

Identifying customary international law from the ivory tower?

Self-defence against non-state actors and why doctrinal precision actually matters

Shpetim Bajrami

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The discussion about the right of self-defence of states against non-state actors is in flux. Among the reasons for that could be new types of terrorism and conflicts which have emerged since the entry into force of the UN Charter. Cross-border impacts and the number of actors involved have increased significantly. These factors, combined with the UN Security Council's inaction and the increasing threat from terrorist groups, are putting a substantial strain on the system of collective security. The promising legal answer to this phenomenon – not only for scholars, but also for states – appears to be the unwilling or unable doctrine.

However, it seems that experts recently (too) generously identify a potential invocation of the unwilling or unable doctrine in case law: For instance, Christian Henderson [pointed out](#) that India might have relied on unwilling or unable to justify the February 2019 attacks against Pakistan in the Kashmir Region. In response, Mary Ellen O'Connell [mentioned](#) that the term unwilling or unable was apparently first used in the context of international law and military force by the U.S. ambassador to the United Nations to support Israel's hostage rescue operation at Entebbe, Uganda. Shortly thereafter, Kevin John Heller [wrote](#) that the earliest invocation of the unwilling or unable test could actually be found in the 1970 U.S. military action by the Nixon administration against Cambodia during the Vietnam War.

It seems as if both the question of the true origin of the unwilling or unable doctrine and its support in state practice have become a 'race to the bottom'. Scholarly attention, as a matter of fact, is beneficial for international law in many regards: Teachings of legal scholars are not only subsidiary means for determining rules of law pursuant to Art. 38 (1) lit. d) of the [ICJ-Statute](#). The 2018 [ILC Draft Conclusions on identification on customary law](#) specify the magnitude of legal writings, which accordingly "may offer guidance for the determination of the existence and content of rules of customary international law. This auxiliary role recognizes the value that teachings may have in collecting and assessing State practice; in identifying divergences in State practice and the possible absence or development of rules; and in evaluating the law." Nonetheless, and without prejudice to the posts above, doctrinal accuracy is indispensable due to the responsibility academia takes within the process of emerging rules of customary international law.

Self-defence against a non-state actor is not always self-defence against a non-state actor: There is a huge variety of different requirements, models and approaches

to tackle the problem of terrorist threats. Some scholars have developed different legal constructions outside the scope of Art. 51 UN Charter. [Yoram Dinstein](#) (p. 294) for example, introduced the term 'Extraterritorial Law Enforcement' to describe the constellation of a non-consensual, cross-border self-defence against non-state actors within the territory of another state when the host state is unwilling or unable. [Federica Paddeu](#) (pp. 175-224) makes a case for a technical legal distinction between justification and excuse in international law: While a state can be justified with regard to the use force against a non-state actor based on Art. 51 UN Charter, the question of the violation of the sovereignty of the host state is accordingly a different one. That infringement of sovereignty must be resolved by way of Art. 21 of the ILC Articles on State Responsibility as an independent body of rules.

However, it is my impression that most scholars discuss this issue within the regime of Art. 51 UN Charter. In this regard, the question of state attribution is particularly controversial. Due to the large number of different possibilities of state involvement in acts of violence by private individuals a likewise remarkable number of standards of responsibility can be found in literature and case law: It is a crucial difference whether attribution is based on the Nicaragua-standard (effective control or substantial involvement) or lower thresholds like the overall control test applied by the ICTY, aiding or abetting, granting a safe haven, complicity or, finally, being unwilling or unable (which some consider to *de facto* eliminate the attribution criterion). Analysing the functioning of each standard, pinpointing the differences and elucidating its consequences is predominantly a task of academic writings.

Yet, the difference is not only of a theoretical, merely academic, nature. It rather gains utmost practical importance when assessing state practice. While Elena Chachko and Ashley Deeks for example, [consider](#) the U.S. Position in the Afghanistan-Intervention in 2001 as a confirmation of the unwilling or unable doctrine, the [U.S. letter](#) to the Security Council itself stated that there was clear and compelling information that the Al Qaeda organization, "which is supported by the Taliban regime in Afghanistan, had a central role in the attacks" against the United States. Doctrinally, there is a significant difference whether the existing Nicaragua-threshold has potentially been loosened by the reaction of the international community in the aftermath of the Afghanistan-Intervention due to the U.S. stance, or whether that practice constitutes a potential precedent of the unwilling or unable doctrine. The former is based on active participation and awareness of a state. The latter is based on culpable omission and can lead to forceful actions even though the host state may not even have knowledge of terrorist activities within its territory.

Doctrinal accuracy is just one of many parameters in need of specification in order to assess the status *lex lata* of the unwilling or unable doctrine as precisely as possible. A closer look at the controversies of the doctrine reveals that the debate is fuelled by different underlying methodological approaches. Both a general practice and acceptance of such practice as law (*opinio iuris*) must be ascertained for the identification of a new rule of customary international law. This presupposes that the underlying doctrinal patterns coincide with the respective opinions of states. Indeed, statements of states, e.g. letters to the Security Council, are seldom very precise in terms of legal reasoning. However, this should induce cautiousness in

legal assessments. Otherwise, the amount of academic opinions may cause dilution of and confusion about the prevailing law – contrary to what it is expected to serve as.

[Shpetim Bajrami](#) is a PhD Candidate and Research Assistant at Bucerius Law School, Hamburg. His research is in the areas of the law on the use of force, self-defence and state responsibility.

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