The temporal scope of Unwilling or Unable: a case study on Syria

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Abstract

The purpose with this paper is to analyze the temporal scope of the doctrine of Unwilling or Unable and focus on when the right to use force in self-defense ends. According to the doctrine a State has a right to use force in self-defense towards a non-state actor on another States territory, if the harboring state is Unwilling or Unable to suppress the non-state actor. This paper will first analyze which factors governs the right to use force in self-defense according to the Unwilling or Unable doctrine and secondly the findings will be applied to the situation in Syria, where the United States are using force in collective self-defense on Iraq’s request, towards ISIL. The conflict will be analyzed in three different time periods, 2014, 2016 and 2018 to identify for how long the United States has a right to use force in self-defense in Syria. The conclusion in this paper is that in 2014 and 2016 the United States has a right to use force in self-defense towards ISIL on Syria’s territory according to the doctrine, but in 2018 the circumstances has changed and the United States’ right to use force in self-defense in Syria has ended.
# TABLE OF CONTENTS

1. Introduction ................................................................................................................. 2

2. Research questions and methodology ........................................................................... 4
   2.1. Research questions .................................................................................................. 4
   2.2. Methodology, structure and material ....................................................................... 4
   2.3. Limitations .............................................................................................................. 4

3. The doctrine of Unwilling or Unable .............................................................................. 5
   3.1. What indicates Unwilling ....................................................................................... 6
   3.2. What indicates Unable ........................................................................................... 7

4. Syria as Unwilling or Unable .......................................................................................... 8

5. Territorial sovereignty .................................................................................................... 8

6. Self-defense ..................................................................................................................... 9
   6.1. Armed attack .......................................................................................................... 10
   6.2. Reactive self-defense, preventive self-defense and dual claim .................................. 10
   6.3. Collective self-defense ............................................................................................ 10
   6.4. The principles of self-defense ................................................................................ 11
      6.4.1. Necessity ........................................................................................................... 11
      6.4.2. Proportionality ................................................................................................. 12
      6.4.3. Limitations on the use of force in self-defense .................................................. 12

7. Applying the principles of self-defense to Unwilling or Unable ....................................... 13
   7.1. Necessity ................................................................................................................ 13
   7.2. Proportionality ........................................................................................................ 14
   7.3. The twofold test ..................................................................................................... 14

8. The United States involvement in the conflict in Syria ................................................... 15

9. The situation in Syria ..................................................................................................... 16
   9.1. The situation in Syria 2014 ...................................................................................... 16
   9.2. The situation in Syria 2016 .................................................................................... 16
   9.3. The situation in Syria 2018 .................................................................................... 17

10. The temporal scope of Unwilling or Unable in Syria .................................................. 18
    10.1. Applying the twofold test to the situation in Syria 2014 ........................................ 19
    10.2. Applying the twofold test to the situation in Syria 2016 ....................................... 19
    10.3. Applying the twofold test to the situation in Syria 2016 ....................................... 19

11. Conclusion .................................................................................................................... 20

Bibliography ...................................................................................................................... 21
1. Introduction

In a world where more conflicts are between a non-state actor and a state, rather than between two states, the subject of self-defense towards non-state actors has increased in interest and in relevance. One theory which has gained a lot of attention in this subject is the doctrine of Unwilling or Unable.¹

The doctrine means that if a state is attacked by a non-state actor, which has its base on another state’s territory, the attacked state has a right to use force in self-defense towards the non-state actor, if the harboring state is Unwilling or Unable to suppress the threat.²

The legality of the doctrine of Unwilling or Unable is still very uncertain, and the doctrine raises questions regarding the harboring states right to sovereignty. Still, the doctrine has been used by several states to claim a right to use force in self-defense.³ Especially in the conflict in Syria when several states used the Unwilling or Unable doctrine to invoke self-defense against the Islamic state of Iraq and the Levant (ISIL).⁴ Amongst the states that used the Unwilling or Unable doctrine were the United Kingdom, Canada, and Australia.⁵ Another state that has used the Unwilling or Unable doctrine in Syria is the United States. The United States invoked collective self-defense against ISIL in Syria at Iraq’s request and claimed that Syria was Unwilling or Unable to suppress the threat posed by ISIL.

The doctrine of Unwilling or Unable is a highly debated subject in international law, but one part of the doctrine which has not yet been discussed in depth is what the temporal scope of the doctrine might be, and especially, when does the right to use force in self-defense according to the Unwilling or Unable doctrine end?

This paper will analyze the Unwilling or Unable doctrine and focus on when the right to use force in self-defense according to the doctrine ends. The paper will attempt to establish which facts that can indicate that a state still has a right to use force in self-defense or has lost that right according to the doctrine. Further, the findings will be applied to the United States use of force towards ISIL in Syria to establish when the United States right to use force in self-defense ends.

² ibid.
³ According to a study made 2016 ten states have provided explicit endorsement of the doctrine of Unwilling or Unable (United States, United Kingdom, Germany, Netherlands, Czech Republic, Canada, Australia, Russia, Turkey and Israel) See Elena Chachko and Ashley Deeks, ‘Who is on Board with “Unwilling or Unable”?’ Lawfare <https://www.lawfareblog.com/who-board-unwilling-unable> accessed 4 January 2019.
2. Research questions and methodology

2.1. Research questions

- When does the right to use force in self-defense according to the Unwilling or Unable doctrine end?
- When does the United States right to use force against ISIL in Syria end according to the Unwilling or Unable doctrine?

2.2. Methodology, structure and material

This paper will first analyze the Unwilling or Unable doctrine, thereafter, the laws regulating the use of force in self-defense and the laws governing every state’s right to sovereignty will be discussed. The analysis will focus on which facts indicate that the right to use force in self-defense according to the Unwilling or Unable doctrine and apply the findings on the case where the United States uses force against ISIL on Syria’s territory. This will be made by looking at the situation in Syria in three different years; 2014, 2016 and 2018.

The relevant law which needs to be analyzed to approach this topic is stated in the United Nations Charter\(^6\) (UN Charter) and in Customary International Law (CIL). Since there are no laws specifically guiding self-defense towards non-state actors, the laws regulating the use of force in self-defense will be analyzed.

The Unwilling or Unable doctrine gives a right to use force in self-defense towards a non-state actor on another state’s territory. Therefore, the laws governing sovereignty will also be discussed. The relevant law can be found in the UN Charter and the Declaration on Friendly Relations\(^7\) and in CIL.

2.3. Limitations

This essay will not discuss the legality of the Unwilling or Unable doctrine. The paper will apply the doctrine as if it was law and analyze its temporal scope. It will be a purely *Jus ad bellum* essay which means that the laws regulating *Jus in bello* will not be discussed. Further, it will not be discussed what threshold is needed for a use of force to count as an armed attack or if a non-state actor can perform an armed attack. Neither will this paper discuss when a right to use force in self-defense starts. The laws of self-defense will only be discussed as far as it concerns when the right to use force in self-defense ends.

3. The doctrine of Unwilling or Unable

The doctrine of Unwilling or Unable does not have one clear definition. There are different interpretations of the doctrine made by authors and states. States generally tend to be very limited with details regarding the doctrine.

If the doctrine is described in its most basic way, it dictates that if state A suffers from an armed attack from a non-state actor, state A has a right to use force in self-defense towards the non-state actor, even though the non-state actor is on state B’s territory, provided that state B is either Unwilling or Unable to suppress the threat.

When a state uses force in self-defense towards a non-state actor on another state’s territory it most certainly violates the harboring state’s territorial integrity, even if the use of force is defensive and not targeted at the state’s apparatus. Regarding this Kimberly Trapp writes ‘The balancing mechanism, between the right of defence against armed attacks, and the prohibition against violations of a State’s territorial integrity, lies in the customary law elements of the right of self-defence itself’. This means that if the use of force in self-defense is lawful according to the principles of self-defense; necessity and proportionality, the right to self-defense would balance out the harboring state’s right to territorial integrity.

Therese Reinold suggests in her article that ‘Irregular warfare does not occur in a vacuum. It flourishes because states direct, support, tolerate, or cannot control irregular activities on their territory’. This suggests that the harboring state is responsible for the existence of non-state actors on its territory. Reinold further discusses sovereignty as something conditional, ‘the enjoyment of sovereign privileges is made dependent upon whether the harboring state lives up to certain standards of good (responsible) governance’. This suggests that the condition to every state’s protected sovereignty is that it can perform good governance and control its inhabitants and territory.

It is also a state’s unwillingness or incapability of controlling its territory that can give another state a right to use force in self-defense according to the customary principle of necessity. If the harboring state is satisfactory suppressing the non-state actor, the use of force in self-defense would not be necessary. However, if the harboring state is not doing anything, or if

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10 ibid.

11 Deeks (n 1) 487.


13 ibid, 156.


15 Ibid, 247.

16 Trapp, (n 12) 147.
the harboring state is trying to suppress the non-state actor but not doing enough, the victim state’s use of force can be deemed necessary.

Ashley Deeks suggest that this assessment should be made by a ‘reasonable victim state’. Deeks continues:

A reasonable victim state should take into account that even a state with a robust military capacity is unlikely to be able to suppress the threat fully. A plan by a territorial state that does not anticipate complete success in rooting out every last member of the nonstate group does not necessarily indicate that the territorial state is unwilling or unable.

This suggests that the victim State cannot claim to have a right to use force in self-defense until the very last member of the non-state group no longer exists. Even if there are still some members active on the harboring State’s territory, that wouldn’t automatically mean that the harboring State is Unwilling or Unable.

3.1. What indicates Unwilling

To decide whether the territorial State is willing to address the threat Deeks suggests that the victim State should ask the territorial State to act on the threat and give the territorial State a ‘reasonable time’ to respond to the threat before intervening. What a reasonable time is should be defined by the imminence of the threat. However, Deeks also acknowledges that in certain cases it is not possible to ask the harboring State to address the threat if the victim State believes it would be a risk to its national security. Risks include, if the victim State believes that the harboring State is colluding with the non-state actor.

According to the United States legal military framework from 2016 ‘unwillingness might be demonstrated where, for example, a State is colluding with or harboring a terrorist organization operating from within its territory and refuses to address the threat posed by the group’.

One example of this could be the conflict in Afghanistan 2001. After the terrorist attack 11 September, the United States invoked self-defense towards Al-Qaeda and the Taliban regime in Afghanistan. The United States did not explicitly mention the Unwilling or Unable doctrine in their letter to the Security Council, but they stated that the threat ‘posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation’. This is indicating that Afghanistan was Unwilling, without using the exact same wording. At the London School of economics the United States’ Legal Adviser John B Bellinger stated ‘We were justified in using military force in self-defense against the Taliban because it had

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17 Deeks, (n 1), 529.
18 ibid, 530.
19 ibid, 521, 525.
20 ibid, 525.
21 ibid, 523.
allowed al Qaida to use Afghanistan as an area from which to plot attacks and train in the use of weapons and it was unwilling to prevent al Qaida from continuing to do so’.  

When the United States invaded Afghanistan, they didn’t only target Al-Qaeda, they also targeted the Taliban regime. This means that this is not a clear-cut case of self-defense towards a non-state actor. However, as argued by Bellinger above, and by Reinolds ‘In the inability scenario, the proportionality principle thus prohibits the targeting of state infrastructure, which might not apply to the same extent in the unwillingness scenario, as in the case of the Taliban in Afghanistan’. This means that when a State is Unwilling the State might not be excluded as a target to the same extent. The terminology in this case suggests that this could be an example of a case where the regime is Unwilling to address the threat and where the government is ‘colluding’ with the non-state actor.

3.2. What indicates Unable

Ashley Deeks suggests that inability is demonstrated by the territorial State’s lack of control over its territory. This was also stated by the Russian President Vladimir Putin when he sent in a letter to the Security Council 2002 invoking article 51 against rebels in Georgia according to the Unwilling or Unable doctrine. President Putin writes:

The continued existence in separate parts of the world of territorial enclaves outside the control of national governments, which, owing to the most diverse circumstances, are unable or unwilling to counteract the terrorist threat is one of the reasons that complicate efforts to combat terrorism effectively.

President Putin further states that ‘no measures or special operations will be needed if the Georgian leadership actually controls its own territory’. He continues ‘If the Georgian leadership is unable to establish a security zone in the area of the Georgian-Russian border…we reserve the right to act in accordance with Article 51 of the Charter of the United Nations’. In this letter Russia clearly states that it’s the fact that Georgia cannot establish a security zone and prevent attacks towards Russia that makes military operations necessary. Georgia is thus Unable and therefore Russia has a right to intervene.

This has also been acknowledged by United States State Department legal adviser Brian Egan in his speech at American Society of International Law (ASIL) ‘With respect to the “unable” prong of the standard, inability perhaps can be demonstrated most plainly, for example, where a State has lost or abandoned effective control over the portion of its territory from which the non-State actor is operating’.

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25 Reinolds (n 14) 272.
26 Deeks (n 1) 525.
27 Charter of the United Nations (n 6).
29 ibid, 4.
30 ibid, 3.
4. Syria as Unwilling or Unable

Syria openly welcomed States to combat ISIL in 2014 as long as it was done in cooperation with the Syrian government. Syria stated multiple times in the Security Council that to combat terrorism, attacks must be made in cooperation with the Syrian government. At the meeting in the Security Council 19 September 2014, Syria stated that ‘there is a need to coordinate upstream with the Syrian Government in the framework of any credible efforts to combat terrorism’. On the meeting held in the Security Council 24 September the same year, one day after The United States launched their first attack in Syria, Syria stated that ‘We also stress that military strikes will not achieve their goals against terrorism unless they are carried out in respect for international law and in coordination with the countries concerned’. Instead of seeking Syria’s consent the United States launched strikes on Syria’s territory without seeking the approval from the Syrian government. This was explained by the United States’ State Department Legal Adviser Brian Egan at ASIL, ‘we could act in self-defense without Syrian consent because we had determined that the Syrian regime was unable or unwilling to prevent the use of its territory for armed attacks by ISIL’. This statement goes against Ashley Deeks interpretation of the Unwilling or Unable doctrine and indicates that it’s not necessary to seek consent before taking actions against a non-state actor on another State’s territory.

In the Secretary-General report which contained information from the period 19 August to 24 September 2014 it is described how Syria ‘undertook airstrikes against ISIL positions in the northern and eastern parts of the country’. Even so, ISIL advanced. On 9 July 2014 it was reported that ISIL had gained control over 150 kilometers of land in Syria, indicating that Syria might have been willing, but not able to suppress the threat posed by ISIL.

5. Territorial sovereignty

The issue when a State uses force in self-defense according the Unwilling or Unable doctrine is, as mentioned above, that it almost certainly is a violation of the harboring State’s sovereignty. The sovereignty of States is fundamental in international law and protected in the UN Charter and in the Declaration on Friendly Relations.

In the Declaration on Friendly Relations the principle of non-intervention is stated. According to the resolution there is a ‘duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter’. The term intervenes in this case incorporate armed intervention and all other forms of interference such as political, economic or cultural.

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33 UNSC 7271th meeting (19 September 2014) UN Doc S/PV.7271, 43.
34 UNSC 7272th meeting (24 September 2014) UN Doc S/PV.7272, 40.
35 Wittes (n 31).
37 ibid, 12.
39 ‘Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation Among States’ (n 7) [1.C.].
40 ibid.
In the UN Charter the principle of sovereign equality can be found. According to article 2 (1) ‘The Organization is based on the principle of the sovereign equality of all its Members’. This is meant to ‘exclude legal superiority of any one State over another’. All States are thus seen as equal in international law and it doesn’t matter if they are big or small, superpower or not, they all enjoy the same right to be sovereign. The International Court of Justice (ICJ) has stated that ‘Between independent States, respect for territorial sovereignty is an essential foundation of international relations’.

The prohibition to use force is also stated in the UN Charter. The prohibition concerns the use of force ‘against the territorial integrity or political independence of any state’. This prohibition means that even an incursion into the territory of another State, not intended to deprive the State of any territory and immediately withdrawn after the completion of the operation would be a breach of article 2 (4).

However, it is also acknowledged that with a State’s sovereignty comes responsibility, for example has the ICJ articulated that a State is ‘not to allow knowingly its territory to be used for acts contrary to the rights of other States’.

6. Self-defense
The use of force in self-defense is governed by article 51 of the UN Charter. According to article 51 States have an inherent right to self-defense ‘if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security’. The right to use force in self-defense thus is a temporal right limited to until the Security Council has taken measures or asks the belligerents to halt the use of force, but that rarely happens. Except for that limitation there are no indications for the temporal scope of self-defense in the UN Charter, instead the limitations can be found in CIL, which will be discussed later in this paper.

When the United States invoked self-defense towards ISIL, they invoked self-defense towards a non-state actor. The use of force in self-defense towards a non-state actor has been controversial in international law, but after the 9/11 attacks the almost universal support by States of the United States use of force towards Al-Qaeda in Afghanistan showed that there might have been a change in the interpretation of article 51 of the UN Charter or the evolution of a new CIL right. It is still debated if the UN charter applies in situations where one of the

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41 Charter of the United Nations (n 6).
43 Corfu Channel case (UK v Albania) (Merits) [1949] ICJ Rep 4, 35.
44 Charter of the United Nations (n 6), art 2 (4).
46 Corfu Channel case (n 43) 22.
47 Charter of the United Nations (n 6).
48 ibid.
parties is a non-state actor\textsuperscript{52}, but several States has invoked article 51 in self-defense towards a non-state actor.\textsuperscript{53}

6.1. Armed attack
The right to use force in self-defense is a reactive right, this means that the use of force in self-defense can only be used legally if a State first has been exposed to an armed attack.\textsuperscript{54} If an attack is to be considered an armed attack it must reach a certain threshold. This means that not every use of force would be enough to count as an armed attack.\textsuperscript{55} As mentioned earlier, there are different opinions on whether a non-state actor can perform an armed attack, but in this paper, it will be assumed that they can.

6.2. Reactive self-defense, preventive self-defense and dual claim
In the UN Charter it is stated that ‘if an armed attack occurs’\textsuperscript{56} the member State has an inherent right to self-defense, suggesting that self-defense is a reactive right. Further, the traditional rule is that ‘once the armed attack is over, any defensive response must also be stopped’.\textsuperscript{57} However, this is rarely the case.\textsuperscript{58} Instead States often respond in self-defense when the actual armed attack is already over. In these cases, States usually invoke self-defense in response to the former armed attack and to prevent a future attack.\textsuperscript{59} By doing this, States combine reactive and preventive self-defense and give a dual reason to their response.\textsuperscript{60} This combined way to explain self-defense makes sense, because if there has already been an armed attack and there still is an imminent threat of further attacks, the claim that it is necessary to respond will be stronger.\textsuperscript{61}

This so-called dual claim was used by the United States when they invoked self-defense at Iraq’s request in Syria. The United States invoked self-defense in response to ‘continuing attacks from the ISIL coming out of safe havens in Syria’.\textsuperscript{62} This means that the United States didn’t only invoke self-defense to repel an ongoing attack, but also to prevent future attacks.

6.3. Collective self-defense
When the United States invoked article 51\textsuperscript{63}, they did so at the request of Iraq as collective self-defense. The United States also state that ‘ISIL and other terrorist groups in Syria are a threat not only to Iraq, but also to many other countries, including the United States’\textsuperscript{64}, which could indicate individual self-defense, but in this paper the use of force will be analyzed as collective self-defense.

\textsuperscript{52} See for example Olivier Corten, ‘The ‘Unwilling or Unable’ Test: Has it Been, and Could it be, Accepted?’ [2016] Leiden Journal of International Law, 795.
\textsuperscript{53} Chachko and Deeks (n 3).
\textsuperscript{56} Charter of the United Nations (n 6) art 51.
\textsuperscript{57} Green, ‘The ratione temporis elements of self-defense’ (n 49) 111.
\textsuperscript{59} ibid, 245.
\textsuperscript{60} Green, ‘The ratione temporis elements of self-defense’ (n 49) 114.
\textsuperscript{61} ibid, 115.
\textsuperscript{62} 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.
\textsuperscript{63} Charter of the United Nations (n 6).
\textsuperscript{64} ibid.
Collective self-defense is governed by the same rules and principles as individual self-defense, but there are some differences. ICJ has identified three elements which must exist before collective self-defense can be invoked. The first two elements are that an armed attack must have occurred, and the victim State must have declared that it has been the victim of an armed attack. The third element dictates that the victim State must expressly request for the defending State’s involvement.

Some of these elements are more established than others. The need for the victim State to request the defending State’s involvement is usually seen in State practice while the victim States’ declaration of suffering an armed attack is not. This was also reflected in the case with Iraq. Iraq has not sent in a letter to the Security Council where they invoked article 51 or specifically declared they had suffered from an armed attack, but Iraq did request the United States’ involvement and described several grave attacks of which they were victims in their letters to the Security Council.

6.4. The principles of self-defense
The two principles which are governing the right to self-defense in customary law are necessity and proportionality. Some scholars also claim that there is a third principle; immediacy. However, the principle of immediacy can also be seen as a part of necessity.

The principles of self-defense limit when the right to use force in self-defense starts, ends, and in what amount of force the defending State can use. These principles must be put into context to take a meaning, and always has to be applied on a case by case basis to define what a lawful response in self-defense is. This makes it hard to measure what a lawful response in self-defense is and makes the criteria of proportionality and necessity uncertain. Regardless, these principles are regularly used as a measure to argue for if a State’s use of force in self-defense is lawful or not. For example, when Israel used force in Lebanon towards Hezbollah there were strong reactions in the international community arguing that the use of force was excessive. The European Union stated that it was ‘greatly concerned about the disproportionate use of force by Israel’. The French President Jean-Marc De La Sablière stated that ‘Israel has the right to defend its territory and its citizens when they are attacked — and they have been attacked. But we condemn the disproportionate nature of the response.’

6.4.1. Necessity
For the use of force in self-defense to be deemed as necessary two conditions must be met. The first is that the use of force should be ‘necessary for the repelling of an armed attack and

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66 ibid, 199.
67 Henderson (n 58) 260.
68 Charter of the United Nations (n 6).
69 See for example Dinstein (n 55).
71 Green, ‘The ratione temporis elements of self-defense’ (n 49) 101.
73 UNSC 5489th meeting (14 July 2006) UN Doc S/PV.5489, 17.
74 Gill (n 54) 743.
must not acquire a retaliatory, deterrent, or punitive character’.\footnote{Georg Nolte and Albrecht Randelzhofer, ‘Ch.VII Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Article 51’ in Bruno Simma and others (eds), \textit{The Charter of the United Nations: A Commentary}, Volume II (3\textsuperscript{rd} edition; Oxford University Press 2012) [57].} This means that the use of force in self-defense should not be used as revenge, rather as a way to make the armed attack stop.

The second condition is that no other response to the threat should be possible.\footnote{Gray (3\textsuperscript{rd} edition, OUP Oxford 2008) (n 50) 150.} If there is a peaceful alternative for the victim State to suppress the threat, that option must always be used and the use of force in self-defense would not be necessary and therefore not lawful.

Christian Tams and James Devaney describe in their article that necessity has two requirements when it is used towards non-state actors. The first requirement is that no peaceful alternative exists and the second is that it’s not possible to suppress the threat with unilateral use of force by the host State.\footnote{Christian J Tams and James G Devaney, ‘Applying necessity and proportionality to anti-terrorist self-defence’ [2012] Israel Law Review, 99.}

The imminent part of necessity governs when the right to use force in self-defense starts. The State which is using force in self-defense can only wait a limited time before responding to an armed attack.\footnote{Dinstein (n 55) 252.}

6.4.2. Proportionality

The principle of proportionality relates to the duration and target of the response.\footnote{Gray (3\textsuperscript{rd} edition, OUP Oxford 2008) (n 50) 150.} When a State is using force in self-defense towards a non-state actor the proportional ‘target’ would only be the non-state actor that is responsible for the armed attack and not the State which harbors the non-state actor.\footnote{Tams and Devaney (n 77) 105.} As noted above, this might not apply to the same extent when the harboring State is Unwilling.

The principle of proportionality limits the use of force in self-defense to no more force than what is needed to halt the armed attack. In his report on State Responsibility Robert Ago stated:

\begin{quote}
The requirement of the proportionality of the action taken in self-defence, as we have said, concerns the relationship between that action and its purpose, namely—and this can never be repeated too often— that of halting and repelling the attack or even, in so far as preventive self-defence is recognized, of preventing it from occurring.\footnote{Robert Ago, Special Rapporteur to the International Law Commission, ‘Eighth Report on State Responsibility, (1980) ILC Yrbk, II, I, 13 UN Doc A/CN.4/318/ADD.5–7 [121].}
\end{quote}

This means that even if the response might be disproportionate to the original armed attack, the use of force can still be proportionate if it’s no more than is needed to halt the attack and prevent future attacks.

6.4.3. Limitations on the use of force in self-defense

The common interpretation is that there are limitations to how much force the defending State can use after an armed attack has been identified. The limitations are governed by the principles of self-defense; necessity and proportionality. These principles limit the use of
force in self-defense so that responses that go much further than ending the armed attack, for example a use of force which would lead to regime change would still be unlawful.\textsuperscript{82}

This interpretation is also used by the ICJ in the Case Concerning Oil Platforms. This case was a conflict between the United States and Iran. When an unidentified agency mined one of the United States’ military warships, the United States launched an attack on Iranian oil platforms, because they believed that the platforms were used to collect intelligence regarding passing vessels, and the United States believed that the platforms acted as a military communication link.\textsuperscript{83}

ICJ wrote in their judgement:

As a response to the mining, by an unidentified agency, of a single United States warship, which was severely damaged but not sunk, and without loss of life, neither “Operation Praying Mantis” as a whole, nor even that part of it that destroyed the Salman and Nasr platforms, can be regarded, in the circumstances of this case, as a proportionate use of force in self-defence.\textsuperscript{84}

There are diverging opinions to if there are restrictions to a State’s use of force in self-defense after an armed attack has occurred. Yoram Dinstein writes that there:

is no support in the practice of states for the notion that proportionality remains relevant – and has to be constantly assessed – throughout the hostilities in the course of war. Once war is raging, the exercise of self-defence may bring about ‘the destruction of the enemy’s army’, regardless of the condition of proportionality.\textsuperscript{85}

This would mean that once an armed attack has been identified, the use of force by the violated State can take any shape and cause unlimited harm to the attacker. However, ICJ has endorsed the interpretation that the principles of self-defense still are relevant as a limit to the force used in self-defense and this is also acknowledged in State practice.\textsuperscript{86}

7. Applying the principles of self-defense to Unwilling or Unable

In section 3 the doctrine of Unwilling or Unable was discussed and it was established that the right to use force in self-defense according to the doctrine was governed by the principles of self-defense. In this section the principles of self-defense will be applied to the doctrine of Unwilling or Unable by the author of this paper.

7.1. Necessity

When a State is using force in self-defense according to the Unwilling or Unable doctrine there is not only a need to identify if the attacker still poses an immediate threat to decide when the right to self-defense ends. The parameter regarding the host State’s sovereignty must also be accounted for.

According to the Unwilling or Unable doctrine a State’s right to sovereignty is not absolute. For a State to enjoy its sovereignty it must administer good governance. If a State fails to

\textsuperscript{82} Green ‘The ratione temporis elements of self-defense’ (n 49) 114.
\textsuperscript{83} Gray (4\textsuperscript{th} edition, OUP Oxford 2018) (n 51) 160-161.
\textsuperscript{84} Case concerning oil platforms (Judgement) [2003] ICJ Rep161 [77].
\textsuperscript{85} Dinstein (n 55) 282.
\textsuperscript{86} Henderson (n 58) 228.
deliver good governance and a non-state actor settles on its territory the principle of necessity can give other States a right to use force on the harboring State’s territory.

For the use of force to be necessary the harboring State must either show that it is Unwilling to fight the non-state actor, by for example colluding with them or by not sufficiently addressing the threat the non-state actor pose. This has been the case for example by the Taliban government in Afghanistan. If the harboring State starts acting satisfactory against the threat, the necessity requirement would no longer be fulfilled, and the victim State would no longer be able use force on the harbors State’s territory according to the Unwilling or Unable doctrine.

If the harboring State instead would be Unable, the clearest sign is an inability to control its territory. This was the case for example, in the conflict between Russia and Georgia. Georgia’s inability was demonstrated by its incapacity to control its side of the border. In these cases, the necessity and imminence in the threat posed by the non-state actor would dominate the harboring State’s right to sovereignty and therefore use of force in self-defense would be deemed necessary. Therefore, the principle of necessity is the principle that can outweigh the harboring State’s sovereignty. When measuring if the harboring State is Unwilling or Unable one must look at the principle of necessity.

The principle of necessity is also filling the function it does between States, by limiting when a State has a right to start to use force in self-defense, to times when it’s necessary and cannot be solved by peaceful means.

7.2. Proportionality
The proportionality principle instead governs the target and if the use of force is necessary to the aim of suppressing the non-state actor. The part of the proportionality principle which is relevant for this paper, is the part that governs if the use of force is needed to suppress the threat posed by the non-state actor.

The use of force must be proportional to the purpose of ending the threat posed by the attacker. In this way the principle of proportionality is filling the same purpose as it does when it’s applied in self-defense between States. The principle of proportionality will thus indirect be measuring the threat posed by the non-state actor, to establish if the use of force was a necessary to reach the aim of preventing future attacks. This means, that to establish if an act is proportionate in self-defense one must always reassess if there is still an imminent threat to which it would be lawful to respond.

7.3. The twofold test
The two principle thus measures two factors when a State is using force according to the Unwilling or Unable doctrine. The necessity principle will measure the harboring State’s willingness and ability, if the harboring State is acting satisfactory to suppress the non-state actor, the necessity requirement will not be fulfilled. The proportionality principle will indirect measure the threat posed by the non-state actor and therefore if the use of force by the victim State is still necessary.
8. The United States involvement in the conflict in Syria

The United States did, as mentioned earlier, invoke collective self-defense on Iraq’s behalf. Iraq sent a letter to the Security council in June 2014 describing the escalating situation in Iraq. In the letter Iraq’s Minister of Foreign Affairs Hoshyar Zerabi describes violent attacks made by ISIL, ‘more than 300 suicide bombings that killed thousands of innocent Iraqis. We believe that all those attacks were carried out by foreign recruits who were sent to Syria by the network of ISIL.’

The letter continues:

The situation has become more serious over the past two years, as ISIL has repeatedly launched attacks against Iraqi territory from eastern Syria. Hundreds of foreign suicide bombers have streamed into Iraq to murder its citizens in their markets, mosques, churches, playgrounds and schools.

There were repeated attacks described with a high level of violence and a lot of casualties. In the second letter which was sent to the Security Council in September 2014, Iraq’s Minister of Foreign Affairs Ibrahim al-Ushayqir al-Jafri wrote ‘As we noted in our earlier letter, ISIL has established a safe haven outside Iraq’s borders that is a direct threat to the security of our people and territory’. The letter continues to explain that it is therefore Iraq has ‘requested the United States of America to lead international efforts to strike ISIL sites and military strongholds, with our express consent’. As stated earlier in this paper, Iraq didn’t specifically state that they had suffered from an armed attack. Neither did the United States state which armed attack it was responding to when they invoked self-defense. However, there had been sever attacks described in Iraq’s letter to the Security Council which could reach the threshold for an armed attack.

The United States sent their letter to the Security Council on 23 September where they invoked collective self-defense. Samantha J. Power writes that when ‘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’. In this statement it is not clear if the United States believed that the Syrian government was Unwilling or Unable or if it believed that Syria was both Unwilling and Unable.

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87 Annex to the letter dated 25 June 2014 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General UN Doc S/2014/440.
88 ibid.
89 Annex to the letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council UN Doc S/2014/691.
90 ibid.
91 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.
9. The situation in Syria

In this section some facts will be presented to establish how the situation in Syria has been in recent years. The facts will be presented in three sections, firstly establishing the situation in 2014, secondly establishing the situation in 2016 and thirdly establishing the situation in 2018. These facts will later be used to analyze the temporal limit of the United States right to use force in self-defense in Syria.

9.1. The situation in Syria 2014

As shown by the letters sent in by Iraq to the Security Council, Iraq had suffered from many attacks before the US invaded Syria. In January 2014 ISIL had taken full control over the city Raqqa in northern Syria, which it claimed to be their capital and in June they took over Mosul in Iraq. In July 2014 it was reported that ISIL ‘Militants conquer a 90-mile stretch of Syrian towns, from Deir Ezzor to the Iraq border’. The estimated area under ISIL’s control was more than 34,000 square miles in Syria and Iraq and it was estimated that 20,000-31,500 people were fighting for ISIL in Syria and Iraq.

These facts clearly show that ISIL was a threat to Iraq, and that Syria had troubles with governing their territory in 2014. This was also acknowledged by the United Nations who wrote in a report that the ‘emergence of ISIL has been facilitated’ by the weakening of State institutions and the inability of the two States to exercise effective control over their territories and borders.

9.2. The situation in Syria 2016

In 2016 ISIL was weakened, but they still posed a significant threat to Iraq. In a report released by the United Nations in March 2015 it is described how Syrian ‘Government aerial bombardment continued throughout February against ISIL-controlled cities and towns’.

The 15 October 2015 Russia informed the Security Council that it had responded to a request by Syria and engaged in the fight against terrorists the 30 September the same year. In a letter to the Security Council Syria described Russia’s involvement as:

> providing air support for ground operations conducted by the Syrian Arab Army in its war against Islamic State in Iraq and the Levant (ISIL), the Nusrah Front and other terrorist organizations. The Russian Federation is also striking the

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94 ibid.
95 ibid.
97 Report of the Secretary-General on the threat posed by ISIL (Da’esh) to international peace and security and the range of United Nations efforts in support of Member States in countering the threat (29 January 2016) UN Doc S/2016/92 [4].
bases, camps, munitions depots and command posts of armed terrorist groups that are in the territory of the Syrian Arab Republic.\footnote{Identical letters dated 14 October 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 A/70/429–S/2015/789.}


In July, an ISIL suicide bomber killed 200 civilians in Baghdad,\footnote{Mustafa Salim and Loveday Morris, ‘Toll climbs to more than 200 in Islamic State’s worst-ever bomb attack on civilians’ The Washington Post (Baghdad, 4 July 2016) <https://www.washingtonpost.com/world/death-toll-climbs-to-187-in-islamic-states-worst-ever-bomb-attack/2016/07/04/6964d2b2-41ce-11e6-bc99-7d62f8719b1_story.html?utm_term=.77dee35f7c6b> accessed 17 December 2018.} this was only one of many attacks in Iraq. For example, ISIL also claimed responsibility for two other attacks in May, one was a car bomb exploding on a market in Baghdad and the other attack was made by a suicide bomber who detonated a bomb on a busy street in the north of Baghdad.\footnote{See for example Jomana Karadsheh, Joshua Berlinger and Ashley Fantz, CNN (12 May 2016) ‘ISIS says it’s behind Iraq blasts that kill scores’ <https://edition.cnn.com/2016/05/11/middleeast/baghdad-market-bombing/index.html> accessed 20 December 2018.} ISIL still controlled territory in 2016 even if they were losing ground. By the end of 2016 the territory controlled by ISIL had shrunk to 23,320 square miles.\footnote{‘ISIS Fast Facts’ (n 93).}

To summarize, in 2016 ISIL had showed that they still could perform vicious and deadly attacks even if they were losing territory and were actively opposed by the Syrian government and its allied Russia.

9.3. The situation in Syria 2018

In 2018 ISIL had become significantly weaker. They lost control over Raqqa in 2017\footnote{‘ISIS F Facts’ (n 93).} and no longer controlled any urban areas in either Iraq or Syria.\footnote{‘ISIS defeated in Raqqa as 'major military operations' declared over’ CNN (18 October 2017) <https://edition.cnn.com/2017/10/17/middleeast/iraq-isis-syria/index.html> accessed 7 December 2018.} Instead ISIL were pushed into small pockets of land on Syrian territory close to the border towards Iraq.\footnote{Sixth report of the Secretary-General on the threat posed by ISIL (Da’esh) to international peace and security and the range of United Nations efforts in support of Member States in countering the threat (31 January 2018) UN Doc S/2018/80 [12].}

The United
Nations wrote in a report that there remain terror cells in some cities and small ISIL groups are located in the south-west of Syria and in northern Iraq.\footnote{Sly and Salim (n 110).} There were still estimated 1000-3000 active fighters fighting for ISIL\footnote{Mark Landler, Helene Cooper and Eric Schmitt, ‘Trump Withdraws U.S. Forces From Syria, Declaring ‘We Have Won Against ISIS’’, The New York Times (Washington, 19 December 2018) <https://www.nytimes.com/2018/12/19/us/politics/trump-syria-turkey-troop-withdrawal.html> accessed 2 January 2019.} and there were still attacks in Iraq.\footnote{ibid.} For example six members from the Iraqi forces were abducted and killed during 2018.\footnote{ibid.} At the end of 2018 ISIL didn’t control any territory and had decreased in numbers of fighters. Even so they could still conduct deadly attacks in Iraq.

Iraq declared victory over ISIL on 9 December 2017.\footnote{See ‘Iraq bombs meeting of Islamic State leaders in Syria: military’ Reuters (Baghdad, 23 June 2018) <https://www.reuters.com/article/us-mideast-crisis-syria-iraq-iraq-bombs-meeting-of-islamic-state-leaders-in-syria-military-idUSKBN1JJ0FD> accessed 6 January 2019.} According to the government ‘the declaration meant Iraqi forces had secured the western desert and the entire Iraq-Syria border, and marked the end of the war against Islamic State’.\footnote{ibid.} However this didn’t end the United States’ military presence in neither Iraq or Syria and Iraq has not yet officially asked the United States to leave Iraq. The United States state department spokeswoman Heather Nauert said in a statement ‘The United States joins the government of Iraq in stressing that Iraq’s liberation does not mean the fight against terrorism, and even against Isis [IS], in Iraq is over’.\footnote{ibid.} There has also been reports of Iraq bombing in Syria after 9 December 2017.\footnote{ibid.} This indicates that Iraq’s declaration on victory was merely to win political points amongst its inhabitants.

Additionally, on 19 December 2018 United States’ President Donald Trump announced on twitter that American forces would be withdrawn from Syria, Trump has not yet given a legal reason to the withdrawal.\footnote{ibid.}

10. The temporal scope of Unwilling or Unable in Syria

If the twofold test consisting of the principles of necessity and proportionality is applied on the United States use of force in Syria, the necessity principle will be measuring Syria’s willingness and ability. Syria’s willingness will be measured by their actions against ISIL. Their ability will be measured mainly by looking at their ability to control its territory because, as discussed above, losing control over territory is the strongest indicator of a State

\footnotetext[111]{Sixth report of the Secretary-General on the threat posed by ISIL (Da’esh) to international peace and security and the range of United Nations efforts in support of Member States in countering the threat (31 January 2018) UN Doc S/2018/80 [12].}
\footnotetext[114]{ibid.}
\footnotetext[115]{‘Iraq declares war with Islamic State is over’ BBC (9 December 2017) <https://www.bbc.com/news/world-middle-east-42291985> accessed 2 January 2019.}
being Unable. This will be made to see if the necessity criterium is fulfilled or if the threat could have been suppressed with unilateral force from the territorial State.

The principle of proportionality will measure the threat posed by ISIL. As long as ISIL are carrying out violent attacks, the aim of suppressing the non-state actor has not been reached, which means it would still be proportionate for the United States to use force against ISIL. Therefore, to see if the use of force is proportionate, the strength of ISIL will be analyzed. This will be made by establishing if there still were attacks and how many fighters there were actively fighting for ISIL.

10.1. Applying the twofold test to the situation in Syria 2014
As has been shown, Syria showed itself willing and did not refuse to take actions against ISIL, neither did they collude with them which would have been the sign showing that Syria was Unwilling. They were carrying out airstrikes towards ISIL and welcomed other countries to do the same, as long as it was done in cooperation with the Syrian government. Still ISIL advanced. This suggests that Syria did not do enough. ISIL controlled more than 34,000 square miles of territory in Iraq and Syria and had taken over Raqqa in northern Syria. As shown in section 3.2., lack of control over territory is a sign that a State is Unable and indicates that the necessity requirement is fulfilled.

In 2014 20,000-31,500 people were fighting for ISIL, as described in the letter sent in by Iraq to the Security Council several attacks had been conducted in Iraq by ISIL. This together indicates that the proportionality criterium were fulfilled.

10.2. Applying the twofold test to the situation in Syria 2016
Turning to the necessity requirement it’s obvious that Syria was actively fighting ISIL. However, ISIL still controlled territory. Therefore, it can still be argued that the necessity requirement was fulfilled. Since Syria still had not been able to retake big parts of its territory one can argue that they still were Unable to handle ISIL.

In 2016 ISIL still was a threat to Iraq even if they were weakened. ISIL still carried out attacks, for example there were a suicide bomber who killed 200 civilians in Baghdad in July. There were continuing attacks made by ISIL on Iraq’s territory. This shows that the use of force in collective self-defense can still be warranted and proportional.

10.3. Applying the twofold test to the situation in Syria 2016
In 2018 it’s harder to argue that the necessity requirement was fulfilled. When Syria had regained control over almost all its territory, the strongest sign that a State is Unable was no longer met. There were no signs that Syria was Unwilling either, since they actively fought to retake territory and to suppress ISIL. This suggests that the necessity criterium is no longer fulfilled.

ISIL also was significantly weakened. They had lost control over their self-proclaimed capital Raqqa and almost all territory. The estimated number of fighters are only 1000-3000 who hides on Syria’s territory close to the border of Iraq. The fact that there are so few active fighters left makes it harder to argue that the right to self-defense still is proportional. As mentioned earlier in chapter 3, the victim State cannot expect the harboring State to suppress the threat fully and according to the proportionality principle it’s harder to argue that ISIL still pose a big threat to Iraq. Attacks continued in the northeastern parts of Iraq’s territory, but they were not as heavy and mainly conducted by ISIL soldiers who were hiding on Iraq’s territory.120 This suggests that the threat could be handled on Iraq’s territory without violating

120 Chmaytelli and Aboulenein (n 115).
Syrian territory. Together it seems as if the United States aim to suppress ISIL as a threat had been met, which means that the proportionality no longer allowed for the use of force in self-defense.

The fact that Iraq declared victory against ISIL also raises the question on what basis the United States were using self-defense. One has to presume that if Iraq has declared victory the United States could no longer use force in collective self-defense at Iraq’s request. On the other hand, Iraq did not officially ask the United States to leave and Iraq did also continue to carry out bombings in Syria. This shows that Iraq continued to take part in the war against ISIL even after they had declared victory.

11. Conclusion
It has in this paper been researched what the temporal limits to self-defense are between States and what laws are governing sovereignty. On this background the paper has analyzed the Unwilling or Unable doctrine and what temporal limitations the doctrine has. The findings in this analysis has been applied to define what the temporal limits to the United States use of force in Syria might be.

It has been argued that the temporal limit to self-defense according to the Unwilling or Unable doctrine lies in the principles of self-defense which can be found in customary law. The principles governing self-defense between States are necessity and proportionality, although they have a slightly different meaning when they are used to measure the temporal scope according to the Unwilling or Unable doctrine.

When deciding if self-defense is lawful according to the Unwilling or Unable doctrine, it has been argued that a twofold test should be used. The necessity principle measures if the use of force would be necessary by the victim State and that it could not be solved by unilateral force by the territorial State. The proportionality principle measures if the amount of force used is necessary to repel the attack and prevent future attacks.

When this twofold test was applied on the conflict between the United States and ISIL it has been found that in both 2014 and in 2016 the facts were indicating that the United States had a right to use force in self-defense against ISIL according to the Unwilling or Unable doctrine. It has been shown that Syria could not be accused for being Unwilling, because they have actively fought to suppress the threat posed by ISIL. However, Syria had difficulties with controlling their territory and lost big parts of its territory to ISIL, indicating that they were Unable.

In 2018 it was harder to argue that the United States had a right to use force in self-defense on Syria’s territory because ISIL was significantly weaker, and Syria had regained control over its territory which means that the strongest indicator of a State being Unable was no longer existing. Neither did Syria show themselves Unwilling during 2018 since they were actively fighting ISIL. This means that in 2018 neither the necessity or the proportionality requirement was fulfilled with the consequence that the United States no longer had a right to have military presence in Syria according to the Unwilling or Unable doctrine.

Since the Unwilling or Unable doctrine is becoming more commonly cited by States when they invoke self-defense, it’s important that the temporal limits are defined. If the temporal restrictions to a State’s right to use force are unclear this can lead to an unnecessary violation of the harboring State’s territorial sovereignty. Therefore, it’s important that the principles limiting self-defense are always reassessed during a State’s use of force in self-defense, when it’s done according to the Unwilling or Unable doctrine.
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