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The Unwilling or Unable Doctrine: Extraterritorial Use of Force Against Non-State Armed Groups

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Abstract

When the drafters of the United Nations Charter (UN Charter) agreed on the strict rule for the prohibition of use of force between members states, they provided an exception for that prohibition by allowing states to resort to force in forms of individual or collective self-defence provided that an armed attack happens against them. However, since it is argued that the UN Charter was written with the traditional concept of warfare in mind, namely war between sovereign states, under Art. 51 of the UN Charter only an armed attack by a state triggers the right to use force in self-defence. That is to say, the scope of the UN Charter did not cover the regulation regarding the conducts of non-state armed groups within the international plane, and thus this has created a dilemma for the states as how to respond when they become targeted by the armed activities of a non-state armed group operating from the territory of the third state. This issue has been further exacerbated by the potential conflict between two principles of the UN Charter including territorial integrity and self-defence when the victim state seeks to act in self-defence and target the group in question. Indeed, there are many cases in which states used force extraterritorially by referring to the inability or unwillingness of the host state in dealing with the threat posed by the non-state armed groups within its territory. In the academic literature, this type of justification has been referred to as the "unwilling or unable doctrine". However, this doctrine can only be invoked as a legal justification when it is understood that it is already a rule of customary international law. By analyzing various case studies, this thesis seeks to determine whether there are sufficient state practice and *opinio juris* in the favour of the unwilling or unable doctrine that could prove its customary status. The result of this paper shows that despite the fact that states have frequently used force extraterritorially against non-state armed group, their practices seems to be not consistent with the standard required by the unwilling or unable doctrine. It further indicates that the states chosen for this study do not genuinely believe that the unwilling or unable doctrine is meant to have legal obligation upon them. Thus, neither the constituent element of state practice nor *opinion juris* has been met to conclude that the unwilling or unable doctrine is a rule of customary international law.

Když se autoři Charty Spojených národů (Charta OSN) dohodli na přísných pravidlech zakazujících užití síly mezi členskými státy, poskytli také výjimku z tohoto zákazu skrze možnosti uchýlení se k užití síly ve formě sebeobrany nebo kolektivní sebeobrany ve chvíli kdy je proti státu užito ozbrojené síly. Nicméně, má se za to, že Charta OSN myslí na tradiční koncept válčení ve smyslu války mezi svrchovanými státy, podle čl. 51 Charty OSN, pouze ozbrojený útok provedený státem spouští právo na užití síly v sebeobraně. Tudíž se má za to, že rámec Charty OSN nekryje žádné specifické případy, právní úprava týkající se jednání nestátních ozbrojených skupin na poli mezinárodního práva. Toto pravidlo pro státy vytvořilo dilema, jak by měly reagovat v přídě stanou-li se objetí ozbrojeného útoku vedeného nestátním ozbrojeným subjektem, jenž zasahuje z území třetího státu. Tento problém je ještě zhoršen potencionální kolizí mezi principy Charty OSN, jimiž jsou nedotknutelnost území a právo na sebeobranu. Na jednu stranu, je-li stát terčem útoku nestátního subjektu, měl by být logicky schopen se bránit a odpovědět na útok. Vskutku existuje mnoho případů, kdy státy ospravedlňovaly přeshraniční užití síly odvoláváním se na neschopnost nebo neochotu hostujících států řešit hrozbu, kterou představují ozbrojené skupiny na jejich území. V odborné literatuře byl tento způsob ospravedlnění nazván "unwilling or unable doctrine" – doktrína neochoty nebo neschopnosti. Nicméně této doktríny se mohou dovolávat pouze v případě právního ospravedlnění přeshraničního užití síly jde-li o pravidlo mezinárodního obyčeje. Skrze analýzy různých případových studií se tato práce snaží určit, zda je dána patřičná praxe států a *opinio juris* ve prospěch doktríny neochoty nebo neschopnosti, které by mohly prokázat její obyčejový status. Cíl této práce je poukázat, že navzdory faktu, že státy často užívají sílu mimo své území proti nestátním ozbrojeným skupinám, jejich praxe nemusí být v souladu se standardy požadovanými doktrínou neochoty nebo neschopnosti. Práce dále poukazuje na silný nedostatek *opinio juris* mezi státy, když se dovolávají této doktríny k ospravedlnění jejich přeshraničních operací proti nestátním ozbrojeným skupinám. Tedy ani konstitutivní prvky praxe států ani *opinion juris* nedocházíme k závěru, jestli doktrína neochoty nebo neschopnosti je pravidlem mezinárodního obyčeje.

Key words: unwilling or unable doctrine, use of force, extraterritorial use of force, cross-border use of force, customary international law, territorial integrity, self-defence, Art. 2

(4) of the UN Charter, Art. 51 of the UN Charter, territorial state, host state, victim state, non-state armed group.

Klíčová slova: Doktrína unwilling or unable, použití síly, extrateritoriální použití síly, přeshraniční použití síly, mezinárodní obyčejové právo, teritoriální integrita, sebeobrana, čl. 2(4) Charty OSN, čl. 51 Charty OSN, teritoriální stát, hostitelský stát, postižený stát, ozbrojené nestátní skupiny.

Declaration

I hereby declare that this Master's Thesis on the topic "The Unwilling or Unable Doctrine: Extraterritorial Use of force Against Non-State Armed Groups" is my original work and I have acknowledged all sources used.

Place: Olomouc Date: 21 May 2019 Signature: Ayyoub Jamali

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Contents

List of Abbreviations and Acronyms

Art – Article

ARSIWA – The Draft Articles on Responsibility of States for Internationally Wrongful Act

FARC – Revolutionary Armed Forces of Colombia

ICJ – International Court of Justice

ILC – International Law Commission

ISIS – Islamic State of Iraq and Syria

JeM – Jaish-e-Mohammad

OAS – Organization of American States

Para – Paragraph

PKK – Kurdistan Worker's Party

UN – United Nations

UN Charter – Charter of the United Nations

UNSC – United Nations Security Council

UNGA – United Nations General Assembly

UK – United Kingdom

US – United States

SDF – Syrian Democratic Forces

WWII – World War II

1. Introduction

1.1 Introduction to the topic

The Charter of the United Nations (UN Charter) was drafted in 1945 with the aim to preserve international peace and security.[1] The new organization was established on the principle of the equal sovereignty of all its members.[2] Outraged by the cruelness of World War II (WWII), the use of force was prohibited between states.[3] However, a general exception provided states with the right to self-defence when an armed attack happens against them.[4] Indeed, it is argued that since the UN Charter was written with the traditional concept of warfare in mind, namely war between sovereign states[5], under Art. 51 of the UN Charter only an armed attack by a state triggers the right to use force in self-defence. Nevertheless, today's reality shows that states can also be the victims of the armed attacks of the non-state armed groups originated from the territory of a third country. In such situation, if the victim state wants to respond and target the non-state armed group tension may potentially appears between two principles of international law including state sovereignty and self-defence right. On the one side, the state that is targeted by the armed activities of a non-state armed group should, logically, be able to defend itself and respond to them. In such situation, the victims state will most likely conduct the cross-border use of force against the group in question. On the other side, the territorial state would continuously argue that its sovereignty and territorial integrity should not be infringed when it is not responsible for the conducts of the irregular groups within its territory. To address this dilemma, various arguments have been put forward to determine whether the framework regulating the use of force in the UN Charter permits states to take extraterritorial use of force against such groups. In fact, the unwilling or unable doctrine has been suggested and supported by many scholars, legal advisors, and some states to justify the cross-border use of force against non-state armed groups in those cases when

[1] United Nations, Charter of the United Nations (UN Charter), 24 October 1945, 1 UNTS XVI, Art. 1 (1)
[2] Ibid, Art. 2 (1).
[3] FAIX, Martin, Law of Armed Conflict and Use of Force, 1st edition, Univerzita Palackeho v Olomouc, 2013, p. 16.
[4] UN Charter, Art. 51.
[5] WELLER, Marc et al. The Oxford Handbook of the Use of Force in International Law, Oxford, Oxford University Press, 2015, P. 168.

the territorial state is unable or unwilling to suppress the armed activities of irregular groups within its territory. However, for the doctrine to be considered legal, it is necessary to show that the doctrine is already a rule of customary international law. Thus, this paper seeks to determine whether the unwilling or unable doctrine satisfies the constituent elements of state practice and *opinio juris,* and thus it is a rule of customary international law. In doing so, it analyses several relevant case studies which include the practices of the most important states in the area of use of force including the United States (US), Russia, United Kingdom (UK), France, Turkey and other major powers.

1.2 Aim

The aim of this thesis is to investigate the status of the unwilling or unable doctrine in current international law. Despite the fact that some states have invoked the doctrine to justify their extraterritorial use of force against non-state armed groups, there is no consensus among scholars whether such practice is legal under international law. Thus, as long as the question regarding the legality of the unwilling or unable doctrine remains unanswered, a troubling gap exacerbates within the framework of the use of force legal regime. On the one hand, the state which is the victim of the armed attacks of a non-state armed group will undoubtedly continue to find a remedy for dealing with the situation. It will potentially claim self-defence right and use force extraterritorially against the group in question. On the other hand, the territorial state will continue to claim that its sovereignty and territorial integrity should not be violated when it is not responsible for the conducts of irregular groups within its territory. Thus, this thesis seeks to contribute to the current discussion of the unwilling or unable doctrine by clarifying its legality and its possible application in the case of extraterritorial use of force against the non-state armed groups.

1.3 Research question

In conformity with the aim of this project, the research question of the thesis has been formulated as follow:

1. Does the current form of the unwilling or unable doctrine constitute a rule of customary international law?

1.4 Previous research

A multitude of scientific articles, academic books, materials from International Court of Justice (ICJ) and United Nations Security Council Resolutions, legal analysis by research organization such as Max Planck, reports from United Nations and even Social Networks and newspapers can be found in relation to the development of unwilling or unable doctrine and extraterritorial use of force against non-state armed groups. Consequently, these sources provide crucial information when analyzing the legal questions surrounding the customary status of the unwilling or unable doctrine.

1.5 Material

In conformity with the previous research conducted in the area and the aim of this project, the material for the thesis will include primary, secondary and internet sources. The primary sources will consist of the various international treaties, the judgments of the International Court of Justice (ICJ), correspondence letters between states and United Nations Security Councils (UNSC) and official documents and statements of the states. The primary source will be mainly used to analyse the customary status of the unwilling or unable doctrine. As regards to the secondary and internet sources, academic articles, books, legal analysis by research organization such as Max Planck and researchers will be used to build up the structure of the thesis and provide the relevant information required for the reader to understand the research problem of this study.

1.6 Delimitation and definitions

This paper is limited to a number of cases in which states have had the possibility or opportunity to invoked the unwilling or unable doctrine to justify their cross-border use of force against non-state armed groups. The reason for this limitation stems from the fact that the scope of the thesis does not let a comprehensive analysis of all possible and relevant cases. It should be acknowledged that even identifying cases in which the states have had the possibility or opportunity of applying the doctrine is difficult. Nevertheless, the cases that have been chosen for this study consist of the practices of the most important states in the area of use of force. That is, those states whose practices are perceived to be very crucial

for establishing a new rule of customary international law. In this paper, non-state armed groups are referred to those military or paramilitary organisations that are not official institutions of a state and they are capable to conduct cross-border military operation at large scale. Such groups can be based on the territory of different states, and in some cases, they are unofficially state-allied and receive government support to launch an attack against another state. Moreover, an armed attack by a non-state armed group should be seen as parallel in terms of intensity and scale in comparison to that of a state, the letter of which warrants the right to self-defence under Art. 51 of the UN Charter. The victim state is referred to the state which is targeted by the armed activities of a non-state armed group based on the territory of another state. Additionally, the territorial state or the host state referred to the state whose territory used by a non-state armed group for attacking other states. Last but not least, the term "doctrine" is equivalent to the "unwilling or unable doctrine".

1.7 Chapter outline

The second chapter of this thesis provides necessary analysis of the use of force legal regime in current international law. It ends with arguing that while extraterritorial use of force against non-sate armed group is not permissible under international law, the doctrine of unwilling or unable can serve as a legal justification provided that it is already a rule of customary international law. Thus, the third chapter starts describing what is the unwilling or unable doctrine and its sets its criteria required when it is invoked by the states. The third chapter further continues by analyzing the process by which a new rule of customary international law can be established. The fourth chapter is devoted to the analysis of several case studies to see the current development of the unwilling or unable doctrine in international law. The last chapter goes to analyse whether the case studies of the paper support the customary status of the unwilling or unable doctrine. In doing so, it analyses the constituent elements of general state practice and *opinio juris* as regard to the unwilling or unable doctrine. The final chapter ends with a conclusion in which the answer to the research question will be provided.

2. Use of Force

As this paper deals with the extraterritorial use of force against non-state armed groups it is necessary to start explaining the relevant regulation in the area of use of force legal regime. Indeed, those who drafted the UN Charter had in mind the cruelness of WWII and thus agreed on strict rules to prohibit use of force between member states. Nevertheless, they made an exemption to this prohibition by allowing states to resort to force in self-defence when an armed attack occurs against them. However, since the concept of an "armed attack" is understood to involve a cross-border use of force by one state against another it is believed that the scope of the UN Charter did not regulate the armed activities of the non-state armed groups in international plane.[6]

2.1Art. 2 (4) of the UN Charter

The current existing legal regime regulating the prohibition of use of force has been formulated by Art. 2 of the UN charter. In its essence, Art. 2 (3) of the UN Charter establishes that member states should rely on peaceful means to settle their international disputes in such a way "that international peace and security, and justice are not endangered".[7] Furthermore, Art. 2 (4) of the UN Charter provides that "all Members shall 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".[8] As it can be seen the drafters of Art. 2 (4) of the UN Charter were very sensitive to not use the term 'war' in the formulation of the article and instead they used the term 'use of force' to refer to any types of armed conflict that can be directed against the territorial sovereignty, political independence or the purpose of the United Nations (UN).

[6] WILMSHURST, Elizabeth, Principles of international law on the use of force by states in self-defence, Chatam House, The Royal Institute of International Affairs, 2005, P. 18.
[7] UN Charter, Art. 2 (3).
[8] Ibid, Art. 2 (4).

2.2Art. 39 of the UN Charter

A state is in violation of Art. 2 (4) of the UN Charter when it uses force or threats to use force against another sovereign state. Such violation is considered to be a threat to the peace, breach of the peace, or act of aggression stipulated in Art. 39 of the UN Charter. Under Chapter VII of the UN Charter, the United Nations Security Council (UNSC) is equipped with sufficient power to determine the existence of such violation and decide which measures should be taken in such cases to restore the international peace and security. Although the terms used in the Art. 2 (4) and Art. 39 are left undefined and it is not very clear what the relation and differences are between "threat or use of force" in Art. 2 (4) and "breach of the peace" and "act of aggression" in Art. 39, it is logical to argue that in circumstances when "use of force" or "act of aggression" has been occurred, a "breach of the peace" has also occurred.[9]

2.3Art. 51 of the UN Charter

The inherent right to self-defence dates back to the *Caroline incident* of 1837 involving Britain, the US and the Canadian independence movement.[10] Indeed, the modern interpretation of the right to self-defence is considered to be very significant as it provides an exception to the prohibition of use of force enshrined under Art. 2 (4) of the UN Charter. Art. 51 of the UN Charter allows member states to use force in forms of individual or collective self-defence when an armed attack occurs against them:

"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. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time

[9] AMINZADEH, Elham, The United Nations and International Peace and Security: A Legal and Practical Analysis, PhD Thesis, Faculty of Law and Financial Studies, University of Glasgow, 1997, p. 32-33.
[10] AREND, Anthony, International Law and the preemptive Use of Military Force, The Washington Quarterly, 2003, Vol. 26, Issue 2, P. 90.

such action as it deems necessary in order to maintain or restore international peace and security".[11]

It is understood that once a state claims to have acted in self-defence, it may not be held responsible for the consequences of its action.[12] In fact, the International Law Commission (ILC) defines self-defence as a tool which can label the military action of a state as a lawful act. Art. 21 of the Draft Articles on Responsibility of States for Internationally Wrongful Act (ARSIWA) holds that "the wrongfulness of an act of a state is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations".[13] This implies to the fact that the use of force by a member state against another state is not in breach of Art. 2 (4) of the UN Charter when the state acts in self-defence in accordance to the Art. 51 of the UN Charter.[14]

2.3.1 Collective self-defence

As established in Art. 51 of the UN Charter, states can resort to force in collective self-defence. In *Nicaragua case* (1986), the ICJ identified three elements need to be met for exercising the right to self-defence collectively. The first element requires that there should be at least one state entitled to act by way of individual self-defence. Despite the Dissenting Opinion of Judge Sir Robert Jennings, the Court did not suggest that the use of force in collective self-defence is permissible only if the armed attack on the victim state should also poses security threat to the other states seeking use force collectively with the victim state. The second condition requires the victim state to declare itself as a victim of an armed attack before the other states will be entitled to use force in its assistance. It should be noted that the ICJ did not require the existence of pre-alliance between the states seeking to act in collective self-defence. The last element requires the victim state to

[11] UN Charter, Art. 51.
[12] CRAWFORD, James et al. The Law of International Responsibility, Oxford Commentaries on International Law, Oxford University Press, 2010, p. 455.
[13] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), November 2001, Supplement No. 10 (A/56/10), chp.IV.E. 1, Art. 21.
[14] Crawford et al., n.d., The Law of International Responsibility, p. 460-461.

request the other states for assistance before they are entitled to use force in form of collective self-defence.[15]

2.4 Individual Self-Defence and Its Elements

It is generally understood that the use of force under Art. 51 of the UN Charter is permissible when it meets the following conditions:

i) the act of self-defence must be a response to an armed attack;[16]
ii) the use of force, and the degree of force used, must be necessary and proportionate;[17] and
iii) it must be reported to the UNSC and must cease when the UNSC has taken measures necessary to maintain international peace and security.[18]

2.4.1 The Source of the Armed Attack

There is no consensus among scholars whether Art. 51 of the UN Charter requires that an armed attack should be carried out by a state in order to trigger the right to self-defence on the part of the victim state. Indeed, Art. 51 of the UN Charter does not specify the source of the attack; it only requires the existence of an armed attack against a member state for the purpose of self-defence right.[19]This ambiguity, therefore, raises significant challenges in number of cases where the states have restored to force in response to the armed attack of a non-state armed group.

Nevertheless, the current regulation for triggering the right to self-defence under Art. 51 of the UN Charter requires a certain level of attribution to the state from which the alleged armed attack originated. In fact, the ICJ case-laws has not settled this issue

[15] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America); (Nicaragua Case 1986), Merits*, International Court of Justice (ICJ), 27 June 1986, Para. 195-199; GREENWOOD, Christopher, Self-defence, Max Planck Encyclopedia of Public International Law Foundation, Oxford Public International Law, 2011, Para. 35-40.
[16] For the purpose of this thesis, the armed attack should be understood as if it had passed the threshold required to trigger the right to self-defence.
[17] For the purpose of this thesis, the use of force by the states against non-state armed group, examined in chapter 4, shall be assumed as they satisfy the requirement of necessity and proportionality.
[18] GREENWOOD, Christopher, Self-defence, 2011, Para. 8.
[19] UN Charter, Art. 51.

thoroughly but it can still be a good guidance to shed light upon this ambiguity. In the *Nicaragua Case* (1986), the ICJ established that an armed attack could include "the sending by or behalf of a state of armed bands, groups, irregulars or mercenaries, which carries out acts of armed force against another state of such gravity as to amount to (*inter alia*) an actual armed attack conducted by regular forces, or its substantial involvement therein".[20] This interpretation of Art. 51 of the UN Charter is based on Art. 3 (g) of the Definition of Aggression annexed to Resolution 3314 (1974) which contains the same phrase. This interpretation creates possibility for a victim state to exercise self-defence right, under Art. 51 of the UN, against a non-state armed group on whom the host state has a certain level of control.[21] Moreover, in the *Israeli Wall Advisory Opinion* (2004), the ICJ explicitly recognized that under Art. 51 of the UN Charter only an armed attack by a state triggers the right to use force in self-defence.[22] Additionally, *in the Oil Platforms Case* (2003), the ICJ requires a certain level of state responsibility as pre-condition for exercising the right to self-defence under Art. 51 of the UN Charter.[23] Nevertheless, in the *Armed Activities Case* (2005), the ICJ appeared to be reluctant to clarify explicitly whether the armed attack by a non-state armed group can trigger the right to self-defence under Art. 51 of the Charter:

"For all these reasons, the Court finds that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present. Accordingly, the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces".[24]

Thus, it can be understood that for the victim state to use force in self-defence, Art. 51 of the UN Charter requires a certain level of attribution to the state from which the armed

[20] Nicaragua Case 1986, para. 195.
[21] STARSKI, Paulina, Right to Self-Defence, Attribution and the Non-State Actor, Birth of the "Unable or Unwilling" Standard?, Max Plank Institute for Comparative Public Law and International Law. Heidelberg Journal of International Law, 2015, p. 469-471.
[22] Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice (ICJ), 9 July 2004, para. 139.
[23] Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America, International Court of Justice (ICJ), 6 November 2003, para. 51.
[24] Case Concerning Armed Activities on The Territory of The Congo (Democratic Republic of the Congo v. Uganda) ICJ Decision of 19 December 2005, para. 147.

attack originated. However, considering the fact that, nowadays, non-state armed groups are sufficiently equipped to launch armed attacks independently, it will be unreasonable to expect the victim state to stay idle when targeted by the armed attacks of such groups. On the other hand, it is argued that the territorial integrity and sovereignty of the territorial state should not be infringed when the territorial state is not responsible for the conducts of the non-state armed groups within its territory. To address this dilemma, the doctrine of unwilling or unable has been suggested by some scholars and states to justify cross-border use of force against non-state armed group when the territorial state is not willing or able to put an end to the activities of non-state armed groups within its territory. However, the unwilling or unable doctrine can only be used as a legal justification provided that it is already a rule of customary international law. Thus, in the next chapter the characteristics of the unwilling or unable doctrine and the requirement for establishing a new rule of customary international law will be examined.

3. The Unwilling or Unable Doctrine and The Rule of Customary International Law

3.1 The Unwilling or Unable Doctrine

The unwilling or unable doctrine is generally defined as "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".[25] Thus, to put in in simple terms, the doctrine of unwilling or unable applies to a scenario where Group C (a non-state armed group) launches an armed attack from the territory of state A (the host state) against state B (the victim state). According to this doctrine, the victim state is entitled to use force within the territory of the host state to take action against Group C provided that the state A is neither willing nor able to take effective action against Group C. In such a situation, tensions can arise between two fundamental principles of international law including principles of territorial integrity and self-defence right. While the victim state argues for its inherent right of self-defence under 51 of the UN Charter, the host state can claim that its territorial integrity should not be infringed when it is not responsible for the conducts of non-state armed groups within its territory. Thus, resorting to force within the framework of the unwilling or unable doctrine should be seen as the last resort when no other peaceful measures remain feasible for the victim state to deal with the issue.

Indeed, the origin of the unwilling or unable doctrine has been contested by many scholars. Ashley Deeks traces back the origin of the doctrine in the law of neutrality.[26] The law of neutrality aims to ensure the minimal injuries for those states which are not participating in an interstate armed conflict. According to the Hague Convention V, the territory of neutral powers perceived to be inviolable.[27] As such, belligerent parties are not

[25] GARETH, Williams, Piercing the Shield of Sovereignty: An Assessment of the Legal Status of the" Unwilling or Unable" Test, University of New South Wales Law Journal, Vol. 36, No. 2, 2013, p. 625.
[26] DEEKS, Ashley, "Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defence, Virginia Journal of International Law, Vol. 52, No. 3, 2012, p. 497-503.
[27] International Conferences (The Hague), *Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land*, 18 October 1907, Art. 1.

allowed to transfer troops or convoys of either ammunition of war or supplies within the territory of a neutral power.[28] Additionally, belligerent states are not allowed to form and recruit agencies within the territory of neutral powers.[29] Thus, the belligerent powers are prohibited to use the territory of neutral states for the restricted purposes. Nevertheless, the neutral power shall make sure that its territory will not be violated by the belligerent states, thereby in the case of violation of its territory it should take all necessary steps to put an end to the violation.[30] Deeks also, citing several sources, argues that in order to fulfill neutral obligations it might be necessary for the neutral state to use force against those belligerent powers which violate its territory for the prohibited purposes.[31] In Deeks's view, the territorial state is considered to be in similar position as the neutral state and the non-state armed group is considered to be like the belligerent party using and violating the territory of the neutral state to launch attack against the third state.

However, Gareth D. Williams rejects the Deeks's theory of neutrality law and claims that such law predates the UN Charter and are only applicable in the context of international armed conflicts between belligerent states. He argues that the origin of the doctrine can be found in the customary law requirement of "necessity". He explains that if the territorial state is willing and able to secure its territory and not let the non-state armed groups operate against the third state, then it will be unnecessary for the victim state to resort to force in self-defence.[32] Furthermore, Tom Ruys and Sten Verhoeven seek to identify the origin of the doctrine of unwilling or unable in the international law principle of state responsibility as articulated in the ARSIWA.[33] Likewise, Ahmed Dawood also argues that provided that the armed activities of a non-state armed group is under control of the territorial state, such activities may become a legitimate target of self-defence.[34]

[28] Ibid, Art. 2.
[29] Ibid, Art. 4.
[30] DEEKS, Ashley, "Unwilling or Unable", p. 498.
[31] Ibid.
[32] GARETH, Williams, Piercing the Shield of Sovereignty, p. 640.
[33] RUYS, Tom, STEN, Verhoeven, Attacks by Private Actors and the Right to Self-Defence, Journal of Conflict & Security Law, vol. 10, No. 3, 2005, p. 299-301.
[34] DAWOOD, Ahmad, Defending Weak States Against the 'Unwilling or Unable' Doctrine of Self-Defence, journal of international law & international relations, Vol. 9, Issue. 1, 2013, p. 7.

3.1.1 The Standard of The Unwilling or Unable Doctrine

The Oxford Dictionary defines the term "unwilling" as "not ready, eager, or prepared to do something".[35] It also refers to the term "unable" as "lacking the skill, means, or opportunity to do something".[36] It should be noted that identifying the exact criteria of the unwilling or unable doctrine may be seen as elusive, and it will be quite impossible to see a situation where the host state claims that it is not willing or able to remove the threat posed by a non-state armed group within its territory.

Deeks acknowledges that "the unable or unwilling test … currently lacks sufficient content to serve as a restrictive international norm".[37] Nevertheless, there are certain conditions need to be met when the doctrine invoked by a state to justify its cross-border use of force against a non-state armed group. In order to evaluate the willingness of the territorial state, it is important that the victim state should, firstly, request consent and cooperation of the territorial state to deal with the threat posed by the concerned group. The victim state should notify and request the host state to act against the group within its territory, either alone or with its cooperation. It is also possible that the victim state can use force within the territory of the host state when it obtains the consent of the host state. In such scenario, it is not necessary for the victim state to determine whether the conditions required by the unwilling or unable doctrine are fulfilled. However, in the case when the host state denies the victim state's request for consent and cooperation, this can be interpreted as an indication of the host state's unwillingness in dealing with the threat of the non-state armed group.[38] It should be mentioned that the unwillingness of the host state is not the only determining factor for invoking the unwilling or unable doctrine. We may face situations in which the host state is willing to take action against the non-state armed group within its territory but it lacks sufficient capacity to do it. According to the unwilling or unable doctrine, such states are deemed to be "unable". Such inability is usually associated with the lack of control over relevant part of territory from which the non-state

[35] Oxford Dictionary, https://en.oxforddictionaries.com/definition/unwilling, (accessed on 25 Feb 2019).
[36] Ibid, https://en.oxforddictionaries.com/definition/unable (accessed on 25 Feb 2019).
[37] DEEKS, Ashley, "Unwilling or Unable", P. 519-521; GARETH, Williams, Piercing the Shield of Sovereignty, p. 546.
[38]DEEKS, Ashley, "Unwilling or Unable", p. 519-520.

armed group is operating.[39] The host state's lack of control over certain part of its territory is usually understood to be the result of insufficient law-enforcement capacity that the host state needs in order to keep order within its territory.[40] Thus, in such cases, the victim state is understood to have right to use force extraterritorially against non-state armed group to accomplish what the host state was not capable to achieve.

It is very important to mention that since the general rule on the prohibition of use of force, enshrined in Art. 2 (4) of the UN Charter, is one of the most important principles of the UN Charter determining new exception for this prohibition appears to be a very controversial and questionable approach. Thus, if the unwilling or unable doctrine is supposed to provide an exception for the prohibition of use of force, it should be understood as an expansion to the scope of already existing rule of self-defence which is set forth by Art. 51 of the UN Charter. Therefore, the standard of the unwilling or unable doctrine requires states to invoke the doctrine based on the self-defence right when they resort to force extraterritorially against the non-state armed groups.

So far, the application of the unwilling or unable doctrine seems to be straight-forward. It is understood that once a victim state is attacked by a non-state armed group which operates within the territory of another state, it should first try to seek peaceful solutions to remedy the situation and respect the territorial integrity of the host state. Then, the victim state shall seek consent and cooperation of the territorial state in order to deal with the threat posed by the non-state armed group. If it is proved that the territorial state is neither willing nor having sufficient law-enforcement capacity to maintain order within its territory and suppress the armed activities of the non-state armed group, then the victim state can resort to force under right to self-defence provided by Art. 51 of the UN Charter. However, the exact details of how the test should be applied remains vague and unclear. Some of these uncertainties include the question of who has the burden of proof for the inability or unwillingness of the host state and how to deal with a situation when the host state is only not able to remedy a small part of the problem.[41] Nevertheless, the legality of

[39] Ibid, P. 525.
[40] Ibid, P. 527.
[41] Ibid, p. 505.

the doctrine depends on its customary status. In other words, for the doctrine to be considered legal under international law, it is necessary to ascertain whether the doctrine is a rule of customary international law. Thus, in the next section the requirement for establishing a new rule of customary international will be examined.

3.2Customary International Law

Customary international law is considered to be among one of the three primary sources of public international law.[42] In the *Nicaragua case* (1986), the ICJ recognized the existence of a strong link between treaties and customary international rules. It is understood that the customary international rule and treaties exist in parallel when they contain the same rules and regulation. In the *Nicaragua case* (1986), the ICJ noted that in the areas of relevant law " the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content".[43] For example, while the self-defence right is established in the UN Charter, its characteristics has been regulated and governed by customary international law.[44] Thus, customary international law can be considered as a complementary for the legal basis of self-defence as the exception from the prohibition of use of force. In order to analyse the legal status of the unwilling or unable doctrine it is necessary to examine the basics and principles of customary international law.

Indeed, customary international law is the unwritten rules arising from general and consistent practice of states that they follow as if it was legally binding upon them. Art. 38 (1) (b) of the statute of the ICJ defines customary international law as the "evidence of a general practice accepted as law".[45] The ILC sets out basic approach as how to determine whether a norm can be constituted as a rule of customary international law. It requires the existence of two constituent elements. It requires to ascertain whether there is an objective element, general practice, that is accepted as law (subjective element or *opinio juris*).[46] In other words, to identify whether a norm is part of customary international law one should

[42] United Nations, Statute of the International Court of Justice, 18 April 1946, Art. 38 (1) (b).
[43] Nicaragua case (1986), para. 175.
[44] Ibid, para. 181.
[45] Statute of International Court of Justice, Art. 38 (1) (b).
[46] International Law Commission, Draft conclusions on identification of customary international law, with commentaries, Yearbook of the International Law Commission, vol. II, Part Two, 2018, conclusion 2.

look at what states actually do and determine whether the states treat that practice as if it had legal obligation upon them.

This two-element approach for the identification of customary international rules was applied by the Permanent Court of International Justice (the predecessor of ICJ) in 1927. The ICJ has followed the same approach since its establishment in 1945 and it has played a significant role in the understanding of customary international rule and its elements.[47] For example, in the *North Sea Continental Shelf Cases* (1969), the ICJ established that for the identification of international customary law the practice in question must be "both extensive and virtually uniform"[48], and it noted that it should be also a "settled practice".[49]

Furthermore, the ILC's Draft Conclusion on the Identification of Customary International Law provides detailed guidance as how to determine whether there is a general practice that is accepted as law. In this regard, the ILC established that "regard must be had to the overall context, the nature of the rule and the particular circumstances in which the evidence in question is to be found".[50] Additionally, the ILC requires to ascertain and assess the evidence for the existence of the two constituent elements separately.[51]

3.2.1 The Objective Element, *Usus*

The Draft conclusion defines state practice as a relevant practice that "must be general, meaning that it must be sufficiently widespread and representative, as well as consistent".[52] It further stipulates that "provided that the practice is general, no particular duration is required".[53] In *Nicaragua case* (1986), the ICJ established that in order to ascertain the existence of a customary rule it is sufficient if the states practice is generally consistent with the rule. The Court held that in those cases where the states practice is

[47] North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), I.C.J. Reports 1969, p.3, International Court of Justice (ICJ), 20 February 1969, p. 44, para. 77.
[48] Ibid, p. 43, para. 74.
[49] Ibid, p. 44, para. 77.
[50] Draft conclusions on identification of customary international law, with commentaries, Conclusion 3 (1)
[51] Ibid, P. 127, conclusion 3 (2).
[52] Ibid, p. 135, conclusion 8 (1).
[53] Ibid, p. 136, Conclusion 8 (2).

inconsistent with a given rule it should generally be understood as violation of that rule, not as sign for the recognition of a new rule.[54]

A number of factors must be considered to determine whether there is a general practice that could be treated as the first constituent element for establishing a new legally binding custom. Indeed, the Draft conclusion 4 specifies whose practice should be taken into consideration when ascertaining the existence and the content of the rules of customary international law. It primarily refers to the practice of the states.[55] Since states are considered to be the main subject of international law, it is usually their practice that should be considered when establishing the existence and content of rules of customary international law. In *Nicaragua case* (1986), the ICJ noted that "to consider what are the rules of customary international law applicable to the present dispute … it has to direct its attention to the practice and *opinio juris* of states".[56] In addition to the practice of the states, the Draft conclusion 4 (2) establishes that "in certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law".[57] Finally, the Draft conclusion 4 (3) explicitly notes that the conduct or practice of actors other than states and international organization does not constitute as relevant practice that could be used in the formation, or expression, of a new rule of customary international law.[58] However, the conduct of such entities may sometimes be relevant in the identification of customary international law.[59] For example, it can be argued that the conducts of a private person may be considered to be relevant for the establishment of a customary rule provided that states have endorsed or reacted to them.

The Draft conclusion 5 explains that the state practice consists of any conduct of a state when it exercises "its executive, legislative, judicial or other functions".[60] It further identifies the following forms of conducts which are covered under the term "practice":

[54] Nicaragua case (1986), para. 186.
[55] Draft conclusions on identification of customary international law, with commentaries, conclusion 4 (1).
[56] Nicaragua case (1986), para. 183.
[57] Draft conclusions on identification of customary international law, with commentaries, conclusion 4 (2).
[58] Ibid, Conclusion 4 (3).
[59] Ibid.
[60] Ibid, Conclusion 5.

i. Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction.

ii. Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and decisions of national courts.[61]

The Draft conclusion 6 (3) further hold that there is no pre-established hierarchy among the various forms of practice in the identification of customary international law.[62] Nevertheless, scholars point out to the importance of the verbal act in ascertaining whether the practice in question is a relevant one for the establishment of a new rule of customary international law. They argue that a sole conduct which is not followed by a suitable form of expression, through which the legal position of the state can be determined, cannot be constituted as a relevant practice.[63]

3.2.2 The Subjective Element, *Opinio Juris*

For a practice to be established as a new rule of customary international law the second constituent element, known as the "subjective" element or *opinion juris*, must also be fulfilled. This element requires that in each case the general practice should be treated as if it has binding obligation. The ILC's Draft conclusion 9 (1) stipulates "that the general practice be accepted as law (*opinio juris*) means that the practice in question must be undertaken with a sense of legal right or obligation".[64] It further distinguishes the *opinio juris* from the general habit and usage of the states.[65] Therefore, it is important to emphasise that, in each case, states shall react in a specific way to the practice because they feel or believe they are legally bound to do so as a rule of customary international law.

[61] Ibid, p. 133, conclusion 6 (1)(2).
[62] Ibid, conclusion 6 (3).
[63] FAIX, Martin, SVACEK, Ondrej, Studies in International Law and Organization: International Law on the Use of Force: Need for Methodological Debate, Chapter II, Czech Yearbook of Public & Private International Law, vol. 9, 2018, p. 100.
[64] Draft conclusions on identification of customary international law, with commentaries, conclusion 9 (1).
[65] Ibid, conclusion 9 (2).

This position has been taken by ICJ in the *North Sea Continental Shelf case*. The Court noted that the act in question not only needs to be a settled practice, but it must also be followed in such way that states feel obliged practicing it.[66] Indeed, the Draft conclusion 10 specifies the ways by which the existence of *opinio juris* for the rule in question can be determined. It provides a non-exhaustive list of forms of evidence that can help ascertaining the existence of *opinio juris* in regard to the concerned practice:

i. public statements made on behalf of States;
ii. official publications; government legal opinions;
iii. diplomatic correspondence;
iv. decisions of national courts; treaty provisions; and
v. conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.[67]

The Draft conclusion 10 further establishes that the state's failure to react over time to a practice may indicate to the existence of *opinion juris* of the state in regard to the concerned rule provided that the state was in a position to react and the circumstances demanded some reactions.[68]

3.2.3 Persistent Objector

In the *North Sea Continental Shelf Case*, the ICJ established that the rules of customary international law are applicable equally to all the members of international community, and thus cannot be subject of any right of unilateral exclusion in the favour of a particular state.[69] Nevertheless, the Draft conclusion 15 stipulates that provided that a state has persistently objected to a rule when it was in the process of formation, the rule in question is not applicable to that state as long as the state keeps its objection. This is referred to as the "persistent objector". [70] Indeed, the Draft conclusion 15 (2) clarifies the stringent requirement that needs to be fulfilled by a state in order to be exempt from a rule

[66] North Sea Continental Shelf Cases, p. 44, para. 77.
[67] Draft conclusions on identification of customary international law, with commentaries, conclusion 10 (1) (2).
[68] Ibid, p. 140, Conclusion 10 (3).
[69] North Sea Continental Shelf Cases, p. 38-39, para. 63.
[70] Draft conclusions on identification of customary international law, with commentaries, conclusion 15 (1).

of customary international law. It requires the state to clearly express its objection to the rule in question and make it known to the other states. The objection shall also be maintained persistent.[71] Finally, the Draft conclusion 15 (3) establishes that the exclusion from a rule of a customary international law is not possible when the given rule concerns peremptory norms of general international law (*jus cogens*).[72]

[71] Ibid, conclusion 15 (2).
[72] Ibid, conclusion 15 (3).

4. Case Studies

As shown above, the notion of the "unwilling or unable" doctrine is highly contested among scholars. There are different views regarding the origin, substantive provisions and the scope of the doctrine. Nevertheless, the situation in which the doctrine is invoked is not uncommon. States have frequently invoked the doctrine of unwilling or unable to justify their extraterritorial use of force against non-state armed groups. Indeed, the only way to legally rely on the unwilling or unable doctrine for justifying the cross-border use of force against non-state armed groups is when it is understood that the doctrine is already a rule of customary international law. As discussed before, customary international law consists of two elements of state practice and *opinio juris*. Deeks suggests that the unwilling or unable doctrine is already a rule of customary international law. She argues that "more than a century of state practice suggests that it is lawful for state X, which has suffered an armed attack by an insurgent or terrorist group to use force in state Y against that group if State Y is unwilling or unable to suppress the threat".[73] She further noted that the "states frequently cite the test in ways that suggest that they believe it is a binding rule".[74] Thus, she believes that the unwilling or unable doctrine has fulfilled the requirement of state practice and *opinio juris* and, thus, it is a rule of customary international law. However, William doubts whether the requirement of *opinio juris* has been met. He argues that while the state practice in the favour of the unwilling or unable doctrine is increasing, the required elements of *opinio juris* seems to be largely missing.[75] In this chapter, different cases of extraterritorial use of force against non-state armed groups, where the doctrine of unwilling or unable is applicable, will be examined to see whether the current development of the unwilling or unable doctrine amounts to a rule of customary international law.

4.1 US-led coalition and ISIS

The most recent and notable case in which the doctrine of unwilling or unable has been invoked is the case of US-led coalition airstrike against ISIS in Syria. The background

[73] Ibid, p. 486.
[74] Ibid, p. 503.
[75] GARETH, Williams, Piercing the Shield of Sovereignty, p. 634, 640.

of the airstrikes can be traced back to the increasing military activities of the ISIS in Iraq. The ISIS control over Mosul, Iraq's second largest city, in June 2014 raised serious concern over the national security of Iraq. Following the fall of Mosul, the Iraqi government sent a letter to the United Nations General Assembly (UNGA) and requested "urgent assistance from the international community" to eliminate the ISIS through "a collective response".[76] When the ISIS started to move and advance towards Erbil, the capital of Iraqi Kurdistan, the US authorized airstrikes against ISIS to protect the American personnel and civilians.[77] In the abovesaid letter, the Iraqi government further noted that ISIS has repeatedly carried out attacks against Iraq from eastern parts of Syria.[78] This was followed by a significant development. On 10 September 2014, the US announced that they are planning to extend military operation against ISIS into Syria.[79] Following that a document known as "Jeddah Communiqué" was signed between the member states of the Gulf Cooperation Council, Egypt, Jordan, Iraq, Lebanon and the US. The parties agreed to negotiate a strategy to eliminate ISIS within the territory of Iraq and Syria.[80]

In another subsequent letter sent to the UNSC on 20 September 2014, the Iraqi government expressed its gratitude for the military assistance provided by international community and noted that it has asked the US to lead the international effort to strike the military bases of ISIS.[81] Thus, in September 2014, the US-led coalition launched airstrikes against ISIS in Syria. Following the airstrikes, the US sent a letter to UNSC in which it invoked the doctrine of unwilling or unable to justify its use of force in Syria. According to this letter:

[76] Letter from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General, UN Doc. S/2014/440, 25 June 2014.
[77] The White House, Statement by the President, 7 August 2014, https://obamawhitehouse.archives.gov/the-press-office/2014/08/07/statement-president (accessed on 22 March 2019).
[78] UN Doc. S/2014/440.
[79] The White House, Statement by the President, 10 September 2014, https://obamawhitehouse.archives.gov/the-press-office/2014/09/10/statement-president-isil-1, (accessed on 25 March 2019).
[80] U.S. Department of State, Jeddah Communique, Office of The Spokesperson, Washington, 11 September 2014, https://2009-2017.state.gov/r/pa/prs/ps/2014/09/231496.htm (accessed on 23 March 2019).
[81] Letter from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, UN Doc. S/2014/691, 22 September 2014.

"ISIL and other terrorist groups in Syria are a threat not only to Iraq, but also to many other countries, including the United States and our partners in the region and beyond. States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence, as reflected in Article 51 of the Charter of the United Nations, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks. The Syrian regime has shown that it cannot and will not confront these safe havens effectively itself. Accordingly, the United States has initiated necessary and proportionate military actions in Syria in order to eliminate the ongoing ISIL threat to Iraq, including by protecting Iraqi citizens from further attacks and by enabling Iraqi forces to regain control of Iraq's borders. In addition, the United States has initiated military actions in Syria against al-Qaida elements in Syria known as the Khorasan Group to address terrorist threats that they pose to the United States and our partners and allies".[82]

Thus, the US relied on the inability and unwillingness of Syrian government to exercise self-defence right under Art. 51 of the UN Charter. Indeed, among those states participating in the US-led coalition, only few states have explicitly referred to the "unwilling and unable" doctrine to justify their cross-border use of force in Syria.[83] Initially, Canada was not convinced about the legality of the airstrikes in Syria. On 6 October 2014, in a debate in the parliament, the Canadian Minister of Foreign Affairs explicitly noted that, unlike the military operation in Iraq, there is not any legal basis for use of force in Syria, thus rejecting the argument raised in the letter US had submitted to UNSC few days before.[84] Despite this, in March 2015, Canada changed its position when it sent a letter to the UNSC invoking the unwilling or unable doctrine and thus endorsing the US position. Among other things, Canada asserted that "ISIL also continues to pose a threat not only to Iraq, but also to Canada and Canadians, as well as to other countries in

[82] Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Doc. S/2014/695, 23 September 2014.
[83] CORTEN, Olivier, The 'Unwilling or Unable' Test: Has it Been, and Could it be, Accepted? Leiden Journal of International Law, Vol. 29, Issue. 3, 2016, P. 780.
[84]Government orders – Military Contribution against ISIL, House of Commons Debates, 41st Legislature, Second session, 123, Parliament of Canada, 6 October 2014, https://www.ourcommons.ca/DocumentViewer/en/41-2/house/sitting-123/hansard (accessed on 20 March 2019).

the region and beyond. In accordance with the inherent rights of individual and collective self-defence reflected in Article 51 of the United Nations Charter, States must be able to act in self-defence when the Government of the State where a threat is located is unwilling or unable to prevent attacks emanating from its territory".[85]

The same shift can be noticed in the position of the Australian government. Prior to 2015, Australia was not eager to support the use of force in Syria. On September 2014, the former Australian Prime Minister Tony Abbot said in an interview that the legality of airstrike in Syria can be different from the one that exists in Iraq since the military operation in Iraq is carried out at the request of Iraqi government.[86] However, Australia subsequently changed its position and endorsed the unwilling or unable doctrine when it joined US-led coalition in Syria. In the letter submitted to the UNSC, the Australian government hold that based on Art. 51 of the UN Charter states must be able to resort to force in self-defence when the territorial government is not able or willing to prevent attacks originating from its territory.[87] The letter continues by recognizing Syria as an such example and establishing that since Syrian government appears to be unwilling or unable to put an end to the military activities of ISIS against Iraq originating from its Syrian bases, states are entitled to use force against ISIS in self-defence of Iraq provided by Art. 51 of the UN Charter.[88]

Moreover, Turkey has also established that the Syrian government is neither willing nor able to prevent threats emanating from its territory which threaten the national security of Turkey, and thus it is entitled to take action against ISIS in Syria under self-defence right provided by Art. 51 of the UN Charter.[89] However, in January 2018 when Turkey launched "Operation Olive Branch" against Kurds in Syria, it did not invoke the doctrine in its letter

[85] Letter dated 31 March 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/221, 31March 2015.
[86] The ABC News, "Abbott: No frontline role for special forces in Iraq", 16 September 2014, https://www.abc.net.au/worldtoday/content/2014/s4088451.htm (accessed on 20 April 2019).
[87] Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/693, 9 September 2015.
[88] Ibid.
[89] Letter dated 24 July 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/563, 24 July 2015.

submitted to the UNSC; it only referred to the self-defence right based on the Art. 51 of the UN Charter.[90]

For its part, Germany referred to the unwilling or unable doctrine implicitly by holding that since Syrian government does not exercise effective control on some parts of its territory, states that are subjected to the armed activities of ISIS originating from this part of Syria, are therefore entitled to take necessary measures under Art. 51 of the UN Charter to remedy the situation.[91] Likewise, the Belgium has also implicitly invoked the doctrine in the case of Syria. In the letter sent to the UNSC, the Belgian government noted that since Syrian government does not exercise effective control over certain part of its territory, it is legal for the victim states to take action against the armed attacks of ISIS originating from Syrian territory.[92] The Netherlands and UK have also made explicit official statements at the national level in the favour of the unwilling or unable doctrine. In 2015, the former Prime Minister of UK, David Cameron, has referred to the doctrine of unwilling or unable before the parliament by stating that "there is a direct link between the presence and activities of ISIL in Syria, and their ongoing attack in Iraq"[93] and that "the Assad regime is unwilling and/or unable to take action necessary to prevent ISIL's continuing attack on Iraq – or indeed attacks on us".[94] In response to the question posed by the Parliament's Permanent Committee on Foreign Affairs, the Dutch government asserted that provided that an armed attack has been conducted by a non-state armed group and the host state is not able or willing to put an end to the activities of the group in its territory,

[90] Identical letters dated 20 January 2018 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2018/53, 20 January 2018.
[91] Letter dated 10 December 2015 from the Charge´ d'affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/946, 10 December 2015.
[92] Letter dated 7 June 2016 from the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council, UN Doc. S/2016/523, 7 June 2016.
[93] The Telegraph, "David Cameron's full statement calling for UK involvement in Syria air strikes", 26 Nov 2015, https://www.telegraph.co.uk/news/politics/david-cameron/12018841/David-Camerons-full-statement-calling-for-UK-involvement-in-Syria-air-strikes.html (accessed on 25 March 2019).
[94] Ibid; see also Memorandum to the Foreign Affairs Select Committee, Prime Minister's Response to the Foreign Affairs Select Committee's Second Report of Session 2015-16: The Extension of Offensive British Military Operation to Syria, November 2015, https://www.parliament.uk/documents/commons-committees/foreign-affairs/PM-Response-to-FAC-Report-Extension-of-Offensive-British-Military-Operations-to-Syria.pdf (accessed on 25 March 2019).

the victim state is, therefore, entitled to use force to deal with the issue.[95] Additionally, the Dutch Foreign Minister noted that since the Syrian government is not able to suppress the activities of ISIS against Iraq in its territory, it is permissible to use force in Syria pursuant to the Art. 51 of the UN Charter.[96]

Importantly, the position of France, Norway and Denmark over the doctrine of unwilling or unable is unclear. Indeed, none of these states invoked the doctrine when they joined US-led coalition in Syria. Both France[97] and Norway[98] relied on the collective self-defence to justify their use of force against ISIS in Syria. Moreover, the Arab states which form a significant part of the US-led coalition have not shown their support in the favour of the doctrine. In fact, none of these states have informed UNSC when they joined US-led coalition to strike ISIS position in Syria. The Arab League even adopted Resolution 7987 in which it condemned the Turkish use of force against PKK in Iraq and recognized it as the "violation of Iraqi sovereignty and a threat to Arab security".[99] In its latest move, the Arab League established that it will not accept the presence of Turkish army in the safe zone if it is created at the Syrian-Turkish border.[100]

Syria, as the host state to the ISIS, has established that the use of force by the US and its allies against ISIS, based on Art. 51 of the UN Charter, is illegal as they failed to inform and consult the Syrian government for the adoption of such move.[101] Additionally, in a letter sent to the UNSC and UN Secretary General, the Syrian government noted that any attempt to justify military operation in Syria based on self-defence is contrary to the

[95] CHACHKO, Elena, DEEKS, Ashley, International Law, Self-defence: Which states Support the "Unwilling or Unable" Test?, 10 October 2016, https://www.lawfareblog.com/which-states-support-unwilling-and-unable-test#TheNetherlands (accessed on 25 March 2019).
[96] Ibid.
[97] Identical letters dated 8 September 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2015/745, 8 September 2015.
[98] Letter dated 3 June 2016 from the Permanent Representative of Norway to the United Nations addressed to the President of the Security Council, UN Doc. S/2016/513, 3 June 2016.
[99] Annex to the Letter dated 7 January 2016 from the Permanent Representative of Egypt to the United Nations addressed to the President of the Security Council. UN Doc. S/2016/16, 11 January 2016.
[100] Kurdpress News Agency, translated from Persian to English: "Arab League opposes Turkish presence in the future Syrian safe zone", 16 April 2019, http://kurdpress.com/details.aspx?id=64500 (accessed on 25 April 2019).
[101] Identical letters dated 21 September 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2015/727, 22 September 2015.

provision of Art. 51 of the UN Charter. It further establishes that resorting to force under Art. 51 of the UN Charter is subject to several important conditions that were put in place in order to oblige states to respect the principles of international law including state's sovereignty and principle of non-interference. The letter continues by establishing that "among the conditions required by Article 51 are that there should be an ongoing and effective act of aggression on the part of an armed force against a Member State, that the response should be temporary, and that it should respect the authority and responsibility of the Security Council". [102] It concludes that since the military operation of US and its allies do not fulfil these conditions and they lack the cooperation and prior coordination with the Syrian government, they are illegal and belong outside the scope of international law.[103]

Indeed, Russia, as one of the main players in the Syrian conflict, has taken different approaches regarding the invocation of the unwilling or unable doctrine to justify use of force against non-sate armed groups. It has heavily relied on the doctrine to justify its war against the Chechen rebels operating from the territory of Georgia. However, in the context of Syrian conflict, it has expressed its disapproval to the use of force against ISIS without the consent of Syrian government. The Spokesman for the Russian Ministry of Foreign Affairs has noted that the American use of force in Syria without the authorization of UNSC and the consent of Syrian government would amount to the act of aggression. This position has been further reaffirmed by the Russian ambassador to the UN who stated that the use of force without the consent of the Syrian government would be "unlawful and detrimental to international and regional stability".[104]

Cuba and Venezuela have also stated that the US-led coalition's airstrikes against ISIS in Syria are undermining the sovereignty, political and territorial integrity of Syrian government, and thus such move is contrary to the provision of the UN Charter.[105] Similarly, Ecuador and Iran have also hold that the military intervention by the US and its

[102] Identical letters dated 29 December 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2915/1048, 4 January 2016.
[103] Ibid.
[104] UN Security Council, 7271stmeeting, UN Doc. S/PV.7271, 19 September 2014.
[105] CHACHKO, Elena, DEEKS, Ashley, International Law, Self-defence; Security Council, 7504thmeeting, UN Doc. S/PV.7504, 17 August 2015.

allies against ISIS in Syria is in contrast to the provision of the UN Charter since such conducts lack the consent of Syrian government and the authorization of UNSC.[106] Moreover, Brazil has also rejected the endorsement of the unwilling or unable doctrine to justify use of force against non-state armed groups, and it has established that it does not agree with the interpretation of self-defence right that allows states to exercise use of force against non-state armed groups provided that the host state is not able or willing to take action against them.[107] Thus, the Syrian example is the best case in which we can apply and examine the doctrine of unwilling or unable. While there are some countries which explicitly invoked the doctrine to justify their intervention, other hold different opinion concerning its legality and application.

Regarding the question whether Syria was or still is willing to deal with ISIS, it should be mentioned that, in the long term, its willingness to combat and eliminate the terror group from its territory is doubtless. It is reasonable to argue that the Syrian government should be willing to eliminate all those rebel groups fighting to overthrow it. However, questions may be raised once we consider the willingness of the Syrian government to combat ISIS in the short time. In 2015, a report published by the Washington Institute for Near East Policy doubts the willingness of Syrian government to combat ISIS. The report established that fighting ISIS is not the Syrian regime's main priority, instead it devotes military resources against the group when its key interests are threatened by it.[108] Nevertheless, the inability of the Syrian government to fight against ISIS is less doubtful. Despite the government's effort to keep some strategic cities like Raqqa, the terror group was able to

[106] Ministry of Foreign Affairs, "Ecuador rejects US offensive in Syrian territory", https://www.cancilleria.gob.ec/ecuador-rechaza-ofensiva-estadounidense-en-territorio-sirio/ (accessed on 25 March 2019); The Independent, "Syria air strikes: Iran 'says US attacks on Isis are illegal", 23 September 2014, https://www.independent.co.uk/news/world/middle-east/syria-air-strikes-iran-says-us-attacks-on-isis-are-illegal-9751245.html (accessed on 25 March 2019).

[107] Mission of Brazil, United Nations Statement of Ambassador Mauro Vieira, Permanent Representative of Brazil to the United Nations, 17 May 2018, https://drive.google.com/file/d/15CWYwX_G9K610xBWb7JmKelCOYHZDKSX/view (accessed on 26 March 2019); Statement of Brazil during the United Nations Security Council's 8262 Meeting, 17 May 2018, https://www.un.org/press/en/2018/sc13344.doc.htm (accessed on 26 March 2019).

[108] The Washington Institute for Near East Policy, "Syrian Regime Military Operations Against ISIS", 13 March 2015, https://www.washingtoninstitute.org/policy-analysis/view/syrian-regime-military-operations-against-isis (accessed on 25 March 2019).

defeat the Syrian army and occupies a large part of its territory.[109] ISIS territorial control started to shrink since 2015 and the terror group was finally defeated by the Kurdish-led Syrian Democratic Forces (SDF) in March 2019.[110]

4.2 Turkey and Kurds

With a population of around 40 million people in Middle East, Kurds are considered to be the largest nation without an independent state. Indeed, since the geographical division of Kurdistan in 1923, Kurds have been the victims of various forms of discrimination and oppression by the nation states of Iran, Iraq, Turkey and Syria. The Kurdish struggle for autonomy has led to various armed conflicts with the states in the region. With the establishment of the Kurdistan Worker's Party (PKK) in 1978, regular armed conflicts have continued to happen between the Turkish army and the PKK forces in the region.

Throughout 1990s, Turkey launched a series of cross-border operations against PKK in northern part of Iraq. Indeed, one of such operation by Turkey against PKK was carried out in March 1995.[111] Following the operation, Turkey declined to mention the exact legal basis for its military action in Iraq[112]. However, when the Libyan government objected to the Turkish military attack on the Kurds and brought up the discussion in UNSC[113], Turkey issued a letter in which it implicitly referred to the unwilling prong of the doctrine to justify its incursion in Iraq. [114] In the letter, Turkey noted that since Iraq is not able to exercise its sovereignty over northern parts of its territory, it cannot ask the Iraqi government to respect its obligation under international law and prevent terrorist groups

[109] Syria Untold, "How Did Raqqa Fall to the Islamic State of Iraq and Syria?", 13 January 2014, https://syriauntold.com/2014/01/13/how-did-raqqa-fall-to-the-islamic-state-of-iraq-and-syria/ (accessed on 25 March 2019).
[110] BBC News, "Islamic State group defeated as final territory lost, US-backed forces say", 23 March 2019, https://www.bbc.com/news/world-middle-east-47678157 (accessed on 27 March 2019).
[111] Letter from the Permanent Representative of Iraq to the United Nations Addressed to the Secretary-General, UN Doc. S/1995/540, 6 July 1995.
[112] GREY, Christine, OLLESON, Simon, The Limits of the Law on the Use of Force: Turkey, Iraq and the Kurds. Finnish Yearbook of International Law, Vol. 12, 2001, p.378.
[113]Letter from the Charge d'Affaires A.I. of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations Addressed to the President of the Security Council, UN Doc. S/1995/566, 12 July 1995.
[114] Letter dated 24 July 1995 from the Charge d'Affaires A.I. of the Permanent Mission of Turkey to the United Nations Addressed to the President of the Security Council, UN Doc. S/1995/605, 24 July 1995.

from operating within its territory and from launching attack against Turkey.[115] It continues by establishing that no country should stay idle when its territorial integrity is constantly threatened and infringed by the armed activities of a terrorist group based on the territory of a neighboring country, if that host state is unable to take effective action against such group. [116] Despite the fact that Turkey did not explicitly refer to the unwilling or unable doctrine for its military operation in Iraq, the Spokesman for the US State Department voiced its support for the legality of the doctrine when he was asked about the Turkish use of force against PKK in Iraq:

"a country under the United Nations Charter has the right in principle to use force to protect itself from attacks from a neighboring country if that neighboring state is *unwilling or unable* to prevent the use of its territory for such attacks. That is a legal definition that gives a country under the U.N. Charter the right to use force in this type of instance".[117]

Although the above statement is certainly valuable in determining the *opinio juris* of the US as regard to the doctrine, the fact that Turkey did not invoke the doctrine to justify its incursion based on the self-defence right provided by Art. 51 of the UN Charter undermines its credibility when establishing the customary status of the unwilling or unable doctrine. In fact, during 1990s, Turkey had never invoked Art. 51 of the UN Charter when it used force against PKK in Iraq. Moreover, during this period, Turkey had never fulfilled its obligation to inform UNSC about its cross-border operation in Iraq.[118]

In 1996, the Turkish government responded to a letter of complaint submitted by Iraq to UNSC. In the letter, Turkey again referred to the inability of Iraqi government to exercise sovereignty over the northern parts of its territory as the reason for its military incursion. This time Turkey explicitly referred to the unwilling or unable doctrine by stating that "as of this very principle, it becomes inevitable for a country to resort to necessary and appropriate force to protect itself from attacks from a neighbouring country, if the neighbouring state is unwilling or unable to prevent the use of its territory for such

[115] Ibid.
[116] Ibid.
[117] CHACHKO, Elena, DEEKS, Ashley, International Law, Self-defence.
[118] GREY, Christine, OLLESON, Simon, The Limits of the Law on the Use of Force p. 383, 391.

attacks".[119] Thus, it was the first time that Turkey explicitly referred to the "unwilling or unable" doctrine to justify its military operation in Iraq. Moreover, in response to a number of letters submitted by Iraq to UNSC in 1997, Turkey submitted a letter to the UNSC in which it underlined its concern regarding the activities of PKK in Iraq. In the letter, once again, Turkey did not refer to self-defence right to justify its use of force against PKK, but it noted that it has informed Iraqi government in time regarding the military operation.[120] However, the fact that Turkey notified Iraq about its military operation does not mean that it tried to obtain the consent of Iraqi officials. Later that year, the Turkish military operation in Iraq was discussed within the UNGA. In response to the objection of Iraq, Turkey once again emphasized the inability of Iraqi government to exercise sovereignty over the northern parts of its territory as the reason for its military intervention. During the discussion, Turkey further stated that Iraq has never expressed its discontent regarding the presence of terrorist groups operating from its territory against the neighborhood countries.[121] Importantly, during all the discussions, Turkey did not make any explicit reference to the self-defence right or the unwilling or unable doctrine to justify its use of force against PKK in Iraq.

4.3 Russia and Chechen Rebels

Unlike the unclear legal reasoning of Turkish military campaign against PKK in Iraq, Russia heavily relied on the unwilling or unable doctrine to justify its use of force against Chechen rebels based in Georgia. Following the US-led invasion of Afghanistan in 2001 and the Second Chechen War, the Chechen rebels alongside Al-Qaeda militants moved to the eastern part of Georgia. The Chechen militants started to launch armed attacks against the Russian army from their Georgian bases.[122] Russia had long sought to cooperate with

[119] Identical Letters from the Charge d'Affaires A.I. of the Permanent Mission of Turkey to th United Nations Addressed to the Secretary-General and the President of the Security Council, UN Doc. S/1996/479, 2 July 1996.
[120] Identical Letters from the Charge d'Affaires A.I. of the Permanent Mission of Turkey to the United Nations Addressed to the Secretary-General and the President of the Security Council, UN Doc. S/1997/552, 18 July 1997.
[121] United Nations General Assembly, 52ndSession. 22ndplenary meeting, UN Doc. A/52/PV.22, 2 October 1997.
[122] BBC News, "The Problem with the Pankisi", 5 August 2002, http://news.bbc.co.uk/2/hi/europe/2173878.stm (accessed on 27 March 2019).

the Georgian government in order to deal with the threat. However, the Georgian government denied the suggestion that it is not capable to control and secure its border.[123]

On 23 August 2002, the Russian Air Force launched a series of cross border airstrikes against the Chechen rebels based in the Pankisi Gorge. Although, initially, the Russian government denied that it was behind the operation, it subsequently submitted a letter to UNSC in which it claimed responsibility for the aforesaid airstrikes against Chechen rebels in Georgia. In the letter, Russia established that the inability or unwillingness of states around the world to combat the existence of non-state armed groups in their territory has complicated the effort to combat terrorism effectively.[124] The letter continued to mention the presence of Chechen rebels in Pankisi Gorge as an example and noted that Russia has patiently and continuously tried to arrange cooperation with the Georgian authorities on issues related to fight against terrorism.[125] The letter further established that if the Georgian government is not able to maintain security at its border and put an end to the armed activities of the irregular groups within its territory, Russia will act in self-defence to deal with the threat in question.[126]

Indeed, the Russian case provides fruitful discussion in regard to establishing the customary status of the unwilling or unable doctrine. This will be examined in the next chapter.

4.4India and JeM

The disputed region of Kashmir has sparked huge tension between India and Pakistan. On 26 February 2019, the Indian Air Force launched a series of cross-border airstrikes against the non-state armed group known as "Jaish-e-Mohammad" (JeM) based on the territory of Pakistan. The airstrikes were in response to a suicide bombing carried out by the JeM group on 14 February 2016 in the India-administrated Kashmir which took the life of over 40 Indian soldiers.

[123] GARETH, Williams, Piercing the Shield of Sovereignty, p. 636; BBC News, "US Rebukes Russia over Bombing", 25 August 2002, http://news.bbc.co.uk/2/hi/europe/2214995.stm (accessed on 27 March 2019).
[124] Annex to the 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.
[125] Ibid.
[126] Ibid.

Following the airstrikes, India claimed that its jets targeted a JeM training camp that caused the group to bear significant casualties. The Pakistani government claimed that the Indian jet withdrew from the Pakistani territory after being confronted by the Pakistan Air Force. The day after the incident, Pakistan claimed to have carried out air strikes on open ground within Indian territory. Nevertheless, during an ensuing confrontation, the Pakistani Air Force shot down an Indian jet which fell within the territory of Pakistan and led to the capture of its pilot.

Although India did not inform UNSC when it used force in Pakistan, the Indian Foreign Secretary tried to provide some justification for the incursion of the Indian Air Forces into Pakistan. He noted that the existence of JeM's training camps in Pakistan could not have functioned without the knowledge of the Pakistanis authorities. [127] He held that despite the fact that India has repeatedly requested Pakistan to take effective action against the JeM group, Pakistan has not taken any effective measure to combat the group in its territory.[128] He continued to argue that based on the credible information that the JeM group was planning to carry out another suicide attack in different parts of Indian territory a "preemptive strike" became absolutely necessary to protect the country in the face of imminent danger.[129]

Thus, it is apparent that India implicitly referred to the unwilling prong of doctrine to justify its military action based on the controversial concept of "preemptive strike".

4.5Colombia and FARC

The Revolutionary Armed Forces of Colombia (FARC) was a guerilla movement involved in the number of armed conflicts with the Colombian army from 1964 to 2017.

[127] Ministry of External Affairs, "Statement by Foreign Secretary on 26 February 2019 on the Strike on JeM training camp at Balakot", 26 February 2019, https://www.mea.gov.in/Speeches-Statements.htm?dtl/31089/Statement+by+Foreign+Secretary+on+26+February+2019+on+the+Strike+on+JeM+training+camp+at+Balakot (accessed on 27 March 2019).
[128] Ibid.
[129] Ibid.

The rebel group has formally ended its existence as an armed group in 2017 following a series of negotiation between its representative and the Colombian government.[130]

Indeed, the main base of the FARC was inside the territory of Colombia. However, in a number of cases, the rebel group crossed the Colombian border and set up military and training bases within the territory of Ecuador. On the beginning of March 2008, the Colombian army launched cross-border airstrikes targeting the position of FARC rebels inside the territory of Ecuador. The Colombian army claimed that the airstrike killed 17 members of the rebel group including one of the rebels' highest-ranking commanders named as Raúl Reyes.[131] The Colombian authorities have ascertained that their military operation was an act of "hot pursuit".[132] This may explain why the Colombian government did not inform the Ecuadorian authorities regarding their operation in advance. Indeed, the president of Ecuador was only informed 9 hours after the incursion.[133] The Colombian president suggested that the operation was an act of self-defence, but he failed to mention the specific nature of the claim.[134]The Ecuadorian authorities challenged the claim, arguing that the operation was preplanned.[135] Although the operation was ended after reaching its target, it led to a high tension among the countries in the region. Ecuador decided to cut its diplomatic relation with Colombia and it deployed its armed forces to the border with Colombia.[136] In the letter submitted to the UNSC, Ecuador labeled the Colombian military operation as the breach of its "territorial integrity" and established that:

"The Government of Ecuador is deeply disappointed by the actions of the Colombian forces. At the same time, it rejects the presence of members of irregular Colombian groups in its territory. The Government of Ecuador reiterates its strong determination not to allow the nation's territory to be used by third parties for the conduct of military operations or as

[130] BBC News, "Colombia's Farc officially ceases to be an armed group", 27 June 2017, https://www.bbc.com/news/world-latin-america-40417207 (accessed on 28 March 2019).
[131]New York Times, "Colombian Forces Kill Senior Guerrilla Commander, Official Says", March 2, 2008, https://www.nytimes.com/2008/03/02/world/americas/02farc.html (accessed on 29 March 2019).
[132] DEEKS, Ashley, "Unwilling or Unable", p. 537.
[133] Ibid, p. 538.
[134] Ibid, p. 537.
[135] Ibid, p. 537.
[136] BBC News, "Neighbours cut ties with Colombia", 4 March 2008, http://news.bbc.co.uk/2/hi/americas/7276228.stm> (accessed on 29 April 2019).

a base of operations in the context of the Colombian conflict... No military force, whether regular or irregular, may take action in Ecuadorian territory".[137]

Additionally, the Permanent Council of the Organization of American States (OAS) has also strongly reacted to the Colombian incursion by passing a Resolution on 5 March 2008 in which it recognized the Colombian operation as the infringement of the territorial sovereignty and integrity of Ecuador that is contrary to the principles of international law.[138] The OAS further established that "the territory of a state is inviolable and may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever".[139] Indeed, the OAS Resolution is certainly valuable for the analysis of the customary status of the unwilling or unable doctrine.

After the incident, Colombia claimed that it has found document in the camp that shows ties between the Ecuadorean President Rafael Correa and the FARC rebels.[140] One may argue that such claims and accusation meant to imply that Ecuador was not willing to take action against FARC. However, such interpretation would be irrelevant considering the fact that Colombia claimed its attack was an act of "hot pursuit", and in such circumstances there will be little possibility to ask the host state for cooperation.[141] It is worth noting that in 2006 when Colombian aircrafts entered the Ecuadorian airspace to target the rebel groups, the Colombian government officially apologized for its incursion

[137] Letter dated 3 March 2008 from the Chargé d'affaires a.i. of the Permanent Mission of Ecuador to the United Nations addressed to the President of the Security Council, UN Doc. S/2008/146, 3 March 2008.
[138] Organization of American States, Convocation of the Meeting of Consultation of Ministers of Foreign Affairs and Appointment of a Commission, Permanent Council, CP/RES. 930 (1632/08), 5 March 2008, http://www.oas.org/council/resolutions/res930.asp (accessed on 29 March 2019).
[139] Ibid.
[140] Reuters World News, "Colombia says FARC documents show Correa ties", 3 March 2008, https://www.reuters.com/article/us-colombia-ecuador/colombia-says-farc-documents-show-correa-ties-idUSN0229738220080303 , (accessed on 29 March 2019).
[141] It should be mentioned that the right to hot pursuit is described in Convention on the Law of the Sea. The rule is designed to give a coastal state the right to pursue a foreign ship when the competent authority of the coastal state has good reason to believe that the ship has violated the laws and regulations of that State. However, recognition of such right on the territorial land is controversial since there is no territorial land that could be equivalent to the one of the high sea.

and reassured the Ecuadorian government that such action would not happen again in the future.[142]

Thus, the subsequent developments in the aftermath of the attack provide a fruitful discussion in ascertaining the customary status of the unwilling or unable doctrine. One may argue that the vague justification of Colombian authority for its incursion, OAS Resolution, the strong reaction of the Ecuadorian government, and the previous commitment of Colombian government not to violate its neighboring territory give little support for the customary status of the unwilling or unable doctrine.

[142] BBC News, "Colombian apology for incursion", 3 February 2006, http://news.bbc.co.uk/2/hi/americas/4676664.stm (accessed on 29 March 2019).

5. Analysis

5.1General State Practice

As discussed before, for a practice to become a rule of customary international law it is necessary that the practice in question should be general, "meaning that it must be sufficiently widespread and representative, as well as consistent".[143] For a practice to be general, it is not necessary to have the participation of all the states. Indeed, it is only required to have the participation of those states which had the opportunity or possibility to apply the concerned rule.[144]

All the cases discussed in this paper had the possibility or opportunity of applying the unwilling or unable doctrine. They were all being targeted by a non-state armed group operating from the territory of the third country. It should be acknowledged that it is very difficult to ascertain and identify all the states around the world which have had the possibility of invoking the unwilling or unable doctrine but chosen not to do so. Indeed, in many parts of the world, states have not felt the need to express their position regarding justification of use of force based on unwilling or unable doctrine. This can be explained by either the fact that there are not any non-state armed groups at their borders or because of the prior existence of an effective security cooperation among neighboring states to deal with the issue. One may also argue that there may be many cases in which a state had been a victim of the cross-border attack of a non-state armed group but decided not to invoke the doctrine because it was convinced that the nature of the attack had not reached the threshold of an armed attack required by the standard of international law to trigger the right self-defence under Art. 51 of the UN Charter.

Nevertheless, it is safe to assume that in those parts of the world where the states are experiencing political and security instability it is more likely that non-state armed groups are present, and thus such states have better opportunity or possibility to invoke the unwilling or unable doctrine. The cases which are chosen for this study reflect this

[143] Draft conclusions on identification of customary international law, with commentaries, conclusion 8 (1).
[144] Ibid, p. 136.

assumption. Middle East and Caucasus are the regions which are consistently dealing with various political and security issues, and, as such, states in these regions are more likely to be targeted by the cross-border attacks of non-state armed groups. Thus, given the diversity of the case studies of this paper it can be concluded that states, when they are faced with a situation to which the unwilling or unable doctrine is applicable, have resorted to force or threatened to use force in order to deal with the issues of non-state armed groups.

The next issue which needs to be addressed concerns the question of whether the extraterritorial use of force by the states chosen in the case studies have been carried out in conformity with the standard required by the unwilling or unable doctrine. It is further important to ascertain whether the states which had the possibility of invoking the doctrine had justified their use of force based on the other grounds. Indeed, the cases which are examined in this paper suggest that only few states have explicitly invoked the unwilling or unable doctrine for their cross-border use of force against non-state armed group. This includes Turkish use of force against PKK in 1996, Russian use of force against Chechen rebels in 2002, and in the context of Syrian conflict several states explicitly referred to the doctrine to justify their use of force against ISIS. This includes the US, Australia, Canada and Turkey. As discussed in the section 3.1, states are supposed to invoke the doctrine for the cross-border use of force when they see no other feasible measures that could remedy the issue. Additionally, the doctrine requires states to prioritize seeking the consent and cooperation of the host state before they resort to force against the non-state armed groups. Importantly, if the unwilling or unable doctrine is supposed to be a rule of customary international law, it should be understood as the expansion to the self-defence right provided by the Art. 51 of the UN Charter. Thus, states are required to invoke the doctrine based on the self-defence right, enshrined in Art. 51 of the UN Charter.

In the case of Turkey, prior to 1989, based on an agreement, Iraqi government gave its consent to Turkey to use force against PKK within its territory. However, Iraq refused to renew the agreement when it expired in 1990.[145] Moreover, despite the fact that the situation on the ground remained quite similar throughout 1990s, Turkey had been

[145] GREY, Christine, OLLESON, Simon, The Limits of the Law on the Use of Force, p. 63.

inconsistent in its legal reasoning for the justification of its use of force against PKK throughout this period. Indeed, the unwilling prong of the doctrine was largely missed in the Turkish argument when it was responding to the objection of Iraq. Turkey mostly relied on the inability of Iraq to control northern parts of its country as the reason for its incursion. This may be explained by the fact that the decision of US and its Golf allies to establish no-fly zone in northern Iraq made Turkey convinced that Iraq despite its willingness is not able to deal with the issue. [146] However, the fact that Turkey had never justified its use of force by invoking the doctrine within the framework of the Art. 51 of the UN Charter its practice seems to be rather doubtful to be counted as a relevant one. Thus, the Turkish case give a little support to argue that unwilling or unable doctrine satisfies the first constituent element of general state practice required for establishing a new rule of customary international law.

Unlike the Turkish case, it seems that the standard of unwilling or unable doctrine has been largely met in the case of Russian use of force against Chechen rebels in Georgia. Russia claimed that it had unsuccessfully sought the consent and cooperation of the Georgian authority to combat the Chechen rebels based in the territory of Georgia. It further held that it is continuously exposed to the threat and armed attacks by the Chechen rebels operating from the Georgian territory. It eventually concluded that since the Georgian government is not able to secure its border and stop the activities of the Chechen rebels, Russia is entitled to use force in self-defence pursuant to Art. 51 of the UN Charter. Thus, the Russian case can be understood as a "state practice" that could give support to the customary status of the unwilling or unable doctrine.

In the case of FARC, the Colombian government did not seek the consent or cooperation of the Ecuador when it used force against FARC rebels inside its territory. Colombia appears to have a reason to not seek the consent or cooperation of Ecuadorian government. The Colombia's Defence Minister established that his government did not

[146] The Independent, "No-fly zone imposed on Iraq": Allies soften role and mandate of air forces while UN fixes border with Kuwait, 27 August 1992, https://www.independent.co.uk/news/no-fly-zone-imposed-on-iraq-allies-soften-role-and-mandate-of-air-forces-while-un-fixes-border-with-1542751.html (accessed on 28 March 2019).

trust the Ecuadorian authorities for any military cooperation against FARC rebels.[147] Indeed, the reason provided by the Defence Minister seems to be unsatisfactory as the issue of distrust should not be considered as a satisfactory ground for the states to avoid any joint cooperation to deal with the issues of non-state armed groups.

Thus, considering the fact that Colombian government did not seek the consent and the cooperation of Ecuador and its reference to the controversial concept of "hot pursuit" for the justification of its incursion it seems that the Colombian case is not in conformity with the standard required by the doctrine of unwilling or unable, and thus cannot be counted as a relevant practice for the formation of a new rule of customary international law. The same applies in the case of India's airstrike against JeM group in Pakistan. Indeed, India just implicitly referred to the unwilling prong of the doctrine through an official statement. However, India totally ignored the basic criteria required by the standard of the unwilling or unable doctrine. It did not try to get the consent of Pakistanis government when it launched airstrike in Pakistan-administrated Kashmir. It even neither provided a clear legal justification for its military operation nor informed UNSC when it used force against JeM group in Pakistan. Thus, such practice deems to be irrelevant when establishing the customary status of unwilling or unable doctrine.

In the case of Syrian conflict to see whether the use of force by some members of the US-led coalition[148] could be recognized as a relevant practice, it is necessary to determine whether their practice was compatible with the standard of unwilling or unable doctrine. Firstly, it is essential to analyse whether it was possible for the members of the US-led coalition to seek the consent and cooperation of Syrian government. Indeed, the Syrian Foreign Minister established that his government is ready to co-operate and co-ordinate efforts with the US and the other members of the US-led coalition to fight against ISIS. He noted that "any strike which is not co-ordinated with the government will be considered as aggression".[149] Despite this, none of those states which used force on the

[147] DEEKS, Ashley, "Unwilling or Unable", p. 540.
[148] This includes the US, Canada, Australia, Turkey and Germany.
[149] The Guardian, Syria offers to help fight Isis but warns against unilateral air strikes, 26 August 2014, https://www.theguardian.com/world/2014/aug/26/syria-offers-to-help-fight-isis-but-warns-against-unilateral-air-strikes (accessed on 10 April 2019).

grounds of the unwilling or unable doctrine have tried to seek the consent and cooperation of Syrian government. They only informed the Syrian government of their intention of planning to launch airstrikes against ISIS. This may raise doubts whether the use of force by the US and its allies comply with the standards required by the unwilling or unable doctrine since they ignored seeking consent and cooperation of Syrian government in their action against ISIS. Nevertheless, in this case the prioritization of consent and cooperation seems to be controversial as there are many political motives behind. For example, one may argue that Assad's regime had only sought to strengthen its legitimacy through possible cooperation with the US-led coalition, and thus the cooperation between US and Syrian government could not be fruitful in fight against ISIS. However, such political argument seems to be not very convincing to justify use of force inside the territory of a sovereign state without the consent and cooperation of its government. The US and its allies could at least try to cooperate with the Syrian government and see whether such cooperation could be fruitful in their fight against ISIS. One may argue that the cooperation between Syrian government and Russia proved to be significant in the fight against ISIS. Thus, it could be also possible to reach a similar result provided that the US was cooperating with the Assad's government. Although the US and its allies invoked the doctrine to justify their use of force based on self-defence rights enshrined by the Art. 51 of the UN Charter, it seems that the use of force by the US-led coalition lacks a significant component of unwilling or unable doctrine which is the prioritization of consent and cooperation. This, therefore, cast doubts whether this case can be considered as a relevant practice that could give strong support for establishing the customary status of the unwilling or unable doctrine.

In conclusion, it seems to be very questionable whether the unwilling or unable doctrine satisfies the necessary requirement of general state practice that needs to be met as the first constituent element for the formation of a new rule of customary international law. Seeking consent and cooperation, as the major component of the unwilling or unable doctrine, have been largely missing among the states which referred to the doctrine to justify their cross-border use of force against non-state armed groups. Nevertheless, the reliance of states on the doctrine based on the self-defence right under Art.51 of the UN Charter has been more widespread. However, states like Turkey, Colombia and India

neglected to refer their measure as an act of self-defence, instead they treated the doctrine as a separate exception from the prohibition of use of force. Thus, it seems that the requirement of general and consistent state practice has not sufficiently been met to conclude that the unwilling or unable doctrine has satisfied the first constituent element for the formation of a new rule of customary international law.

5.2Common *Opinio Juris*

As discussed in the part 3.2.2, *opinio juris* essentially defines that states shall act in conformity with the norm in question not because of the habit or political expediency, but rather out of a sense of legal right or obligation. In the context of *jus ad bellum*, this should be interpreted that the states shall feel convinced that restoring to force is legal. In order to determine whether the unwilling or unable doctrine has satisfied the constituent element of *opinio juris* it is essential to analyse the sources which have been primarily used in this paper. This includes various documents such as the correspondence letters to the UNSC or UNGA, official statements and documents by the state's authorities. In doing so, it is necessary to determine whether the states which have used force extraterritorially believed that resorting to force stems from the host state's inability or unwillingness to deal with the issue of non-state armed group in its territory. It is further essential to analyse whether such states are convinced that their cross-border use of force constitute self-defence provided by the Art. 51 of the UN Charter.

Indeed, not all of the states which have been analysed in this paper referred to the host state's inability or unwillingness when they launched cross-border use of force against non-state armed groups. In the previous section we have seen that Russia largely complied with the standard required by the doctrine when it used force against Chechen rebels in 2002 in Georgia. It clearly referred to the unwilling or unable doctrine to justify its intervention based on self-defence right under Art. 51 of the UN Charter. It tried to obtain the consent of Georgia before it used force in its territory. The Russian use of force against Chechen rebels based on the unwilling or unable doctrine was explicitly supported by Russian president in 2002. Thus, it can be argued that Russia was convinced that its military operation based on the unwilling or unable doctrine was legal. However, the fact that

Russia initially denied that it was behind the 2002 incursion in Georgia may cast doubts whether Russia was genuinely convinced that its use of force against the Chechen rebels was legal under international law. Moreover, in the context of Syrian war, Russia rejected the US assumption of the unwilling or unable doctrine, and it expressed its opposition to the airstrikes carried out by the US-led coalition. Indeed, Russia labelled the US-led coalition airstrike in Syria as an "act of aggression". Thus, considering that Russia was not willing to accept the legality of unwilling or unable doctrine when it was invoked by the members of the US-led coalition in Syria it is rather questionable to conclude that Russia holds a genuine legal conviction in regard to the unwilling or unable doctrine.

In the case of PKK, while the situation on the ground remained quite similar throughout 1990s, Turkey provided different justifications for its use of force throughout this period. In 1995, it heavily relied on the inability of Iraq to maintain its sovereignty over northern parts of the country, then in 1996 it referred to the Friendly Relation Declaration and invoked the unwilling or unable doctrine. In 1997, it again emphasized the Iraqi inability to control its territory and implicitly invoked the self-defence right to justify its military intervention in Iraq. Indeed, this inconsistency undermines the credibility of the Turkish practice when ascertaining the customary status of unwilling or unable doctrine. One may argue that this inconsistency in the Turkish legal reasoning reflects the country's lack of *opinio juris* in regard to the doctrine. The lack of *opinio juris* can be further evidenced by the fact that Turkey had never fulfilled its obligation to inform the UNSC and claim that it has acted under Art. 51 of the UN Charter when it resorted to force inside the Iraqi territory. This assumption is supported by ICJ as the Court has established that "for the purpose of enquiry into the customary law position, the absence of a report [to the SC] may be one of the factors indicating whether the state in question was itself convinced that it was acting in self-defence".[150] Thus, in the cases of Turkey, the existence of a genuine *opinio juris* in the favour of the doctrine seems to be very doubtful

In the case of FARC, while Colombia did not make any reference to the inability of Ecuador when it attacked FARC rebels in 2008, it had periodically raised its concern

[150] Armed Activities on the Territory of the Congo, para. 145.

over the lack of sufficient action by Ecuador against the FARC group in its territory. This can be understood as indicating that Colombia did not believe that Ecuador was willing to take action against FARC rebels. Nevertheless, one may also reject such interpretation and argue that such expression of concern was not brought up to justify any specific attack. However, because of the fact that Colombia justified its use of force against FARC rebels based on the doctrine of "hot pursuit" it seems that the Colombian government was not convinced that the unwilling or unable doctrine could have a legal conviction for use of force against non-state armed groups. Moreover, in the case of Colombia, the lack of *opinio juris* among members of American states is further evidenced by the consideration of the Resolution passed by the OAS in which it strongly condemned the Colombian incursion in Ecuador and recognized it as "a violation of the sovereignty and territorial integrity of Ecuador and the principles of international law".[151] Additionally, the case of India does not seem to provide any support for establishing *opinio juris* in the favour of the unwilling or unable doctrine. Indeed, India not only failed to inform the UNSC of its operation but also did not provide any precise legal justification for its incursion in Pakistan. It only released an official statement and referred implicitly to the unwillingness of Pakistan as the reason for its airstrike based on the controversial concept of "preemptive strike". Thus, it can be understood that India was not convinced that its operation based on the unwilling or unable doctrine could be legal under international law.

The Syrian case seems to be more complicated. Among 17 states[152] participated in the US-led coalition only few states explicitly referred to the inability or unwillingness of the Syrian government to justify their use of force against ISIS. As discussed in the section 4.2, US, Australia, Canada, and Turkey are the only states which explicitly invoked the unwilling or unable doctrine to justify their military intervention against ISIS in Syria. For its part, Germany referred to the doctrine implicitly. Both UK and the Netherlands also expressed their support for the legality of the doctrine at national level, but they did not invoke the doctrine when they submitted letter to the UNSC to justify their airstrike in

[151] Organization of American States, Convocation of the Meeting of Consultation of Ministers of Foreign Affairs and Appointment of a Commission, Permanent Council.
[152] These 17 states include US, UK, Canada, Australia, France, The Netherlands, Germany, Denmark, Norway, Belgium, Saudi Arabia, Jordan, Qatar, Bahrain, United Arab Emirates, Morocco, and Turkey.

Syria, instead they relied on self-defence right provided by Art. 51 of the UN Charter. Importantly, the other 9 members of the US-led coalition did not refer to the unwilling or unable doctrine at all and France only relied on the collective self-defence when it sent a letter to the UNSC informing the council of its operation in Syria.

Initially, Australia was not even convinced about the legality of airstrike in Syria but then it changed its position one year later when it joined the coalition, and thus endorsed the unwilling or unable doctrine by submitting a letter to the UNSC on September 2015. The same shift has been observed in the position of Canada. On October 2014, the Canadian Minister of Foreign Affairs explicitly stated that there was not any legal basis that could be relied on to authorize force in Syria.[153] The Canadian position had changed in March 2014 when it invoked the unwilling or unable doctrine in the letter sent to the UNSC. Moreover, a similar change but in the opposite direction can be seen in the position of Turkey. Unlike 2015 when Turkey joined the US-led coalition in Syria, in January 2018 when it launched "Olive Branch Operation" against Kurdish forces it did not refer to the doctrine in the letter sent to the UNSC. This time, Turkey solely relied on the self-defence right pursuant to the Art. 51 of the UN Charter. In fact, these changes in the position of these countries may cast doubts whether they were genuinely convinced that the unwilling or unable doctrine can be invoked as a legal justification for cross-border use of force against non-state armed groups. The position of the US over the legality of the unwilling or unable doctrine appears to be controversial. While US heavily relied on the doctrine of unwilling or unable to justify its military operation against ISIS in Syria, it was a strong opponent of the doctrine when it was invoked by Russia in the context of war against Chechen rebels in Georgia. In this regard, the White House Spokesperson Ari Fleischer noted 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

[153] Government orders – Military Contribution against ISIL, House of Commons Debates, 41st Legislature, Second session, 123, Parliament of Canada, 6 October 2014, https://www.ourcommons.ca/DocumentViewer/en/41-2/house/sitting-123/hansard (accessed on 20 April 2019).

Georgia's sovereignty".[154] Nevertheless, US expressed its support for the doctrine when it was implicitly invoked by Turkey in the context of war against PKK in 1995. One may argue that the US understanding of the doctrine stems from the general habit and political expediency of the American government. In other words, it can be argued that the US does not treat the doctrine as if it has legal obligation on them; it is rather different political motives that defines the perception of US towards the legality of the unwilling or unable doctrine. Thus, it can be argued that even the US is not genuinely convinced that cross-border use of force, based on willing or unable doctrine, against non-state armed group is legal under international law.

Additionally, the Arab states which form a significant part of the US-led coalition have never invoked the unwilling or unable doctrine in support of their intervention in Syria. Despite the requirement by Art. 51 of the UN Charter, none of these states informed the UNSC when they joined the US-led coalition and used force in Syria. As mentioned before, the ICJ considered this requirement to be relevant when determining whether the state "itself convinced that it was acting in self-defence".[155] The existence of common *opinio juris* in the favour of the unwilling or unable doctrine is further doubtful considering the fact that there are many states which rejected the use of force by the US-led coalition against ISIS in Syria and labelled such intervention as the infringement of the provisions of the UN Charter. This includes Syria, Russia, Iran, Venezuela, Brazil, Ecuador and Cuba (discussed in the section 4.2). Thus, in the Syrian case, based on the aforementioned arguments including the changes in the legal position of Canada, Australia and Turkey, lack of support and endorsement by the Arab members of the US-led coalition and also the rejection of the other states for the US-led coalition airstrikes, the existence of common *opinio juris* in the favour of the doctrine seems to be very questionable.

In sum, the case studies of this paper raise significant doubts in regard to the existence of common *opinio juris* in the favour of unwilling or unable doctrine. Turkey was very inconsistent in its legal position for the justification of its intervention in Iraq,

[154] U.S. Department of State, "Russian Bombing of Georgia", White House Press Release, 24 August 2002, https://2001-2009.state.gov/p/eur/rls/prsrl/2002/13002.htm (accessed on 29 April 2019).
[155] Armed Activities on the Territory of the Congo, para. 145.

and it never invoked self-defence right for its cross-border use of force against PKK. It appeared that Colombia was very unclear in its legal reasoning for the attack against FARC rebels and importantly its incursion was strongly condemned by the OSA Resolution. Moreover, it was understood that India does not hold any legal conviction as regard to the application of the doctrine for cross-border use of force against non-state armed groups. The Syrian case further casted doubts on the existence of common *opinio juris* among the members of the US-led coalition. Only 4 states invoked the doctrine when they informed the UNSC about their use of force in Syria. However, the position of Australia, Canada and Turkey were changed in a short period of time. UK and the Netherlands just supported the legality of doctrine at the national level. France, Norway and Belgium did not make any reference to the unwilling or unable doctrine when they informed the UNSC of their operation in Syria. Significantly, the Arab member states of the US-led coalition have never invoked the doctrine in the favour of military intervention in Syria and they never provided any legal justification for their use of force in Syria. The Russian case also contains doubts when analyzing its genuine *opinio juris* of the doctrine. This is evidenced not only by its initial denial for the 2002 incursion in Georgia but also by its strong opposition when the doctrine was invoked by US and its allies in the case of Syria. Similarly, it is understood that the position of the US over the legality of the doctrine varies depending on different political context. Thus, all these developments indicate that the second constituent element for establishing a new rule of customary international law has not been met in regard to the unwilling or unable doctrine.

5.3Conclusion

Use of force against non-state armed groups seems to be a very controversial topic within international law governing use of force. Despite different opinions of different scholars regarding the customary status of the unwilling or unable doctrine, the analysis of this paper indicates that the unwilling or unable doctrine has not attained the status of customary international law. The mere fact that states are engaged in the cross-border use of force against non-state armed groups is not a sufficient factor to conclude that the element of state practice has been met in regard to the unwilling or unable doctrine. When states have carried out the cross-border use of force against non-state armed group in secret

and did not seek the consent and cooperation of the host state, and treated the doctrine as an separate exception to the Art. 2 (4) of the UN Charter, such practice should not be recognized as a relevant one that could support the customary status of unwilling or unable doctrine.

From the first glance, there seems to be a slightly broader *opinio juris* among the states studied in this paper. At least, we have seen that the states resorted to force when they deemed that the host state was not able to deal with the issue. However, the analysis of this study shows the lack of strong *opinio juris* among different states. Some states have undermined the credibility of their own actions by providing different and vague legal justification. Some states never informed the UNSC about their cross-border operations. This may be interpreted that the concerned state was not convinced whether its conduct was based on self-defence right provided by Art. 51 of the UN Charter, and thus legal under international law. Additionally, it seems that the position of some states such as Russia and US over the legality of the doctrine depends on different political context, and thus such position is based on their general habit and political expediency. This is contrary to how the constituent element of *opinio juris* is defined by the ILC.

Moreover, the unwilling or unable doctrine does not seem likely to get universal recognition in the very near future. We have seen two major trends that stand against each other. On the one hand, US rationale of its military intervention in Syria appears to be a permissive approach to use of force against non-state armed groups. On the other hand, the OSA Resolution indicates a very restrictive approach that opposes cross-border use of force against non-sate actors. Indeed, this widespread opposition increases the threshold required for the doctrine to become a rule of customary international law. In other words, to attain the status of customary international law the doctrine is required to be invoked and applied more often among states with a stronger sense of legal obligation which is not out of habit or political expediency.

Nevertheless, the theory adopted by the US-led coalition to justify the military operation against ISIS in Syria represents the clearest example of the unwilling or unable doctrine up to this time. Indeed, due to the brutality of ISIS, it seems that the US-led

coalition airstrike in Syria has attained more international legitimacy. The former UN Secretary General, Ban Ki-Moon, supported the legal reasoning of the US for the airstrike in Syria by stating that "I am aware that today's strikes were not carried out at the direct request of the Syrian Government, but I note that the Government was informed beforehand. I also note that the strikes took place in areas no longer under the effective control of that Government".[156] However, as the analysis showed us the doctrine still lacks the sufficient support among states to be considered as a rule of customary international law. There are many states which have consistently changed their position as regard to the legality of the doctrine. The Syrian case supports this conclusion. We have seen how Canada and Australia changed their stance on the legality of use of force in Syria in the period of one year. The same has been observed in the case of Turkey. Russia, as the major supporter of the doctrine, refused to endorse the legality of the doctrine when it was invoked by the US and its allies. Moreover, the Arab states which forms a significant part of the US-led coalition strongly condemned Turkish use of force against PKK in Iraq and recognized the Turkish incursion as the violation of the territorial integrity of Iraq.

Thus, all these developments indicate that the unwilling or unable doctrine is not a rule of customary international law. None of the cases studied in this paper proved to be a pure form of unwilling or unable doctrine. While William characterizes the unwilling or unable doctrine as an emerging norm of customary international law,[157] it seems that even reaching such conclusion is not very close to reality. Indeed, for the doctrine to become a rule of customary international law it is necessary to see more states which are ready to invoke and apply the doctrine in a more consistent manner. It is also very essential that such states should be willing to recognize the legality of the doctrine when it is invoked by the others.

[156] Ban Ki-moon, United Nations Secretary-General, Remarks at the Climate Summit Press Conference (including comments on Syria), 23 September 2014, https://www.un.org/sg/en/content/sg/speeches/2014-09-23/remarks-climate-summit-press-conference-including-comments-syria (accessed on 25 April 2019).
[157] GARETH, Williams, Piercing the Shield of Sovereignty, P. 620.

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