

Self-Defence Against Non-State Actors: Reconceptualising the Legality of the ‘Unwilling or Unable’ Test in Light of the Doctrine of Necessity in International Law.

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ABSTRACT

The ‘unwilling or unable’ test is a real-world challenge that has the potential to make a mockery of the cornerstone of modern international law in Article 2(4) of the UN Charter. The increasing prevalence of unattributable armed attacks by NSAs provides an opportunity for powerful victim States to expand the notion of the inherent right of self-defence through the ‘unwilling or unable’ test, without any real thorough basis to their reasoning. To complicate matters further, the dangers of State silence in the face of the unwilling or unable justification from primarily powerful Western States seeking to invoke self-defence, may end up playing into the hands of proponents of the ‘unwilling or unable’ test. This potentially contributes to ‘norm entrepreneurship’ and the shaping of international law in their favour through the expansion of the law of self-defence to incorporate the test itself. Despite the uncertainty surrounding the legality of the test, the fact remains that the legitimisation of predatory force against primarily weaker host States in the Global South by primarily powerful victim States in the Global North cannot continue and has to be addressed in order to avoid the abuse of the test in the name of self-defence. The principle of necessity provides this foundation and is the key to engaging States in a discourse that seeks to bring the ‘unwilling or unable’ test into greater compliance with the jus ad bellum regime. This paper refines Deeks’ test, using the notions of reasonableness and objectivity under the principle of necessity, and aims to contribute to the debate on the ‘unwilling or unable’ doctrine by clarifying the possible practical application of the test in order to strike as close a balance between the inherent right of self-defence on one hand, and State sovereignty and territorial integrity on the other.

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INTRODUCTION

Article 2(4) of the UN Charter is explicit in prohibiting the use of force against States by requiring Member States to ‘refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations’.¹ This prohibition is held widely to be peremptory in nature and is often referred to as the ‘cornerstone’ of modern international law.² However, as per Article 51 of the UN Charter, this does not impair the inherent right of States to use individual or collective self-defence if an armed attack occurs against them.³ At a cursory glance, this seems to preserve an inter-State reading of the UN Charter. However, this type of reading has eroded over the last few decades, as a result of greater discussion on whether armed attacks can be carried out by non-State actors (NSAs) and whether States are able to use force in self-defence against NSAs in other countries. This paper is structured into six sections. Section II will briefly take a look at both these questions through interpreting Article 51, along with ICJ jurisprudence and State practice, before eventually asserting that NSAs can mount an armed attack and self-defence is indeed permissible against NSAs when an armed attack by those NSAs is attributable to a State. This Section will further explore whether self-defence is permissible against NSAs through the ‘unwilling or unable’ test when an armed attack by those NSAs is *not* attributable to a State, before resting on the fact that although Article 51 and ICJ jurisprudence do not preclude this, there does not seem to be enough State practice and *opinio juris* to permit the practice as part of customary international law.⁴

However, this does not put an end to the conversation on the ‘unwilling or unable’ test. Despite its controversial legality, the fact remains that the ‘unwilling

¹ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art 2(4).

² Christian Tams, ‘The Use of Force Against Terrorists’ (2009) 20 European Journal of International Law 359.

³ UN Charter (n 1), art 51.

⁴ Kevin Jon Heller, ‘The Absence of Practice Supporting the “Unwilling or Unable” Test’ (*Opinio Juris*, 17 February 2015) <<http://opiniojuris.org/2015/02/17/unable-unwilling-test-unstoppable-scholarly-imagination/#:~:text=Simply%20put%2C%20there%20is%20simply,against%20a%20non%2Dstate%20actor>> accessed 25 February 2022.

or unable' justification is continuously being used by certain States to pierce the shield of sovereignty of the host State in which the NSAs operate.⁵ Section III of this paper will thus discuss the dangers of State silence in the face of the unwilling or unable justification from primarily powerful Western States seeking to invoke self-defence, as well as the problem of Article 51 communications from these States. Taken together, this may end up playing into the hands of proponents of the 'unwilling or unable' test, potentially contributing to 'norm entrepreneurship' and the shaping of international law in their favour through the expansion of self-defence to incorporate the test itself.⁶

Once it is established that the 'unwilling or unable' test is here to stay despite its uncertain legality, the arguments regarding whether the test *should* be legal cannot be dismissed. This debate brings to light the age-old conflict between the inherent right of self-defence on one hand, and State sovereignty and territorial integrity on the other. Section IV of this paper will embark on an analysis of the dangers of lowering the Article 2(4) threshold through the use of the 'unwilling or unable' test. In doing so, this Section will examine the issue primarily from a Third World Approach to International Law (TWAAIL) perspective, highlighting the fallacy of the 'vulnerable' victim State that always needs protection and which uses the 'unwilling and unable' test as a mechanism to justify potentially spurious claims of self-defence and consequent legitimising of predatory force against host States.

Whilst important to discuss, the question of *should* only takes the 'unwilling or unable' test so far. As this paper will demonstrate, practically, States are still using the 'unwilling or unable' test to justify their use of force in self-defence irrespective of whether the test *should* be legal. It must be recognised however, that the 'unwilling or unable' test is not a new test under *jus ad bellum* (the condition under which States may use armed force) that works to replace the current law on self-defence.⁷ Section V of this paper will instead draw upon the doctrine of necessity in international law and argue that the 'unwilling or unable'

⁵ Gareth D. Williams, 'Piercing the Shield of Sovereignty: An Assessment of the Legal Status of the 'Unwilling or Unable' Test' (2013) 36(2) UNSW Law Journal 619.

⁶ Jutta Brunnée and Stephen J Toope, 'Self-Defence Against Non-State Actors: Are Powerful States Willing but Unable to Change International Law?' (2018) 67 International and Comparative Law Quarterly 263.

⁷ Noam Lubell, 'Fragmented Wars: Multi-Territorial Military Operations against Armed Groups' (2017) 93 International Law Studies 215.

test should be viewed as a component within necessity. This will ultimately serve as an additional limit and hurdle for States claiming self-defence to overcome, thereby curbing potential abuse of the test being used as an alternative route in expanding and relaxing the strict standards of the use of force by States based on self-defence. Nevertheless, it is pivotal to take this a step further, in that if the ‘unwilling or unable’ test is indeed here to stay, clear parameters and criteria need to be put in place in order to clarify the way in which the principle of necessity can be used to justify the ‘unwilling or unable’ test. In doing so, this paper will examine Bethlehem’s Principles, which seek to provide a legal foundation for the ‘unwilling or unable’ test.⁸ However, this paper will consequently reject these Principles on the basis of their lack of clarity, and instead puts forward a test which builds on and refines Deeks’ seminal factors of the ‘unwilling or unable’ test proposed a decade earlier⁹ in order to strike as close a balance between the inherent right of self-defence on one hand, and State sovereignty and territorial integrity on the other.

CHAPTER 1: THE CURRENT LEGALITY OF SELF-DEFENCE AGAINST NON-STATE ACTORS

A) Can armed attacks be carried out by NSAs?

In beginning to assess the current state of legality regarding self-defence against NSAs, it must be understood whether armed attacks can be carried out by NSAs in the first place. This can be dispensed with rather swiftly. As stated previously, Article 2(4) and Article 51 of the UN Charter initially seem to suggest an inter-State reading¹⁰, with Judge Kooijmans in *Legal Consequences of the Construction of a Wall* acknowledging that the state-based view has been the ‘generally accepted interpretation for more than 50 years’¹¹ and academicians such as Schachter proposing that Article 51 can ‘only be triggered by an armed

⁸ Daniel Bethlehem, ‘Self-Defense Against an Imminent or Actual Armed Attack by Non-State Actors’ (2012) 106 *American Journal of International Law* 769.

⁹ Ashley S. Deeks, ‘“Unwilling or Unable”: Towards a Normative Framework for Extraterritorial Self-Defense’ (2012) 52 *Virginia Journal of International Law* 483, 550.

¹⁰ Kimberley N. Trapp, ‘Can Non-State Actors Mount an Armed Attack?’ in Marc Weller, *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 680.

¹¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, 230 [35].

attack from a State'.¹² On closer examination however, Article 51 does not preclude an armed attack being conducted by NSAs. It simply mentions that Member States may use self-defence if 'an armed attack occurs against a Member of the UN'.¹³ There is no mention as to the source of the armed attack despite the wording of Article 2(4). Therefore, even if Article 51 does not address NSAs directly, nothing in the language precludes them from being able to carry out an armed attack. Furthermore, the *travaux préparatoires* is vague on the issue as the negotiating history of the UN Charter demonstrates that early proposals on Article 51 shifted from an 'attack by any state' to 'armed attack', with the reasoning behind this not subject to minuted discussion.¹⁴ This view is further supported by UNSC Resolutions post 9/11 attacks such as UNSC 1368 and 1373, with reference being made to 'terrorist attacks' and the 'inherent right to self-defence'¹⁵, thus reflecting the actor-pluralism that exists today in the international legal order, in contrast to the previous Westphalian state-based approach. As such, a purely inter-State reading on the legal order of the use of force and self-defence is no longer tenable. The international community has woken up to the fact that attacks by non-State actors are a real and evolving threat, requiring an international legal response.

B) Are states able to use force in self-defence against NSAs?

Taking a look at ICJ jurisprudence, it is clear that for a victim State to use self-defence against NSAs, armed attacks by NSAs need to be attributed to the host State. In its landmark ruling in the *Nicaragua* case, the ICJ referred to the *Definition of Aggression* and crucially noted that in order for the irregular forces to be attributed to a State, that State had to have 'substantial involvement' or 'effective control' over the military or paramilitary operation in question.¹⁶ This notion of attribution was again referred to in the *Armed Activities* case, whereby the ICJ decided that the attacks conducted by NSAs from the territory of the DRC against Uganda were 'non-attributable' to the DRC and as such, 'the legal

¹² Oscar Schachter, 'The Lawful Use of Force by a State against Terrorists in Another Country' (1989) 19 *Israel Yearbook on Human Rights* 209, 216.

¹³ UN Charter (n 1) art 51.

¹⁴ Trapp (n 10) 685.

¹⁵ UNSC Res 1368 (12 September 2001) UN Doc S/RES/1368; UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.

¹⁶ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 14, paras 115, 195.

and factual circumstances giving rise to self-defence by Uganda were not present'.¹⁷ The ICJ's concept of attribution thereby maintains a narrow inter-State reading of Article 2(4) and self-defence when NSAs are involved, addressing only attribution to a State and as such, effectively relegating the NSA conduct itself. The consequence of this is an attempt by the ICJ to preserve an outdated inter-State rights-based approach to the use of force regime which no longer represents the current state of the international legal order. The dangers of such an approach becomes all the more apparent when dealing with the issue of self-defence against armed attacks by NSAs that are not attributable to the host State.

C) Are states able to use self-defence against NSAs in the absence of attribution to the host state?

When deciding attribution, however, the ICJ consistently addressed self-defence only against the host State from which the NSAs operate. In the cases that came before the Court, the circumstances involved self-defence measures taken against the host State itself, instead of the NSA directly. In *Nicaragua*, the ICJ had to only decide the circumstances under which the victim State could respond in self-defence to armed attacks by NSAs 'against the State from whose territory the NSAs were allegedly supported', thus conditioning the legitimate use of self-defence on the notion of attribution.¹⁸ In the *Armed Activities* case, the Court explicitly touched on the fact that the self-defence measures taken by Uganda were carried out against the DRC itself instead of regions which held anti-Ugandan rebels.¹⁹ The circumstances in these cases have provided the ICJ wide berth to ignore situations in which self-defence was directed only against NSAs, with the Court holding that it 'does not need to respond as to whether and under what conditions international law provides a right of self-defence against large scale attacks by irregular forces'.²⁰ The decisions by the ICJ consequently cannot be read as precluding self-defence only against NSAs in the host State's territory. Instead, these decisions deliberately leave open the question of unattributability by only using attribution as a necessary condition for self-defence against the host State in which the NSAs operate from.

¹⁷ *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* (Judgment) [2005] ICJ Rep 168, 223 [146].

¹⁸ Trapp (n 10) 687.

¹⁹ *ibid* 689.

²⁰ *Armed Activities* (n 17) para 147.

In addition to the treaty basis, it is further crucial to inspect State practice in assessing whether self-defence against armed attacks by NSAs which are not attributable to a host State is permissible under customary international law. To justify this, States have begun to use the 'unwilling or unable' test. Trapp's definition of 'unwilling or unable', due to its comprehensive nature is relied on in this paper, with the test being described as 'the basis for a victim State's use of defensive force against (and only against) NSAs operating from a host State's territory, in response to unattributable cross-border armed attacks by those NSAs where the host State is unwilling or unable to prevent its territory from being used by NSAs'.²¹ Examples of this include Russia's use of force in Georgia in 2002 based on Georgia being 'unwilling or unable' to prevent the Chechen rebels from conducting attacks in Russia.²² Even further back in 1979 and 1981, Israel sought to use the 'unwilling or unable' test as a reason to justify its use of force in self-defence against attacks from the PLO and Hezbollah.²³ Israel, more implicitly, took a similar position recently in 2006 when it justified its use of self-defence on the basis of the 'ineptitude and inaction of the Lebanese government which has not exercised jurisdiction over its territory for many years', with the international community largely refraining from condemning this.²⁴ Turkey further defended its use of force in self-defence against the PKK in 1996 to 2008 by referring to Iraq's unwillingness and inability to deal with the threat from the PKK.²⁵

However, these varied instances of self-defence against NSAs based on the 'unwilling or unable' test have not gained express support from a majority of the international community. There has been express condemnation from all but one State in the Security Council, in response to Israel's guided missile attacks in Syria based on self-defence in 2003.²⁶ Colombia's military operations in Ecuador against FARC further drew condemnation from the Organisation of American

²¹ Kimberley N. Trapp, 'Actor-Pluralism, the "Turn to Responsibility" and the *Jus ad Bellum*: 'Unwilling or Unable' in Context' (2015) 2 *Journal on the Use of Force and International Law* 199, 222.

²² Deeks (n 9) 486.

²³ *ibid.*

²⁴ Kinga Tibori-Szabó, 'The 'Unwilling or Unable' Test and the Law of Self-Defence' in Christophe Paulussen and others, *Fundamental Rights in International and European Law: Public and Private Law Perspectives* (1st edn, T.M.C Asser Press 2016).

²⁵ Deeks (n 9) 487, 526.

²⁶ Trapp (n 10) 692.

States in 2008.²⁷ Although members of the Security Council acknowledged Israel's right of self-defence against Hezbollah attacks in 2006, Iran, Venezuela, China, Cuba and the League of Arab Nations condemned Israeli action.²⁸ Furthermore, a much heralded case for proponents of the 'unwilling or unable' test involves Operation Enduring Freedom, conducted by the US in Afghanistan in 2001. This initially seems to be a strong point in favour of the test, with UNSCR 1368 and 1373 supporting the US resorting to self-defence against Al-Qaeda and the Taliban.²⁹ However, the justification from the US to the Security Council was critically not one which involved the 'unwilling or unable' test, but instead was akin to attribution as it was based on support of Al-Qaeda by the Taliban regime, thereby relying on and maintaining the fact that there was still a nexus between the non-State actor and the host State.³⁰

One of the clearest instances in which the 'unwilling or unable' test has been used is in the context of US-led force in Syria in 2014 with the US arguing that the Syrian regime could not and would not confront terrorist safe-havens effectively.³¹ However, some coalition members, such as Jordan, Bahrain, Qatar, Saudi Arabia and the UAE, who participated in the Syrian operations did not explicitly make such a claim, thus lacking *opinio juris* in support of the test.³² As mentioned above, these States are also part of the League of Arab Nations which specifically rejected the test with regard to Israel attacks on Hezbollah in Lebanon in 2006.³³ Others, including Denmark, Belgium and the Netherlands confined their participation in operations to Iraqi territory based on consent by Iraq.³⁴ Russia, who was a previous proponent of the test, rejected it in opposing US operations in Syria, with States such as Argentina, Iran and Syria also criticising the operations.³⁵ Most damning of all is the view of the Non-Aligned Movement (NAM) when considering the legality of the 'unwilling or unable' test. The NAM consists of 120 States and its views should consequently be

²⁷ *ibid.*

²⁸ Tibori-Szabó (n 24) 83.

²⁹ UNSC Res 1368 and UNSC Res 1373 (n 15).

³⁰ Brunnée and Toope (n 6) 269.

³¹ Tibori-Szabó (n 24) 73.

³² Kevin Jon Heller, 'Do Attacks on ISIS in Syria Justify the "Unwilling or Unable" Test?' (*Opinio Juris*, 13 December 2014) <<http://opiniojuris.org/2014/12/13/attacks-isis-syria-justify-unwilling-unable-test/>> accessed 25 February 2022.

³³ *ibid.*

³⁴ Brunnée and Toope (n 6) 270.

³⁵ *ibid.* 275, 282.

afforded considerable weight. It has consistently emphasised that the UN Charter should not be re-written or re-interpreted, most recently stating as such in 2016,³⁶ while having long opposed the ‘unwilling or unable’ test specifically with regard to Turkey’s use of force against the PKK in Iraq in 2000.³⁷

Therefore, although academicians such as Deeks state that ‘more than a century of State practice suggests that the unwilling or unable test is lawful’³⁸ (itself controversial for the reasons mentioned above), it cannot be argued that there exists enough *opinio juris* for the test to be classified as part of customary international law, with Deeks herself conceding that she ‘found no cases in which States clearly assert that they follow the test out of a sense of legal obligation’.³⁹ Deeks’ study from 1817 to 2011 demonstrated the fact that only five States have specifically invoked the ‘unwilling or unable’ test during that period.⁴⁰ Five States do not make customary international law regardless of how powerful those States are. This instead, unfortunately demonstrates that proponents of the legality of the ‘unwilling or unable’ test tend to privilege the sporadic practice of mainly Western First-World States while choosing to ignore the views and objections of majority of States in the Global South. It remains a myth that the ‘unwilling or unable’ test is established customary international law and its legality, at the very most, can be classified as ‘unsettled’. Despite this, and although too early to classify the ‘unwilling or unable’ test as legal, or even as an ‘emerging norm’⁴¹, it is starting to become more and more difficult to simply ignore the ‘unwilling or unable’ test as it is continuously being used by powerful victim States regardless of its legality.

CHAPTER 2: THE DANGEROUS INFLUENCE OF STATE SILENCE ON THE LEGALITY OF THE ‘UNWILLING OR UNABLE’ TEST

It is difficult to deny that the growing number of purported exercises of the right of self-defence against NSAs using the ‘unwilling or unable’ test has

³⁶ Non-Aligned Movement (NAM), *17th Summit of Heads of State and Government of the Non-Aligned Movement, Final Document* (17–18 September 2016) para 25.2.

³⁷ Heller (n 32).

³⁸ Deeks (n 9) 486.

³⁹ *ibid* 503.

⁴⁰ *ibid* 549, 550.

⁴¹ Williams (n 5) 620.

gained more relevance in a counter-terrorism context, as illustrated in the previous section. Despite its 'illegal' or unsettled nature, it is nonetheless vital not to ignore or dismiss the test due to its frequent use. The primary issue lies with the fact that States who invoke the 'unwilling or unable' test are, at times, not opposed by the majority of other States, who are silent in the face of the questionable legality of the test. For the sake of clarity, this paper defines silence as 'a lack of a publicly discernible response to conduct reflective of a legal position or to the explicit communication of a legal position'.⁴² The significance of this form of non-opposition cannot be understated as it has potential legal consequences on evolving norms of international law. The International Law Commission (ILC) has commented on this, making it clear that under certain circumstances, the number of treaty parties that must actively engage in subsequent practice to establish an interpretative agreement in the sense of Article 31(3)(b) VCLT may vary,⁴³ and silence on the part of parties may be considered acquiescence and acceptance of the subsequent practice.⁴⁴

The response by States to the ILC's conclusions has generally been to take a restrictive stand on circumstances where State silence may establish an interpretative agreement of a treaty, and that the knowledge or awareness of silent States and their ability to act are potential factors when considering their *opinio juris*.⁴⁵ Be that as it may, the dangers of State silence being seen as acquiescence has become more prevalent in recent decades, with scholars relying on State silence as evidence of support for the controversial 'unwilling or unable' test. Turkey's use of force against the PKK in Iraq from 1999, and Russia's use of force in Georgia against Chechen rebels in self-defence in 2002 were categorised by Chachko and Deeks as instances of how 'low-level force

⁴² Dustin A. Lewis, Naz K. Modirzadeh and Gabriella Blum, 'Quantum of Silence: Inaction and *Jus ad Bellum*' (2019) Harvard Law School Program on International Law and Armed Conflict, 7 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3420959> accessed 15 March 2022.

⁴³ Paulina Starski, 'Silence within the process of normative change and evolution of the prohibition on the use of force: normative volatility and legislative responsibility' (2017) 4 *Journal on the Use of Force and International Law* 21.

⁴⁴ *ibid.*

⁴⁵ Lewis, Modirzadeh and Blum (n 42) 32.

used to respond to attacks by NSAs have been met with general acquiescence⁴⁶. Davis, Macherel and Cardiel used the same line of reasoning suggesting acquiescence with regard to the US-led coalition force in Syria against ISIS in 2014.⁴⁷ Both cases have been further drawn upon by Hakimi who views third States as ‘tolerating operations under the unwilling or unable standard’ and ‘tacitly condoning the military operations’.⁴⁸

The readiness of certain scholars to find acquiescence based on State silence is certainly worrying. Although they do not explicitly contribute to the doctrine of silence taking up an evolutionary legal norm, they do provide greater support and affirmation for powerful States to justify a form of ‘norm entrepreneurship’: an attempt by certain powerful States to shift legal norms of their own accord.⁴⁹ The question may then be phrased as this: why do other third States not just openly and explicitly reject this shifting of legal norms instead of, at times, staying silent? Reasons for this may vary, with many falling outside the scope of this paper, however, from an international political perspective, State silence may be motivated by military alliances and joint geopolitical interests. Third States may determine that in the balance of its interests at the multilateral level, taking a principled position on international law that does not directly concern the State in question is simply a luxury that that State does not have the ability to afford. This ends up placing Third States in a ‘catch-22’ situation, whereby they either speak out and face the prospect of placing their interests at risk, or stay silent and provide licence for powerful States in the Global North to argue that there are quickly emerging customary international law rules that cut in their favour.

In essence, Third States (especially those in the Global South) need to be aware and understand that their silence on the application of the ‘unwilling or unable’ test can have potential consequences within the *jus ad bellum* field. A

⁴⁶ Elena Chachko and Ashley Deeks, ‘Which States Support the ‘Unwilling or Unable’ Test?’ (*LAWFARE*, 10 October 2016) <<https://www.lawfareblog.com/which-states-support-unwilling-and-unable-test>> accessed 25 February 2022.

⁴⁷ José Luis Aragón Cardiel, Amanda Davis and Lauranne Macherel, ‘Modern Self-Defense in Practice: Two Case Scenarios’ (2018) 2 *Columbia Human Rights Law Review* 5.

⁴⁸ Monica Hakimi, ‘Defensive Force Against Non-State Actors: The State of Play’ (2015) 91 *International Law Studies* 14.

⁴⁹ Brunnée and Toope (n 6) 263.

critical obstacle to their awareness, however, arises in the form of ambiguous Article 51 communications from proponents of the ‘unwilling or unable’ test. Article 51 of the UN Charter does not elaborate on what makes up an Article 51 communication, the manner of reporting and the implications of not reporting.⁵⁰ States in the Global South are further routinely not being made aware of communications by powerful Global North States asserting self-defence made to the Security Council under Article 51, with the Legal Advisor of the Permanent Mission of Mexico to the US being critical of the ‘lack of information, publicity and transparency’ regarding the Article 51 reporting process.⁵¹ There is an absence of an authoritative system to identify, evaluate and catalogue self-defence communications, with Article 51 communications themselves being very difficult to get a hold of by States that are not part of the Security Council as such communications are not circulated to all UN Member States.⁵² The result of this is that Third States may not know whether or on what basis to respond, feeding into the greater likelihood of default State silence, thereby providing yet another weapon to the armoury of powerful States in the Global North to claim acquiescence and the creation of precedents that have the potential to shift and undermine the current legal order.

Although State silence, in general, has no clear settled doctrinal impact, certain forms of ‘qualified silence’ can have legal consequences if there is a legitimate expectation that the Third State has knowledge of the conduct and claim, as well as the capacity to react and does not do so deliberately.⁵³ Essentially, the point to be made here is that despite the obstacles facing States that are not proponents of the ‘unwilling or unable’ test, these Third States cannot be discouraged and continue to treat the ‘unwilling or unable’ test as illegal based on the default tactic of State silence. These Third States should at the very least consider that they may have to speak up to preserve legal certainty,

⁵⁰ James A. Green, ‘The Article 51 Reporting Requirement for Self-Defense Actions’ (2015) 55(3) *Virginia Journal of International Law* 563.

⁵¹ Pablo Arrocha Olabuenaga, ‘An Insider’s View of the Life Cycle of Self-Defence Reports by UN Member States’ (*JUST SECURITY*, 2 April 2019) <<https://www.justsecurity.org/63415/an-insiders-view-of-the-life-cycle-of-self-defense-reports-by-u-n-member-states/>> accessed 25 February 2022.

⁵² Pablo Arrocha Olabuenaga, ‘The Time has Come to Have a Conversation at the UN on Self-Defence’ (*JUST SECURITY*, 13 April 2020) <<https://www.justsecurity.org/69625/the-time-has-come-to-have-a-conversation-at-the-u-n-on-self-defence/>> accessed 25 February 2022.

⁵³ Lewis, Modirzadeh and Blum (n 42) 32.

as the alternative of silence has the potential to contribute to the state of volatility of contentious practices in the *jus ad bellum* field, which comes at the detriment of these very States.

CHAPTER 3: SHOULD THE ‘UNWILLING OR UNABLE’ TEST BE LEGAL?

The qualified silence of the international community, in the face of the invocation of the ‘unwilling or unable’ test by powerful States should not be underestimated as a tool through which these States can push forward their agendas through norm entrepreneurship. Consequently, the fact that powerful States are increasingly using the ‘unwilling or unable’ test to justify self-defence against NSAs, paired with the uncertainty of State silence that has the potential to be deemed as acquiescence and contribute to the evolution of customary international law, calls for this paper to delve into the question of whether the ‘unwilling or unable’ test *should* be legal in the first place.

The right to use force in a host State’s territory based on self-defence against attacks by NSAs that are not attributable to the host State, can be described as the fault line of Article 2(4) prohibition on the use of force, and Article 51 recognition of State security.⁵⁴ However, due to the present ‘illegal’ or, at the most, ‘unsettled’ nature of the ‘unwilling or unable’ test, international law focuses on accommodating a purely inter-State approach to Article 2(4) and Article 51, either through a restrictive reading of the Charter or through the notion of attribution to the host State. Either way, this does not allow for NSAs to be a part of the *jus ad bellum* narrative.⁵⁵ This form of mandatory attribution ends up placing victim States at the ends of two extreme approaches where attacks by NSAs are not attributable to the host State. The victim State must either sacrifice its national security with no method to defend itself, or violate the territorial sovereignty of the host State, regardless of the host State’s involvement.⁵⁶ Neither response is satisfactory. It has been made clear that the

⁵⁴ Trapp (n 10) 696.

⁵⁵ Trapp (n 21) 201, 202.

⁵⁶ Kimberley N. Trapp, ‘Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors’ (2007) 56 *International and Comparative Law Quarterly* 141, 147.

UN Charter is not a 'suicide pact', in that it is not expected that a State should allow itself to be attacked.⁵⁷

It is not realistic to expect victim States to stand by idly as they are attacked by NSAs from the host State.⁵⁸ This exudes utopian thinking and goes against the very purpose of Article 51 of the Charter by depriving a State of a right to respond and defend itself, while failing to evolve in times where actor pluralism reflects the broader shifts in the international legal order. Nor is it acceptable for a victim State to use force against the host State whenever the victim State feels that it has a claim of self-defence, no matter how spurious the claim is. The 'unwilling or unable' test, using the mechanism of State complicity seems to strike a delicate balance between these two extreme approaches. Although this is just one account of the 'unwilling or unable' test, by identifying links between NSAs and host States, victim States maintain an inter-State rights-based approach, while allowing greater scope to accommodate 'special rules on attribution of NSA activities'. This is because the links could include providing minimal or low-level assistance or harbouring NSAs.⁵⁹ In other words, this relaxes the high threshold of previous State-based attribution while ensuring that at least some form of attribution remains and is still necessary through complicity being akin to the notion of 'aiding and abetting' illegal conduct.⁶⁰ This safely ensures that the 'unwilling or unable' test does not completely depart from the traditional rules on attribution.

Although at first glance, the 'unwilling or unable' test using the more lenient mechanism of State complicity may seem attractive, viewing the test from this lens fails to deal with the 'unable' component of the test. What happens when the host State is not complicit and willing to tackle the threat of NSAs within its own territory, but is unable to do so due to some incapacity? The host State may then find itself in a position where it is labelled by powerful victim States as having suffered a 'diminution of sovereignty', thereby allowing such victim States to justify violating the host State's territorial sovereignty when

⁵⁷ Trapp (n 21) 201, 202.

⁵⁸ *ibid.*

⁵⁹ Tams (n 2) 385.

⁶⁰ *ibid.*

the host State lacks control and sovereignty over the NSA.⁶¹ Nevertheless, it is important to question why a host State should claim the privilege of full external sovereignty while not containing enough internal sovereignty so as to dispel NSAs within its territory.⁶² The host State instead possesses a shield against intervention by the victim State through external sovereignty, while failing to use its internal sovereignty as a weapon against the NSA in its own territory, thus heavily favouring territorial sovereignty ahead of self-defence and national security. This argument, however, is inherently problematic as it assumes that there are levels of sovereignty which vary according to the degree of internal State control, with internally stronger States enjoying greater sovereignty compared to internally weaker States, instead of the traditional conception of sovereignty being absolute, with a State either enjoying sovereignty or not.⁶³

The failure of the mechanism of complicity and the troubles with the sovereignty argument of host States open the door to a solution consisting of the ‘unwilling or unable’ test without the barrier of complicity. The understanding behind this is that the lack of attribution provides victim States the opportunity to respond in self-defence to NSAs directly, without needing to target or being justified in targeting the military or government of the host State. This direct targeting of NSAs is primarily the approach that victim States have taken when justifying their self-defence based on the ‘unwilling or unable’ test as exemplified in Section II above. Further, the ‘unwilling or unable’ test without complicity signals a move away from the need to have some semblance of attachment to the traditional rules on attribution, hence allowing victim States to more effectively respond to the increasingly dangerous threat of NSAs. Despite the ‘unwilling or unable’ test not being accepted as law, this more flexible approach ensures that victim States will continue to situate their use of force in these instances under the Charter, consequently enhancing its viability and relevance as victim States would be less inclined to simply ignore the Charter when justifying their use of force.⁶⁴

⁶¹ Jens David Ohlin, ‘The Unwilling or Unable Test for Extraterritorial Defensive Force’ in Claus Kreß and Robert Lawless, *Necessity and Proportionality in International Peace and Security Law* (Oxford University Press 2020) 122.

⁶² *ibid* 123.

⁶³ *ibid*.

⁶⁴ Trapp (n 21) 222.

However, the issue most stark here is that the ‘unwilling or unable’ test now has the potential to shift from a middle-ground approach to an extreme approach at the other end of the spectrum as mentioned above, as it involves the lowest threshold for the use of force by the victim State in the name of self-defence against the host State. The victim State now has free licence to use force based on the ‘unwilling or unable’ test irrespective of the host State’s involvement in the first place, with the victim State taking up a position where it can unilaterally act as judge, jury and executioner with regard to whether the host State was unwilling or unable to deal with NSAs within its territory. The result of this is a total favouring of national security and self-defence ahead of territorial sovereignty, while making a mockery of the cornerstone of modern international law in Article 2(4), by risking the transformation of a supposed temporary defensive right to one of forcible intervention.⁶⁵

It is of paramount importance to thus continue the thread of analysis of the unwilling or unable test from a TWAIL perspective, as the fact that the ‘unwilling or unable’ test is mostly promoted and used by powerful States in the Global North only adds to the test being viewed as one which ‘harkens back to the standard of civilisation in nineteenth century international law’⁶⁶ that ‘enabled European States to accord non-European States lesser legal status because of how they were internally organised’.⁶⁷ The ‘unwilling or unable’ test thereby ‘reintroduces a hierarchy of States’ within the *jus ad bellum* field by almost categorising State civilisation as based on the internal legal control that a State has, thus reducing the notion of sovereign equality under the UN Charter from an absolute to a relative concept.⁶⁸ This brings to mind notions of colonial origins and Eurocentrism as it makes it easier for powerful victim States in the Global North to portray host States in the Global South as ‘weak’ or ‘failing’ States that cannot be trusted to govern or take action against NSAs within its territory, while Global North States are painted as the ‘saviour’ instead.

⁶⁵ Tams (n 2) 392.

⁶⁶ Arnulf Becker Lorca, ‘Rules for the Global War on Terror: Implying Consent and Presuming Conditions for Intervention’ (2012) 45 *New York University Journal of International Law and Politics* 45.

⁶⁷ Brunnée and Toope (n 6) 279.

⁶⁸ Ntina Tzouvala, ‘TWAIL and the “Unwilling or Unable” Doctrine’ (2016) 109 *American Journal of International Law Unbound* 267.

As the ‘unwilling or unable’ test is constantly being used against States in the Global South, these very States (even when they are willing) are left with no option but to either consent to operations on their territory from powerful States or become the subject of forcible intervention whenever these powerful States decide as such.⁶⁹ Global South States are increasingly under pressure to adopt measures and policies that favour Global North interests to avoid the spectre of the ‘unwilling or unable’ test. The fact is that there has been too much focus on the plight of the victim State and its security at the expense of the host State who, due to power inequalities, may find itself marginalised and placed in a position where it is increasingly difficult to hold to account powerful victim States for arbitrary determinations and use of the ‘unwilling or unable’ test. Questions such as whether a host State’s reluctance to situate State military against NSAs can be construed as unwillingness, or whether unwillingness can be construed when the host State rejects outside assistance while taking all appropriate measures in its own view against NSAs, are all decided by the victim State and therefore extremely subject to manipulation.⁷⁰ While recognising that there do exist genuine claims of self-defence if the host State is unwilling or unable to deal with armed attacks from NSAs in their territory, the arbitrary nature of the ‘unwilling or unable’ test ends up legitimising predatory uses of force by powerful victim States from the Global North.

Ultimately, the question of whether the ‘unwilling or unable’ test should be legal comes down to the issue of arbitrariness and potential for abuse in deciding when a host State is ‘unwilling or unable’ to tackle the threat of NSAs within its own territory. This is significant in polarising those who flat out reject the ‘unwilling or unable’ test from those who believe whole heartedly in it in favour of victim States. In its penultimate section below, this paper will attempt to bridge this gap by drawing attention to the doctrine of necessity, with the ‘unwilling or unable’ test being viewed as an additional limitation within the test of necessity that victim States must satisfy when claiming self-defence against armed attacks by NSAs that are not attributable to the host State.

CHAPTER 4: KEEPING THE ‘UNWILLING OR UNABLE’ TEST IN CHECK THROUGH THE DOCTRINE OF NECESSITY

⁶⁹ Cardiel, Davis and Macherel (n 47).

⁷⁰ Tibori-Szabó (n 24) 84.

As depicted above, the dangers of lowering the Article 2(4) threshold are rife when using self-defence based on the ‘unwilling or unable’ test absent attribution of armed attacks by NSAs to host States. This has led many scholars to claim that the ‘unwilling or unable’ test has led to an unwarranted expansion of Article 51⁷¹ through a decoupling of the breach of the host State’s territorial sovereignty from the responsibility for the use of force by the victim State, allowing the host State to be subject to the former, but absolving the victim State from legal consequences of the latter.⁷² It is, however, critical at the outset to note that the ‘unwilling or unable’ test should not be seen as a completely new justification for the use of force by victim States, but instead as a component of the doctrine of necessity.⁷³ Despite not being explicitly mentioned in Article 51 of the Charter, as is clear from ICJ jurisprudence, necessity and proportionality are clear limits on any instance of self-defence.⁷⁴ Simply put, if the host State is willing and able to tackle NSAs in its territory, the use of force in self-defence by the victim State does not satisfy the requirement of necessity, and in fact, is deemed unlawful as it will not be able to be justified by self-defence at all.⁷⁵ By placing the ‘unwilling or unable’ test within the doctrine of necessity, will the high threshold of Article 2(4) really be lowered or instead reinforced? In this sense, instead of being viewed as a new route for widening self-defence, the ‘unwilling or unable’ test should be seen as yet another hurdle that the victim State must overcome in satisfying the requirement of necessity in order to resort to self-defence in the first place.

However, it is not enough, and almost negligent, to invoke the doctrine of necessity as a way to constrain the abuse of the ‘unwilling or unable’ test, without setting out clear parameters and criteria for how the ‘unwilling or unable’ test would operate within such a doctrine in practice. As it currently stands, this tends to lead to the ‘unwilling or unable’ test ‘both under- and over-protecting the security equities of victim States’.⁷⁶ Due to the current lack of clarity of the test, victim States may be wary of using the test due to the political

⁷¹ Olivier Corten, ‘The “Unwilling or Unable” Test: Has it Been, and Could it be, Accepted?’ (2016) 29 *Leiden Journal of International Law* 777; Tams and Devaney (n 9) 98, 101.

⁷² Lubell (n 7) 221.

⁷³ *ibid* 219.

⁷⁴ *Nicaragua* (n 16) para 176.

⁷⁵ Lubell (n 7) 221, 222.

⁷⁶ Deeks (n 9) 507.

and legal ramifications of doing so, with States such as France, Denmark and the Netherlands as possible examples in their assessment of legal justifications for using force in Syria or Iraq in 2014/15.⁷⁷ On the other hand, victim States may use the current broad, generalised ‘unwilling or unable’ test in their favour as a legal shield when using force against host States as it is ‘easy to make and relatively hard to disprove’.⁷⁸ By merely stating that the ‘unwilling or unable’ test shall be used as the last resort, thus deeming it necessary, without deeper engagement into how and under what conditions the test will be used, simply serves as an insincere constraint on arbitrariness while paying lip service to the potential for abuse of the test, as highlighted in Section IV above.

Daniel Bethlehem admirably took this a step further in 2012 by developing the Bethlehem Principles around the doctrine of necessity to provide a more solid legal grounding to the ‘unwilling or unable’ test.⁷⁹ It is important at this stage to note that these Principles do not reflect customary international law, nevertheless it is clear that they have come to provide the substance for States asserting the ‘unwilling or unable’ test.⁸⁰ The primary issue with these Principles nonetheless lies in the fact that they do not expand on ‘how and by whom a series of determinations are to be made’ when deciding on whether to use of force in self-defence against NSAs in another State based on the ‘unwilling or unable’ test.⁸¹ Principle 10 emphasises the requirement of consent for the use of force, as if the host State consents to the victim State’s use of force in its territory against NSAs, there is no violation of territorial sovereignty and no need for the justification of self-defence from the victim State.⁸² However, Principles 11, 12 and 13 then go on to extraordinarily reduce the meaning of that presumption by implying that if the host State were to refuse consent, it would be seen as harbouring or colluding with the NSAs.⁸³ This is regardless of

⁷⁷ Brunnée and Toope (n 6) 270, 271.

⁷⁸ Deeks (n 9) 507.

⁷⁹ Bethlehem (n 8).

⁸⁰ UK Attorney General’s Office and Jeremy Wright QC, ‘Attorney General’s Speech at the International Institute for Strategic Studies’ (International Institute for Strategic Studies, London, 11 January 2017) 15, 16 <<https://www.gov.uk/government/speeches/attorney-generals-speech-at-the-international-institute-for-strategic-studies>> accessed 15 March 2022.

⁸¹ Craig Martin, ‘Challenging and Refining the “Unwilling or Unable” Doctrine’ (2019) 52 *Vanderbilt Journal of Transnational Law* 435.

⁸² Bethlehem (n 8) 776.

⁸³ Martin (n 81) 441.

whether the host State refuses consent due to its own assessment that a use of force is not necessary or justified currently in dealing with the NSAs. There is an absence of guidance as to the evidence that the victim State needs to provide to the host State in requesting such consent.⁸⁴ Instead, the Principles seem to put forward an ultimatum from the victim State to the host State where the host State either has to take action or consent, or the victim State will undertake strikes in the host State's territory.⁸⁵

Taken together, Principles 11, 12 and 13 allow the victim State to unilaterally infer the host State's ability to deal with NSAs and whether at times, requesting consent is unnecessary due to it 'undermining the effectiveness of action in self-defence or would increase the risk of armed attack'.⁸⁶ These unilateral decisions by Global North victim States are permitted to be taken without any form of communication with the Global South host State, once again overly privileging the interests of powerful victim States at the expense of the rights of weaker host States.⁸⁷ In addition, the standard applied within the Bethlehem Principles is one of a 'reasonable and objective basis', without any explanation as to how such a standard is to be applied in practice.⁸⁸ Thus, the Bethlehem Principles, while laudable in being an attempt to improve on the previous non-existent clarification of the use of the 'unwilling or unable' test, seemingly papers over the cracks as they ultimately rest on the victim State making determinations on the host State's ability and willingness, all under a low standard of reasonableness.⁸⁹ The Bethlehem Principles only serve to reinforce the inequalities detailed throughout this paper and exacerbate the risk of destabilising the *jus ad bellum* regime by providing powerful Global North victim States with greater ammunition against weaker Global South host States in the form of a legal basis to rest their justification of self-defence in the name of the 'unwilling or unable' test on.

⁸⁴ *ibid.*

⁸⁵ *ibid.*

⁸⁶ Dapo Akande and Thomas Liefländer, 'Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense' (2013) 107 *American Journal of International Law* 566.

⁸⁷ Martin (n 81) 392.

⁸⁸ *ibid* 436.

⁸⁹ *ibid* 441.

This is where Deeks' seminal factor-based test comes into play in shoring up the 'unwilling or unable' test. The factor-based test encompasses five principles, requiring the victim State to '(1) prioritise consent or cooperation with the victim State over unilateral uses of force, (2) ask the host State to address the threat and provide adequate time for it to respond, (3) reasonably assess the host State's control and capacity in the region, (4) reasonably assess the host State's proposed means of suppressing NSAs and (5) evaluate its prior interactions with the host State'.⁹⁰ Only once there is an examination into all five factors will it be deemed necessary and lawful or unnecessary and unlawful for the victim State to use force in self-defence against NSAs in the host State. At first glance, these factors may seem similar to the Bethlehem Principles. However, upon taking a closer look, there certainly seems to be more deference paid to the host State in Deeks' analysis. With the first factor, there exists an emphasis on consent and cooperation, however, the fact that the host State denies the victim State's request for consent does not automatically provide the victim State with a legally sound basis to violate the host State's territorial sovereignty. Instead of being an ultimatum, the lack of consent from the host State may instead only prove relevant to the 'unwilling or unable' analysis instead of being instantaneously decisive.⁹¹

There further seems to be a greater element of communication between the victim State and host State within Deeks' test. In the event that the host State does not consent to the victim State using force in its territory against NSAs, the victim State is encouraged to request the host State to take action against NSAs in its territory. In doing so, the victim State is further encouraged to 'share relevant information with the host State about the location and nature of the threat'.⁹² By doing so, the host State will now more holistically understand the nature of the threat of the NSAs to the victim State. The increased communications between both States will ensure that the victim State will not be able to keep such information classified in order to have greater leeway in violating the host State's territorial sovereignty, thereby preventing the host State from being subject to the creation of a strict liability regime.⁹³

⁹⁰ Deeks (n 9) 490.

⁹¹ *ibid* 519.

⁹² *ibid* 522.

⁹³ *ibid* 523.

Further, in assessing the proposed means to suppress the threat of NSAs, deference is once again paid to the host State ahead of the interests of the victim State. The approach taken here is one of what a ‘reasonable State’ would believe is sufficient in preventing armed attacks from NSAs within the host State from occurring.⁹⁴ This requires the victim State to seriously consider the ways in which the host State intends to suppress the NSA, and if in doubt, err on the side of the host State’s plan irrespective of whether the victim State would have taken a different approach.⁹⁵ Such deference to the host State may seem unjust, however, this is in line with the responsibility that the victim State holds as a potential bearer of the use of force. The use of force by the victim State on the territory of the host State is a breach of its sovereignty, and is not a matter that should be taken lightly, therefore demanding that the benefit of the doubt be given to the host State. Moreover, if the host State’s plan fails, the victim State will have more reason to persuade the host State that a change in tact is necessary and factor this into the overall analysis of whether the host State is able to suppress the NSA.

As such, the improvements present within Deeks’ factor-based test compared to Bethlehem’s Principles is striking and welcome, in providing a greater balance between the respect for territorial sovereignty of the host State and right of self-defence of the victim State. This is not to say that Deeks’ factor-based test is absent of criticism. There still remains a lack of clarity when arguing that the victim State must provide the host State with a ‘reasonable amount of time to respond to that threat’ and ‘make a reasonable assessment of territorial control and State capacity’.⁹⁶ The test here should be one similar to the way Deeks deals with factor 4 of her test, namely what a ‘reasonable State’ would believe is a reasonable amount of time to respond to a threat or how a ‘reasonable State’ would assess territorial control and State capacity.⁹⁷ For instance, it is unsuitable to set a uniform time limit on the amount of time a host State has to respond to a threat as circumstances vary on a case-by-case basis. The assessment of the timing a ‘reasonable State’ would set in this situation would provide a suitable alternative instead. Although it is acknowledged that

⁹⁴ *ibid* 529.

⁹⁵ *ibid* 530.

⁹⁶ Dawood I. Ahmed, ‘Defending Weak States against the “Unwilling or Unable” Doctrine of Self-Defense’ (2013) 9 *Journal of International Law and International Relations* 15.

⁹⁷ Deeks (n 9) 529.

there are difficulties in even defining a ‘reasonable State’⁹⁸ once the ‘reasonable State’ is placed in the position of the victim State, the ‘reasonable State’ should be obligated to at least make assessments in good faith and objectively based on information available publicly from credible sources.⁹⁹ The evidence used in making such assessments should be disclosed and be of a compelling standard.¹⁰⁰ The reasoning behind this is that since the victim State unilaterally makes the assessment, a ‘reasonable State’ should always provide greater deference to the host State when making its assessments with a view to balancing the respect for territorial sovereignty of the host State and right of self-defence of the victim State.

Furthermore, factor 5 of Deeks’ test which states that the victim State must ‘evaluate its prior interactions’ with the host State when making a decision as to whether the host State is ‘unwilling or unable’ to suppress the NSA, should be refined further.¹⁰¹ With the current test and based on previous interactions with the host State, the victim State may be biased and use these previous interactions as ‘precedent’ to limit the number of opportunities it provides to the host State to suppress the NSA. This may consequently lead to potentially effective plans of the host State in dealing with NSAs to be disregarded in favour of the use of force from the victim State. Each individual case needs to be reasonably and objectively assessed on its own merits to prevent the victim State from simply drawing conclusions that the host State is ‘unwilling or unable’ to suppress NSAs based on previous interactions. This assists in preventing host States who are not allies or whom do not have a stable political relationship with the victim State from being subject to such bias and arbitrariness. It should, however, not be forgotten that the primary approach and priority of the victim State should be to gain consent from the host State to use force in suppressing NSAs.¹⁰² Even if, after consideration of all five factors, the victim State decides that the host State is unwilling or unable to suppress the NSA and that the use of force on its territory is consequently necessary, the

⁹⁸ Matthew Waxman, ‘The Use of Force Against States that Might Have Weapons of Mass Destruction’ (2009) 31 *Michigan Journal of International Law* 50.

⁹⁹ Deeks (n 9) 525, 530.

¹⁰⁰ Martin (n 81) 447.

¹⁰¹ Deeks (n 9) 531.

¹⁰² Tibori-Szabó (n 24) 97.

victim State must communicate and attempt to obtain consent for a reasonable plan in dealing with the NSA.¹⁰³

Therefore, a refinement of Deeks' five-factor test within the doctrine of necessity embodies a grounding of the notion of reasonableness to an objective standard as well as the constant prioritisation of consent, instead of one that can be interpreted arbitrarily by the victim State. Taken together, this refinement has the potential to stem the current one-sided inequity of power relations between the victim State and the host State when it comes to the 'unwilling or unable' test through providing a greater constraint on powerful victim States arbitrarily using the test on weaker host States, while legitimising the victim State's use of force when it is used in accordance with the test. This paper does not claim that certain victim States will not still use force despite clearer proposals such as this on the 'unwilling or unable' test.¹⁰⁴ However by refining tests such as Deeks', these States will have less incentive and justification to do so, while those against the 'unwilling or unable' test will expect strict adherence by victim States to the refined test. Thus, although powerful victim States would tend to prefer Bethlehem's Principles as they provide such States with more leeway and flexibility, these States should seriously consider the refined proposal of Deeks' test as it does more to narrow the gap between those who flat out reject the 'unwilling or unable' test from those who believe whole heartedly in it in favour of victim States. It is important to highlight that a win-win scenario is not showcased here, in that this is not the perfect solution to the controversy of the use of the 'unwilling or unable' test. The viability of these new standards remains outside the scope of this paper as the primary aim here is to establish a theoretically sound framework. However, through fleshing out Deeks' test, it provides a greater incentive for the host State to address the threat from the NSA within its territory. This thereby enables the host State to gain full control of its territory and negates the need for self-defence to be used in the first place, accordingly striking a further balance between the host State's territorial sovereignty and the inherent right of the victim State to self-defence.¹⁰⁵

¹⁰³ *ibid* 92.

¹⁰⁴ Deeks (n 9) 507, 508.

¹⁰⁵ *ibid* 510.

CONCLUSIONS

It is well settled in international law that armed attacks can be carried out by NSAs and that States are able to use force against NSAs when armed attacks by NSAs are attributable to the host State. This perfectly represents the dichotomy between the international legal system waking up to the fact that attacks by non-State actors are a real and evolving threat that require an international legal response, and an attempt by the ICJ to preserve an outdated inter-State rights-based approach to the use of force regime which no longer represents the current state of the international legal order. The ‘unwilling or unable’ test attempts to determine when self-defence is permissible when armed attacks by NSAs are not attributable to the host State. However, as has been constantly underlined, there does not exist enough *opinio juris* for the test to be classified as part of customary international law, with proponents of the test tending to favour the occasional practice of powerful Global North States in the face of constant rejection of the test by Global South States.

Despite this, powerful victim States are continuing to use the test regardless of its legality, with the silence of States who are not proponents of the test being seen as acquiescence and consequently a way for powerful victim States to push forward their agendas through norm entrepreneurship.¹⁰⁶ As it seems that the ‘unwilling or unable’ test is here to stay for the foreseeable future, this paper has delved into the necessary question of whether the ‘unwilling or unable’ test *should* be legal in the first place. The ‘unwilling or unable’ test, without the barrier of complicity, signals a move away from false needs to have some semblance of attachment to the traditional rules on attribution, hence allowing victim States to more effectively respond to the increasingly dangerous threat of NSAs. However, far from striking a balance between respect for the host State’s territorial sovereignty and the right of self-defence of the victim State, the test instead shifts from a middle-ground approach to an extreme approach involving the lowest threshold for the use of force by the victim State in the name of self-defence against the host State. This current arbitrary nature of the test only ends up legitimising predatory uses of force by powerful victim States from the Global North against weaker host States from the Global South,

¹⁰⁶ Brunnée and Toope (n 49).

keeping these latter States subservient within a newly formed hierarchy of sovereignty and civilisation.¹⁰⁷

It is thus important to impose constraints on a seemingly revisionist wave that intends to modify or get rid of the hallmarks of international law that interfere with the interests of powerful States.¹⁰⁸ By viewing the ‘unwilling or unable’ test as a component of the doctrine of necessity instead of a completely new justification for the use of force by victim States, the arbitrary use of force can be contained and the unwarranted expansion of Article 51 in favour of powerful victim States can be halted. Deeks’ factor-based test undoubtedly provides more precision in doing so compared to Bethlehem’s Principles, which provides powerful victim States with more leeway and flexibility to violate the territorial integrity of the host State. However, only with a refinement of Deeks’ test through the notion of reasonableness and objectivity, will greater clarity be achieved. This strikes a more appetising balance between the territorial integrity of the host State (through much greater deference paid to the host State by the victim State) and the inherent right of self-defence of the victim State (through the victim State still making the final assessment). This refined test is an improvement on the ‘unwilling or unable’ test in its current form, and has the potential to narrow the gap between those who flat out reject the ‘unwilling or unable’ test from those who believe whole heartedly in it in favour of victim States. If taken up by victim States and recognised by host States, there may just be less scope for the controversial ‘unwilling or unable’ test to make a mockery of the cornerstone of modern international law.

¹⁰⁷ Ahmed (n 96) 4.

¹⁰⁸ Tzouvala (n 68) 270.