

**PIERCING THE SHIELD OF SOVEREIGNTY:
AN ASSESSMENT OF THE LEGAL STATUS OF THE
'UNWILLING OR UNABLE' TEST**

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I INTRODUCTION

It is the unfortunate reality of contemporary international relations that states suffer attacks from terrorist organisations. These non-state actors do not act in a vacuum devoid of sovereignty. Instead, they are required by necessity to base their operations within the territorial confines of states, from which they disseminate their radical ideology and launch attacks upon their enemies. The nature of the relationship between the host and non-state actor can vary. The host state may actively support the aims of the organisation, such as the relationship between the Taliban regime of Afghanistan and al-Qaeda.¹ Alternatively, the terrorist organisation may have sought refuge in a geographically remote region outside of the effective control of the host state, such as the use by Chechen militants of the Pankisi Gorge in Georgia.² Where the host state is not legally responsible for the attack, the use of force by the victim against terrorists within the territory of the host state infringes the territorial integrity of the host state, contrary to the prohibition of the use of force contained in article 2(4) of the *Charter of the United Nations* ('UN Charter'). Hence, the host state's sovereignty is used by the terrorist organisation as a shield to deter and inhibit retaliation from the victim state.

Naturally, states that suffer terrorist attacks seek to pierce this shield of sovereignty. The typical response of the victim state is to use force against the

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1 See Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 5th ed, 2011) 228; Jason Burke, 'Kabul Paper Trail Damns Al-Qaeda', *The Guardian* (online), 18 November 2001 <<http://www.guardian.co.uk/world/2001/nov/18/terrorism.afghanistan5>>.

2 Neil Arun, 'Russia's Reach Unnerves Chechens', *BBC News* (online), 16 January 2008 <<http://news.bbc.co.uk/2/hi/europe/7189024.stm>>.

non-state actor in the territory of the host state,³ with the inherent right to self-defence of the victim state coming into conflict with the sovereignty and territorial integrity of the host state. Consequently, victim states offer the ‘unwilling or unable’ test as a practical means of resolving these tensions. According to this test, a victim state is permitted to use force in the territory of a host state where the host state is either ‘unwilling or unable’ to do so. It is on this basis, for example, that Russia justified its attack on Chechen rebels based in Georgia’s territory.⁴

While many commentators support the test,⁵ the question of whether it is part of the contemporary international law on the use of force remains unanswered and relatively unexplored. This article will attempt to address this issue. It will examine the problem posed by international terrorism and the practical necessity for the ‘unwilling or unable’ test, considered in the framework of the law on the use of force. It will then consider the parameters of the test espoused to date. From there, the potential sources of the test will be examined. Several commentators argue that it is legal for state A to use force against terrorists within state B where the latter has failed to discharge its international obligations not to aid or abet terrorism.⁶ Such a view is entirely inconsistent with the prohibition of the use of force contained in article 2(4) of the *UN Charter* and at customary international law. The second potential source can be extracted from an elastic reading of article 2(4). Some have argued that limited attacks against terrorists which are not directed against the territorial integrity of the host state may not infringe article 2(4).⁷ Such a view is not supported by a plain reading of the *UN Charter*. The most likely legal source of the ‘unwilling or unable’ test is located within article 51 of the *UN Charter* and at customary international law, in particular, the requirement that the use of force in self-defence be ‘necessary’. Simply put, if a host state is willing and able to counter the non-state actor within its territory, then the use of force by the victim state will not be necessary. Despite these potential sources, the growing state practice and the lessons that can be drawn from international criminal law, it will be shown that the nebulous parameters of the test critically undermine *opinio juris*, and with it the legal status of the ‘unwilling or unable’ test. It is instead more apt to characterise the test as an emerging norm.

3 Subject to the threshold of an armed attack being met. See Christian J Tams, ‘The Use of Force against Terrorists’ (2009) 20(2) *European Journal of International Law* 359, 388.

4 Stephen Dalziel, ‘The Problem with the Pankisi’, *BBC News* (online), 5 August 2002 <<http://news.bbc.co.uk/2/hi/europe/2173878.stm>>.

5 See Parts III and IV below.

6 See, eg, Carsten Stahn, ‘Terrorist Acts as “Armed Attack”: The Right to Self-Defense, Article 51(1/2) of the UN Charter, and International Terrorism’ (2003) 27(2) *The Fletcher Forum of World Affairs* 35; Kimberly Trapp, ‘Back to Basics: Necessity, Proportionality and the Right to Self-Defence against Non-State Terrorist Actors’ (2007) 56 *International and Comparative Law Quarterly* 141; Abraham D Sofaer, ‘Terrorism, the Law, and the National Defense’ (1989) 126 *Military Law Review* 89.

7 Ivan Shearer, ‘A Revival of the Just War Theory?’ in Michael N Schmitt and Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines* (Martinus Nijhoff, 2007) 1; Gregory Travalio, ‘Terrorism, International Law, and the Use of Military Force’ (2000) 18 *Wisconsin International Journal of Law* 166.

II THE PROBLEM

A Prohibition on the Use of Force and Its Exceptions

States have historically been at liberty to use force to resolve their international disputes.⁸ The prohibition of the use of force is a relatively recent development in international law. Enshrined in article 2(4) of the *UN Charter*,⁹ members of the United Nations ('UN') are required 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.'¹⁰ This is an expansive prohibition, applying to the relatively low threshold of the use of 'force' and the 'threat' of force.¹¹ Despite certain views to the contrary,¹² the use of the words 'territorial integrity or political independence' does not operate as an exception.¹³ While article 2(4) applies to 'members' of the UN, the prohibition is now regarded as a principle of customary international law, and therefore applies to all states.¹⁴

There are two fundamental exceptions to the prohibition of the use of force. The first is that of self-defence as contained in article 51 of the *UN Charter*, which relevantly provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.¹⁵

In contrast to the language contained in article 2(4), in order for a state to acquire the right to use force in self-defence, it must have first suffered an 'armed attack', although there is some debate as to whether self-defence is permitted

8 See Dinstein, above n 1, ch 3. The first major attempt to outlaw war being the *General Treaty for Renunciation of War as an Instrument of National Policy*, opened for signature 27 August 1928, 94 LNTS 57 (entered into force 24 July 1929).

9 The prohibition of the use of force has been described as the 'cornerstone' of the *UN Charter*. See *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda) (Judgment)* [2005] ICJ Rep 168, 223 [148] ('*Armed Activities*').

10 *UN Charter* art 2(4).

11 As compared with the reference to 'armed attack' contained in art 51 of the *UN Charter*.

12 For example, the argument of the United Kingdom before the International Court of Justice in the *Corfu Channel case*, and also by Israel in defence of its raid at Entebbe: *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v Albania) (Merits)* [1949] ICJ Rep 4, 35 ('*Corfu Channel case*'); Christine Gray, *International Law and the Use of Force* (Oxford University Press, 3rd ed, 2008) 32–3. Cf Shearer, above n 7, 10.

13 See Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press, 1963) 268. See below Part IV(B).

14 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 100 ('*Nicaragua case*'). See Dinstein, above n 1, 95.

15 *UN Charter* art 51.

where the armed attack is imminent.¹⁶ Like article 2(4), article 51 forms part of customary international law.¹⁷ The second exception to the prohibition of the use of force relates to authorisation by the United Nations Security Council ('UNSC'), pursuant to chapter VII of the *UN Charter*.¹⁸

Once an armed attack has occurred, the right to self-defence is subject to the customary law requirements of necessity and proportionality, which 'equally apply to Article 51'.¹⁹ The use of force in self-defence will be necessary where 'peaceful measures have been found wanting or when they clearly would be futile'.²⁰ Proportionality requires that the use of force must not be more than what is required to mount the defence.²¹ There is a third contingent condition to the use of force in self-defence – immediacy. This requirement, distilled from the *Caroline* incident,²² provides that there must not be an unreasonable delay between the armed attack giving rise to the right of self-defence and the use of force in response to that illegal attack.²³

B Armed Attacks from Non-State Actors – Problems and Perspectives

There is some contention surrounding the question of whether a state can be the victim of an armed attack from a non-state actor, thereby triggering the victim state's right to use force in self-defence pursuant to article 51. Prior to al-Qaeda's attacks on the United States ('US') on 11 September 2001 ('9/11'), the use of force in self-defence against attacks from non-state actors was controversial.²⁴ The *UN Charter* is state-centric, with membership open to 'peace-loving states'.²⁵ Article 2(4) is similarly state focused, as it prohibits '[m]embers ... in their international relations from the threat or use of force against ... any state'.²⁶ This state-based view was noted by Judge Kooijmans in the *Wall Opinion* as being the 'generally accepted interpretation for more than 50 years'.²⁷

16 Oscar Schachter, 'The Right of States to Use Armed Force' (1984) 82 *Michigan Law Review* 1620, 1634; Derek Bowett, 'Reprisals Involving Recourse to Armed Force' (1972) 66 *American Journal of International Law* 1, 4. But see Brownlie, above n 13, 278. The issue of pre-emptive self-defence is outside the scope of this paper.

17 *Nicaragua (Merits)* [1986] ICJ Rep 14, 102–3. See also Dinstein, above n 1, 193. However, the two rights are not identical – the right to self-defence contained within customary law does not contain the reporting obligation to the Security Council: *Nicaragua (Merits)* [1986] ICJ Rep 14, 121; Dinstein, above n 1, 239.

18 *UN Charter* art 42.

19 *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 245, citing *Nicaragua (Merits)* [1986] ICJ Rep 14, 94. This was reaffirmed by *Oil Platforms (Islamic Republic of Iran v United States of America) (Judgment)* [2003] ICJ Rep 161, 198 ('*Oil Platforms*') and *Armed Activities (Judgment)* [2005] ICJ Rep 168, 222–3.

20 Schachter, above n 16, 1635. See also Dinstein, above n 1, 231.

21 Dinstein, above n 1, 262.

22 See generally R Y Jennings, 'The Caroline and McLeod Cases' (1938) 32 *American Journal of International Law* 82.

23 See Dinstein, above n 1, 233.

24 See Gray, above n 12, 198. To a degree, it remains controversial.

25 *UN Charter* art 4 (emphasis added).

26 *UN Charter* art 2(4).

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

Consequently, as Schachter has argued, article 51 can only be triggered by an armed attack from a state.²⁸

Despite this, a loophole can be gleaned from the text of the *UN Charter*, which may support the view that non-state actors could commit an armed attack. In contrast to the language used in article 2(4), the right of self-defence contained in article 51 does not explicitly contemplate the origin of the armed attack, it simply provides for the right to self-defence where ‘an armed attack occurs against a Member of the United Nations’.²⁹ While states are prohibited from threatening or using force against other states, the absence of an explicit reference to the source of the armed attack in article 2(4) suggests that a victim state may have recourse to the use of force where it is the subject of an armed attack from a non-state actor.

This view was affirmed by the response of the UNSC to the 9/11 attacks. On 12 September 2001, the UNSC adopted *Resolution 1368*, which recognised a state’s inherent right of self-defence in accordance with the *UN Charter* in the context of al-Qaeda’s attacks.³⁰ This recognition was reaffirmed by UNSC *Resolution 1373* on 28 September 2001.³¹ Despite this, the key text in *Resolution 1368* and *Resolution 1373* is not located in the operative part of the resolution, but in the preamble, and explicit reference is not made to an ‘armed attack’ but instead to the ‘threat to international peace and security’.³² However, as Gray notes, the UNSC does not often make express reference to the right to self-defence in its resolutions and therefore the reference to self-defence in the preamble is significant.³³ Notwithstanding the International Court of Justice’s (‘ICJ’) failure to date to make a clear pronouncement on whether a non-state

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

29 See also Michael N Schmitt, ‘Responding to Transnational Terrorism under the *Jus ad Bellum*: A Normative Framework’ in Michael N Schmitt and Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines* (Martinus Nijhoff, 2007) 163. As noted above, the prohibition on the use of force articulated in art 2(4) applies to all states as a matter of customary international law.

30 SC Res 1368, UN SCOR, 56th sess, 4379th mtg, UN Doc S/Res/1368 (12 September 2001).

31 SC Res 1373, UN SCOR, 56th sess, 4385th mtg, UN Doc S/Res/1373 (28 September 2001). See Dinstein, above n 1, 228. However, it must be noted that the key text Dinstein relies on for his implication is contained in the preamble of Res 1368 and 1373. As to whether 9/11 is evidence of ‘instant’ customary law, see Antonio Cassese, ‘Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law’ (2001) 12 *European Journal of International Law* 993, 996–7.

32 SC Res 1368, UN SCOR, 56th sess, 4379th mtg, UN Doc S/Res/1368 (12 September 2001); SC Res 1373, UN SCOR, 56th sess, 4385th mtg, UN Doc S/Res/1373 (28 September 2001); see also Cassese, above n 31.

33 Gray, above n 12, 199.

actor can commit an armed attack,³⁴ it seems from the international response to 9/11 that states may acquire the right to self-defence against non-state actors.³⁵

Yet this raises a contentious conundrum. If a state suffers an armed attack by a non-state actor, which triggers the right to use force in self-defence, where can the victim legally deploy such force? While non-state actors are, by their very nature, stateless, they do not operate in a vacuum devoid of sovereignty. To the contrary, terrorist organisations must operate *within* the territorial confines of states. If the host state is legally responsible for the armed attack carried out by the non-state actor, then the right of the victim state to use force is much clearer.³⁶ The position at first appears to be equally clear where the victim state secures the consent of the host state prior to using force within its territory.³⁷ The US has used armed unmanned aerial vehicles ('UAVs') extensively in Yemen to target al-Qaeda operatives, with two UAV strikes killing five militants on 17 April 2013.³⁸ According to cables released by WikiLeaks, Yemen's President Saleh has given the US an 'open door on terrorism', pledging 'unfettered access to Yemen's national territory for US counterterrorism operations'.³⁹

The waters are muddied when the host state is either unwilling or unable to suppress the threat posed by the non-state actor. For example, in 1985 three Israeli tourists were murdered by the Palestine Liberation Organisation's ('PLO') Force 17 while onboard a yacht off Cyprus. Israel responded by attacking PLO headquarters based in Tunisia. Such action was widely criticised by the international community, with the UNSC vigorously condemning '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'.⁴⁰ While the controversy surrounding the Israeli use of force centres on

34 See *Wall Opinion* [2004] ICJ Rep 136, 230 [35]–[36], where the ICJ took a restrictive view of SC Res 1373 and 1368.

35 Gray, above n 12, 199. See also Schmitt, above n 28, 165; Dinstein, above n 1, 228. NATO members regarded the 9/11 attacks as constituting an 'armed attack', as seen by the invocation of art 5 of the NATO treaty, where al-Qaeda's attacks were considered an 'armed attack': *The North Atlantic Treaty*, signed 4 April 1949, 34 UNTS 243 (entered into force 24 August 1949). Similarly, Australia invoked art 4 of the ANZUS Treaty, which had similar provisions: *Security Treaty between Australia, New Zealand and the United States of America*, opened for signature 1 September 1951, [1952] ATS 2 (entered into force 29 April 1952). As to whether 9/11 is evidence of 'instant' customary law, see Cassese, above n 31, 996–7.

36 Gray, above n 12, 132. See generally Ian Brownlie, 'International Law and the Activities of Armed Bands' (1958) 7 *The International and Comparative Law Quarterly* 712; Pierluigi Lamberti Zanardi, 'Indirect Military Action' in Antonio Cassese (ed), *The Current Legal Regulation of the Use of Force* (Martinus Nijhoff, 1986) 111.

37 Dinstein, above n 1, 268; Schmitt, above n 29, 176; Ashley S Deeks, "'Unwilling or Unable": Towards a Normative Framework for Extraterritorial Self-Defense' (2012) 52 *Virginia Journal of International Law* 483, 492. See below regarding the difficulties posed by consent.

38 Ahmed Al-haj, 'Yemen: US Drone Strikes Kill 5 Al-Qaeda Suspects', *Time* (online), 17 April 2013.

39 'US Embassy Cables: Bomb Al-Qaida Where You Want, Yemen Tells US, but Don't Blame Us if They Strike Again', *The Guardian* (online), 4 December 2010 <<http://www.guardian.co.uk/world/us-embassy-cables-documents/225085>>.

40 SC Res 573, UN SCOR, 40th sess, 2615th mtg, UN Doc S/Res/573 (4 October 1985).

whether the actions of Force 17 constitute an armed attack,⁴¹ it is nonetheless an instructive example of the tension between the right of the victim state to use force in self-defence and the host state's right of territorial integrity. In the absence of state responsibility, the deployment of force against non-state actors based within the territory of the host state clearly constitutes the use of force against the territorial integrity of the host state and is therefore a *prima facie* infringement of article 2(4). The 'unwilling or unable' test has been proffered as the solution to this problem.

III THE 'UNWILLING OR UNABLE' TEST

Several states and commentators have advocated for the right of a victim state to engage in extraterritorial self-defence where the host is either unwilling or unable to take measures to mitigate the threat posed by domestic non-state actors, thereby circumventing the need to obtain consent from the host state. While there have been many articulations of this right, the parameters of the test remain relatively undefined.⁴² Ashley Deeks' recent work is the first to examine the test in detail. Despite considering some 200 years of state practice, Deeks notes that the elements of the test are 'not well-articulated'.⁴³ Deeks argues in favour of the test, and identifies certain key principles, including:

- i. the requirement to prioritise consent or cooperation with the host state;
- ii. requesting that the host address the threat within a reasonable time;
- iii. the victim state undertaking a reasonable assessment of the host state's control and capacity in the target region;
- iv. the victim state assessing the host state's means to suppress the threat; and
- v. the victim state assessing past dealings with the host.⁴⁴

Such measures are intended to ensure that that the host state is given an opportunity to deal with the threat before having its territorial integrity affected, thereby addressing the requirement of necessity.

Similarly, Dinstein identifies the parameters of the test as follows:

- i. the force employed by the victim state must be reactive to an armed attack, and not anticipatory;
- ii. a repetition of the attack has to be expected;

41 It is clearly unlikely that the action by Force 17 could be regarded as an armed attack when viewed in isolation.

42 See Dinstein, above n 1, 268–77; Deeks, above n 36; Shearer, above n 7; Schmitt, above n 28; Theresa Reinold, 'State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11' (2011) 105 *American Journal of International Law* 244; Tom Ruys and Sten Verhoeven, 'Attacks by Private Actors and the Right of Self-Defense' (2005) 10 *Journal of Conflict and Security Law* 289.

43 Deeks, above n 37, 501.

44 *Ibid* 490.

- iii. the victim state ‘must verify that ... [the host state] is either unable or unwilling to take the necessary action within its territory to remove the likelihood of such further attacks’;
- iv. the victim state must first seek the consent of the host state, unless such a request would be futile prima facie; and
- v. the use of force must be the last resort, so that less intrusive remedies must first be undertaken.⁴⁵

Many nations, including the US, Russia, Turkey,⁴⁶ Israel⁴⁷ and Colombia⁴⁸ have, to varying degrees, invoked the test to justify extraterritorial self-defence. Numerous high-ranking US officials, including three legal advisors to the Department of State, have expressed support for the test. In particular Abraham Sofaer issued public comments in support of the test in 1989,⁴⁹ as did John Bellinger in 2006,⁵⁰ and Harold Koh in 2010.⁵¹ Furthermore, during the first presidential debate between US presidential candidates Barack Obama and John McCain in 2007, Barack Obama asserted that ‘[i]f the United States has Al-Qaeda, (Osama) bin Laden, top-level lieutenants in our sights, and Pakistan is unwilling or unable to act, then we should take them out.’⁵² It was arguably on this basis that, on 2 May 2011, the US launched Operation Neptune Spear, dispatching SEAL Team Six to Abbottabad, Pakistan, to capture or kill Osama bin Laden. It has been reported that Pakistani consent was not sought.⁵³ However, the US did not explicitly refer to the ‘unwilling or unable’ test as part of its justification; it simply justified the act as self-defence.⁵⁴

At first glance, this ‘unwilling or unable’ test appears to be a useful and reasonable addition to the international law. The test seeks to balance the rights

45 Dinstein, above n 1, 275.

46 For state practice on the United States, Russia and Turkey, see Part III(C)(2).

47 See Reinold, above n 42, 263.

48 See Deeks, above n 37, 533–45.

49 Sofaer, above n 6, 108.

50 John B Bellinger, ‘Legal Issues in the War on Terrorism’ (Speech delivered at the London School of Economics, London, 31 October 2006) <<http://www.state.gov/s/l/2006/98861.htm>>.

51 Harold H Koh, ‘The Obama Administration and International Law’ (Speech delivered at the Annual Meeting of the American Society of International Law, 25 March 2010). John O’ Brennan, assistant to the President for Homeland Security and Counterterrorism, made similar comments in support of the ‘unwilling or unable’ test in 2011, as did Attorney-General Eric Holder in 2012. John O’ Brennan, ‘Strengthening Our Security by Adhering to Our Values and Laws’ (Speech delivered at the Harvard Law School, 16 September 2011); Eric Holder, ‘Attorney General Eric Holder Speaks at Northwestern University School of Law’ (Speech delivered at the Northwestern University School of Law, 5 March 2012).

52 ‘Obama Vows to “Take Out” Terror Targets in Pakistan’, *PakTribune* (online), 2008 <<http://www.paktribune.com/news/print.php?id=206208>>.

53 Siobhan Gorman and Julian E Barnes, ‘Spy, Military Ties Aided bin Laden Raid’, *Wall Street Journal* (online), 23 May 2011 <<http://online.wsj.com/article/SB10001424052748704083904576334160172068344.html>>. President Obama ‘cut Pakistan out of the loop’ because of mistrust of Pakistan’s Inter-Services Intelligence.

54 *Press Briefing by Press Secretary Jay Carney* (4 May 2011) The White House <<http://www.whitehouse.gov/the-press-office/2011/05/04/press-briefing-press-secretary-jay-carney-542011>>. As will be shown below, this failure to refer to the ‘test’ goes to the question of *opinio juris*.

of the victim state with those of the host state, as the latter's territorial integrity will only be infringed where it is unwilling or unable to deal with the threat. Practically, it is the 'unwillingness' of the host that is central to the test, rather than the host state's inability to deal with the threat. A state that is willing but unable to deal with domestic non-state actors will inevitably provide its consent for the victim state to use force in its territory, such as Yemen consenting to the US, noted above. As will be seen, the test is accepted by many as being part of the law, whether it is subsumed within the customary requirement of necessity, permitted by way of a broad reading of article 2(4), or simply justified if the host state fails to comply with its international obligations to refrain from aiding or abetting terrorists.

While there is a growing body of literature on the virtue and necessity of the unwilling or unable test, there has been a considerable lack of attention paid to the legal basis of the test. Dinstein, for example, notes that the victim state is 'entitled' to use force where the host is 'unable or unwilling'.⁵⁵ Deeks argues that '[m]ore than a century of state practice suggests that it is lawful'.⁵⁶ Shearer describes the test as being 'highly persuasive'.⁵⁷ Furthermore, Judge Kooijmans implied in his dissenting opinion in the *Armed Activities* case that extraterritorial self-defence is permissible, as it is 'unreasonable to deny the attacked State the right to self-defence merely because there is no attacker state, and the *UN Charter* does not so require'.⁵⁸ In contrast, Ahmed notes that the law is 'unclear and unsettled', although this matter is dealt with by way of a solitary paragraph following a review of the literature in this field.⁵⁹ Part IV will examine the purported sources of the 'unwilling or unable' test to determine whether it is part of international law.

IV THE LEGALITY OF THE 'UNWILLING OR UNABLE' TEST

A The Friendly Relations Declaration – Aiding and Abetting Terrorists

International law places various obligations on states not to aid or abet terrorists. It has been argued that the breach of these duties justifies the extraterritorial use of force against such non-state actors. In the *Corfu Channel* case, the ICJ noted that states are under an 'obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'.⁶⁰ The *Friendly Relations Declaration* provides that states are required to:

55 Dinstein, above n 1, 272.

56 Deeks, above n 37, 486 (emphasis added).

57 Shearer, above n 7, 15.

58 *Armed Activities (Judgment)* [2005] ICJ Rep 168, 314.

59 Dawood I Ahmed, 'Defending Weak States against the "Unable or Unwilling" Doctrine of Extraterritorial Self-Defense' (2012) (unpublished, copy on file with author) <http://works.bepress.com/dawood_ahmed/1>.

60 *Corfu Channel Case (Merits)* [1949] ICJ Rep 4, 22.

refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.⁶¹

This obligation was recognised by the ICJ in the *Armed Activities* case as being declaratory of customary international law.⁶² In that case, anti-Ugandan rebels based in a remote and mountainous border region of the Democratic Republic of the Congo ('DRC') absent of government control, launched a series of raids across the border into Uganda. The Court held that the DRC was not in breach of its duty to refrain from 'acquiescing' or 'tolerating' the activities of anti-Ugandan rebels by failing to take action against them. The Court noted that the threshold of the duty is that of vigilance.⁶³ As Dinstein notes,⁶⁴ the *Tehran* case is authority for the principle that states are obligated, subject to their means, to undertake reasonable acts in order to protect the interests of other states. States that fail to discharge their duty of vigilance and their duty to other states 'must assume responsibility for this international wrongful act of omission'.⁶⁵

Several commentators have argued that it is permissible for a victim state to attack non-state actors within a host state, where the host aids or abets non-state actors in breach of the *Friendly Relations Declaration*. Stahn, for example, argues that in such a case the violation of the host state's sovereignty is 'justified'. If the host state is unable or unwilling to act then the victim state may as a matter of last resort.⁶⁶ Similarly, Sofaer argues that where a state breaches its obligations under international law, the victim state has 'no option for ending the threat ... short of violating in some manner the territorial integrity of the State that has violated its own international responsibilities'.⁶⁷ Hence, it has been argued that territorial integrity is not an inviolable shield under international law. Trapp has similarly argued that if a host state is unwilling or unable to prevent its territory being used in contravention of customary international law, the victim has little choice but to violate the territorial integrity of the host state.⁶⁸ To a degree, this notion is supported by state practice. For example, Turkey, justified its attacks against Kurdistan Workers' Party ('PKK') militants in northern Iraq in 1996 and 1997 by reference to Iraq's failure to comply with the *Friendly Relations Declaration*.⁶⁹ Thus, it is argued that while state sovereignty is important, it should not be inviolable where a host state fails to comply with its international obligations.

61 *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, GA Res 2625 (XXV), 25th sess, 1883rd mtg, UN Doc A/Res/2625 (24 October 1970).

62 *Armed Activities (Judgment)* [2005] ICJ Rep 168, 227. Dinstein, above n 1, 226.

63 *Ibid* 268.

64 Dinstein, above n 1, 226–7.

65 *Ibid* 227. See *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment)* [1980] ICJ Rep 3 ('*Tehran*').

66 Stahn, above n 6, 47.

67 Sofaer, above n 6, 106–7.

68 Trapp, above n 6, 147.

69 Gray, above n 12, 142.

However, such an approach is irreconcilable with the prohibition of the use of force contained in article 2(4) of the *UN Charter* and at customary law. As noted above, article 2(4) expressly prohibits the use of force against a state. As will be shown below, the text of article 2(4) does not support such a broad reading so as to justify the use of force where the non-state actors are not an organ of the state, but where the host state has failed to comply with its customary law obligations. As Cassese notes, despite the failure of a state to discharge its duty in connection with the attack, if the attack is not ‘the State’s act ... there can be no question of a forcible response to it’.⁷⁰ Rather, the appropriate response for such a breach is the ‘application of peaceful sanctions.’⁷¹ Therefore, it is doubtful that the legality of the ‘unwilling or unable’ test can be found arising from the host state’s breach of the duties flowing from the *Friendly Relations Declaration*.

B Legal Justification of the ‘Unwilling or Unable’ Test within Article 2(4)

It has been contended by some that article 2(4) of the *UN Charter* can be read in a restrictive manner so as to permit the use of force. For instance, Shearer postulates that the prohibition of the use of force contained in article 2(4) can be read so as to support the ‘unwilling or unable’ test.⁷² The first draft of article 2(4) provided that ‘[n]o Member shall threaten or use force against any other state except as expressly allowed by the Charter’. The additional reference to ‘territorial integrity or political independence’ was included at the request of Australia’s External Affairs Minister, Dr H V Evatt.⁷³ Shearer’s textual analysis relies on the words ‘the territorial integrity or political independence’ within article 2(4), which he argues are to be read as ‘words of qualification’, so that the threat or use of force, not aimed at the territorial integrity or political independence of the host state, but instead directed to remedy ‘a manifest illegality or injustice’, would not be prohibited.⁷⁴ While Shearer argues for such a reading in the context of remedying abuses to human rights, he locates the source of the ‘unwilling or unable’ test in article 2(4).⁷⁵ Similarly, Travalio argues in support of an elastic reading of article 2(4) to enable that use of force against non-state actors.⁷⁶

It is highly doubtful whether such a view can be supported.⁷⁷ Shearer’s interpretation of article 2(4) is not supported by the proper construction of the

70 Antonio Cassese, ‘The International Community’s “Legal” Response to Terrorism’ (1989) 38 *International and Comparative Law Quarterly* 589, 597.

71 *Ibid.*

72 Shearer, above n 7.

73 *Ibid.* 10.

74 *Ibid.* 10–11.

75 *Ibid.* 15.

76 Travalio, above n 7.

77 See Stahn, above n 6, 38; Schachter, above n 16.

UN Charter's text in accordance with the principles of the *Vienna Convention*,⁷⁸ namely, by considering the text in the context of the objects and purpose of the *UN Charter*.⁷⁹ Article 1(1) of the *UN Charter* provides that the purpose of the United Nations is to maintain international peace and security, to suppress acts of aggression, and to bring about the settlement of disputes which might lead to a breach of the peace. Article 2(3) provides that members must settle their disputes by peaceful means. A wide reading of article 2(4) is therefore inconsistent with the overarching purpose of the *UN Charter*, which seeks to solve disputes through peaceful means and thereby limit recourse to force. Furthermore, the *travaux préparatoires* of the *UN Charter* reveal that the words 'territorial integrity or political independence' were added for emphasis, not for the purpose of restricting the prohibition.⁸⁰ This is in fact recognised by Shearer.⁸¹ Dinstein notes that if the use of force were limited solely to circumstances affecting the territorial integrity or political independence of states, 'a legion of loopholes would inevitably be left open'.⁸² This would in turn deprive article 2(4) of its intended effect.⁸³ Despite Shearer's assertions to the contrary, article 2(4) cannot provide the legal basis for the 'unwilling or unable' test.

C Article 51 and the Customary Right of Self-defence

If the 'unwilling or unable' test is part of international law, then the legal basis for the test is most likely legal and contained within the right of self-defence pursuant to article 51 of the *UN Charter* and at customary international law.⁸⁴ In particular, the test can be ascertained from the 'necessity' requirement of self-defence. Dinstein argues that the necessity of the victim state to infringe the host state's territorial integrity requires the victim to verify that the host is either unable or unwilling to take the required action within its territory to remove the likelihood of further attacks.⁸⁵ Hence, if the host is willing and able, then the use of force will be unnecessary and illegal. Similarly, Deeks argues that:

A victim state must consider not just whether the attack was of a type that would require it to use force in response to that nonstate actor, but it also must evaluate the conditions in the state from which the nonstate actor launched the attacks. This latter evaluation is where, absent consent, states currently employ the 'unwilling

78 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('*Vienna Convention*'), art 31(1). While the Vienna Convention does not strictly apply to the interpretation of the *UN Charter* owing to art 4, the general principles contained in art 31 do apply as a matter of customary international law.

79 *Ibid.*

80 Dinstein, above n 1, 90. See *Vienna Convention*, above n 76, art 32.

81 Shearer, above n 7, 10.

82 Dinstein, above n 1, 89. See also Julius Stone, *Aggression and World Order: A Critique of United Nations Theories of Aggression* (Stevens & Sons, 1958).

83 Stahn, above n 6, 38.

84 As noted above, the customary international law requirement of necessity is applicable to the right of self-defence contained in art 51 of the *Charter*. See *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 245.

85 Dinstein, above n 1, 275.

or unable' test to assess whether the territorial state is prepared to suppress the threat. If the territorial state is neither willing nor able, the victim state may appropriately consider its own use of force in the territorial state to be necessary and, if the force is proportional and timely, lawful.⁸⁶

Furthermore, Deeks identifies the origins of the 'unwilling or unable' test in neutrality law.⁸⁷ Such laws, it is argued, place obligations on a neutral state to ensure that its territory is not violated by belligerents. If the neutral state is unable or unwilling to prevent violations of its neutrality by a belligerent, then the other belligerent is entitled to use force on the neutral state's territory. This, Deeks argues, gives the 'unwilling or unable' test 'compliance pull', thereby anchoring the test's legitimacy.⁸⁸ While innovative, it is unlikely that the test's origins are located in neutrality law. Such laws predate the *UN Charter*, and only apply to international armed conflicts between belligerent states. As a consequence, the extent to which one can rely on neutrality laws to reinforce the purported legitimacy of the 'unwilling or unable' doctrine appears limited.⁸⁹

1 *The 'Substantive Indeterminacy' of the 'Unwilling or Unable' Test*

While the contention that the assessment of the unwillingness or inability of the host state forms part of the 'necessity' enquiry appears to be a reasonable resolution to the tension between the victim state's right to self-defence and the host state's territorial integrity, it is nonetheless problematic. Deeks acknowledges that the test suffers from 'substantive indeterminacy' as the parameters of the test are unclear.⁹⁰ Who, for instance, is entitled to make the assessment as to whether a host state is unable or unwilling? Both Deeks and Dinstein argue that it is up to the victim state to make that determination.⁹¹ There is certainly a degree of pragmatism in reaching the conclusion that if state A, being a failed state, is unable to prevent segments of its territory being used by terrorist groups as a base of operations from which to attack state B, and if state B has endeavoured, albeit unsuccessfully, to secure state A's consent to deal with the threat or to otherwise resolve the threat posed to state B without recourse to force, then state B is best placed to make the determination of the hosts willingness and ability. Furthermore, the victim state is arguably in the best position to make the assessment in a timely manner given its direct involvement.

86 Deeks, above n 37, 495.

87 *Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land*, opened for signature 18 October 1907, 36 Stat 2310 (entered into force 26 January 1910); *Convention (XI) Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War*, opened for signature 18 October 1907, 36 Stat 2396 (entered into force 26 January 1910); *Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War*, opened for signature 18 October 1907, 36 Stat 2415 (entered into force 26 January 1910).

88 Deeks, above n 37, 497–501.

89 Kevin J Heller, *Ashley Deeks' Problematic Defense of the 'Unwilling or Unable' Test* (15 December 2011) *Opinio Juris* <<http://opiniojuris.org/2011/12/15/ashley-deeks-failure-to-defend-the-unwilling-or-unable-test/>>.

90 Deeks, above n 37, 503.

91 *Ibid* 495–6; Dinstein, above n 1, 275.

This is significant, as the use of force in self-defence must be ‘immediate’. Hence, while Ahmed argues that the determination should be made by the UNSC in order to protect weak states from the unilateral determination by strong states,⁹² placing the decision making in the hands of a third party is likely to undermine the immediacy of the victim’s response. There is therefore an inherent tension within the ‘unwilling or unable’ test between the assessment to be conducted and the immediacy of the response.

This tension is also reflected by the uncertainty as to how the assessment as to the unwillingness or inability of the host state is to be determined. As Ahmed aptly notes, ‘the current test is not clear in answering satisfactorily when a host state should be deemed ineffective’.⁹³ This is also noted by Deeks, who poses:

What if the territorial state is not aware (or is not persuaded) that the nonstate actors that launched the attack actually are located on its territory? What if the territorial state requires several days to suppress the threat and the victim state is not sure whether that response will be timely enough? What if the victim state is worried that some officials in the territorial state might tip the nonstate actors off to a planned response? Or if the territorial state will be able to arrest 75% of the nonstate actors, but believes that it has no basis to use force against 25% of them? In any of a number of cases, it will not be clear to a victim state, at least initially, whether the territorial state is unwilling or unable to suppress the threat.⁹⁴

As noted above, Deeks has admirably endeavoured to particularise a procedural and substantive framework for the determination of whether the host is unwilling or unable.⁹⁵ However, this framework remains aspirational. As will be seen below, the substantive indeterminacy of the test undermines *opinio juris*.

Furthermore, as noted above, the issue of the host state’s consent at first appears to be a reasonably simple enquiry. This is not the case in practice. For example, there is some debate as to whether Pakistan has consented to the use of UAVs by the US to kill militants in Pakistani territory. This raises the issue of whether consent can be implied or coerced from the host state, and reflects the practical problem of obtaining consent. In January 2006, a US UAV strike in Pakistan targeted Ayman al-Zawahiri, al-Qaeda’s second in command. Eighteen civilians are reported to have died in the attack, with al-Zawahiri surviving. Pakistan’s President Musharraf condemned the attack, stating ‘[w]e’re against such strikes’.⁹⁶ While Pakistan’s publicly declared position suggests that consent had not been given to the US, the official view is different. Cables released by WikiLeaks reveal that in August 2008, Pakistani Prime Minister Gilani stated in relation to US UAV strikes: ‘I don’t care if they do it as long as they get the right people. We’ll protest in the National Assembly and then ignore it.’⁹⁷ Former President Musharraf has recently confirmed that Pakistan consented to the use of

92 Ahmed, above n 38, 23.

93 Ibid 16.

94 Deeks, above n 37, 505.

95 Ibid 519–33.

96 Schmitt, above n 29, 183.

97 ‘US Embassy Cables: Pakistan Backs US Drone Attacks on Tribal Areas’, *The Guardian* (online), 30 November 2010 <<http://www.guardian.co.uk/world/us-embassy-cables-documents/167125>>.

UAVs by the CIA within Pakistani territory ‘on a few occasions’.⁹⁸ It has also been argued that the US has implied consent through the clearance of airspace and the lack of physical interference by the Pakistani military.⁹⁹

It must also be noted that the ICJ in the *Armed Activities* case declined the opportunity to address the legality of extraterritorial self-defence. The Court noted that it ‘has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces’.¹⁰⁰ In contrast, both Judge Simma and Judge Kooijmans cited Dinstein’s position on the legality of extraterritorial self-defence, citing the unreasonableness of denying the victim state the right to self-defence.¹⁰¹ The failure of the ICJ to deal with this issue is suggestive that the ‘unwilling or unable’ test is not part of the contemporary law on the use of force.

Finally, it is apparent that the UNSC is yet to endorse the ‘unwilling or unable’ test. This can be seen in light of the Security Council’s response to the 9/11 attacks, as noted above.¹⁰² The preamble of Security Council resolution 1373 notes ‘the need to *combat by all means, in accordance with the Charter of the United Nations*, threats to international peace and security caused by terrorist acts’.¹⁰³ As McDonnell rightly notes, the resolution does not permit the unilateral use of force by states against non-state actors in states that breach the resolution. Nor does it permit ‘combat by all means’. Rather, such force is subject to compliance with the *UN Charter*, hence the words ‘in accordance with the Charter’.¹⁰⁴

2 State Practice and Opinio Juris

Notwithstanding the above, it is the apparent absence of *opinio juris* on the behalf of victim states which is fatal to the claim that the ‘unwilling or unable’ test is part of international law. Deeks’ argument on this point is contradictory. It is submitted that ‘[m]ore than a century of state practice suggests that ... [the

98 Jon Boone and Peter Beaumont, ‘Pervez Musharraf Admits Permitting “a Few” US Drone Strikes in Pakistan’, *The Guardian* (online), 12 April 2013 <<http://www.guardian.co.uk/world/2013/apr/12/musharraf-admits-permitting-drone-strikes>>. See also Jibran Ahmad, ‘Nine Militants Killed in US Drone, Pakistan Air Force Strikes’ *NBC News* (online), 14 July 2013 <http://www.nbcnews.com/id/52472074/ns/world_news-south_and_central_asia/t/nine-militants-killed-us-drone-pakistan-air-force-strikes/>.

99 Eric Posner, ‘Obama’s Drone Dilemma’, *Slate* (online), 8 October 2012 <http://www.slate.com/articles/news_and_politics/view_from_chicago/2012/10/obama_s_drone_war_is_probably_illegal_will_it_stop_single.html#comments>.

100 *Armed Activities (Judgment)* [2005] ICJ Rep 168, 223 [147].

101 Dinstein, above n 1, 272.

102 See the text accompanying above n 30.

103 SC Res 1373, UN SCOR, 56th sess, 4385th mtg, UN Doc S/Res/1373 (28 September 2001) (emphasis added).

104 Thomas Michael McDonnell, ‘Sow What You Reap? Using Predator and Reaper Drones to Carry Out Assassinations or Targeted Killings of Suspected Islamic Terrorists’ (2012) 44 *George Washington International Law Review* 243, 268–9.

unwilling or unable test] is lawful'.¹⁰⁵ Furthermore, Deeks' argues that states 'frequently cite the test in ways that suggest that they believe it is a binding rule'.¹⁰⁶ Despite this, Deeks concedes having 'found no cases in which states clearly assert that they follow the test out of a sense of legal obligation (i.e. the *opinio juris* aspect of custom)'.¹⁰⁷ If states relying on the 'unwilling or unable' test do not clearly assert that they act out of a sense of legal obligation, it is unlikely that the test is part of customary international law.

As discussed above, Israel's 1985 attack on PLO camps in Tunisia was largely condemned by the international community. While the US opposed Israel's action, Sofaer notes this objection was on policy grounds, with US Ambassador Walters informing the Security Council that the US 'recognize and strongly support the principle that a state subjected to continuing terrorist attacks may respond with appropriate use of force to defend against further attacks'.¹⁰⁸ In 1998, following the bombing of US embassies in Nairobi and Dar-es-Salaam, the US launched cruise missiles against al-Qaeda training camps in Afghanistan and a suspected chemical plant in Sudan. The use of force was justified by the US on the ground of self-defence, with no explicit reference to the 'unwilling or unable' test.¹⁰⁹ States including Iran, Iraq, Libya, Pakistan and Russia condemned the use of force.¹¹⁰

Turkey has an extensive history of using force against PKK militants operating in northern Iraq.¹¹¹ At first, Turkey offered little explanation for such uses of force.¹¹² However, a variety of justifications have since been offered. For example, after one major operation in 1995, Turkey noted:

As Iraq has not been able to exercise its authority over the northern part of its country since 1991 for reasons well known, Turkey cannot ask the Government of Iraq to fulfil its obligation, under international law, to prevent the use of its territory for the staging of terrorist acts against Turkey. Under these circumstances, Turkey's resorting to legitimate measures which are imperative to its own security cannot be regarded as violation of Iraq's sovereignty. No country could be expected to stand idle when its own territorial integrity is incessantly threatened by blatant cross-border attacks of a terrorist organization based and operating from a neighbouring country, if that country is unable to put an end to such attacks. The recent operations of limited time and scope were carried out within this framework.¹¹³

Here, the reference to the inability of the Iraqi government to prevent the PKK from attacking Turkey from northern Iraq is suggestive of the 'unwilling or

105 Deeks, above n 37, 486.

106 Ibid 503.

107 Ibid.

108 Sofaer, above n 6, 108.

109 Schmitt, above n 29, 164.

110 Ibid.

111 See Christine Gray and Simon Olleson, 'The Limits of the Law on the Use of Force: Turkey, Iraq and the Kurds' (2001) 12 *Finnish Yearbook of International Law* 355, 357–91.

112 Gray, above n 12, 141.

113 Gray and Olleson, above n 111, 381. See UN Doc S/1995/605 (24 July 1995).

unable' test. Yet, there is no explicit reference to self-defence.¹¹⁴ The above extract also manifests Shearer's argument above that the use of force against terrorist organisations does not impinge on the territorial integrity of the host state and is therefore not precluded by article 2(4) – here, Turkey is arguing that the 1995 operations were of 'limited time and scope' and 'cannot be regarded as violation of Iraq's sovereignty'. Furthermore, Turkey has, as noted above, justified its attacks on PKK rebels in 1996 and 1997 by reference to Iraq's failure to comply with the *Friendly Relations Declaration*.¹¹⁵ While Turkey's various justifications include references to the 'unwilling or unable' test, this is only by implication. This suggests that Turkey is not acting out of a sense of legal obligation.¹¹⁶

One must also bear in mind the response of Iraq and the international community to Turkey's use of force. Iraq has persistently objected to Turkey's actions, claiming that they are in breach of international law.¹¹⁷ Furthermore, both the Arab League and the Non-Aligned Movement have condemned Turkey's actions.¹¹⁸ Significantly, the states that objected to Turkey's actions are precisely those states that are most likely to find non-state actors within their territory and whose territorial integrity is likely to be directly infringed by the application of the 'unwilling or unable' test. Their rejection of Turkey's actions argues against the formation of customary law. As Shaw states, 'without the concurrence of those [states] most interested, it cannot amount to a rule of customary law.'¹¹⁹

In contrast to Turkey's raids into northern Iraq, Russia justified the deployment of force against Georgian based Chechen rebels by reference to the 'unwilling or unable' test. Chechen rebels and al-Qaeda moved into the Pankisi Gorge in eastern Georgia following the second Chechen war and the US-led invasion of Afghanistan in 2001. The Chechen militants launched attacks into Russia from their Georgian base.¹²⁰ Russia had sought Georgian co-operation to deal with the threat, although Georgia denied the suggestion that it was incapable

114 In contrast, the United States took the view that the deployment of force by Turkey was in self-defence: Gray, above n 12, 141.

115 Ibid.

116 Gray and Olleson, above n 111, 391.

117 Gray, above n 12, 141. See Abdul Amir A Al-Anbari, *Letter Dated 13 October 1991 from the Permanent Representative of Iraq to the United Nations Addressed to the Secretary-General*, UN Doc S/23141 (14 October 1991); Abdul Amir A Al-Anbari, *Letter Dated 16 October 1991 from the Permanent Representative of Iraq to the United Nations Addressed to the Secretary-General*, UN Doc S/23152 (17 October 1991); Mahmut Bozarslan, 'Iraq Says Turkey Incursion "Unacceptable"', *The Sydney Morning Herald* (online), 27 February 2008 <<http://news.smh.com.au/world/iraq-says-turkey-incursion-unacceptable-20080227-1v27.html>>.

118 Gray, above n 12, 142; Nizar Hamdoon, *Identical Letters Dated 14 June 1997 from the Permanent Representative of Iraq to the United Nations Addressed to the Secretary-General and to the President of the Security Council* UN Doc S/1997/461 (16 June 1997).

119 Malcolm Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 80.

120 Dalziel, above n 4.

of securing its borders.¹²¹ On 23 August 2002, Russian aircraft penetrated Georgian airspace and attacked Chechen rebels based within the Pankisi Gorge. While Russia initially denied the incident,¹²² it subsequently issued a letter to the Security Council stating that the existence of terrorist enclaves based in the territory of states which are 'unable or unwilling to counteract the terrorist threat is one of ... [the factors which] complicate efforts to combat terrorism effectively'.¹²³ The letter proceeded to identify the Pankisi Gorge as one such area and recalled attempts 'to arrange cooperation with the official authorities in Tbilisi on issues related to combating terrorism'. The letter continued:

If the Georgian leadership is unable to establish a security zone in the area of the Georgian-Russian border, continues to ignore United Nations Security Council resolution 1373 (2001) of 28 September 2001, and does not put an end to the bandit sorties and attacks on adjoining areas in the Russian Federation, we reserve the right to act in accordance with Article 51 of the *Charter of the United Nations*, which lays down every Member State's inalienable right of individual or collective self-defence.¹²⁴

This letter, read as a whole, generally characterises the 'unwilling or unable' test. Russia had unsuccessfully sought Georgian consent for joint operations and was continuing to suffer attacks from non-state actors based within Georgian territory. Given Georgia's inability to establish a security zone, Russia explicitly identified the right to use force in self-defence pursuant to article 51.

While this is perhaps one of the clearest enunciations of the 'unwilling or unable' test in its simple form, the largely negative reaction of the international community is instructive. The US, in particular, condemned the Russian attack. White House spokesman Ari Fleischer commented that the

United States is deeply concerned about credible reports that Russian military aircraft indiscriminately bombed villages in northern Georgia on August 23, resulting in the killing of civilians ... The United States ... deplores the violation of Georgia's sovereignty.¹²⁵

As noted above, the US has expressed support for the right to engage in extraterritorial self-defence. It is therefore telling that they refused to recognise the legitimacy of Russia's purported use of self-defence arising from Georgia's unwillingness or inability to deal with Chechen rebels, particular after the events of 9/11. While this suggests that the test is not part of customary international law, one must consider the political reality that the US is perhaps unlikely to condone Russian military intervention in a state that was seeking admittance to

121 Reinold, above n 42, 252; 'US Rebukes Russia over Bombing', *BBC News* (online), 25 August 2002 <<http://news.bbc.co.uk/2/hi/europe/2214995.stm>>; Irakly Areshidze, 'Chechen Incursions Prompt Flare-up of Georgian-Russian Tension', *Eurasianet* (online), 6 August 2002 <<http://www.eurasianet.org/departments/insight/articles/eav080702a.shtml>>.

122 Reinold, above n 42, 253; Areshidze, above n 121.

123 Sergey Lavrov, *Letter Dated 11 September 2002 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General*, UN Doc S/2002/1012 (12 September 2002).

124 *Ibid.*

125 US Department of State, 'Russian Bombing of Georgia' (Press Release, 24 August 2002) <<http://2001-2009.state.gov/p/eur/rls/prsrl/2002/13002.htm>>.

the North Atlantic Treaty Organization ('NATO'). Furthermore, the US has historically condemned Russian intervention in Georgia.¹²⁶ However, the failure to accept Russia's use of force, taken with the failure to explicitly justify Operation Neptune Spear in the context of the 'unwilling or unable' test, suggests that even the US is not convinced that such deployments of extraterritorial self-defence are legal, contrary to the views expressed by Koh, Brennan and Holder.

The response of the international community to the 'unwilling or unable' test remains mixed. This can be seen by the Australian position. After the 2002 Bali terrorist attacks, Australian Prime Minister John Howard stated:

I would always want to see Australia act in accordance with proper international practices but proper international practice has always recognised legitimate self-defence. And I have said before, and I'll say it again, that if I were given clear evidence that this country were likely to suffer an attack, and I had a capacity as Prime Minister to do something to prevent that attack occurring, I would be negligent to the people of Australia if I didn't take that action.¹²⁷

While this statement was made in the context of pre-emptive self-defence, it is nonetheless suggestive of the 'unwilling or unable' test. Less than a week after making the above statement, Howard clarified his position in an interview with Indonesian media. Howard stated: 'I was simply stating a principle ... where a country were unable or unwilling and the only way to protect Australia was to take action, that ... action would be taken.'¹²⁸ These comments attracted a considerably negative reaction from many of Australia's neighbours, including Malaysia, Indonesia, the Philippines and Thailand.¹²⁹ Indonesia described Howard's comments as 'unhelpful', while the Malaysian High Commissioner noted that Australia could not operate in Malaysia without consent.¹³⁰ These objections reveal a genuine concern by potential host states as to the development of the 'unwilling or unable' test, which in turn undermines the likelihood that the

126 In response to Russian attacks against Georgia in November 2001, Richard Boucher of the US Department of State noted:

[w]e have consistently supported the sovereignty and the territorial integrity of Georgia. We are deeply concerned about these intrusions which undermine stability in this region, and we've raised the situation at senior levels with the Russian government in the past and will do so again in the near future.

'USA Condemns Russia's Attack on Georgia', *Civil* (online), 29 November 2001

<<http://www.civil.ge/eng/article.php?id=760>>.

127 Tony Jones, Interview with John Howard, Former Prime Minister of Australia (Television Interview, 29 November 2002) <<http://pmtranscripts.dpmc.gov.au/browse.php?did=12666>>.

128 W Michael Reisman and Andrea Armstrong, 'Claims to Pre-emptive Uses of Force: Some Trends and Projections and Their Implications for World Order' in Michael N Schmitt and Jelena Pejic (eds) *International Law and Armed Conflict: Exploring the Faultlines* (Martinus Nijhoff, 2007) 79, 103.

129 Myra Williamson, *Terrorism, War and International Law: The Legality of the Use of Force against Afghanistan in 2001* (Ashgate, 2009) 123.

130 *Ibid.*

test is part of customary international law.¹³¹ As the ICJ held in the *Asylum* case, customary law requires the ‘constant and uniform usage ... by the States in question’.¹³² If the test is imprecise, then this necessarily militates against the test being sufficiently certain so as to constitute customary law.

E Other Potential Sources of the Test

Finally, it could be argued that the ‘unwilling or unable’ test is emerging from the field of international criminal law. This can be gleaned from the jurisdiction of the International Criminal Court (‘ICC’). The ICC does not have primary jurisdiction to determine ‘serious crimes of concern to the international community’.¹³³ If a case is being investigated or prosecuted by a state, or if the case has been investigated and the state has decided not to prosecute the person concerned, then the case is inadmissible before the ICC.¹³⁴ However, article 17 of the *ICC Statute* provides an exception to this inadmissibility, namely, where the state is ‘unwilling or unable genuinely’ to carry out the investigation or prosecution.¹³⁵ Article 17(2) sets out the factors the ICC is to consider when determining the ‘unwillingness’ of the state, including where the accused is shielded from criminal responsibility, where there has been an unjustified delay in bringing proceedings, or the proceedings are not conducted independently or impartially.¹³⁶ Similarly, article 17(3) sets out the factors the ICC is to consider in determining the state’s inability to carry out proceedings.¹³⁷ It is possible that the legal framework of the *ICC Statute*, together with the methodology used by the ICC in determining whether a state is unwilling or unable, could provide guidance to resolve the question of whether a host state is unwilling or unable to deal with domestic non-state actors.

Yet, there are several fundamental distinctions between the exception to inadmissibility contained in article 17 of the *ICC Statute* and the ‘unwilling or unable’ test. These distinctions undermine the argument that the legality of extraterritorial self-defence is emerging from international criminal law. In the case of international criminal law, the ICC is explicitly authorised by virtue of the *ICC Statute* to conduct an examination of unwillingness or inability of a state to prosecute. In contrast, it is the victim state, not an independent third party, which has historically made the determination as to the unwillingness or inability

131 How much weight can be given to the objection of potential victim states? While Pakistan have formally objected to US UAV strikes and the killing of bin Laden, one must consider the possibility that while a state may object publicly to the use of force against non-state actors in its territory, such objections may be for domestic political reasons, as noted above. See, eg, *US Embassy Cables*, above n 40. However, the range of objections from various host states makes clear that there is a genuine concern as to the application of the ‘unwilling or unable’ test.

132 *Asylum Case (Colombia v Peru) (Judgment)* [1950] ICJ Rep 266, 276–7.

133 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 5(1) (‘*ICC Statute*’).

134 *Ibid* art 17(1).

135 *Ibid*.

136 *Ibid* art 17(2).

137 *Ibid* art 17(3).

of the host state. While it would clearly be in the interests of the host state if a third party, such as the UNSC, were to make the assessment, this is yet to occur in practice. Despite this, the biggest distinction remains the requirement of immediacy. In contrast to proceedings in the ICC, which can take many years from investigation to conviction,¹³⁸ the legality of a state to use force in self defence is contingent on the immediacy of the response. As noted above, this raises a fundamental problem for the ‘unwilling or unable’ test – balancing the investigation that is to be conducted as to the willingness or ability of the host with the requirement that if force is to be used in self-defence, then it has to be an immediate response to the armed attack. The extent of any potential guidance provided by the *ICC Statute* and international criminal law is consequently limited.

V CONCLUSION

At first glance the ‘unwilling or unable’ test seems inherently practical – if a host state is unable or unwilling to deal with the threat posed to the victim state, then the latter should acquire the right to use force in the host’s territory against the threat. Such a formulation is simple, and appears to reasonably address the security concerns posed by non-state actors to threatened states. But despite Deeks’ acknowledgement that it will not be clear whether the host is unwilling or unable to act¹³⁹ there is nonetheless a growing state practice in support of the test. As discussed, Russia has used force against Chechen rebels in Georgia, Turkey against PKK rebels in northern Iraq, and the US against al-Qaeda in Pakistan. While many commentators such as Dinstein, Deeks, Shearer and Reinold, as well as several high-ranking US officials including Koh, Brennan and Holder argue that the test is legal under international law, the true position remains doubtful.

There are several possible sources of the legality of the ‘unwilling or unable’ test. In light of the prohibition on the use of force contained in article 2(4) of the *UN Charter*, it is highly doubtful that a host state’s breach of its duty of vigilance will provide legal justification for the use of force by the victim state, despite Stahn’s advocacy. It is equally unlikely that the legality of the ‘unwilling or unable’ test is justified by a flexible reading of article 2(4) of the *UN Charter* so as to permit the use of force by the victim state that is not directed towards the territorial integrity of the host state. Such a view is untenable when one considers the purpose of the *UN Charter*.

Rather, the ‘unwilling or unable’ test is emerging from the customary law requirement of ‘necessity’. The victim state is to take into account the willingness of the host state to act against the non-state actor and its capacity to

138 For example, investigations into allegations of war crimes committed by Thomas Lubanga Dyilo were opened on 23 June 2004, with judgment given on 14 March 2012: *Prosecutor v Dyilo (Judgment)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 14 March 2012) 63.

139 Deeks, above n 37, 505.

do so as part of the assessment as to whether the use of force in self-defence is necessary. If the host state is willing and able to deal with the threat posed to the victim state by the non-state actor, then it will be unnecessary for the victim to use force in self-defence. While state practice in support of the test is increasing, the required element of *opinio juris* appears to be largely absent. Turkey's use of force against PKK rebels in northern Iraq, for example, arguably satisfies the requirement of the test. Yet Turkey has consistently offered a range of justifications for the use of force, with no explicit reference to the 'unwilling or unable' test. The US has historically supported the test, as can be seen from the statements of Sofaer, Bellinger and Koh, as well as President Obama. This explicit support for the test makes the US's reaction to the Russian attack on Chechen rebels in the Pankisi Gorge puzzling. Russia had retrospectively justified its use of force against the Chechen rebels by reference to Georgia's unwillingness and inability to bring the non-state actors to justice, yet the US condemned the violation of Georgian sovereignty. Significantly, the US failed to justify Operation Neptune Spear on the grounds of Pakistan's unwillingness or inability to act against bin Laden. The objections to the doctrine raised by host states and potential host states further undermine *opinio juris*. When this is taken with the failure of the UNSC and the ICJ to make any pronouncement authorising such uses of force, the conclusion that must be drawn is that the 'unwilling or unable' test is not part of the contemporary law on the use of force. It is instead more apt to characterise the doctrine as an emerging norm.

The concern is that if the test is not part of the international law, and powerful states continue to employ this ill-defined doctrine to protect their own interests¹⁴⁰ at the detriment of the territorial integrity of other inevitably less powerful states, then this may lead to the erosion of sovereignty and the world order on which it is based. What, then, can be done to remedy this malady? Unless states apply the test in a consistent manner out of a sense of legal obligation it is unlikely that the test will crystallise into customary international law. The nebulous parameters of the 'unwilling or unable' test undermine this consistent application. To some extent this could be resolved by a ruling from the ICJ, but in the absence of such guidance the extraterritorial use of force in self-defence should be reserved for the most serious cases where the severity of the attack satisfies the threshold of an 'armed attack' under article 51 of the *UN Charter*. Raising the threshold of the test by reference to a narrow interpretation of 'armed attack' under article 51 of the *UN Charter* would assist in facilitating broad normative support for the test, notwithstanding the growing influence of the accumulation of events doctrine.¹⁴¹ Furthermore, the test may find more willing support amongst the international community where the threat posed by the non-state actor is sufficiently imminent. This is in contrast to the overly generous definition of 'imminence' contained in the recent US Department of

140 As is the nature of the nation state.

141 See Tams, above n 3, 388.

Justice White Paper, which includes considerations of the ‘relevant window of opportunity’ and the likelihood of heading off future disastrous attacks.¹⁴²

Furthermore, the primary objective for any victim state seeking to engage in extraterritorial self-defence should be to secure the consent of the host. If consent cannot be obtained, the victim state should provide whatever reasonable assistance is necessary to enable the host to deal with the threat. The victim should be mindful of not coercing the host into providing its consent, but this can be a difficult exercise given the power imbalance between those powerful states that seek to rely on the ‘unwilling or unable’ test, and those comparatively weak states that may find themselves hosting the non-state actors.

If consent cannot be obtained, then an alternative option would be for the victim state to put the allegation of the host’s unwillingness or inability to the UNSC. As Ahmed argues, this would give the host state an opportunity to contest the victim’s allegations, and would provide a degree of transparency and help to prevent abuses by powerful states.¹⁴³ One would anticipate that such an approach would not lead to a prompt determination, and delays may undermine the immediacy of the victim state’s right to use force in self-defence in the event the UNSC verified that the host is in fact unwilling or unable to act. However, such a delay for proper investigation would certainly be justified if it led to greater transparency and certainty that the host is genuinely unable or unwilling to deal with the threat¹⁴⁴ and with independent verification the right of the victim state would be adequately balanced against the territorial integrity of the host.

142 Michael Isikoff, *Justice Department Memo Reveals Legal Case for Drone Strikes on Americans*, *NBC News Investigations* (online), 4 February 2013 <http://investigations.nbcnews.com/_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans?lite>. See also Thomas McDonnell, *Expanding the Executive’s Power to Kill: The US Justice Department’s Memo* (12 February 2013) *International Law Prof Blog* <http://lawprofessors.typepad.com/international_law/2013/02/expanding-the-executives-power-to-kill-the-us-justice-departments-memo.html>.

143 Ahmed, above n 38, 23–30.

144 Dinstein notes that a justifiable delay in the victim state’s response may not prejudice the immediacy of that response: see Dinstein, above n 1, 212–3.