to ascertain whether such criticisms are politically motivated, articulated out of a concern for wider impact on peace and security, or are true instances of dissenting State practice. Criticisms of the frequent use of force by Israel are such examples, as is the criticism by Russia of the use of force against ISIL in Syria when Russia had in the past used the unwilling or unable doctrine itself to justify its own actions. Even with regard to the States identified by Elena Chachko and Ashley Deeks as "objectors," namely Syria, Venezuela, Ecuador, Cuba, Brazil, and Mexico, some could be said to be ambiguous.[105] Further, Syria's actions (and possibly also Ecuador's) might be explained by the fact that force has been used on their territory without their consent (and, as Corten noted, it took Syria a year to formally object to U.S. airstrikes, perhaps also causing less weight to be attached to their objections).

IV. OPINIO JURIS

Set out below is an overview of writings and statements that provide an indication of the views of States with respect to their legal right to exercise the unwilling or unable doctrine.

105. Chachko & Deeks, *supra* note 16. Ecuador's objection related to the application of the doctrine in Syria, rather than a rejection of the doctrine per se. The same could be said of Venezuela and Cuba, who were both said to reiterate commitment to Syria's sovereignty and territorial integrity and, on that basis, were identified as "objectors."

A. The Evidence

Uses of force in self-defense by the United States from Amelia Island until the early stages of the Vietnam War focused upon the State's right to act on a neutral State's territory to prevent or halt an attack when the neutral State was unable or unwilling to do so. It would be hard to argue that the necessary *opinio juris* in respect of the doctrine per se existed during these times, at least up until the early years of the Vietnam War.[106] However, post-9/11, the United States has become increasingly vocal in its articulation of the legality of the doctrine. For example, in 2012, Attorney General Eric Holder stated that:

> Our government has both a responsibility and a right to protect this nation and its people from . . . threats. This does not mean that we can use military force whenever or wherever we want. International legal principles, including respect for another nation's sovereignty, constrain our ability to act unilaterally. But the use of force in foreign territory would be consistent with these international legal principles if conducted . . . after a determination that the nation is unable or unwilling to deal effectively with a threat.[107]

The U.S. position has been reiterated on many occasions, including by the State Department's Legal Adviser, Brian Egan, who said that whereas the "precise wording of the justification for the exercise of self-defense against non-State actors may have varied, the acceptance of this right has remained the same."[108] Notably, he also said the U.S. view is that once

106. Over the course of the war, with changes in legal advisors and administrations, the justification for incursions into Cambodian territory moved from one of "hot pursuit," to justification on the basis that Cambodia was unwilling or unable to defend its neutral status. *See* Brian Joseph Martin Cuddy, Wider War: American Force in Vietnam, International Law, and the Transformation of Armed Conflict, 1961–1977 (Aug. 2016) (Ph.D. dissertation, Cornell University), https://ecommons.cornell.edu/bitstream/handle/1813/45131/bjc249.pdf.

107. Eric Holder, U.S. Att'y Gen., Address at Northwestern University School of Law, U.S. DEP'T OF JUSTICE (Mar. 5, 2012), https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law.

108. Brian Egan, *International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations*, 92 INTERNATIONAL LAW STUDIES 235, 239 (2016). *See also* Stephen Preston, Gen. Counsel for the U.S. Dept. of Def., The Legal Framework for the United States' Use of Military Force Since 9/11, Address Before Annual Meeting of the American Society of International Law (Apr. 10, 2015), https://www.defense.gov/News/Speeches/Speech/Article/606662/.

there has been a resort to force in self-defense against a particular armed group, "it is not necessary as a matter of international law to reassess whether an armed attack is imminent prior to every subsequent action taken against the group, provided that hostilities have not ended."[109]

As detailed above, relevant *opinio juris* was articulated by the UK with respect to the airstrikes on Syria. The Attorney General reiterated this view in 2017 when referencing the ability of international law to adapt to "modern developments and new realities" and noting that the "phenomenon of international terrorism . . . has caused the international community to apply the law to new circumstances." Citing an example, he referred to "many" States holding the view (post-9/11) that the inherent right of self-defense includes the right to use force in response to actual and imminent armed attacks by NSAs and that a "number of States have also confirmed their view that self-defence is available as a legal basis where the state from whose territory the actual or imminent attack emanates is unable or unwilling to prevent the attack or is not in effective control of the relevant part of its territory."[110]

During the 2018 American Society of International Law conference,[111] representatives of Australia, the UK, Denmark, and Brazil debated the use of force against NSAs. During the meeting, Ambassador Katrina Cooper of Australia stated:

> Australia's position is quite clear and quite well articulated: our view and our interpretation of Article 51 of the UN Charter is that the inherent right of self-defence applies to armed attack from both State and non-State actors. We think that Resolutions 1368 and 1373 make that quite clear too.
>
> . . .
>
> In terms of non-State actors, we do subscribe to the unwilling or unable approach.[112]

Although somewhat less emphatic, the Head of the Danish Ministry of Defence's International Law Department, Asif Amin, explained that Denmark relied on Article 51 when assisting coalition forces in Syria. Using the Danish Constitution as a comparator, he described the "beauty of international

109. Egan, *supra* note 108, at 239.
110. Wright, *supra* note 10.
111. *2018 ASIL Meeting*, *supra* note 73.
112. *Id.* (comments by Katrina Cooper at 7:00).

law" as its ability to develop to face new threats and realities while acknowledging that exceptions have to be interpreted narrowly.[113] Acknowledging that Denmark did not mention unwilling or unable in their Article 51 letter, Mr. Amin said that they have had "developments in [their] legal interpretation" and would now state "unwilling or unable in Syria."[114] The UK reiterated its view that its actions in Syria since 2014 were lawful. It stated that the prohibition on the use of force is a fundamental rule of international law with limited exceptions, the right of self-defense recognized as an inherent right in Article 51, being one of them.[115] It also stated that where dealing with an NSA through the law enforcement paradigm is not possible, force can be used in individual or collective self-defense against NSAs and those that harbor them if necessary to avert further attacks.[116]

In contrast, Patrick Luna, representative of the Permanent Mission of Brazil to the UN, explained that not only does Brazil reject the unwilling or unable doctrine but, starting with the UN Charter and looking to the *travaux préparatoires* and ICJ jurisprudence, it is of the view that self-defense can only be in response to an armed attack attributed to a State.[117] Arguing that silence could not be construed as acquiescence, Brazil asserted that only a "numerically small number" of States had submitted Article 51 letters in relation to Syria, whereas the non-aligned movement, consisting of more than 121 States, had argued that Article 51 is "not to be rewritten."[118] Aside from the legal basis for the rejection of the doctrine, Brazil had three concerns about the "stretch" to meet today's challenges: the "uncertainty" associated with a "shift from terrorism to NSA," which could include transnational organized crime, temporal challenges associated with the "operationalization" of necessity and the risk that there would be an erosion of the multilateral security system.[119] Brazil posed rhetorical questions: whether Syria could be said to be "unwilling" when it had invited Russia to fight ISIL and whether Iraq could, in fact, be deemed "unable" on the basis of its request for assistance.[120]

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113. *Id.* (comments by Asif Amin, stating that "the King can send out troops," but it is interpreted that the Parliament, and not the King, needs to approve the sending of troops, at 40:40).

114. *Id.* (at 53:20).

115. *Id.* (comments by Paul McKell at 12:25).

116. *Id.* (at 14:30).

117. *Id.* (comments by Patrick Luna at 23:15).

118. *Id.*

119. *Id.* (at 30:20).

120. *Id.* (at 31:05).

In 2021, Mexico convened an Arria-formula meeting of the Security Council, during which States were specifically invited to provide their views on the unwilling or unable doctrine. At the outset, Mexican Ambassador de La Fuente clearly articulated the Mexican position, which was one of concern about the recent "abuse of Article 51" and rejection of the doctrine. The Ambassador stated that there are just two exceptions to the prohibition on the use of force: Chapter VII powers and self-defense, and that:

> In recent years, however, some States have invoked the right of self-defense to justify the use of force in the territory of another State without its consent, allegedly in response to armed attacks by non-State actors. Sometimes, self-defense has been invoked even before an actual attack has occurred. This has been done under the premise that either a State is unwilling and unable to take action or that it is not exercising effective control over its territory. Mexico has expressed its concern regarding this practice for several years. . . . From a substantive point of view, Mexico rejects the propositions of invoking self-defense on the premise of the so-called "unwilling and unable doctrine" or on the lack of effective control as being legally sound. These caveats are not found within Article 51 and go beyond the scope of this provision which, because of its nature and aim, was carefully and purposely drafted in a narrow way. They also allow for a dangerous and unilateral margin of interpretation, which can have negative unforeseen consequences in different contexts.[121]

In addition to Mexico, thirty-three member States took part in the debate; the views articulated can be summarized as follows:[122]Australia, Austria, the United States, the Netherlands, and Turkey specifically referenced the right of States to use force in self-defense when a territorial State is unwilling or unable to prevent attacks originating from its territory. Whereas Australia, the Netherlands, and the United States were quite straightforward, Turkey was more convoluted in its messaging.[123] Austria could be

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121. Juan Ramón de la Fuente, Permanent Rep. of Mexico to the U.N., Comments addressed to Arria Formula on Upholding the Collective Security System of the UN Charter, YOUTUBE (Feb. 24, 2021), https://www.youtube.com/watch?v=jo67nC2bhSs&list=WL&index=17 (at 21:00).

122. *See* Arria Formula Summary, *supra* note 5, at annexes. *See also* Adil Ahmad Haque, *Self-Defence Against Non-State Actors: All Over The Map*, JUST SECURITY (Mar. 24, 2021), https://www.justsecurity.org/75487/self-defense-against-non-state-actors-all-over-the-map/.

123. Turkey observed that Article 51 places no restrictions on authorship of an attack and noted that terrorist organizations ("without consent or support of a territorial State")

viewed as setting a high bar on the unable element of the doctrine when it described it as being "a consequence of the complete absence of State authority *and* effective control over the respective territory, to prevent or suppress such operations."[124]

In the context in which States were invited to provide their views, Azerbaijan, Belgium, Denmark, Estonia, Norway, Qatar, and the UK can also reasonably be viewed as having endorsed the unwilling or unable doctrine.[125] The fact that we have seen that the UK, Denmark, and Belgium support the doctrine adds weight to this interpretation.

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are increasingly authors of armed attacks. Reference was made to a State's sovereign obligations and the frequent instances "in which States are not capable or willing to prevent terrorist organizations from controlling parts of their territories and using them as safe havens to carry out terror attacks." *See* Arria Formula Summary, *supra* note 5, at 79.

124. Austria referenced the "prevailing view and practice" that acts of NSAs can amount to armed attacks where there is a transboundary element and the other State is "harbouring or substantially supporting the operations of the non-state actor on its territory, or is unable, as a consequence of the complete absence of State authority and effective control over the respective territory, to prevent or suppress such operations." Arguably the "harbouring" does not require anything other than passiveness/inaction, but the reference to "absence of authority *and* effective control" places a high bar on the unable standard. *See id.* at 14.

125. Azerbaijan stated that with Article 51 being silent on the issue of authorship, by "implication, an armed attack can . . . be carried out by non-State actors, including terrorist groups. It is for every State to judge for itself, in the first instance, whether a case of *necessity* in self-defence has arisen." *Id.* at 16 (emphasis added). Belgium stated that, since 2001 and the adoption of Security Council Resolutions 1368 and 1373, "the practice is that States can have recourse to self-defense in case of attacks perpetrated by non-State actors—including terrorist groups—that are located on the territory of a sovereign State." *Id.* at 19. Denmark referenced their Article 51 letter of January 11, 2016, in which they notified the UN Security Council that they were taking "necessary and proportionate measures against ISIL in Syria. . . . Said practice was in agreement with—and has later been confirmed by—several delegations." *Id.* at 26. Estonia stated that the inherent right of self-defense exists against NSAs operating in the territory of another State, that denying such a right would "place the victim State in an impossible position," but that such uses of self-defense must remain exceptional and must correspond to the principles of necessity and proportionality. *Id.* at 32. Norway confirmed their view that there is a "basis in international law to a limited right to use force in self-defence against [attacks by NSAs], in certain exceptional circumstances," such as that notified in their Article 51 letter of June 3, 2016, and that such action should be taken as a last resort. *Id.* at 52. Qatar referenced situations that "necessitate" the use of force in the "application of the inherent and legitimate right to self-defense . . . to counter the serious threat posed by terrorist acts" and noted that "many Member States, including the State of Qatar" had taken part in collective action against "UN designated terrorist groups." *Id.* at 60. The UK stated that it has long been the view of the UK and many States that the right to self-defense can be triggered by

The position of a number of States is ambiguous. India clearly stated that the right of self-defense applies to attacks by NSAs and acknowledged that NSAs "often attack states from remote locations within . . . host states, using the sovereignty of that host state as a smokescreen."[126] It then said that force can be used in self-defense if: "i. The non-state actor has repeatedly undertaken armed attacks against the State. ii. The host State is unwilling to address the threat posed by the non-state actor. iii. The host State is actively supporting and sponsoring the attack by the non-state actor."[127] It is not clear whether all of the conditions have to be met or whether the conditions can be read separately. If the latter, then item ii would indicate support for the doctrine, whereas if they have to be read conjunctively, India would appear to be requiring a degree of State responsibility or attribution.[128]

The French position is even more ambiguous—acknowledging the fact that some NSAs, particularly terrorist groups, have the means to commit armed attacks—it referenced the fact it had joined the coalition of more than seventy States in the fight against Da'esh on the basis of collective self-defense in 2014, and in 2015 with the additional basis of individual self-defense.[129] Saint Vincent and the Grenadines acknowledged that there are "some contexts within which states may be compelled to use force to . . . dispel non-state armed groups, and defend their sovereignty and territorial integrity," however, it is by no means clear that this could be equated to support of the unwilling or unable doctrine.[130]

Russia's potentially conflicting State practice is reflected in the views expressed during the meeting: it differentiates between a State whose government "directs and supports" attacks from a government that "uses all means available . . . and is open for cooperation with other States."[131] In the latter case, Russia asserts that the consent of the government must be requested. What would happen in the event that the territorial State refused to grant consent or placed conditions on its consent that were unacceptable

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ongoing or imminent armed attacks by NSAs and referenced that the "legal basis" of the coalition's military operations in Syria ("which has the support, whether military or political, of some 60 States") is the collective self-defense of Iraq in accordance with Article 51. *Id.* at 62.

126. *Id.* at 39.

127. *Id.*

128. *Id.*

129. *Id.* at 35.

130. *Id.* at 75.

131. *Id.* at 66–67.

to the victim State is unclear. Russia's statement could be deliberately ambiguous given their clear invocation of the doctrine in Georgia, and its criticism of use of the doctrine by others in Syria.

Tunisia appeared to require that "States hosting non-state actors, in particular terrorist groups, should be given the opportunity in the first place to halt and prevent the attacks" and indicated that territorial consent would be required.[132] Similarly, Syria referenced the need to obtain the consent of the territorial State. It thus rejected, at the very least, the United States' and coalition's expansive practice and *opinio juris* that consent is not necessary.[133]

The following States rejected the doctrine: Brazil, Mexico, Sri Lanka, and China.[134] Implicitly, Vietnam's reference to "[a]ttempts to reinterpret or abuse the UN Charter"[135] also suggests a rejection of the doctrine. Brazil not only rejected the doctrine but was of the view that "self-defence is only triggered by an armed attack undertook by or somehow attributable to a State."[136] Mexico rejected the proposition of invoking self-defense on the premise of the "so-called 'unwilling or unable doctrine' or on the lack of effective control as being legally sound," asserting that these "caveats" are not found within Article 51, and they allow for a "dangerous and unilateral margin of interpretation."[137] Sri Lanka referenced the ICJ's decisions which "made it clear that attacks . . . that give rise to the right of self-defence must come from States and not from non-State actors."[138]

Finally, a number of States either failed to address the matter at all (Armenia, Finland, Georgia, Ireland, and Ukraine[139]) or made comments from which it is not possible to interpret their legal position (Ecuador, Pe-

132. *See id.* at 77–78 (If consent were not given, in light of their experiences with Israel, for political reasons it may be that Tunisia would argue that the doctrine may not be invoked). The suggestion that States be given the opportunity to halt and prevent attacks appears to accord with the detail that Deeks sought to add to the doctrine.

133. *Id.* at 70–71.

134. *See id.* at 20, 50, 72, 23 (respectively). China stated that consent of the territorial State was required for a use of force in self-defense against an NSA in the territory of another State.

135. *Id.* at 84.

136. *Id.* at 20.

137. *Id.* at 50.

138. Mohan Pieris, Permanent Rep. of Sri Lanka to the U.N., Comments addressed to Arria Formula on Upholding the Collective Security System of the UN Charter, YOUTUBE (Feb. 24, 2021), https://www.youtube.com/watch?v=jo67nC2bhSs&list=WL&index=17 (at 2:13:30).

139. Arria Formula Summary, *supra* note 5, at 10, 34, 37, 43, 81 (respectively).

ru, Iran, Kenya, and Liechtenstein[140]). One could reasonably contend that silence or ambiguity should not be construed as a dissenting opinion. This is particularly the case when a State simply asserts that, for example, it is committed "to the purposes and principles enshrined in the Charter of the United Nations" (as Kenya did).[141] To say otherwise is akin to arguing that those States that advocate in support of the doctrine do not similarly respect the Charter.

It is also worth turning to Chachko and Deeks' 2016 study, in which they reference the views of States that have not been discussed above. Specifically, the response of the Czech Republic confirmed its position that "state sovereignty should not serve as a protection of a State if such [a] state is unable or unwilling to exercise its sovereignty within its territory."[142] Additionally, the letter they reference from the German Federal Government to the Bundestag clearly references actions being taken in Syria due to the Syrian government being "unable and/or unwilling to stop ISIS attacks originating from its territory," clearly alluding to relevant *opinio juris*.[143]

As referenced above, the members of the non-aligned movement have collectively said that, as pronounced by the ICJ, Article 51 is restrictive and should not be re-interpreted—implicitly, but by no means definitively, indicating a rejection of the legality of the doctrine.[144]

Finally, Israel has clearly articulated their belief in their legal right to invoke the doctrine,[145] as did Canada within their Article 51 letter of March 31, 2015.[146]

B. Summary

It is clear that matters have progressed significantly since 2012 when Deeks was unable to find "the *opinio juris* aspect of custom."[147] Several States now

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140. *Id.* at 27, 56, 41, 45, 47 (respectively). For example, Peru stated that the use of force on the territory of another State must be exercised in accordance with the UN Charter and international law. *Id.* at 57. Iran stated that the "progressive erosion of the principle of the prohibition" of the use of force must be avoided. *Id.* at 42.

141. *Id.* at 46.

142. *See* Chachko & Deeks, *supra* note 16.

143. *Id.* (referencing a January 12, 2015, letter).

144. *See* Corten, *supra* note 34.

145. *See* U.N. SCOR, 2071st mtg., *supra* note 47; discussion *supra* Part III.

146. *See* Permanent Rep. of Canada to the U.N., Letter dated Mar. 31, 2015 from the Permanent Rep. of Canada to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/221 (Mar. 31, 2015).

believe that the doctrine provides the legal right to use force in self-defense; that is to say, they have an *opinio juris sive necessitatis*. These States include Austria, Australia, Azerbaijan, Belgium, Canada, the Czech Republic, Denmark, Estonia, Germany, Israel, the Netherlands, Norway, Turkey, Qatar, the United Kingdom, and the United States. Accordingly, of those States that have conducted relevant State practice, Australia, Belgium, Canada, Denmark, Germany, Israel, the Netherlands, Norway, Turkey, Qatar, the United Kingdom, and the United States have the accompanying *opinio juris*.

The views of several States (India, Saint Vincent and the Grenadines, Colombia, Rwanda, South Africa, Iran, and France) are ambiguous, despite the fact that some (Colombia, Rwanda, South Africa, Iran, and France) could be said to have conducted State practice that appears relevant, or at least to have relied on elements of the doctrine.

While observing the restrictive views of the non-aligned movement, one should note that Bahrain, Colombia, India, Jordan, Qatar, Rwanda, Saudi Arabia, South Africa, and the UAE are all members of the non-aligned movement whose State practice or *opinio juris* runs counter to the articulated view; undermining any argument that the non-aligned movement's views can be interpreted as a collective rejection of the doctrine.

Only a limited number of States have specifically articulated their objection to the legality of the doctrine (Brazil, Mexico, Sri Lanka, China, and, implicitly, Vietnam). Arguably, Syria could be included in this group while noting the time taken to protest against the coalition airstrikes. At a generic level, criticism of the doctrine stems from the violation of the territorial State's sovereignty. The most detailed articulations for the rejection of the unwilling or unable doctrine have been put forward by Brazil and Mexico. The concerns of both nations are two-fold: first, the assertion that Article 51 should be interpreted narrowly, that is, it cannot be invoked in response to an armed attack by an NSA unless attributable to a State (with Brazil citing ICJ jurisprudence in support of this assertion);[148] and, second, concern about the practical application of the doctrine, both generally speaking (for example in respect of the element of discretion that is left to the victim State), and specifically with regard to its invocation in Syria. The concerns in respect of the practical application, as we have seen, have been acknowledged by scholars on both sides of the debate.

147. Deeks, *supra* note 12, at 503 n.70.

148. *2018 ASIL Meeting*, *supra* note 73 (comments by Patrick Luna).

V. CONCLUSION

The aim of this article is to determine whether or not the unwilling or unable doctrine has reached customary international law status. Customary international law requires both widespread and consistent State practice and *opinio juris sive necessitatis*. Different States must not have engaged in substantially different conduct, and State practice must be extensive and representative. This does not require the majority of States to have engaged in the relevant practice so long as there is no significant dissent. Indeed, the International Law Commission suggested that the criterion is more qualitative than quantitative, with "most customs . . . [existing] . . . on the basis of practice by fewer than a dozen States."[149] Consistency and generality of practice, rather than duration, determine when a new rule of customary international law is created. However, new rules can crystallize over a brief period. If, during a rule's formulation stage, a State clearly and persistently objects, it may not be bound by the rule.

Criticism of the doctrine from a legal perspective focuses upon the violation of sovereignty associated with the use of force and the issue of attribution, specifically, the assertion that Article 51 should not be construed as permitting the use of force in self-defense against an NSA on the territory of another State in the absence of attribution to that territorial State. From a practical perspective, concern exists about the application of the doctrine—the freedom it gives the victim State to determine whether a territorial State is unwilling/unable, the suggestion that it could "stretch"[150] to incorporate transnational organized crime, and the potential that it could undermine the UN collective security system.

Insofar as the criticisms are concerned, it should be noted that advocates of the doctrine are not rejecting the collective security system as a whole and that support for or adoption of the doctrine does not provide victim States with absolute freedom—the preconditions for self-defense must still be met. As part of that analysis, as Deeks suggested, consent should first be sought from the territorial State; if provided, invocation of the doctrine is not necessary. The fact that a victim State may determine whether the use of force in self-defense is necessary and, if so, the degree of force necessary to end an attack or remove the threat of an imminent attack until such time as the Security Council has taken steps to restore in-

149. *See* Anthea E. Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation,* 95 AMERICAN JOURNAL OF INTERNATIONAL LAW 757, 768 (2001).

150. *See 2018 ASIL Meeting*, *supra* note 73 (comments by Patrick Luna).

ternational peace and security is no different than the right it has under a traditional or broad analysis of Article 51.

It is incontrovertible that divergent views exist as to whether Article 51 is restrictive and should not be reinterpreted, and the assertion that the jurisprudence of the ICJ supports this. Without rehearsing the schools of thought on this point, it is worth noting that, according to the general rules of treaty interpretation set out in the Vienna Convention on the Law of Treaties, subsequent practice in the application of a treaty shall be taken into account.[151] On this note, one cannot simply ignore the reaction of the international community as a whole to the terrorist attacks of 9/11 or the articulations of Judges Kooijmans, Higgins, and Simma[152]—indicating a development or new approach to self-defense post-9/11, observing that the text of Article 51 does not stipulate that self-defense is only available in response to actions attributable to States, and submitting that it would be unreasonable to deny a victim State the right to self-defense "merely because there is no attacker State."[153] Kooijmans's assertion that it would be unreasonable to deny a victim State the right to self-defense brings one neatly to what appears to be the central concern in relation to the doctrine, namely sovereignty and the notion of the sovereign equality of States. That the doctrine permits one State to violate the territory sovereignty of another State is, understandably, controversial. Arguably, however, the law permits it, and circumstances exist that may preclude the wrongfulness of the violation of sovereignty.[154]

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151. Vienna Convention on the Law of Treaties art. 31(3)(b), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

152. Whereas decisions of the ICJ would not constitute subsequent practice for the purposes of VCLT Article 31(3)(b), noting Mendelson's observation that third-party decision-makers can play an important role in declaring what has or has not become law. Maurice H. Mendelson, *The Formation of Customary International Law*, 272 RECUEIL DES COURS 155, 219 (1999). The significance of these views should not be overlooked. *See* Armed Activities, *supra* note 1, at 306 (separate opinion Kooijmans J.), 334 (separate opinion Simma J.); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 207 (July 9) (separate opinion Higgins J.).

153. Armed Activities, *supra* note 1 at 314, ¶ 30 (separate opinion Kooijmans J.).

154. The circumstances articulated within Articles 20–25 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts justify the non-performance of a legal obligation owed by one State to another. It is possible that a territorial State's failure to meet its due diligence obligation could justify the violation of sovereignty associated with the taking of countermeasures. *Report of the International Law Commission to the General Assembly*, 56 U.N. GAOR Supp. No. 10, arts. 20–25, U.N. Doc. A/56/10 (2001), *reprinted in* [2001] 2 YEARBOOK OF THE INTERNATIONAL LAW

Further, by denying a State the right of self-defense against an NSA when the territorial State is unwilling or unable, one is effectively prioritizing the territorial sovereignty of the host State over the inherent right of self-defense of the victim State. In so doing, one is ignoring the internal and domestic aspects of sovereignty, that is, the duty of the State to protect its citizens—a duty that is not merely an amorphous legal concept but an obligation that, noting the words of Prime Minister Cameron,[155] is keenly felt by those that represent States. Whereas the articulated reason or justification may have varied, from links to duties of neutral States, rights of "hot pursuit" or self-defense when a territorial State is unable or unwilling, State practice indicates that, over time, States will act in self-defense when they determine the need arises.

Returning to the formation of customary international law, the international community's reaction to 9/11 demonstrates significant support for the contention that force may be used in self-defense against an NSA in response to an armed attack not attributable to a State. The study of State practice and *opinio juris* relating to the unwilling or unable doctrine reveals that Australia, Belgium, Canada, Denmark, Germany, Israel, the Netherlands, Norway, Turkey, Qatar, the United Kingdom, and the United States have undertaken relevant State practice *and* hold the necessary *opinio juris*.[156] An additional number of States have invoked the right to self-defense in

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COMMISSION 31, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2). Additionally, analogous examples of a ceding of State sovereignty exist within the law of neutrality. *See* Deeks, *supra* note 12. Arguably, it also exists with respect to the responsibility to protect. *See, e.g.*, INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (Dec. 2001), https://www.globalr2p.org/resources/the-responsibility-to-protect-report-of-the-international-commission-on-intervention-and-state-sovereignty-2001/. The report provides guidance for States faced with human protection claims in other States (e.g., a situation such as Kosovo), rather than on policy of States faced with terrorist attacks within their own State (e.g., 9/11). However, while the report determined such situations to be "fundamentally different" (*id.* at VIII), primarily due to UN Charter, Article 51 providing "more explicit authority for a military response than in the case of intervention for human protection purposes" (*id.* at VIII), there are many useful parallels and views that can be drawn from the report, not least the fact that where a population is suffering "serious harm . . . and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect" (*id.* at XI).

155. Cameron, *supra* note 96.

156. Of these States, Israel and the United States could, as Brunnée and Toope imply, be considered "specially affected" States. On the issue of "specially affected" States, *see* ILA CUSTOMARY INTERNATIONAL LAW REPORT, *supra* note 95, at 26.

what could be construed to be examples of relevant State practice (Iran and Russia, with the latter having advocated clear support for the doctrine) or could be viewed as implicitly having conducted relevant State practice (Saudi Arabia, UAE, Jordan, and Bahrain). Yet more could also arguably be viewed as having invoked the doctrine (Colombia, South Africa, and Rwanda). Other States hold the *opinio juris* (Austria, Azerbaijan, Czech Republic, and Estonia) but may not[157] have invoked the doctrine in practice. The fact that some of these States may have articulated their support more clearly than others, or that some took more time than others before concluding that a State was unwilling or unable, should not lead one to conclude that the necessary *opinio juris* does not exist. The time taken and assessment of a State's willingness and/or inability is a matter for the State invoking the doctrine and could be influenced by, for example, access to, and the assessment of, available intelligence.

Noting that customary international law has been formed on the basis of the practice of fewer than a dozen States,[158] one could reasonably contend that State practice and *opinio juris* are sufficient to argue that the unwilling or unable doctrine is customary international law. However, before one can conclude that, it is necessary to return to the dissenting views. Here, as noted above, it is significant that there are no obvious examples of a State not invoking the doctrine when it could have. The fact that States (and scholars) have questioned the application of the doctrine, for example, by criticizing its invocation in Syria, is understandable (Syria is, after all, actively fighting ISIL and has enlisted the help of Russia to do so) but does not necessarily undermine the validity or existence of the doctrine per se; rather, it could inform the scope and detail of the doctrine as it develops. Unfortunately, just as the United States has sought to argue for a right to pre-emptive self-defense, it has effectively endeavored to broaden the temporal scope of the unwilling or unable doctrine when asserting that, so long as hostilities continue, it is not necessary to consider whether an armed attack is imminent prior to every action taken against an NSA after an initial resort to force.[159] Arguably, this approach does not accord with a strict reading of the preconditions to self-defense and certainly opens the application of the doctrine to criticism, feasibly explaining the reluctance by some States to offer more than ambiguous support to the doctrine. As to

157. No evidence of relevant State practice, for example a relevant Article 51 letter or other indication of the use of force, has been identified.

158. *See* Roberts, *supra* note 149.

159. *See* Egan, *supra* note 108.

Brazil and Mexico, ardent critics of the doctrine, it is quite possible that they could be deemed to be persistent objectors, meaning that they would not prevent the doctrine from developing but that they would not be bound by it. Assuming this means that neither country would be able to invoke the doctrine, it would be particularly interesting to observe what either country does in the event of a qualifying armed attack by an NSA on their own territory.

In summary, we have seen that law adapts to new realities, that the UN Charter can be interpreted to accommodate the unwilling or unable doctrine, that the doctrine need not undermine the collective security system, and that the jurisprudence of the ICJ is not as clear cut as it appears at first blush. Additionally, the cataloging of State practice and *opinio juris* reveals that it is reasonable to conclude that the unwilling or unable doctrine exists within customary international law. However, differing times of invocation of the doctrine by States, combined with its controversial application and efforts to broaden the scope of the doctrine, ensure that it remains contentious. This is likely to remain the case until either the occurrence of another significant terrorist event that unites the international community in the invocation of the doctrine or until it is consistently invoked in narrow and less controversial circumstances. While this may take some time, the desire and duty of States to protect themselves makes more widespread reliance upon the doctrine inevitable.