

INTERNATIONAL LAW AND THE APPLICATION OF THE UNWILLING OR UNABLE TEST IN THE SYRIAN CONFLICT

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ABSTRACT

Recently, the United States has used force against non-state actors residing in host states in cases where the host state is either unwilling or unable to constrain illicit terrorist activities launched from its territory, using the “unwilling or unable” test guidelines. Even more controversially, the United States targeted the Syrian state in the Shayrat missile attack. Though the unwilling or unable test has some theoretical support among legal theorists, the legality of this test in international law is contentious, which has led to a lack of state practice. Accordingly, there is a lack of guidance in international law on the application of the unwilling or unable test, which could turn out to be costly, because unilateral action by one state against another without U.N. Security Council authorization or a legal use of force in international law can have dire consequences.

This Article aims to critically analyze the application of the unwilling or unable test by the United States to the case of Syria, and assess why the justification that the United States provided for its military intervention on Syrian territory has not been universally accepted. It will also discuss barriers to the acceptance of this standard, especially in the way that it has been interpreted by the United States in the particular case of Syria. This Article argues that the theoretical test is inapplicable in the Syrian case, because the prerequisites set by the test itself are not met. Moreover, the Article will argue that the test lowers the threshold for using force set by the U.N. Charter.

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INTRODUCTION

Terrorist organizations often launch attacks on victim states from remote locations within host states, using the sovereignty of the host state as a shield to protect themselves,¹ as international law does not allow victim states to respond with force in cases where a host state is not to blame for an armed attack.² However, victim states feel that they are entitled to use defensive and responsive force against such attacks by these terrorist non-state actors (NSAs) via their inherent right to self-

1. Harold Trinkunas & Anne Clunan, *Alternative Governance in Latin America*, in ROUTLEDGE HANDBOOK OF LATIN AMERICAN SECURITY 99, 103 (David R. Mares & Arie M. Kacowicz eds., 2015); see also Paulina Startski, *Right to Self-Defense, Attribution and the Non-State Actor—Birth of the “Unable or Unwilling” Standard?*, 75 HEIDELBERG J. INT’L L. 455, 494 (2015).

2. NOAM LUBELL, *EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS* 78 (2010).

defense under Article 51 of the U.N. Charter.³ To resolve this legal quandary surrounding the use of force, scholars developed a theoretical legal framework for the use of force against NSAs residing in host states.⁴ This test is known as the “unwilling or unable” test.⁵ The test tries to justify the use of force by victim states against NSAs residing in host states, where the relevant criteria are met.⁶⁷

The first prerequisite under the test is that an NSA has indeed attacked the victim state.⁸ The victim state must then fulfill all the requirements enshrined within the test, such as asking the host state to act against the NSA or curtail its activities, or requesting the consent of the host state to use force against NSAs in its territory in cases where the host state is unable to control the actions of the NSAs.⁹ Recently, using the unwilling or unable test guidelines, the United States has used force against NSAs residing in host states in cases where the host states are either unwilling or unable to constrain illicit terrorist activities launched from within their borders.¹⁰

Though the test has some support among legal theorists, the legality of this test in international law is contentious due to a lack of state practice,¹¹ largely owed to harsh criticisms¹² and lack of acceptance by the global community.¹³ Some have stated

3. CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 242 (4th ed. 2018).

4. Ashley S. Deeks, *Unwilling or Unable: Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483, 483 (2012).

5. *Id.*

6. Christian Schaller, *Using Force Against Terrorists 'Outside Areas of Active Hostilities' – The Obama Approach and the Bin Laden Raid Revisited*, 20 J. CONFLICT & SEC. L. 195, 202–03 (2015).

7. Irene Couzigou, *The Right to Self-Defence Against Non-State Actors: Criteria of the “Unwilling or Unable” Test*, 77 HEIDELBERG J. INT'L L. 53, 53 (2017).

8. Deeks, *supra* note 4, at 483.

9. WASEEM AHMAD QURESHI, *THE USE OF FORCE IN INTERNATIONAL LAW* 103–08 (2017).

10. THE WAR REPORT: ARMED CONFLICT IN 2014, at 403 (Annyssa Bellal ed., 2016) [hereinafter THE WAR REPORT].

11. *Id.*; Marja Lehto, *The Fight Against ISIL in Syria. Comments on the Recent Discussion of the Right of Self-Defence Against Non-State Actors*, 87 NORDIC J. INT'L L. 1, 22 (2018).

12. Lehto, *supra* note 11, at 22.

13. Jefferi Hamzah Sendut, *The Unwilling and Unable Doctrine and Syria*, CAMBRIDGE U. L. SOC'Y: PER INCURIAM (Feb. 21, 2018), <https://culs.org.uk/per-incuriam/legal-updates/unwilling-unable-doctrine-syria/>.

that the test is not part of contemporary international law.¹⁴ As a result, there is a lack of guidance in international law on the application of the unwilling or unable test, which has the potential to be costly. Unilateral action by one state against another without U.N. Security Council (UNSC) authorization or a legal framework for the use of force under international law can have dire consequences.¹⁵ For instance, a host state can retaliate against any use of force launched under the unwilling or unable test against its sovereignty where it is not culpable for an armed attack, and as a responsive act it can use force to defend itself under its inherent right to self-defense,¹⁶ which can provoke full-scale wars and put the lives of hundreds of millions of people at risk. Nevertheless, the test has been somewhat exercised in some small-scale operations.¹⁷

The United States' operation in Pakistan to hunt down Osama bin Laden¹⁸ was not the only instance of a state using force against an NSA in another state to target a rebel or terrorist group on the basis that the host state was unwilling or unable to curtail NSA activities. Similar to the unwilling or unable test, several recommendations on international law—including the Bethlehem Principles, the Chatham House Principles of International Law on the Use of Force in Self Defense, and the Leiden Policy Recommendations on Counterterrorism and International Law—all justify the use of force against NSAs in cases of self-defense.¹⁹

Various other states have also used force against NSAs in foreign territories based on the same reasoning. For example, Russia resorted to the use of force in Georgia in 2002, targeting the Chechen rebels who had undertaken violent attacks in Russia, on the basis that Georgia was unwilling or unable to

14. Couzigou, *supra* note 7, at 53.

15. JOHN-MARK IYI, HUMANITARIAN INTERVENTION AND THE AU-ECOWAS INTERVENTION TREATIES UNDER INTERNATIONAL LAW: TOWARDS A THEORY OF REGIONAL RESPONSIBILITY TO PROTECT 21 (2016).

16. U.N. Charter art. 51.

17. THE WAR REPORT, *supra* note 10, at 403–04.

18. *Id.* at 403–04, 403 n.84.

19. Lehto, *supra* note 11, at 18.

suppress the attacks²⁰ by the Chechen rebels.²¹ Similarly, Turkey resorted to the use of force in Iraq against the Kurdish Workers' Party (PKK) and justified its actions by asserting that Iraq was unable to suppress the PKK.²² Most recently, the United States and its allies resorted to the use of air strikes in Syrian territory to target the rebel group Islamic State of Iraq and Syria (ISIS), based on the assertion that the Syrian authorities were unable or unwilling to suppress ISIS.²³ This in turn posed a direct threat not only to neighboring Iraq, but also to various other countries, including the United States and its allies in the region and beyond.²⁴

The use of force in all these instances has, controversially, been denounced by host states and the international community as a violation of international law.²⁵ For instance, many legal theorists and states have questioned the air strikes undertaken by the United States and its allies in Syrian territory,²⁶ as they were justified by the unwilling or unable test,²⁷ a standard that has not been accepted by the international community as a whole.²⁸

Accordingly, this Article aims to critically analyze the application of the unwilling or unable test by the United States in the case of Syria, and assess why the justification that the United States provided for its military intervention in Syrian

20. CHRISTIAN HENDERSON, *THE PERSISTENT ADVOCATE AND THE USE OF FORCE: THE IMPACT OF THE UNITED STATES UPON THE JUS AD BELLUM IN THE POST-COLD WAR ERA* 160 (2016).

21. Kinga Tibori-Szabó, *The 'Unwilling or Unable' Test and the Law of Self-Defence*, in *FUNDAMENTAL RIGHTS IN INTERNATIONAL AND EUROPEAN LAW: PUBLIC AND PRIVATE LAW PERSPECTIVES* 73, 87 n.64 (Christophe Paulussen et al. eds., 2016).

22. GRAY, *supra* note 3, at 140–41.

23. Tibori-Szabó, *supra* note 21, at 94.

24. *Id.*

25. See GRAY, *supra* note 3, at 140–41 (explaining Turkish actions); GEOFFREY S. CORN ET AL., *THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE* 19 (2015) (describing how the capture of al Qaeda leaders violated the sovereignty of Georgia); HENDERSON, *supra* note 20, at 160 (explaining how the Russian use of force against Chechen rebels violated the sovereignty of Georgia); AMOS N. GUIORA, *MODERN GEOPOLITICS AND SECURITY: STRATEGIES FOR UNWINNABLE CONFLICTS* 52–54 (2013) (noting how U.S. actions have violated Syrian sovereignty).

26. GUIORA, *supra* note 25, at 119.

27. GRAY, *supra* note 3, at 234–37.

28. See *THE WAR REPORT*, *supra* note 10, at 403 n.84; Sendut, *supra* note 13.

territory has not been universally accepted. It will also discuss barriers to the acceptance of this standard, especially the interpretation of the standard offered by the United States to justify its actions in Syria. After briefly describing the unwilling or unable test more generally, the Article critically evaluates the specific application of the unwilling or unable test to the case of Syria.

Fittingly, Part I will explain the unwilling or unable test, and is divided into six brief subsections. The first section discusses armed attacks and consent under the unwilling or unable test. The second explains the notion of assessing future attacks under the test. Section I.C will then consider the assessment under the test of the willingness of the territorial state to deal with the issue of NSAs. Section I.D will discuss the assessment under the test of the capacity of the territorial state to curtail these situations. The fifth section will explain proposed actions that could curtail these situations. Finally, Section I.F will consider the assessment of the prior interaction between the victim and host states under the test.

Part II will critically analyze the test in accordance with the laws regarding the use of force, and is divided into two subsections. The first section will explain the effects of the test on the prohibition on the use of force set out in Article 2, section 4 of the U.N. Charter. The next will discuss the consequences of applying the test on the self-defense threshold set by Article 51 of the U.N. Charter.

Part III will then discuss the general lack of acceptance of the test, as reflected in the official stances of different countries. After outlining Syrian protestations against invasion, it will discuss generally states' denouncement of Syrian intervention and their reasoning in the context of evaluating the test.

Part IV will apply the unwilling or unable test to the Syrian case. Then, Part V will evaluate the application of the unwilling or unable test in the Syrian context, in four subsections. The first section will consider the fact that Iraq has not requested that the United States and its allies intervene in Syria. The second section will outline the lack of endorsement of the test. The next

section will consider the lack of conviction regarding the test among coalition members, and the final section will explain how coalition members interpret the scope of the test differently.

I. THE UNWILLING OR UNABLE TEST

According to the unwilling or unable test, a victim state is not allowed to resort to the use of force against a territorial state/host state (the state from which the non-state rebel group launched the attack) if the latter is “willing and able” to suppress the threat of that non-state rebel group.²⁹ If, however, the territorial state is either unwilling or unable to control or suppress the threat caused by these non-state rebel groups, then the victim state can resort to the use of force to defend itself.³⁰

This “newly devised justification for militant self-defense and humanitarian action” first appeared in a September 2014 letter from former U.S. Ambassador to the United Nations Samantha Power to the U.N. Secretary-General, invoking the unwilling or unable test as a justification for the airstrikes in Syria.³¹ The unwilling or unable test allows the responsive use of force against a territorial state as a reminder that states are responsible³² for controlling their territories and preventing terrorist attacks originating from their territories.³³ However, the need to respond to hostile terroristic acts has caused “the unwilling and unable rationale [to] bypass international conventions as a source of international humanitarian law.”³⁴

Ashley Deeks, who undertook an extensive study for establishing a new normative framework for extraterritorial defense, suggested guidelines for states that wish to apply the unwilling or unable test in order to determine whether they

29. QURESHI, *supra* note 9, at 96–97; *see also* Deeks, *supra* note 4, at 495.

30. Deeks, *supra* note 4, at 495.

31. *Id.* at 558.

32. Startski, *supra* note 1, at 466.

33. Tibori-Szabó, *supra* note 21, at 87.

34. Johan D. van der Vyver, *The ISIS Crisis and the Development of International Humanitarian Law*, 30 EMORY INT’L L. REV. 531, 558 (2016).

should resort to the use of force for countering the threat posed by NSAs operating from the territory of another state.³⁵ These guidelines are summarized below.

A. *Armed Attack and Consent*

First, if an armed attack in one state was conducted by an NSA operating from another state, then, according to the Chatham House Principles and the unwilling or unable test,³⁶ the victim state must seek permission from the territorial state to use force within the latter's territory.³⁷ If permission is granted, then there is no need to apply the unwilling or unable test.³⁸ However, if the territorial state does not grant the victim state permission to use force against the NSA, then the victim state must propose to undertake a joint military operation against the NSA.³⁹ There have been a number of instances where states have chosen this option. For example, when groups of Native Americans and Mexicans carried out raids in Texas in 1877, the U.S. Secretary-General, in an effort to counter these groups, sought the support of the Mexican authorities to put an end to the raids.⁴⁰ More recently, the International Court of Justice (ICJ), reviewing the presence of Ugandan military forces in the Democratic Republic of Congo, established in 2005 that a state could use force legally with consent.⁴¹

B. *Assessing Future Threats*

Second, it is necessary for the nature of the NSA threat to be analyzed, as it helps one determine whether the territorial state

35. Deeks, *supra* note 4, at 506.

36. Lehto, *supra* note 11, at 20.

37. See Tibori-Szabó, *supra* note 21, at 89–90.

38. *Id.*

39. Deeks, *supra* note 4, at 519–20.

40. *Id.* at 520; Amos S. Hershey, *Incursions into Mexico and the Doctrine of Hot Pursuit*, 13 AM. J. INT'L L. 557, 560–61 (1919).

41. See *Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168, ¶ 50–54 (Dec. 19); see also CHIA-JUI CHENG, A NEW INTERNATIONAL LEGAL ORDER: IN COMMEMORATION OF THE TENTH ANNIVERSARY OF THE XIAMEN ACADEMY OF INTERNATIONAL LAW 81 (2016).

is willing and able to subdue the threat posed by the NSA on its own.⁴² There are a number of factors that need to be taken into account, including: (1) the capacity of the NSA, which can be gauged by assessing the level of sophistication of the attacks, (2) the capacity of the government's forces, which can be determined by the number and credentials of government officials operating in the area, and (3) external factors, such as the geographical terrain of the territorial state, which can make it difficult for the state to shut down any safe havens for the NSA.⁴³ The nature of the threat, which has a direct effect on the difficulty, or ease, for the victim state to independently counter the threat of the NSA operating from the territorial state, can be determined only after analyzing all these factors. For example, if the attacks conducted by the NSA are fairly sophisticated, and if government forces lack the capacity to prevent such attacks from happening again, then it is very unlikely that the victim state is going to counter this threat independently.⁴⁴

C. Assessing the Willingness of the Territorial State

Third, in the event that the territorial state neither authorizes the use of force by the victim state nor collaborates with the victim state on a joint operation to counter the threat of the NSA, the victim state can further gauge the willingness and ability of the territorial state by proposing a timeframe for the territorial state to subdue the threat.⁴⁵ If the territorial state accepts the appeal and takes necessary action, then it can be stated that it is willing and able to tackle the threat.⁴⁶ Such use of force by invitation has been approved by the ICJ, as noted above.⁴⁷ In this situation, the victim state cannot use force in the

42. See MARCO ROSCINI, *CYBER OPERATIONS AND THE USE OF FORCE IN INTERNATIONAL LAW* 85 n.291 (2014).

43. See, e.g., Deeks, *supra* note 4, at 525–29, 541 (referring to assessments of NSA threats in Cambodia, Iraq, Georgia, Mexico, and Ecuador).

44. QURESHI, *supra* note 9, at 104.

45. Deeks, *supra* note 4, at 525 n.134.

46. See *supra* note 41 and accompanying text.

47. CHENG, *supra* note 41, at 81.

territories of a host state.⁴⁸ However, if the territorial state refuses to consent or act on its own against the NSA, then it can be concluded that the territorial state is unwilling to counter the threat posed by the NSA.⁴⁹ It is pertinent to point out that this step of making an appeal to the territorial state is particularly important before the victim state resorts to using any kind of force.⁵⁰ This ensures that the territorial state is at least aware of the issue and therefore can take necessary measures to counter the threat if it is indeed willing and able to do so.

It must be mentioned that, in response to the appeal made by the victim state, the territorial state can ask for evidence of proof of the claim, i.e., proof that the victim state was affected by the activities of the NSA operating from within the territorial state.⁵¹ The victim state may or may not want to provide such evidence, depending on its relationship with the territorial state, because in certain cases the evidence could further harm the victim state.⁵² Nevertheless, the victim state should be able to justify its claim in some way so that it is not criticized by the international community for resorting to force without a legitimate reason.⁵³

D. *Assessing the Capability of the Territorial State*

Fourth, it may be the case that the territorial state is willing to counter the threat posed by the NSA operating from within its territory but is merely unable to do so effectively owing to its lack of capacity.⁵⁴ Hence, the victim state is responsible for determining whether the territorial state has the capacity to counter the threat of the NSA independently.⁵⁵ In the vast majority of cases, such information is easily available.

48. *Id.*

49. STEFAN SALOMON ET AL., *BLURRING BOUNDARIES: HUMAN SECURITY AND FORCED MIGRATION* 88–89 (2017).

50. Deeks, *supra* note 4, at 521.

51. *Id.* at 510–11.

52. *Id.*

53. QURESHI, *supra* note 9, at 104–05.

54. Deeks, *supra* note 4, at 525–29.

55. QURESHI, *supra* note 9, at 104–06; *see also* Deeks, *supra* note 4, at 525–29.

Ungoverned spaces within territories tend to be well researched, and based on such research findings the victim state can determine the extent to which the territorial state is in control of its territorial resources.⁵⁶ For example, Turkey justified its military operations against the PKK on Iraqi territory on the assertion that the areas from which the PKK was operating were not under the control of the Iraqi government, rendering Iraq unable to counter the threat posed by the PKK.⁵⁷ It must also be pointed out that this Turkey–US military intervention in Iraq was heavily criticized for violating international law.⁵⁸

E. *Propose Action*

Fifth, the decision of the victim state to intervene should be preceded by an evaluation of the proposed territorial plan to tackle the situation at hand. This will help the victim state determine whether the territorial state can handle the situation independently or whether there is indeed a need for the victim state to take matters into its own hands and use force in self-defense.⁵⁹ If the victim state does not accept the proposed assistance, then it may be concluded that the victim state is unwilling to curtail the threat.⁶⁰

F. *Assess Prior Interactions with the Territorial State*

Sixth, the victim state must also take into account its prior interactions with the territorial state when evaluating the willingness and ability of the latter to tackle the threat of the NSA operating from within its territory.⁶¹ If the territorial state has helped the victim state in the past, then it is likely that it

56. Deeks, *supra* note 4, at 523.

57. SONER CAGAPTAY, *THE RISE OF TURKEY: THE TWENTY-FIRST CENTURY'S FIRST MUSLIM POWER* 52 (2014).

58. LUNGHUIYANG RIAMEI, *THE KURDISH QUESTION: IDENTITY, REPRESENTATION AND THE STRUGGLE FOR SELF-DETERMINATION* 11 (2015).

59. Deeks, *supra* note 4, at 529–30.

60. Couzigou, *supra* note 7, at 54.

61. Startski, *supra* note 1, at 459.

may do so again in the future.⁶² However, there might be some cases where past experiences may not be good indicators of the future. For example, where there is a change in the government of the territorial state, its stance toward the victim state might change as well. So, while in the past the territorial state may have been supportive of the victim state, it may not necessarily be as supportive in the future, or vice versa.⁶³

Taking all of these factors into account allows the victim state to adopt a more balanced approach to assessing a particular situation and taking the necessary steps to address it.⁶⁴ The framework described above provides the territorial state with ample opportunity to respond to the threat posed by the NSA, while also giving the victim state guidelines for assessing the willingness and ability of the territorial state to respond to the threat.

II. CRITICAL ANALYSES OF THE TEST

The following sections will critically evaluate the effects of the application of the unwilling or unable test on the required thresholds for use of force and self-defense, as established by the U.N. Charter under Articles 2(4)⁶⁵ and 51.⁶⁶ This Part is divided into two subsections. The first will analyze the effects of the test's application on the prohibition against the use of force, and the second will critically evaluate its effect on the threshold of self-defense under Article 51 of the U.N. Charter.⁶⁷

62. Deeks, *supra* note 4, at 531–32.

63. QURESHI, *supra* note 9, at 109–11.

64. Deeks, *supra* note 4, at 533; *see also* Waseem Ahmad Qureshi, *The Use of Force Against Perpetrators of International Terrorism*, 16 SANTA CLARA J. INT'L L. 1, 24 (2018).

65. U.N. Charter art. 2, ¶ 4.

66. U.N. Charter art. 51.

67. *Id.*

A. Prohibition on the Test and Use of Force

The use or the threat of the use of force is prohibited under Article 2(4) of the U.N. Charter,⁶⁸ the scope of which is defined by case law⁶⁹ and U.N. General Assembly (UNGA) resolutions.⁷⁰ The scope of the prohibition on the use of force goes beyond prohibiting states from organizing or directly participating in acts undertaken by rebellious groups in other states; it also disallows them from subversively assisting in or supporting such acts, defined and established under U.N. resolutions⁷¹ and ICJ case law.⁷² The United States' interpretation of the prohibition on using force under the unwilling or unable test, however, takes this standard a step further, as its interpretation is based on an entirely objective responsibility. The United States criticized Syria not for supporting or accepting the activities of ISIS, but for being unsuccessful in defeating them.⁷³ Hence, if the United States' interpretation of the unwilling or unable standard was adopted by the international community, then Article 2(4) of the U.N. Charter would not only entail an obligation of conduct, i.e., an obligation to take any reasonable measure against a rebellious group, but also an obligation of result, i.e., an obligation to defeat the rebellious group and put an end to its activities. The test generally deviates from the existing legal requirements and lowers the threshold of the prohibition on the use of force,

68. See U.N. Charter art. 2, ¶ 4; see also WASEEM AHMAD QURESHI, *JUST WAR THEORY AND EMERGING CHALLENGES IN AN AGE OF TERRORISM* 200 (2017).

69. See, e.g., *Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 168 (Dec. 19).

70. See, e.g., G.A. Res. 2625 (XXV), at 123 (Oct. 24, 1970) ("Every [s]tate has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any [s]tate, or in any other manner inconsistent with the purposes of the United Nations.").

71. *Id.*

72. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14 (June 27); see also MAX HILAIRE, NIJHOFF LAW SPECIALS, *INTERNATIONAL LAW AND THE UNITED STATES MILITARY INTERVENTION IN THE WESTERN HEMISPHERE* 101 (1997).

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

which obviously requires the current international law on using force to be changed.⁷⁴

This assertion can be confirmed by analyzing the *Armed Activities Case*,⁷⁵ in which the ICJ stated that the inability of the Democratic Republic of Congo to stop the activities of anti-Ugandan rebel groups was not equivalent to a violation of Article 2(4) of the U.N. Charter, especially when the state concerned was acting against them and not in their support.⁷⁶ As the methodology employed by the ICJ⁷⁷ suggests, the question is not whether a particular state is capable of defeating the rebel groups but rather whether it genuinely tries to do so given the resources it has at its disposal in those circumstances.⁷⁸ Hence, the “duty of vigilance,” or due diligence, is not an obligation of result, but an obligation of conduct.⁷⁹ If a state uses all reasonable means to stop rebel groups from operating within its territory, including launching strikes against those groups and seeking the assistance of other states, then concluding that the state violated the prohibition on the use of force would certainly require lowering the threshold set by Article 2(4) of the U.N. Charter.

Accordingly, if these legal considerations are applied to the case of ISIS, the mere fact that ISIS was able to withstand the efforts of various countries—including Syria, Iraq, the U.S.-led coalition, and even Russia—who attempted to defeat this group, confirms there was no violation of the prohibition of using force. Whereas, by contrast, the aiding and abetting of

74. Olivier Corten, *The 'Unwilling or Unable' Test: Has It Been, and Could It Be, Accepted?*, 29 LEIDEN J. INT'L L. 777, 793 (2016).

75. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 168 (Dec. 19).

76. *Id.*; see also Corten, *supra* note 74, at 793.

77. TOM RUYS, “ARMED ATTACK” AND ARTICLE 51 OF THE UN CHARTER 375 (2010); see also GRAY, *supra* note 3, at 242.

78. Corten, *supra* note 74, at 793.

79. RUYS, *supra* note 77, at 375.

NSAs in Syria by the United States and its allies⁸⁰ can be considered to violate the prohibition on the use of force.⁸¹

B. *Self-Defense and the Test*

Article 51 of the U.N. Charter recognizes the right of a state to use self-defense in response to an armed attack.⁸² Customary laws define self-defense in detail,⁸³ emphasizing that only an armed attack can trigger the right to use force in self-defense.⁸⁴ ICJ case law⁸⁵ further establishes that only the gravest forms of the use of force constitute an armed attack, which include sending armed bands⁸⁶ into the territory of another state.⁸⁷ Per Article 3(g)'s definition of aggression, if a state sends an irregular group to another state's territory, or the state is found to be significantly involved in the use of force by such a group, such acts can be considered aggression.⁸⁸ Similarly, the ICJ in the *Nicaragua Case*⁸⁹ also established that arming rebels in the territory of another state could be considered an act of aggression.⁹⁰ This suggests that the threshold required for Article 51⁹¹ of the U.N. Charter is higher than that required for

80. TAJ HASHMI, *GLOBAL JIHAD AND AMERICA: THE HUNDRED-YEAR WAR BEYOND IRAQ AND AFGHANISTAN* 182 (2014); *see also* CHARLOTTE WALKER-SAID & JOHN D. KELLY, *CORPORATE SOCIAL RESPONSIBILITY?: HUMAN RIGHTS IN THE NEW GLOBAL ECONOMY* 167 (2015).

81. HILAIRE, *supra* note 72, at 101; *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶ 226 (June 27).

82. RUYS, *supra* note 77, at 375.

83. G.A. Res. 3314 (XXIX), at 142–43 (Dec. 12, 1974); *see also* Tibori-Szabó, *supra* note 21, at 80.

84. G.A. Res. 3314 (XXIX), *supra* note 83, at 142–43.

85. *Oil Platforms (Iran v. U.S.)*, Preliminary Objection, 1996 I.C.J. Rep. 803 (Dec. 12).

86. Startski, *supra* note 1, at 464.

87. *See* *Iran v. U.S.*, 1996 I.C.J. at 39–41; *see also* CHRISTINE CHINKIN & MARY KALDOR, *INTERNATIONAL LAW AND NEW WARS* 137 (2017).

88. KIMBERLEY N. TRAPP, *STATE RESPONSIBILITY FOR INTERNATIONAL TERRORISM* 258 (2011).

89. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14 (June 27).

90. *Id.*; HILAIRE, *supra* note 72, at 101.

91. U.N. Charter art. 51.

Article 2(4),⁹² i.e., only the gravest forms of force, such as aggression or armed attack, can trigger self-defense.⁹³

However, if the unwilling or unable test is to be accepted then the thresholds of the two articles of the U.N. Charter would be lowered, and the mere inability to control an NSA's activities would constitute a violation of not only Article 2(4) of the U.N. Charter, but also Article 51.⁹⁴ According to the unwilling or unable test, even a small-scale attack by an NSA can invoke the right to self-defense.⁹⁵

Some advocates of the unwilling or unable test have developed an alternate interpretation of self-defense under Article 51, likely in order to evade these legal repercussions.⁹⁶ They have suggested that the condition for the existence of an armed attack should be distinguished from the "necessity" criterion: the former is relevant to the relationship between the victim state and the rebel group, while the latter would pertain to the relationship between the territorial state and the victim state.⁹⁷ Applying this interpretation to the case of Syria, if ISIS were to commit an "armed attack" against Iraq without Syrian support or assistance, then the United States and the members of its coalition would be, in the name of "necessity," entitled to respond by launching strikes against ISIS in Syrian territory according to the unwilling or unable test.⁹⁸ It is safe to say that such an approach or reasoning appears rather inventive, as evidenced by the following arguments.

First of all, the idea of splitting the conditions of self-defense, i.e., distinguishing the condition for the existence of an armed attack from the "necessity" criterion, is clearly not in line with the letter or the spirit of Article 51.⁹⁹ Secondly, none of the

92. U.N. Charter art. 2, ¶ 4.

93. See *Oil Platforms (Iran v. U.S.)*, Preliminary Objection, 1996 I.C.J. Rep. 803 (Dec. 12); see also CHINKIN & KALDOR, *supra* note 87, at 135–39.

94. See Deeks, *supra* note 4, at 491–95; Corten, *supra* note 74, at 791–99.

95. Tibori-Szabó, *supra* note 21, at 90–91.

96. See U.N. Charter art. 2, ¶ 4; see also U.N. Charter art. 51; Deeks, *supra* note 4, at 492–93.

97. See Deeks, *supra* note 4, at 494–95.

98. QURESHI, *supra* note 9, at 88; see also Deeks, *supra* note 4, at 494–95.

99. See U.N. Charter art. 51.

contemporary texts or case law support the assertion that using force in the name of “necessity” is allowed against a state that is not responsible for an armed attack, or for that matter in response to any violation of Article 2(4).¹⁰⁰ In fact, ICJ case law prohibits the cross-border use of force against NSAs owing to the veil of sovereignty.¹⁰¹ Since 1945, necessity has been seen as an additional—rather than a self-sufficient—condition triggering a nation’s right to use force.¹⁰² Moreover, per the ICJ, this condition does not broaden the right to self-defense, but restrains it.¹⁰³

Even if one is to refer to the Webster formula, a broader conception of self-defense,¹⁰⁴ it is not clear how the necessity criterion can be applied to support the unwilling or unable test as it has been interpreted by the United States in the case of Syria. Per the Webster formula, to be applicable, the need for self-defense must be “instant, overwhelming, and [must] leav[e] no choice of means, and no moment of deliberation.”¹⁰⁵ These prerequisites of self-defense cannot be reconciled with the United States’ interpretation of self-defense, as one cannot assert that the United States had no choice but to launch a military intervention in Syria without even seeking the consent of the Syrian authorities, which pierces the veil of Syrian sovereignty.¹⁰⁶

100. See *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 168, ¶ 147 (Dec. 19); see also *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. Rep. 161, 165 (Nov. 6); *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, 166 (June 27); OLIVIER CORTEN, *THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW* 472 (2012) [hereinafter *THE LAW AGAINST WAR*]; Corten, *supra* note 74, at 777–99; HANSPETER NEUHOLD, *THE LAW OF INTERNATIONAL CONFLICT: FORCE, INTERVENTION AND PEACEFUL DISPUTE SETTLEMENT* 125 (2015).

101. See *Dem. Rep. Congo v. Uganda*, 2005 I.C.J. at 150–54; see also *Iran v. U.S.*, 2003 I.C.J. at 166; *Nicar. v. U.S.*, 1986 I.C.J. at ¶ 226.

102. Corten, *supra* note 74, at 796.

103. *Iran v. U.S.*, 2003 I.C.J. at 39–41; *Nicar. v. U.S.*, 1986 I.C.J. at 93.

104. IAN BROWNLIE & JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 751 (2012).

105. RUY, *supra* note 77, at 250–51; 8 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 440 (Armin von Bogdandy et al. eds., 2004).

106. Gareth D. Williams, *Piercing the Shield of Sovereignty: An Assessment of the Legal Status of the “Unwilling or Unable Test”*, 36 U. NEW S. WALES L.J. 619, 619–20 (2013). As Williams explains,

Thirdly, it assumes, without being backed by relevant international law,¹⁰⁷ that Article 51 is applicable to the NSA,¹⁰⁸ which goes directly against ICJ case law.¹⁰⁹ Since Article 2(4) does not prohibit the use of force against an NSA in one's own territory,¹¹⁰ the invocation of Article 51¹¹¹ in self-defense appears to be irrelevant here. The situation is different when the use of force is directed not only against the NSA but also against the sovereignty of another state.¹¹² Every time a state launches strikes against an NSA operating from another state it infringes on the sovereignty of that state,¹¹³ violates the international law governing the use of force,¹¹⁴ and commits an act of aggression against that state.¹¹⁵

III. LACK OF ACCEPTANCE OF THE TEST

An evaluation of the relevant documents, including the letters written by different states to the UNSC between August 2014 and January 2016,¹¹⁶ the reports of the debates within the

this phenomenon occurs when "the host state's sovereignty is used by the terrorist organization as a shield to deter and inhibit retaliation from the victim state. Naturally, states that suffer terrorist attacks seek to pierce this shield of sovereignty . . . [by using] force against the non-state actor in the territory of the host state." *Id.*

107. See U.N. Charter arts. 39–51.

108. Deeks, *supra* note 4, at 492–93.

109. Dem. Rep. Congo v. Uganda, 2005 I.C.J. at ¶ 146; Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. Rep. 161, ¶ 51 (Nov. 6); see also THE LAW AGAINST WAR, *supra* note 100, at 472; Corten, *supra* note 74, at 795; NEUHOLD, *supra* note 100, at 125.

110. U.N. Charter art. 2, ¶ 4.

111. U.N. Charter art. 51.

112. See U.N. Charter art. 2, ¶ 4; see also Marco Sassoli, *Ius ad Bellum and Ius in Bello—The Separation Between the Legality of the Use of Force and Humanitarian Rules to Be Respected in Warfare: Crucial or Outdated?*, in INTERNATIONAL LAW AND ARMED CONFLICT, EXPLORING THE FAULTLINES: ESSAYS IN HONOUR OF YORAM DINSTEIN 242 (Michael Schmitt & Jelena Pejic eds., 2007).

113. Williams, *supra* note 106, at 619–20.

114. Lehto, *supra* note 11, at 3; see also G.A. Res. 3314 (XXIX), *supra* note 83, at 142–43; U.N. Charter art. 2, ¶ 4; Dem. Rep. Congo v. Uganda, 2005 I.C.J. at ¶ 43; Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 191 (June 27); THE LAW AGAINST WAR, *supra* note 100, at 472; Corten, *supra* note 74, at 795; NEUHOLD, *supra* note 100, at 125.

115. G.A. Res. 3314 (XXIX), *supra* note 83, at 142–43.

116. See Permanent Rep. of the United States to the U.N., *supra* note 73; Permanent Rep. of Australia to the U.N., Letter dated Sept. 9, 2015 from the Permanent Rep. of Australia to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/693 (Sept.

United Nations,¹¹⁷ and the resolutions and statements adopted by the United Nations, make it clear that the international community does not generally accept the unwilling or unable test.¹¹⁸

A. Syrian Protests Against the Violation of International Law

Syria waited for more than a year before it formally launched a protest against the U.S.-led military intervention.¹¹⁹ That military intervention began in September 2014.¹²⁰ The Syrian authorities wrote a number of letters¹²¹ to the United Nations protesting the support extended toward the rebels by various

9, 2015); Chargé d'affaires a.i. of the Permanent Mission of Canada to the U.N., Letter dated Mar. 31, 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, U.N. Doc. S/2015/221 (Mar. 31, 2015); Chargé d'affaires a.i. of the Permanent Mission of Turkey to the U.N., Letter dated July 24, 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, U.N. Doc. S/2015/563 (July 24, 2015); Permanent Rep. of Turkey to the U.N., Letter dated June 14, 2015 from the Permanent Rep. of Turkey to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/434 (June 15, 2015); Chargé d'affaires a.i. of the Permanent Mission of Germany to the U.N., Letter dated Dec. 10, 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/946 (Dec. 10, 2015).

117. See generally U.N. SCOR, 70th Sess., 7527th mtg., U.N. Doc. S/PV.7527 (Sept. 30, 2015) (transcribing statements by various representatives of member nations); U.N. SCOR, 70th Sess., 7589th mtg., U.N. Doc. S/PV.7589 (Dec. 18, 2015) (same).

118. Corten, *supra* note 74, at 786.

119. Permanent Rep. of the Syrian Arab Republic to the U.N., Identical letters dated Sept. 17, 2015 from the Permanent Rep. of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/719 (Sept. 21, 2015).

120. STOCKHOLM INT'L PEACE RESEARCH INST., SIPRI YEARBOOK 2015: ARMAMENTS, DISARMAMENT AND INTERNATIONAL SECURITY 3 (2015), <https://www.sipri.org/sites/default/files/2016-03/YB-15-Summary-EN.pdf>.

121. Permanent Rep. of the Syrian Arab Republic to the U.N., Identical letters dated Sept. 26, 2014 from the Permanent Rep. of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2014/705 (Oct. 1, 2014) [hereinafter Permanent Rep. of the Syrian Arab Republic (Oct. 1)]; see also Permanent Rep. of the Syrian Arab Republic to the U.N., Identical letters dated June 29, 2015 from the Permanent Rep. of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/487 (July 2, 2015) [hereinafter Permanent Rep. of the Syrian Arab Republic (June 29)]; Permanent Rep. of the Syrian Arab Republic to the U.N., Identical letters dated Dec. 28, 2015 from the Permanent Rep. of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/1044 (Dec. 31, 2015) [hereinafter Permanent Rep. of the Syrian Arab Republic (Dec. 31)].

Western and Arab states,¹²² the economic sanctions imposed on Syria,¹²³ and the Turkish¹²⁴ and Israeli¹²⁵ incursions. But it was not until September 2015 that the Syrian authorities protested against the military interventions of the United Kingdom, Australia, and France.¹²⁶ A few days later, the Syrian authorities wrote a letter stating that while the United States, United Kingdom, France, Canada, and Australia had cited the fight against ISIS to justify their military interventions in Syria, and had invoked Article 51 of the U.N. Charter, they had not consulted with the Syrian government.¹²⁷ Hence, they had acted in a manner that misrepresented the Charter's provisions and manipulated international law.¹²⁸ Syria was also critical of the actions of the United Kingdom and France in Syrian airspace, describing them as "contrary to the Charter of the United Nations and international law."¹²⁹ In a subsequent letter, the Syrian authorities stated that, since the actions of the United Kingdom and other states did not meet the conditions that triggered the application of Article 51 of the U.N. Charter, the military intervention undertaken by the U.S.-led coalition fell

122. Permanent Rep. of the Syrian Arab Republic (Oct. 1), *supra* note 121; *see also* Permanent Rep. of the Syrian Arab Republic (June 29), *supra* note 121; Permanent Rep. of the Syrian Arab Republic (Dec. 31), *supra* note 121.

123. Permanent Rep. of the Syrian Arab Republic to the U.N., Identical letters dated Oct. 28, 2014 from the Permanent Rep. of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2014/769 (Nov. 7, 2014).

124. Chargé d'affaires a.i. of the Permanent Mission of the Syrian Arab Republic to the U.N., Identical letters dated Oct. 3, 2014 from the Chargé d'affaires a.i. of the Permanent Mission of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2014/719 (Oct. 8, 2014).

125. Permanent Rep. of the Syrian Arab Republic to the U.N., Identical letters dated Dec. 8, 2014 from the Permanent Rep. of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. A/69/646-S/2014/874 (Dec. 8, 2014).

126. Permanent Rep. of the Syrian Arab Republic to the U.N., Identical letters dated Dec. 21, 2015 from the Permanent Rep. of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. A/70/385-S/2015/727 (Sept. 21, 2015).

127. *Id.*

128. *Id.*

129. Corten, *supra* note 74, at 787.

outside the scope of international law.¹³⁰ Thus, it is evident that the Syrian authorities refused to accept any argument that was based on self-defense.¹³¹

B. *Denouncement of Syrian Intervention*

Interestingly, some states more generally denounced the breach of sovereignty of a state, even if it was done in the name of fighting ISIS.¹³² For example, China stated that it was necessary that all states comply with the principles and purposes of the U.N. Charter, the basic norms governing international relations, and the sovereignty and territorial integrity of Syria.¹³³ Similar statements were made by Ecuador,¹³⁴ Chad, Algeria, Brazil, Belarus, South Africa, and India.¹³⁵ Meanwhile, other states were critical of any unilateral action that violated Syrian sovereignty.¹³⁶ Among these states were those that simply condemned any unilateral action against Syria as illegal.¹³⁷ For example, Russia stated that the United

130. Permanent Rep. of the Syrian Arab Republic to the U.N., Identical letters dated Jan. 4, 2016 from Permanent Rep. of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. A/70/673-S/2015/1048 (Jan. 4, 2016).

131. *See id.* at 3, 5–7; Corten, *supra* note 74, at 786–88. *See generally* Permanent Rep. of the Syrian Arab Republic to the U.N., Identical letters dated Jan. 11, 2016 from the Permanent Rep. of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2016/31 (Jan. 12, 2016) (describing the international coalition’s hostile and coercive methods throughout the attacks).

132. *See, e.g.*, Hua Chunying, Spokesperson, Ministry of Foreign Affairs of China, Remarks (Apr. 14, 2018), http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1551073.shtml (noting China’s opposition to the use of force and calling for respecting a nation’s sovereignty and territories); Alex Leff, *Brazil and Ecuador Come Out Against Airstrikes in Syria*, PUBLIC RADIO INT’L (Sept. 24, 2014, 7:45 AM), <https://www.pri.org/stories/2014-09-24/brazil-and-ecuador-come-out-against-airstrikes-syria> (quoting Brazilian and Ecuadorian officials’ rejection of the attacks); Corten, *supra* note 74, at 789 (compiling positions of countries opposed to the use of force even to fight ISIS).

133. Chunying, *supra* note 132.

134. Leff, *supra* note 132.

135. Corten, *supra* note 74, at 788–89.

136. *See Russia Says Air Strikes in Syria Would Be Act of Aggression Without UN Vote*, REUTERS (Sept. 11, 2014, 8:18 AM) [hereinafter *Russia Says Air Strikes*], <https://uk.reuters.com/article/uk-russia-u-s-syria-airstrikes/russia-says-air-strikes-in-syria-would-be-act-of-aggression-without-u-n-vote-idUKKBN0H61BF20140911>; *The Shame of the United Nations*, SYRIAN CIVIC PLATFORM (Apr. 7, 2018), <http://www.scplatform.net/en/the-shame-of-the-united-nations/>.

137. *Russia Says Air Strikes*, *supra* note 136.

States' strikes against ISIS in Syria without the consent of the Syrian authorities constituted an act of aggression, and were "therefore a gross violation of international law."¹³⁸ Venezuela,¹³⁹ Ecuador,¹⁴⁰ Cuba, Argentina, and Iran adopted similar stances and made similar assertions.¹⁴¹

The relevant resolutions and statements adopted by the UNSC and UNGA make it clear that none of the texts discussing "the Syrian crises mention Article 51 of the UN Charter, the right to self-defense, or . . . the unwilling or unable [test]."¹⁴² In fact, most of these documents appear to oppose any unilateral action.¹⁴³ Therefore, in light of the positions adopted by a number of states,¹⁴⁴ and the resolutions and statements adopted by the relevant U.N. bodies, it appears that there is a general lack of acceptance of the unwilling or unable test.¹⁴⁵ Such conclusions, however, can only be considered provisional, as one cannot rule out the possibility that the international community could gradually tolerate or even accept such an argument. If this were to happen, then it would imply a drastic change in the present *jus contra bellum*. In particular, the acceptance of the United States' interpretation of the unwilling or unable test would mean that the thresholds contained in Articles 2(4) and 51 of the U.N. Charter would need to be lowered.¹⁴⁶

138. *Id.*

139. Corten, *supra* note 74, at 788.

140. Leff, *supra* note 132.

141. Corten, *supra* note 74, at 788–89.

142. *Id.* at 789.

143. *See id.* at 788–89.

144. *Russia Says Air Strikes*, *supra* note 136; *see also The Shame of the United Nations*, *supra* note 136; Corten, *supra* note 74, at 788–89; Chunying, *supra* note 132; Leff, *supra* note 132; *Ecuador Rejects the Possibility of Armed Aggression Against Syria*, MINISTERIO DE RELACIONES EXTERIORES Y MOVILIDAD HUMANA, <http://www.cancilleria.gob.ec/ecuador-rejects-the-possibility-of-armed-aggression-against-syria> (last visited Dec. 15, 2018).

145. Corten, *supra* note 74, at 791.

146. *Id.* at 791.

IV. APPLICATION OF THE TEST IN THE SYRIAN CASE

In the case of ISIS, not only have the Syrian authorities employed all sorts of resourceful means,¹⁴⁷ but they have also been fighting various terrorist or rebel groups, including ISIS, for several years.¹⁴⁸ Syria has reached out to other states for support in this cause,¹⁴⁹ but it has warned against unilateral actions against its sovereignty.¹⁵⁰ These efforts of the Syrian authorities are well documented and are confirmed by various sources, including the reports that were frequently made by the U.N. Secretary-General.¹⁵¹ Thus, as Olivier Corten has noted, one cannot rightfully accuse the Syrian government of backing ISIS, or even of turning a blind eye toward the group's terrorist activities.¹⁵²

However, the government was unsuccessful in eradicating the threat of ISIS, which still has control over a significant part of Syrian territory.¹⁵³ It is this failure of the Syrian authorities to suppress the ISIS threat that, as per the legal reasoning of the United States, triggers the right to self-defense not only for Iraq, which is a victim of the armed activities of ISIS, but also for the United States and other states whose national interests may be threatened by ISIS.¹⁵⁴

The United States applied the unwilling or unable test to the Syrian case in its letter to the UNSC in 2014.¹⁵⁵ In it, the United States justified its use of force against ISIS in sovereign Syrian territory.¹⁵⁶ As per the letter, ISIS and other terrorist groups based in Syria were identified as a threat not only to Iraq but

147. *Id.*

148. *Id.*

149. 19 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 114 (Terry D. Gill et al. eds., 2016) [hereinafter YEARBOOK].

150. *Id.*

151. Corten, *supra* note 74, at 778.

152. *Id.*

153. Alia Chughtai, *Syria's War: Who Controls What?*, AL JAZEERA (Sept. 7, 2018), <https://www.aljazeera.com/indepth/interactive/2015/05/syria-country-divided-150529144229467.html>.

154. Permanent Rep. of the United States to the U.N., *supra* note 73.

155. *Id.*

156. *Id.*

also to many other countries, including the United States and its partners in the region and beyond.¹⁵⁷ The letter went on to note that all states have the inherent right of individual and collective self-defense, as per Article 51 of the U.N. Charter, which is triggered when the government of the state from which the threat operates is either unwilling or unable to stop the threat to operate from its territory.¹⁵⁸ The letter further asserted that such was the case with Syria, since its government had shown that it was unwilling and unable to eliminate the threat by attacking the safe havens of ISIS in its territory.¹⁵⁹ The United States had therefore commenced necessary and proportionate military actions in Syria for the purpose of eliminating ISIS's threat to Iraq. These actions included protecting the citizens of Iraq from future attacks and supporting the Iraqi forces in regaining control of the country's borders.¹⁶⁰ Furthermore, the letter stated that the United States had initiated a military intervention in Syrian territory against elements of al-Qaeda, which were known as the Khorasan Group, to address the terroristic threat that the group posed to the United States and its allies.¹⁶¹ Accordingly, due to Syria's objective inability or the lack of positive results on the ground, the United States believed that it was allowed to launch air strikes into Syrian territory without seeking the Syrian government's consent¹⁶² and without asking the UNSC to take the initiative in addressing the situation.¹⁶³ Paradoxically, Syria's inability to take action is mainly due to the fact that the United States and its coalition members have been arming antigovernment rebel groups in Syria to fight the Assad regime, rather than fighting ISIS.¹⁶⁴ Interestingly, some analysts

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. Lehto, *supra* note 11, at 22.

163. Permanent Rep. of the United States to the U.N., *supra* note 73.

164. *Syria's Civil War Explained from the Beginning*, AL JAZEERA (Apr. 14, 2018), <https://www.aljazeera.com/news/2016/05/syria-civil-war-explained-160505084119966.html>.

consider the Syrian war to be a “proxy” war.¹⁶⁵ Olivier Corten notes that because Iraq has not officially asked the United States to help fight under collective self-defense¹⁶⁶ as required by the *Nicaragua Case*, the United States and its allies cannot use legal force against NSAs if the attacks are not attributable to Syria.¹⁶⁷

The unwilling or unable test is entirely premised on an armed attack by an NSA launched from the territories of a host state against the victim state, and if the territorial/host state is unable or unwilling to fight the NSA, then the victim state can fight the NSA to defend itself and curtail future activities.¹⁶⁸ In the Syrian case, however, the United States has not accused Syria of launching any attack against the United States or its allies, nor has the United States in fact been attacked. Rather, the official U.S. stance is that ISIS’s existence in Syria is a threat to the United States and its allies, though it has not provided any kind of evidence of that threat.¹⁶⁹

The United States is not using force against Syria because of an attack; instead, it is acting to advance its “national security and foreign policy interests”¹⁷⁰ in the region and overhaul the Assad regime.¹⁷¹ Since there is no armed attack against the United States or its allies in the Syrian case, and the use of force by the United States and its allies is not responsive in nature, as reflected in the official stance,¹⁷² the unable and unwilling test

165. Mara Karlin, *After 7 Years of War, Assad Has Won in Syria. What’s Next for Washington?*, BROOKINGS (Feb. 13, 2018), <https://www.brookings.edu/blog/order-from-chaos/2018/02/13/after-7-years-of-war-assad-has-won-in-syria-whats-next-for-washington>.

166. Corten, *supra* note 74, at 785.

167. *Id.*; see also *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14 (June 27); NEUHOLD, *supra* note 100, at 125; THE LAW AGAINST WAR, *supra* note 100, at 472.

168. Lehto, *supra* note 11, at 1–25; see also Deeks, *supra* note 4, at 541.

169. Permanent Rep. of the United States to the U.N., *supra* note 73.

170. Letter from Donald J. Trump, President of the United States, to Paul Ryan, Speaker of the House of Representatives, and Orrin Hatch, President Pro Tempore of the Senate (Apr. 8, 2017) [hereinafter Donald Trump Letter], <https://www.whitehouse.gov/briefings-statements/letter-president-speaker-house-representatives-president-pro-tempore-senate/>.

171. MARTIN S. INDYK ET AL., *BENDING HISTORY: BARACK OBAMA’S FOREIGN POLICY* 179 (2012).

172. Donald Trump Letter, *supra* note 170; see also Permanent Rep. of the United States to the U.N., *supra* note 73.

is *ab initio* inapplicable in the case of Syria. Moreover, even if we assume that there was an attack by ISIS from Syria against the United States, then, according to the unwilling or unable test, the use of force by the United States and its allies can only be employed after seeking Syria's consent.¹⁷³ Only if Syria refuses such consent and the United States concludes that Syria is unwilling or unable to curtail future actions of the NSA can the United States use force against this NSA.¹⁷⁴

It is important to note that even under this hypothetical situation where there is an attack against the United States and Syria is unable and unwilling to help, the reasonable use of force must only be targeted against the NSA in Syrian territory,¹⁷⁵ according to the test.¹⁷⁶ In reality, however, the United States and its allies have not only illegally aided in providing arms¹⁷⁷ to rebel groups in Syria,¹⁷⁸ which has helped arm ISIS indirectly, but they have also used force against the Syrian state¹⁷⁹ by directly targeting it with Shayrat missile attacks.¹⁸⁰ Since there is no actual armed attack against the

173. Deeks, *supra* note 4, at 522–33.

174. *See id.*

175. Tibori-Szabó, *supra* note 21, at 90.

176. *See* MICHAEL P. SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE: RECOGNIZING GROTIAN MOMENTS 198 (2013); Deeks, *supra* note 4, at 522–33.

177. *See* Carla Babb, *Mattis: "Self-Defense" Attack Doesn't Mean US Getting into Syrian Civil War*, VOA NEWS (Feb. 9, 2018, 3:00 AM), <https://www.voanews.com/a/us-coalition-airstrikes-in-syria/4244233.html>; W.J. Hennigan et al., *In Syria, Militias Armed by the Pentagon Fight Those Armed by the CIA*, L.A. TIMES (Mar. 27, 2016, 5:00 AM), <http://www.latimes.com/world/middleeast/la-fg-cia-pentagon-isis-20160327-story.html>; WALKER-SAID & KELLY, *supra* note 80, at 167; GRAY, *supra* note 3, at 115.

178. Kirsten Schmalenbach, *International Responsibility for Humanitarian Law Violations by Armed Groups*, in INDUCING COMPLIANCE WITH INTERNATIONAL HUMANITARIAN LAW: LESSONS FROM THE AFRICAN GREAT LAKES REGION 480 (Heike Krieger ed., 2015) (explaining that training and supporting NSAs violates the U.N. Charter and constitutes the use of force); *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶ 117–19 (June 27) (noting that supporting NSAs is viewed as an aggression and an act of war); *see also* HILAIRE, *supra* note 72, at 101–04.

179. JOHN W. PARKER, INST. FOR NAT'L STRATEGIC STUDIES, PUTIN'S SYRIAN GAMBIT: SHARPER ELBOWS, BIGGER FOOTPRINT, STICKIER WICKET 49 (2017), <http://inss.ndu.edu/Portals/68/Documents/stratperspective/inss/Strategic-Perspectives-25.pdf>.

180. *Id.* (describing the American attack on Syria's Shayrat Air Base on April 7, 2017, which was made in response to the Syrian government's chemical attack on civilians).

United States or its allies,¹⁸¹ Syria¹⁸²—rather than the NSAs—has been targeted by the United States and its allies. Although Syria is willing to fight ISIS¹⁸³ and is currently fighting ISIS in its territory,¹⁸⁴ neither the United States nor its allies have sought Syria's consent to curtail NSA activities. Therefore, the unwilling or unable test is completely irrelevant and inapplicable to the Syrian case at hand. Furthermore, the international law of using force established by the ICJ in the *Nicaragua Case*¹⁸⁵ and the *Armed Activities Case*¹⁸⁶ denies any right to self-defense against NSAs where an armed attack is not attributable to a state¹⁸⁷ and where the consent of the host state is not acquired.¹⁸⁸

Those who support the test are of the view that self-defense against NSAs is allowed under international law based on UNSC Resolutions 1368 and 1373.¹⁸⁹ Accordingly, the next section of this paper will critically evaluate the revocation of the defensive use of force and the endorsement of the test, acknowledging that Iraq (the victim state) has not requested that the United States use force against Syria in accordance with the law.

181. Permanent Rep. of the United States to the U.N., *supra* note 73.

182. PARKER, *supra* note 179, at 49.

183. YEARBOOK, *supra* note 149.

184. Corten, *supra* note 74, at 778.

185. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 171 (June 27).

186. *See* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶ 148 (Dec. 19); *see also* Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. Rep. 161, ¶ 43 (Nov. 6); THE LAW AGAINST WAR, *supra* note 100, at 472.

187. *See id.*; Dem. Rep. Congo v. Uganda, 2005 I.C.J. at ¶ 148; Iran v. U.S., 2003 I.C.J. at ¶ 43; Nicar. v. U.S., 1986 I.C.J. at ¶ 171; Corten, *supra* note 74, at 793; NEUHOLD, *supra* note 100, at 125.

188. Lehto, *supra* note 11, at 23.

189. Tibori-Szabó, *supra* note 21, at 86.

VI. EVALUATION OF THE APPLICATION OF THE TEST

Out of fifteen U.S.-led coalition bombing members in Syria,¹⁹⁰ only the United States,¹⁹¹ Australia,¹⁹² Canada,¹⁹³ and Turkey¹⁹⁴ made explicit reference to the unwilling or unable test in their letters to the United Nations or in the debates that have taken place there. Germany has also referred to the test implicitly in its letter to the UNSC.¹⁹⁵ The other ten participants of the coalition, however, have not made any reference to the unwilling or unable test, either explicitly or implicitly, in any letter to or debate in the United Nations,¹⁹⁶ despite the international law of using force established by the ICJ in the *Armed Activities Case*.¹⁹⁷

A. No Request by Iraq

While the United States and some of its allies have referred to the letters sent by Iraq to the United Nations to justify their military interventions in Syria,¹⁹⁸ Iraq (intended to be the chief beneficiary) did not¹⁹⁹ explicitly denounce any armed attack or

190. Corten, *supra* note 74, at 780.

191. Permanent Rep. of the United States to the U.N., *supra* note 73.

192. Permanent Rep. of Australia to the U.N., *supra* note 116.

193. Chargé d'affaires a.i. of the Permanent Mission of Canada to the U.N., *supra* note 116.

194. Chargé d'affaires a.i. of the Permanent Mission of Turkey to the U.N., *supra* note 116; *see also* Permanent Rep. of Turkey to the U.N., *supra* note 116.

195. Chargé d'affaires a.i. of the Permanent Mission of Germany to the U.N., *supra* note 116.

196. Corten, *supra* note 74, at 780–85.

197. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 168, ¶ 223 (Dec. 19); *see also* *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. Rep. 161, ¶ 808–11 (Nov. 6); André Nollkaemper, *Attribution of Forcible Acts to States: Connections Between the Law on the Use of Force and the Law of State Responsibility*, in *THE SECURITY COUNCIL AND THE USE OF FORCE: THEORY AND REALITY, A NEED FOR CHANGE?* 133, 141 (Niels M. Blokker & Nico Schrijver eds., 2005).

198. See Prime Minister's Office, *Summary of the Government Legal Position on Military Action in Iraq Against ISIL*, GOV.UK (Sept. 25, 2014), <https://www.gov.uk/government/publications/military-action-in-iraq-against-isil-government-legal-position/summary-of-the-government-legal-position-on-military-action-in-iraq-against-isil>.

199. *See generally* Permanent Rep. of Iraq to the U.N., Letter dated June 25, 2014 from the Permanent Rep. of Iraq to the United Nations addressed to the Secretary-General, U.N. Doc S/2014/440 (June 25, 2014) (attaching a letter from the Iraqi Minister of Foreign Affairs requesting assistance from the international community).

invoke self-defense as per Article 51 of the U.N. Charter,²⁰⁰ as was required by the ICJ in the *Nicaragua Case*.²⁰¹ Those letters blamed ISIS for repeatedly launching attacks on Iraqi territory from eastern Syria,²⁰² and requested that the United States help Iraq protect its citizens, end the constant threats faced by the country, and equip the Iraqi forces with the arms to help them regain control of the country's borders.²⁰³

B. Lack of Endorsement of the Test by Coalition Members

A significant number of the participants in the U.S.-led coalition made no reference to the unwilling or unable test to the United Nations in their legal reasoning for using force in Syria.²⁰⁴ For example, at the end of 2015 and after previously deciding against entering Syria, France suddenly invoked self-defense without providing any precise legal reasoning and without referencing the unwilling or unable test.²⁰⁵ Similarly, the Arab states, which constitute a substantial portion of the coalition members in Syria, did not consider it necessary to put forth any legal argument or reasoning at all.²⁰⁶ After starting their military intervention on Syrian territory, they did not even send a report to the UNSC²⁰⁷ as required under Article 51 of the U.N. Charter.²⁰⁸ Interestingly, the Arab states even refused to endorse the unwilling or unable test.²⁰⁹ Furthermore, at the end of 2014, the United Kingdom invoked Iraqi consent as its only legal basis,²¹⁰ and between November 2014 and December 2015

200. Corten, *supra* note 74, at 785.

201. Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), Judgment, 1986 I.C.J. Rep. 14, ¶ 200 (July 27); Corten, *supra* note 74, at 785.

202. See generally Permanent Rep. of Iraq to the U.N, *supra* note 199.

203. *Id.*; see also Tibori-Szabó, *supra* note 21, at 93.

204. Corten, *supra* note 74, at 782.

205. *Id.* at 782–83.

206. *Id.* at 783.

207. *Id.*

208. See generally U.N. Charter art. 51 (laying out the report requirements of the UNSC).

209. Corten, *supra* note 74, at 783.

210. Prime Minister's Office, *supra* note 198.

wrote to the UNSC three times.²¹¹ None of those letters, however, referenced the unwillingness or inability of the Syrian government as a factor triggering the applicability of Article 51.²¹² Based on the official reasoning of the U.S.-led coalition members, the unwilling or unable test has not been endorsed or supported by a majority of the states that have participated in the U.S.-led coalition against ISIS.²¹³

C. Lack of Legal Conviction Among Coalition Members

Additionally, in the case of Canada and Australia, a series of events cast doubt on the sincere legal conviction of the two states, despite their sending letters to the UNSC in which they made reference to the unwilling or unable test in the context of Syria.²¹⁴ In a debate in the House of Commons, Canadian Minister of Foreign Affairs John Baird rejected arguments raised by the United States in an earlier letter to the UNSC, explicitly stating that there was no legal basis for any intervention in Syria because of the lack of authorization by the Syrian government.²¹⁵ Despite this clear and unambiguous statement, and without the Syrian government authorizing any intervention, Canada later sent a letter to the UNSC in which it endorsed the stance of the United States.²¹⁶

Similar issues exist in the Australian case. Australian Prime Minister Tony Abbott expressed his doubts during an interview regarding the legality of the strikes in Syria absent the consent of the Syrian government.²¹⁷ Later, however, Prime Minister

211. Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the U.N., Identical letters dated Nov. 25, 2014 from the Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2014/851 (Nov. 26, 2014).

212. *See id.*

213. Corten, *supra* note 74, at 783.

214. Permanent Rep. of the United States to the U.N., *supra* note 116.

215. Canada, Parliament, House of Commons Debates, 41st Parl, 2nd Sess, Vol 147, No. 123 (Oct. 6, 2014).

216. Chargé d'affaires a.i. of the Permanent Mission of Canada to the U.N., *supra* note 116.

217. *See* Matt O'Neil, *Syria Incursion Still on the Table, Says Prime Minister Tony Abbott*, RN (Sept. 16, 2014, 8:19 AM), <https://www.abc.net.au/radionational/programs/breakfast/tony-abbott/5746376>.

Abbott appeared to endorse the air strikes in Syria on moral grounds.²¹⁸ This endorsement was followed by the Australian legal advisers justifying the air strikes in Syria using the unwilling or unable test,²¹⁹ which they also mention in a letter written to the UNSC.²²⁰ Based on the sudden change in their stances regarding the airstrikes in Syria and the position of the United States, the legal conviction of the Canadian and Australian authorities can be seriously questioned. Some have even asserted that their decisions to accept the United States' stance after initially opposing or doubting it appears to have been caused by political considerations and not by any sense of moral duty or legal standing.²²¹

D. Differences in the Scope of the Test Among Coalition Members

Even among the United States,²²² Australia,²²³ Canada,²²⁴ and Turkey,²²⁵ a difference of opinion exists concerning the scope of self-defense in the context of the unwilling or unable test. On one hand, the United States, Canada, and Turkey each invoked their individual rights of anticipatory self-defense.²²⁶ The United States, Canada, and Australia, with respect to Iraq,

218. Daniele Hurst, *Australia Has "Moral Obligation" to Join Fight Against Isis in Syria, Says Bob Carr*, GUARDIAN (Aug. 26, 2015), <https://www.theguardian.com/australia-news/2015/aug/26/australia-has-moral-obligation-to-join-fight-against-isis-in-syria-says-bob-carr>.

219. Sarah Kimmorley, *Australia's Military Involvement in Syria Is a War of Self-Defence Not a Plan to Topple the Assad Regime*, BUS. INSIDER AUSTL. (Sept. 10, 2015), <https://www.businessinsider.com.au/australias-military-involvement-in-syria-is-a-war-of-self-defence-not-a-plan-to-topple-the-assad-regime-2015-9>.

220. Permanent Rep. of Australia to the U.N., *supra* note 116.

221. Corten, *supra* note 74, at 782.

222. Permanent Rep. of the United States to the U.N., *supra* note 73.

223. Permanent Rep. of Australia to the U.N., *supra* note 116.

224. Chargé d'affaires a.i. of the Permanent Mission of Canada to the U.N., *supra* note 116.

225. Chargé d'affaires a.i. of the Permanent Mission of Turkey to the U.N., *supra* note 116; Permanent Rep. of Turkey to the U.N., *supra* note 116.

226. Permanent Rep. of the United States to the U.N., *supra* note 73; Chargé d'affaires a.i. of the Permanent Mission of Canada to the U.N., *supra* note 116; Chargé d'affaires a.i. of the Permanent Mission of Turkey to the U.N., *supra* note 116; Permanent Rep. of Turkey to the U.N., *supra* note 116.

referred to an “undefined” threat or “direct” threat,²²⁷ to make it appear as an application of the broad definition of the right of preventive self-defense.²²⁸ Meanwhile, Turkey invoked the right to preemptive self-defense, which was allegedly in response to a “clear and imminent” threat.²²⁹ On the other hand, Australia limited its argument to a collective form of self-defense, the purpose of which was to protect the Iraqi state from the activities of ISIS that were originating from within Syrian territory.²³⁰ Interestingly, preventive or anticipatory self-defense is prohibited under the international law of force and violates the U.N. Charter.²³¹

CONCLUSION

According to the unwilling or unable test, if the territorial state is either unwilling or unable to control the threat caused by an NSA, then the victim state can resort to the use of force to defend itself.²³² If this interpretation of the unwilling or unable standard were to be adopted by the international community, then Article 2(4) of the U.N. Charter²³³ would entail not only an obligation of conduct, i.e., the obligation to take any reasonable measure against a rebel group, but also an obligation of result, i.e., an obligation to defeat the rebellious group and put an end

227. Permanent Rep. of the United States to the U.N., *supra* note 73; Chargé d'affaires a.i. of the Permanent Mission of Canada to the U.N., *supra* note 116; Permanent Rep. of Australia to the U.N., *supra* note 116.

228. Corten, *supra* note 74, at 781.

229. Chargé d'affaires a.i. of the Permanent Mission of Turkey to the U.N., *supra* note 116; Permanent Rep. of Turkey to the U.N., *supra* note 116.

230. Permanent Rep. of Australia to the U.N., *supra* note 116.

231. NATHAN E. BUSCH & DANIEL JOYNER, *COMBATING WEAPONS OF MASS DESTRUCTION: THE FUTURE OF INTERNATIONAL NONPROLIFERATION POLICY* 186 (2009); *see also* MURRAY COLIN ALDER, *THE INHERENT RIGHT OF SELF-DEFENCE IN INTERNATIONAL LAW* 102 (2013); RACHEL BZOSTEK, *WHY NOT PREEMPT?: SECURITY, LAW, NORMS AND ANTICIPATORY MILITARY ACTIVITIES* 227 (2008); BELINDA HELMKE, *UNDER ATTACK: CHALLENGES TO THE RULES GOVERNING THE INTERNATIONAL USE OF FORCE* 154–55 (2010) (stating that scholars are divided on whether Article 51 should have a restrictive or permissive reading regarding the invocation of anticipatory self-defense).

232. Deeks, *supra* note 4, at 487–88.

233. *See* U.N. Charter art. 2, ¶ 4.

to its activities.²³⁴ Therefore, the test generally deviates from the existing legal requirements and lowers the threshold of the prohibition on the use of force,²³⁵ changing the current state of international law on using force.²³⁶ Similarly, customary international law,²³⁷ substantiated by ICJ case law,²³⁸ emphasizes that only an armed attack can trigger the right to use force in self-defense.²³⁹ If the unwilling or unable test were accepted, then the thresholds of Article 51 of the U.N. Charter²⁴⁰ would also be lowered.²⁴¹

While some advocates of the unwilling or unable test have developed and put forth an alternative interpretation of self-defense as per Article 51 of the U.N. Charter, possibly for the purpose of evading these legal repercussions,²⁴² the test is not part of customary international law and state practice remains unclear as to the requirements for its implementation.²⁴³ Further, the idea of splitting the conditions of self-defense, i.e., distinguishing the condition for the existence of an armed attack from the “necessity” criterion, is clearly not in line with the letter or spirit of Article 51 of the U.N. Charter.²⁴⁴ None of the contemporary texts or cases support the assertion that using force in the name of “necessity” is allowed against a state that is not responsible for an armed attack, or for that matter, in response to any violation of Article 2(4) of the U.N. Charter.²⁴⁵

234. Deeks, *supra* note 4, at 486.

235. See HILAIRE, *supra* note 72, at 101; Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 28 (June 27); RUYS, *supra* note 77, at 375; GRAY, *supra* note 3, at 83; Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶ 223 (Dec. 19).

236. Corten, *supra* note 74, at 793.

237. G.A. Res. 3314 (XXIX), *supra* note 83, at 142–43.

238. See Oil Platforms (Iran v. U.S.), Preliminary Objection, 1996 I.C.J. Rep. 803 (Dec. 12).

239. G.A. Res. 3314 (XXIX), *supra* note 83, at 142–43.

240. See U.N. Charter art. 51.

241. See Deeks, *supra* note 4, at 491–95; Corten, *supra* note 74, at 794–95.

242. See U.N. Charter art. 2, ¶ 4; U.N. Charter art. 51; Deeks, *supra* note 4, at 503.

243. Couzigou, *supra* note 7, at 53.

244. See U.N. Charter art. 51.

245. See Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168 (Dec. 19); Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. Rep.

In fact, ICJ case law prohibits the cross-border use of force against NSAs, owing to the veil of sovereignty.²⁴⁶ Similarly, the test assumes—without support from relevant international law²⁴⁷—that Article 51 of the U.N. Charter is applicable to NSAs,²⁴⁸ an assertion that goes directly against ICJ case law.²⁴⁹ Therefore, every time a state launches strikes against an NSA that is operating from another state, it violates the sovereignty of the state,²⁵⁰ the international law of force,²⁵¹ and commits an act of aggression against that state.²⁵² Hence, one can infer from the radical changes that would result that the international community has been reluctant²⁵³ to accept the unwilling or unable test as a standard. Olivier Corten and six other scholars have challenged this test, initiating in September 2016 the “Plea Against the Abusive Invocation of Self-Defen[s]e as a Response to Terrorism.” The Plea was signed by 240 international lawyers and professors from thirty-six countries,²⁵⁴ indicating that the test has not claimed universal acceptance.

It also appears that the members of the U.S.-led coalition were not convinced by the unwilling or unable test. This lack of legal conviction toward the standard is evidenced by the fact that

161 (Nov. 7); THE LAW AGAINST WAR, *supra* note 100, at 472; Corten, *supra* note 74, at 622; NEUHOLD, *supra* note 100.

246. See *Dem. Rep. Congo v. Uganda*, 2005 I.C.J. at ¶ 170; *Iran v. U.S.*, 2003 I.C.J. at ¶ 47; *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶ 176 (June 27).

247. U.N. Charter chapter V.I.

248. See Deeks, *supra* note 4, at 493.

249. See *Dem. Rep. Congo v. Uganda*, 2005 I.C.J. at ¶ 148; *Iran v. U.S.*, 2003 I.C.J. at ¶ 47; *Nicar. v. U.S.*, 1986 I.C.J. at ¶ 176.

250. Williams, *supra* note 106, at 620.

251. G.A. Res. 3314 (XXIX), *supra* note 83, at 142–43; see also *Dem. Rep. Congo v. Uganda*, 2005 I.C.J. at ¶ 148; *Iran v. U.S.*, 2003 I.C.J. at ¶ 47; *Nicar. v. U.S.*, 1986 I.C.J. at ¶ 176; THE LAW AGAINST WAR, *supra* note 100, at 327; Corten, *supra* note 74, at 638; NEUHOLD, *supra* note 100, at 167.

252. G.A. Res. 3314 (XXIX), *supra* note 83, at 142–43.

253. See Canada, Parliament, House of Commons Debates, 41st Parl, 2nd Sess, Vol 147, No. 123 (Oct. 6, 2014).

254. See Olivier Corten, *A Plea Against the Abusive Invocation of Self-Defence as a Response to Terrorism*, EJIL TALK! (July 14, 2016) [hereinafter *A Plea Against*], <https://www.ejiltalk.org/a-plea-against-the-abusive-invocation-of-self-defence-as-a-response-to-terrorism/>; see also Nicolás Boeglin, *Against the Abusive Invocation of Self-Defence to Face Terrorism*, GERM (July 22, 2016), <http://www.mondialisations.org/php/public/art.php?id=40125&Ian=EN>.

even those states that wrote letters to the UNSC invoked their right to self-defense and did not refer to the unwilling or unable test.²⁵⁵ The majority of states did not invoke self-defense in the various debates in the UNSC until about a year after the air strikes in Syria were underway.²⁵⁶ Only then did the United States²⁵⁷ and Australia²⁵⁸ make a brief reference to self-defense. Generally, when a state adopts a legal position for the justification of the military intervention, it is usually adopted during the initial meetings that are dedicated to that issue.²⁵⁹ By contrast, in this case the states that were part of the U.S.-led coalition abstained from making any reference whatsoever to self-defense or the unwilling or unable test for more than a year.²⁶⁰ After a year, only four coalition members referred to the test.²⁶¹ Moreover, some allies of the United States, such as the Netherlands, supported the argument of self-defense on a national level; however, the Netherlands made no reference to it within the United Nations.²⁶²

Interestingly, the United States is using force against the Syrian state not as a matter of defensive force against any attack but only to “safeguard its interests”²⁶³ in the region and change the Assad regime.²⁶⁴ Since the use of force by the United States and its allies has not been responsive in nature, as reflected in

255. Permanent Rep. of the United States to the U.N., *supra* note 73; Permanent Rep. of Australia to the U.N., *supra* note 116; Chargé d'affaires a.i. of the Permanent Mission of Canada to the U.N., *supra* note 116; Chargé d'affaires a.i. of the Permanent Mission of Turkey to the U.N., *supra* note 116; Permanent Rep. of Turkey to the U.N., *supra* note 116; Chargé d'affaires a.i. of the Permanent Mission of Germany to the U.N., *supra* note 116.

256. U.N. SCOR, 70th Sess., 7527th mtg. at 23, U.N. Doc. S/PV.7527 (Sept. 30, 2015).

257. *Id.* at 22.

258. *Id.* at 69.

259. Corten, *supra* note 74, at 785.

260. *Id.*

261. Permanent Rep. of the United States to the U.N., *supra* note 73; Permanent Rep. of Australia to the U.N., *supra* note 116; Chargé d'affaires a.i. of the Permanent Mission of Canada to the U.N., *supra* note 116; Chargé d'affaires a.i. of the Permanent Mission of Turkey to the U.N., *supra* note 116; Permanent Rep. of Turkey to the U.N., *supra* note 116.

262. Corten, *supra* note 74, at 785.

263. Donald Trump Letter, *supra* note 170.

264. INDYK ET AL., *supra* note 171, at 179.

the official stance,²⁶⁵ the unable and unwilling test is *ab initio* inapplicable in the case of Syria. Moreover, the reasonable use of force must only be targeted against NSAs in Syrian territory, even according to the test.²⁶⁶ In the Syrian case, however, the United States and its allies not only indirectly helped ISIS by illegally providing arms²⁶⁷ to rebel groups in Syria (according to the *Nicaragua Case*, training and supporting NSAs violate the U.N. Charter and constitute a use of force,²⁶⁸ aggression, and an act of war²⁶⁹), but have also used force against the Syrian state²⁷⁰ by directly targeting Syria with the Shayrat missile attacks,²⁷¹ violating Syrian sovereignty.²⁷² Therefore, since (1) there is no actual armed attack against the United States or its allies,²⁷³ (2) rebels are armed in Syrian territories by the United States and its allies, (3) the Syrian state,²⁷⁴ rather than NSAs, has been targeted by the United States and its allies, (4) the consent of Syria has not been sought to curtail NSA activities, (5) Syria is willing to fight ISIS and join forces to fight ISIS,²⁷⁵ and (6) Syria is in fact fighting ISIS in its territory,²⁷⁶ the unable and unwilling test is completely irrelevant and inapplicable to the Syrian case. Furthermore, the international law of force established by the ICJ in cases like the *Nicaragua Case*²⁷⁷ and the *Armed Activities*

265. Donald Trump Letter, *supra* note 170; *see also* Permanent Rep. of the United States to the U.N., *supra* note 73.

266. SCHARF, *supra* note 176, at 198; *see also* Deeks, *supra* note 4, at 519–21.

267. Babb, *supra* note 177; *see also* Hennigan et al., *supra* note 177; WALKER-SAID & KELLY, *supra* note 80, at 167; GRAY, *supra* note 3, at 115.

268. Schmalenbach, *supra* note 178, at 480.

269. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14 (June 27); *see also* HILAIRE, *supra* note 72, at 101.

270. PARKER, *supra* note 179, at 49.

271. *Id.*

272. S. Krishnan, *The Alleged Use of Chemical Weapons Against the Syrian People: Does It Justify Forceful Intervention?*, 21 JADAVPUR J. INT'L REL. 138, 141–42 (2017); *see also* Williams, *supra* note 106, at 619.

273. Permanent Rep. of the United States to the U.N., *supra* note 73.

274. PARKER, *supra* note 179, at 49.

275. YEARBOOK, *supra* note 149, at 114.

276. Corten, *supra* note 74, at 778.

277. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 171 (June 27).

*Case*²⁷⁸ denies any right to self-defense against an NSA where an armed attack is not attributable to a state.²⁷⁹

Given the low threshold provided by the United States in its interpretation of the unwilling or unable test,²⁸⁰ every state would feel that it has the right to launch a military attack against another state when the host state has been unable to bring the activities of a terrorist group to a halt. States would only need to prove the existence of a threat posed by an NSA, whether imminent or not, against any number of other states²⁸¹ without any support by the territorial state. For instance, the United Kingdom and France justified their strikes in Syria by stating that their uses of force would enable them to halt the planning and plotting of future threats.²⁸² This interpretation effectively allows all states to determine for themselves when to resort to using force in any territory of another state without even being required to seek the consent of the government of that state or authorization by the UNSC, thus bypassing²⁸³ all the legal requirements. This means that acceptance of the test would change, if not end, the whole U.N. system regarding the use of force.²⁸⁴

278. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 168 (Dec. 19).

279. *Id.*; see also *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. Rep. 161 (Nov. 7); *Nicar. v. U.S.*, 1986 I.C.J. at ¶ 171; Corten, *supra* note 74, at 785; NEUHOLD, *supra* note 100, at 125.

280. See Permanent Rep. of the United States to the U.N., *supra* note 73 (explaining the United States' interpretation of using force under the test in Syrian case).

281. *Id.*

282. See, e.g., Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the U.N., *supra* note 211 (citing collective self-defense as a basis for attacking ISIL sites in Syria); Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the U.N., Letter dated Sept. 7, 2015 from the Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/688 (Sept. 8, 2015) (citing self-defense of Iraq and the U.K. as a basis for the strikes); Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the U.N., Letter dated Dec. 3, 2015 from the Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/928 (Dec. 3, 2015) (citing self-defense in advance of prospective ISIL attacks); Corten, *supra* note 74, at 782–83 (describing how European countries including France rationalized the strikes in Syria).

283. U.N. Charter arts. 39, 41–42, 51.

284. Corten, *supra* note 74, at 780.

Similar to this test of using force, in 2005 the United States and others attempted to broadly interpret the scope of the notion of self-defense “by recognizing its application in the case of an imminent threat.”²⁸⁵ While the UNSC supported this suggestion,²⁸⁶ it faced strong criticism from a number of states.²⁸⁷ By contrast, the U.N. members endorsed the view that the relevant provisions of the U.N. Charter were sufficient to address the complete range of threats to international peace and security, and reasserted the authority of the UNSC to authorize coercive action for the maintenance and restoration of international peace and security.²⁸⁸ The Non-Aligned Movement backed this stance, stating that the U.N. Charter contained sufficient provisions pertaining to the use of force for the maintenance of international peace and security.²⁸⁹ It also emphasized that there was no room for the reinterpretation or rewriting of Article 51 of the U.N. Charter.²⁹⁰ Given that the unwilling or unable test is, in a way, a reinterpretation of Article 51 of the U.N. Charter, it comes as no surprise that a vast majority of U.N. members are not keen to accept it.²⁹¹

An evaluation of the relevant documents, including the letters written by the different states to the UNSC between August 2014 and January 2016,²⁹² the reports of the debates

285. *Id.* at 798.

286. Charles Sampford, *Introduction*, in *RESPONSIBILITY TO PROTECT AND SOVEREIGNTY* 1, 2 (Charles Sampford & Ramesh Thakur eds., 2016).

287. Corten, *supra* note 74, at 798.

288. *A Plea Against*, *supra* note 254.

289. *Id.*

290. *Id.*

291. Corten, *supra* note 74, at 799.

292. *See, e.g.*, Permanent Rep. of the United States to the U.N., *supra* note 73 (citing individual and self-defense); Permanent Rep. of Australia to the U.N., *supra* note 116 (citing Article 51, the threat ISIS poses to Iraq, and Syria’s unwillingness to address the threat); Chargé d’affaires a.i. of the Permanent Mission of Canada to the U.N., *supra* note 116 (citing self-defense of Iraq, Canada, and other countries); Chargé d’affaires a.i. of the Permanent Mission of Turkey to the U.N., *supra* note 116 (citing the death toll and refugee crisis in Syria, along with direct threats and Turkish deaths, as reasons for invoking self-defense); Permanent Rep. of Turkey to the U.N., *supra* note 116 (citing the refugee crisis and financial burden placed on Turkey as reasons for invoking self-defense); Chargé d’affaires a.i. of the Permanent Mission of Germany to the U.N., *supra* note 116 (citing the global threat posed by Syrian ISIS bases).

within the United Nations,²⁹³ and the resolutions and statements adopted by the United Nations, makes clear that there is a lack of acceptance of the unwilling or unable test by the international community.²⁹⁴ While no one can predict how the future of international law will pan out and what legal instruments will be adopted for the sake of fighting terrorism, some commentators have suggested that the unwilling or unable test can garner greater acceptance in the form of “practice and supporting statements of governments and international organizations.”²⁹⁵ To date, though, what is evident is that a significant number of states have been reluctant to accept the unwilling or unable standard, both as a general principle and in the case of Syria.²⁹⁶

293. See generally U.N. SCOR, 70th Sess., 7527th mtg., U.N. Doc. S/PV.7527 (Sept. 30, 2015) (transcribing statements by various representatives of member nations); U.N. SCOR 7589th mtg., U.N. Doc. S/PV.7589 (Dec. 18, 2015) (same).

294. Corten, *supra* note 74, at 786.

295. *Id.* at 798.

296. *Id.* at 789.