

THE UNWILLING OR UNABLE DOCTRINE AND THE VIEW FROM PAKISTAN

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1. Introduction

The ‘unwilling or unable’ doctrine is a controversial concept in the international law on the use of force. Under this doctrine, a victim state may engage in lawful extra-territorial self-defence when the host state is unwilling and/or unable to mitigate or suppress the threat posed by domestic non-state armed groups (“NSAGs”) in its territory. The ‘unwilling or unable’ doctrine is increasingly referred to by States accusing other States of “being unable to prevent terrorist groups from using their territories as ‘safe havens’ for launching attacks against the intervening states.”¹ However, due to a lack of agreement on the legal validity of the doctrine, it is not recognised as a resolute rule under international law.

At their 17th Summit of Heads of State and Government, the Non-Aligned Movement declared that “Article 51 of the UN Charter is restrictive and should not be re-written or re-interpreted.”² While some argue that the ‘unwilling or unable’ doctrine should hold legal significance, many others continue to be largely opposed to its invocation. This lack of a homogenous position on the doctrine is a cause for concern for the Global South, as Global North states may continue to use the doctrine against states in the Global South to the latter’s detriment. In fact, even more worryingly, certain Global South states have actively invoked the doctrine themselves in their interventions into other States.

This paper will analyse the doctrine, its justifications under Article 51 and State practice which supports its rise as a new law or reinterpretation of the law. Most importantly, this article explores how the doctrine has been used against Pakistan, by the US and India, as well as Pakistan’s own problematic State practice in Afghanistan. It argues against the doctrine as a new law or a new interpretation of the law and argues in favour of the attribution of an armed attack to a State before a response can be made in self-defence against that State. While the law of self-defence may be in a state of flux as it deals with the rise of non-state actors, future debate and practice is necessary. For this to occur in a way that is representative, the Global South must be clear in its approach to this doctrine and not allow powerful, Western States from being able to violate their territorial integrity and sovereignty under the guise of self-defence.

2. Contextualising ‘Unwilling or Unable’ in The Law on the Use of Force

Before delving into the discussion of the doctrine in use, it is necessary to contextualise its place in the international law on the use of force. The law on the use of force is embodied in the UN Charter under Article 2(4) which states that:

¹ Corten, O., ‘The “Unwilling or Unable” Test: Has It Been, and Could It Be, Accepted?’ (2016) 29 *Leiden Journal of International Law* 777, 779

² ‘17th Summit of Heads of State and Government of the Non-Aligned Movement’ (Non-Aligned Movement 17-18 September) CoB/DOC.1. Corr.1, para 25.2

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

There are two recognised exceptions of Article 2(4) within the Charter. The first exception is collective security action taken by the Security Council under Chapter VII of the Charter. The second exception is of self-defence under Article 51:

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

The notion of self-defence as espoused under the Charter presents several basic conditions for the valid exercise of the right.

2.1 Armed Attack

The first condition is the requirement of an ‘armed attack’. Self-defence can only be validly exercised if the attack suffered by the victim state is serious enough to warrant an armed response. In *Nicaragua*, the ICJ held that “It will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms”³ – the former would constitute an armed attack, while the latter would fall short. In essence, all armed attacks are uses of force, but not all uses of force constitute armed attacks. The ICJ clarified that the mere “provision of weapons or logistical or other support” does not constitute an armed attack as it does not satisfy the gravity threshold requirement.⁴ For interpretive guidance, the ICJ has also referred to the UN General Assembly Resolution 3314 (XXIX) on the Definition of Aggression which provides examples of acts that constitute aggression, and thereby an armed attack.

2.2 Attribution of the Armed Attack to a State

The Court in *Nicaragua* further held that indirect uses of force, such as through armed groups, are attributable to a State in certain instances. It prescribed the following test for attributing an armed attack by a non-state group to a State for the purposes of exercising a right to self-defence against that State:

“An armed attack must be understood as including not merely action by regular armed forces across an international border, but also “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against

³ *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America); Merits*, International Court of Justice (ICJ), 27 June 1986, para 191 (hereafter referred to as “*Nicaragua*”)

⁴ *Nicaragua*, para 195

another State of such gravity as to amount to an actual armed attack conducted by regular forces or its substantial involvement therein...”

It referred to Article 3(g) of General Assembly resolution 3314 (XXIX) on the definition of aggression in formulating this test. Similarly, in the *Armed Activities* case, the ICJ held that the “attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3(g) of General Assembly resolution 3314 (XXIX) on the definition of aggression.”⁵ Thus, self-defence is only valid against a State if there is an armed attack, which consists of a use of armed force that satisfies a particular level of gravity that is attributable to that State.

This was further upheld in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,⁶ where the ICJ stated that “Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State **against another State**”,⁷ a stance that was upheld in the *Armed Activities* case.⁸ Some critics argue that the construction of Article 51 does not adequately support the ways in which use of force against non-state actors transpires.

2.2.1 No Need for an Armed Attack ‘By A State’ Under Article 51

To start with, Article 51 does not specify that an armed attack has to be by a State, it merely says that the right of self-defence arises “if an armed attack occurs against a Member of the United Nations” While early proposals in the San Francisco conference did refer to “an attack by any State” against a Member State, it was finally decided to remove this from the final draft of the UN Charter.⁹ However, the move from an “attack by any State” to “armed attack” was not the subject of minuted discussion.

2.2.2 Encouraging Low-Level Terrorism?

Judge Simma, in his separate opinion in the *Armed Activities* case, held that “in the light of more recent developments”, Article 51 should also be read to cover “defensive measures against terrorist groups”.¹⁰ Similarly, Judge Kooijmans stated that “it would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State. Indeed, the Charter does

⁵ *Armed Activities on the Territory of the Congo, Congo, the Democratic Republic of the v Uganda*, Judgment, Merits, ICJ GL No 116, [2005] ICJ Rep 168, ICGJ 31 (ICJ 2005), 19th December 2005, International Court of Justice [ICJ], para __ (hereafter referred to as “Armed Activities”)

⁶ *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004,

⁷ *Ibid*, Para 139

⁸ *Armed Activities*, para 14

⁹ *Foreign Relations of the United States, Diplomatic Papers (1945)*, Vol. I, 659

¹⁰ *Armed Activities*, Separate Opinion by Judge Simma, para 11

not stipulate that the armed attack must come from a state”¹¹ It has been argued that requiring attribution would leave a victim State with no recourse where the NSAG was not sent by another State and when that State did not have substantial involvement in the group. In so leaving a State without a way to defend itself against such attacks, low-level terrorism may be encouraged. However, despite this emerging dissent, the current established position in international law affirms a requirement of attribution of the NSAG’s actions to the host state in order for self-defence to be validly exercised under Article 51.

2.3 Necessity and Proportionality

The third condition is that self-defence must be necessary and proportionate. Although not explicitly codified as part of Article 51, the conditions of necessity and proportionality are well-accepted controls on the right of self-defence in customary international law.¹²

2.3.1 Necessity

According to the *Oil Platforms* case, “measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any “measure of discretion”.¹³ Similarly, in *Nicaragua*, the ICJ found that US measures were taken “several months after the major offensive of the armed opposition against the Government of El Salvador has been completely repulsed”.¹⁴ Thus, the determination of necessity includes a temporal analysis of the immediacy or imminence of the attack, along with the determination of the use of force as a last resort with no viable alternatives.

2.3.2 Proportionality

In terms of proportionality, a State must act in a manner that is no more than necessary in deploying their defensive action. This must be either equivalent to the level of force used by the attacking State (‘tit for tat’ proportionality), or must be proportionate to the legitimate aim of self-defence without being excessive or punitive so as to constitute an armed reprisal (‘means-end’ proportionality).¹⁵ In *Oil Platforms*, the ICJ held the destruction of the oil platforms to be disproportionate to the original attack by Iran on a singular US naval vessel.¹⁶ Similarly, in *Armed Activities*, the ICJ held that “the taking of airports and towns many hundreds of kilometres from Uganda’s border” as disproportionate to the “transborder attacks” that Uganda claimed to give rise

¹¹ *Armed Activities*, Separate Opinion by Judge Kooijmans, para 30

¹² *Nicaragua*, 194

¹³ *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, International Court of Justice (ICJ), 6 November 2003, para 73 (hereafter referred to as “*Oil Platforms*”)

¹⁴ *Nicaragua*, 237

¹⁵ Kretzmer, David, ‘*The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum*’ *EJIL* (2013), 24.1, 235, 238

¹⁶ *Oil Platforms*, para 77

to the right to self-defence.¹⁷ These controls act as a “minimum test by which to determine that a use of force does not constitute self-defence”,¹⁸ but may be seen as an unlawful armed reprisal against the attacking State.

2.4 Reporting Requirement

The fourth condition is the obligation to report measures taken in self-defence to the UN Security Council. Although a failure to do so does not invalidate the State’s defensive measures, the ICJ states in *Nicaragua* that “the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence”.¹⁹ Thus, a State would benefit from clarifying to the UN Security Council that it took certain measures in self-defence, rather than as an act of aggression.

3. Self-Defence and the ‘Unwilling or Unable’ Doctrine

Although the ‘unwilling or unable’ does not neatly fall into the definition of self-defence as it is espoused under Article 51, there have been emerging trends in the discourse around self-defence for a more expansionist view of the right, considering modern developments in the use of force. At the time that the Charter was drafted, most conflicts that took place were international armed conflicts between two or more states. In contrast, most conflicts taking place today are between a state and an NSAG, or between NSAGs, constituting non-international armed conflicts.

This shift in the conventional nature of armed conflicts calls into question the formulation of Article 51 and its established criteria. With the state nexus requirement reinforced by the ICJ, and the requirement of an armed attack to have ‘occurred’, one must look at whether there is any room for a reading of the self-defence provision to take into account emerging trends of conflict.

3.1 Emerging Trends in Self-Defence

The notion of anticipatory self-defence does hold some legal value in customary international law; however, it is not as well-established and well-accepted as the Article 51 conception of self-defence. Anticipatory self-defence refers to a state employing armed force in a defensive capacity against a threat that is yet to materialise into an actual armed attack. In a post-9/11 world, the need for anticipatory self-defence is becoming more prevalent. However, the legal framework for anticipatory self-defence needs to be refined and consolidated before it is accepted in international law as a licence for the use of force.

¹⁷ Armed Activities, para 147

¹⁸ Gray, CD, *International Law and the Use of Force* (Fourth edition, Oxford University Press 2018), 163

¹⁹ *Nicaragua*, para 200

A distinction must be drawn between two types of anticipatory self-defence recognised by the UN Secretary-General's High-level Panel on Threats, Challenges and Change.²⁰ The first type is pre-emptive self-defence, which is recognised as a forcible reaction against an 'imminent' attack. The second type is preventive self-defence, which is recognised as a forcible reaction against likely or possible future attacks. The key distinction between the two types is the criterion of imminence. When determining whether an attack is imminent or not, one can refer to the test defined in the *Caroline* incident note by Daniel Webster to British Representatives:

“It will be for [the UK] to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.”²¹

As per this quote, the notion of imminence draws some semblance from the concept of necessity that applies to the Article 51 notion of self-defence. Guidance on the criteria of imminence has been developed by Daniel Bethlehem to facilitate the development of pre-emptive self-defence, which remains the authoritative interpretive guidance on imminence as it pertains to pre-emptive self-defence. In his article, Bethlehem actively propagates the need for a state's right of self-defence against non-state actors when an attack is imminent.²² Principle 8²³ provides a summary of the factors that may be taken into account when determining imminence:

Whether an armed attack may be regarded as "imminent" will fall to be assessed by reference to all relevant circumstances, including (a) the nature and immediacy of the threat, (b) the probability of an attack, (c) whether the anticipated attack is part of a concerted pattern of continuing armed activity, (d) the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action, and (e) the likelihood that there will be other opportunities to undertake effective action in self-defence that may be expected to cause less serious collateral injury, loss, or damage.

In relation to this, Bethlehem also clarifies that any armed action taken in self-defence on the territory of another State against a non-state actor must be predicated by the consent of the territorial State, unless there is a “reasonable or objective basis for concluding that the third state is... unwilling to effectively restrain the armed activities of the non-state actor”,²⁴ or that “the third state is unable to effectively restrain the armed activities of the non-state actor”.²⁵ Thus, the

²⁰ United Nations Peacekeeping 'Report of the Secretary-General's High-level Panel on Threats, Challenges and Change' (2004), UN Doc A/59/565, para. 19

²¹ Wood M, 'The Caroline Incident—1837', *The Use of Force in International Law: A Case-Based Approach* (2018)

²² Bethlehem, D, 'Self-defence against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106 Am J Int'l L 770, 775

²³ Ibid, 775-6

²⁴ Ibid, 776

²⁵ Ibid

'unwilling or unable' doctrine finds active recognition in the discourse originating from the Global North around an expansive right of anticipatory self-defence.

Where there is an imminent threat posed by an NSAG stationed in the territory of a State, which is either refusing to take action to minimise the threat, or is incapable of doing so, a victim State may invoke anticipatory self-defence if they can adequately prove grounds for an imminent attack.

4. Problems with the Doctrine

The current law on self-defence in international law does not easily accommodate the use of the 'unwilling or unable' doctrine. The 'unwilling or unable' doctrine is seen by some States as an exception to the currently accepted conception of self-defence in international law, whereby a State can legitimately act against a NSAG operating from a third state's territory. The doctrine is often cited as the basis for anticipatory self-defence: the defending state claims that they have a right to defend themselves against an imminent threat posed by a NSAG operating from the territory of the host State that either does not have the capacity to eliminate the threat or refuses to eliminate said threat. To claim self-defence under international law, a State must establish that they were a victim of an armed attack by another state – or, by extension, by an entity whose conduct the relevant state accepts responsibility for. The requirements for an armed attack of a certain gravity that is attributable to a state limits the flexibility of the law on self-defence, especially in this context. This complicates the assessment of armed attacks that are carried out by NSAGs, particularly in the territory of a state that is either 'unwilling or unable' to quell the threat on their own.

A further complication arises with the assessment of the parameters of 'unwilling or unable' – does a State's mere inability to quell the threat posed by an NSAG that operates in its jurisdiction constitute a State nexus? One would have to investigate the measures that a territorial State has taken against the NSAG, or in support of it. According to Corten, "a state tolerating or acquiescing to the activities of an armed group, or even assisting it, cannot be targeted in the name of the right to self-defence."²⁶ The history of the use of the doctrine indicates that a State's mere declaration that a territorial state is 'unwilling or unable' is sufficient grounds for intervention, without any mechanism for validating this assessment by third parties.

The invocation of the 'unwilling or unable' test allows for an ex post facto justification for a violation of the UN Charter without having to conform to the strict standards provided for under Article 51. The use of force against the territorial integrity of another State, where the NSAG is stationed or carrying out its operations, is a violation of the Article 2(4) prohibition on the use of force of the Charter. The use of the doctrine creates a dangerous precedent that serves to legitimise unilateral intervention, which the UN collective security mechanism stands firmly against. As Corten phrases it, the acceptance of this doctrine could lead to a "radical change", consequently

²⁶ Corten (n 1), 794

dismantling the entire UN system.²⁷ The hesitation to accept an expansive right of self-defence which does not require an armed attack prior to the defensive operation shifts the power of enforcement action away from the Security Council into the hands of individual States, which is particularly dangerous in the absence of a resolute accountability mechanism. Enforcement action backed by the Security Council in relation to the ‘unwilling or unable’ doctrine has been seen in the past, with the September 11, 2001, attacks in New York City being the most glaring example. However, its invocation since then has predominantly been unilateral by individual, primarily Western, States.

It is pertinent to examine the 9/11 example and the complexity of the self-defence doctrine in relation to States deemed ‘unwilling or unable’ to curb threats in their jurisdiction. In analysing this State practice, I am attempting to establish whether it has led to a customary right of self-defence against non-state actors where the host State is unwilling or unable to quell the threat they pose. Or, as per Article 31(3)(b) of the Vienna Convention on the Law of Treaties, whether it forms “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”. Consequently, State practice could help to indicate whether States’ have changed their interpretation of the right to self-defence under Article 51 of the UN Charter to no longer require attribution.

5. State Practice

5.1 The Events of September 11, 2001

The US intervention in Afghanistan after the September 11 attacks on the World Trade Centre in 2001 can be seen as an example of the ‘unwilling or unable’ doctrine in play. Following the attack, the US invoked a right to self-defence under Article 51, as well as under customary international law. Despite not naming the entity nor the state that launched the attack, the US’ claim to act in broad self-defence was accepted by the UN Security Council,²⁸ and was backed by several other states in the form of collective self-defence. Although the Security Council Resolutions do not explicitly condone the use of self-defence against armed attacks by NSAGs that are attributable to a state, they do recognize ‘the inherent right of individual or collective self-defence in accordance with the Charter’ to take action against terrorist groups, such as Al-Qaeda (again, not explicitly named).²⁹

The US further claimed that the Taliban government in Afghanistan was harbouring the Al-Qaeda militant Islamic extremist group, and that the Afghan government was “unable to deal with them”, thus triggering their right to self-defence (as they claimed). The Taliban’s decision to allow parts

²⁷ Ibid, 797

²⁸ United Nations Security Council Resolution 1368/01 (12 September 2001) UN Doc S/RES/1368(2001)

²⁹ Ibid

of Afghanistan under their control to be used by Al-Qaeda for their operations constituted an ongoing threat to the United States and its nationals.³⁰

Because of the unprecedented nature of the attacks, the parameters of self-defence were expanded to accommodate the US' response. Under the traditional paradigm of self-defence, any defensive armed action must be necessary to quell the effects of the attack, and proportionate to the effects of the armed attack. However, the US avoided such limitations by framing Operation Enduring Freedom as a response to the ongoing threat that was posed by the Taliban's decision to harbour Al-Qaeda, and to continue to do so.³¹ Furthermore, there was a lack of attribution of Al-Qaeda's attacks to the State of Afghanistan. There was no indication that Afghanistan had sent Al-Qaeda or had substantial involvement in their activities, as is required by the test of attribution prescribed by the ICJ in *Nicaragua*. Despite this, Operation Enduring Freedom was justified on the grounds of self-defence on the basis of the Taliban government 'harbouring' the Al-Qaeda organisation in their territory. Therefore, the test of attribution was significantly watered down in the context of the 'unwilling or unable' doctrine. Thus, this example emulates the first instance of the 'unwilling or unable' doctrine as the basis for anticipatory self-defence even if it was not precisely invoked here.

5.2 Pre- and Post-9/11 State Practice

5.2.1 Pre-9/11

In analysing State practice, commentators arguing in defence of the unwilling or unable doctrine like to point to expansive practice on the part of States starting from before 9/11 and continuing long after it. In terms of pre-9/11 State practice, this arguably starts with Israel's use of force against the Palestine Liberation Organization (PLO) headquarters in Tunisia in 1985. However, in gauging State practice and its significance in creating new rules or re-interpreting existing ones, we do not only look at the practice of a handful of States but also the reactions of other States to their actions. In this instance, Israel's use of force was condemned as an act of aggression by the Security Council in Resolution 573 of 1985, with the US, of course, abstaining.

Similarly, the US attacks in Afghanistan and Sudan in response to the bombing of their embassies Tanzania and Kenya in 1998 are also cited as an example. The US stated that the use of force was only directed against installations and training camps used by the Bin Laden organization and was "carried out only after repeated efforts to convince the Government of the Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down and to cease their cooperation with the Bin Laden organization."³² Kuwait on behalf of the League of Arab States, condemned the

³⁰ Letter dated 7 October 2001, the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council (7 October 2001) UN Doc S/2001/946.

³¹ *Ibid* (n 26) 636

³² UN Doc S/1998/780

United States for its attack on Sudan³³ as did the Movement of Non-Aligned Countries which said it was a unilateral and unwarranted act of aggression,³⁴ Pakistan and Russia also condemned the action.³⁵

5.2.2 Post 9/11

It has been argued that State practice since 9/11 suggests that there is a right to use force even if the armed attack is not attributable to the state where the non-state groups are based. There are numerous examples of States using force in such a manner:

Russia used force in Georgia against Chechen rebels (2002)
Israel used force in Lebanon against Hezbollah (2006)
Turkey used force in Iraq against the PKK (2007/8)
Turkey used force in Syria against the PKK (2012)
Kenya use force in Somalia against Al-Shabaab (2011)
Iraq and the US coalition used force in Syria against ISIS (2015)

The doctrine was in fact first invoked by the US in a letter sent to the UN Secretary-General in 2014 to justify its use of force against ISIS in Syria. The US stated 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 and our partners in the region and beyond. States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence, as reflected in Article 51 of the Charter of the United Nations, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks. The Syrian regime has shown that it cannot and will not confront these safe havens effectively itself. Accordingly, the United States has initiated necessary and proportionate military actions in Syria in order to eliminate the ongoing ISIL threat to Iraq, including by protecting Iraqi citizens from further attacks and by enabling Iraqi forces to regain control of Iraq’s borders.”³⁶

This was objected to by the States which form the Non-Aligned Movement which in its 17th Summit of Heads of State and Government in 2016 noted that “consistent with the practice of the UN and international law, as pronounced by the ICJ, Article 51 of the UN Charter is restrictive and should not be re-written or re-interpreted.” As a result, the State practice invoked by those seeking a reinterpretation is erratic and ambiguous given many States have not mentioned the

³³ UN Doc S/1998/789; UN Doc S/1998/800

³⁴ UN Doc S/1998/879

³⁵ Gray (n 18) page 205

³⁶ UN Doc S/2014/695

doctrine to justify their actions. Moreover, the reaction by a number of States in condemning the rewriting and re-interpreting of international law in this way is indicative of the fact that for most States, the law has not changed since *Nicaragua* and still requires attribution.

5.3 The Global South and the ‘Unwilling or Unable’ Doctrine

The Global South has largely been the victim of the ‘unwilling or unable’ doctrine. The Global North has disproportionately exercised armed action under the doctrine in the territory of states in the Global South. States that have had a turbulent relationship with NSAGs, particularly in the Levant, have been the most frequently targeted with interventions under this doctrine. While States in the Global North have cited the doctrine in multiple instances, such as the US and the UK, the Global South has largely objected to the exercise of armed action under this doctrine in various diplomatic settings. For example, the Arab League condemned the Turkish government for their use of force in Iraq in 2015, passing Resolution 7987 to that effect.³⁷ The unified position adopted by the Arab League echoed a condemnation of Turkey’s violation of Iraq’s territorial sovereignty, and demanded that any such violations should be refrained from in the future.³⁸ The language used by States in this context largely refers to the principle of territorial sovereignty, highlighting that such incursions into another state’s territory are an infringement of Article 2(4) of the UN Charter and are thus not legitimised under a recognised exception under the Charter or via consistent State practice amounting to customary international law.

States in South America have also been vocal in their dissent to the invocation of the doctrine. For example, Venezuela defended Syria’s rights to “sovereignty, territorial integrity and political independence”³⁹ in connection with the US invasion to combat ISIL in 2014. In relation to the same conflict, Ecuador issued a similar statement claiming that “the said offensive has been carried out without the consent of the government of Syria” which constituted “a violation of the sovereignty of the Syrian State and a threat to its territorial integrity.”⁴⁰

Nevertheless, the positions of some states in the Global South have been somewhat ambiguous. While the Arab League did voice dissent against the Turkish government’s use of force in Iraq, certain members of the Arab League did agree to “as appropriate, joining in the many aspects of a coordinated military campaign against ISIL.”⁴¹ Others have invoked a vague semblance of the doctrine, such as Rwanda citing the Democratic Republic of the Congo’s “stated incapacities” to provide an effective response to the Hutu rebels in 2004, and their inability to “deal with this

³⁷ Arab League Resolution 7987/15 (11 January 2016) UN Doc S/2016/16

³⁸ Ibid, para 4

³⁹ United Nations Security Council, 7504th Meeting (17 August 2015) UN Doc S/PV.7504, p.4

⁴⁰ Chachko E and Deeks A, ‘Which States Support the “Unwilling and Unable” Test?’

<<https://www.lawfareblog.com/which-states-support-unwilling-and-unable-test>> accessed 8 September 2022

⁴¹ ‘Jeddah Communique’ (U.S. Department of State) 11 September 2014 <[//2009-2017.state.gov/r/pa/prs/ps/2014/09/231496.htm](https://2009-2017.state.gov/r/pa/prs/ps/2014/09/231496.htm)> accessed 8 September 2022

situation decisively”.⁴² Thus, there is a lack of a homogenous opposition from the Global South - on the one hand, many States condemn the use of the doctrine by powerful Global North states as a violation of state sovereignty and an undermining of the UN collective security system. On the other hand, some states have invoked the doctrine (to some degree) to launch armed action in pre-emptive self-defence against non-state actors. Some examples are explored below.

5.3.1 Israel and Hezbollah

In 2006, Israel was engaged in conflict with the Lebanese Shiite-Muslim political party and militant group, Hezbollah, along the Israel-Lebanon border. Hezbollah maintained significant political control in the Shiite-Muslim majority regions of Lebanon, near the border it shares with Israel. Initially framed as a resistance movement, Hezbollah has increasingly become more powerful and influential in Lebanese politics. In July 2006, Hezbollah launched several airstrikes on Israeli towns. Hezbollah also conducted an unexpected raid along the Israel-Lebanon border and killed three Israeli troops and captured two. In response to this, Israel launched a serious attack consisting of an invasion into Lebanese territory, attacking several parts of Lebanon, including parts that were not controlled by Hezbollah. Fighting continued until August 2006, where the Security Council passed Resolution 1701 ordering a ceasefire and “immediate cessation by Israel of all offensive military operations”.⁴³

With regards to the ‘unwilling or unable’ doctrine and its application to this conflict, Israel claimed Hezbollah’s invasion of the border to capture two Israeli soldiers to be an armed attack, thereby claiming a right to self-defence. This right was claimed against the Lebanese state, which they stated were responsible for their “ineptitude and inaction” in limiting the territorial control that Hezbollah was able to gain in Lebanon.⁴⁴ In response, Lebanon claimed that they assumed no responsibility for the border conflict that Hezbollah engaged in with Israel.⁴⁵ Nevertheless, Israel cited Lebanon’s unwillingness to control the *de facto* political power that Hezbollah wielded as a justification for their defensive armed action in Lebanon. The response from States to the conflict and Israel’s actions were rather mixed. While some accepted that Israel had a right to self-defence, others contested whether Hezbollah’s actions amounted to an armed attack. States also argued that while Israel had a right to self-defence, its response was disproportionate.

⁴² United Nations Security Council, ‘[Letter](#) dated 30 November 2004 from the Permanent Representative of Rwanda to the United Nations addressed to the President of the Security Council’, (30 November 2004) UN Doc S/2004/933

⁴³ United Nations Security Council ‘Report of the Secretary-General on the implementation of Security Council resolution 1701’ (14 March 2007) UN Doc S/2007/147, 8

⁴⁴ United Nations ‘Identical letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council’ (12 July 2006) UN Doc A/60/937-S/2006/515, 5

⁴⁵ United Nations ‘Identical letters dated 2006/07/13 from the Chargé d’affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General and the President of the Security Council (13 July 2006) UN Doc A/60/938-S/2006/518, reporting a statement of an emergency meeting of the Lebanese Council Ministers on 12 July 2006; UN Doc S/PV.5493, 13.

5.3.2. Turkey and Iraq and Syria

Since 1984, Turkey has been involved in a series of conflicts with the Kurdistan Workers' Party (PKK), a Kurdish insurgent movement which has been acknowledged by the EU, US and Turkey as a terrorist organisation. Kurdish political parties like the PKK have been struggling for an independent Kurdish state since the 1980s and have been suppressed by Turkey, Iraq and Syria for fear of losing political control. The conflict flared up in July of 2015, with at least 6,064 casualties between the two parties to the conflict to date.⁴⁶ The escalation of border conflicts to attacks on cities such as Ankara gave rise to the Turkish government's claim for a right to self-defence against the Iraqi state: "If the Iraqi Government claims that it has full sovereignty over all its territory, then it is our right to expect that it will prevent the use of Iraqi soil for terrorist attacks against our own territory."⁴⁷

The Turkish state was also involved in a series of conflicts with ISIL, based in Syria. With ISIL posing an international threat as a globally recognised terrorist organisation, the Turkish government cited a right to self-defence in a manner similar to the US' claim to self-defence against Afghanistan post-9/11: "the regime in Syria is *neither capable of nor willing* to prevent these threats emanating from its territory, which clearly imperil the security of Turkey and the safety of its nationals. Both these examples indicate the use of the 'unwilling or unable' doctrine by Turkey to justify the use of force in self-defence against Iraq and Syria for failing to control the threats posed by NSAGs in their territories.

5.3.3. Kenya and Somalia

Kenya invoked a right to self-defence against the Al-Shabaab militant group that was based in Somali territory in 2011.⁴⁸ Tensions had been ongoing across the Kenya-Somali border; however, Al-Shabaab was involved in incursions into Kenyan territory in a border conflict that was ongoing since 2010. The Al-Shabaab group had no links to the Somali government, and thus their incursions into Kenyan territory could not be classified as an armed attack attributable to a State. It is also unclear whether the scale of attacks could qualify to be classified as an 'armed attack', with Kenya citing nine different incidents as its basis for defensive action.⁴⁹ Furthermore, the Somali Transitional Federal Government was engaged in a conflict with Al-Shabaab itself, indicating that Al-Shabaab could not attribute its actions to the State. Nevertheless, the inability of the Somali government to effectively "police its own territory"⁵⁰ was used as a basis for Kenya's

⁴⁶ Turkey's PKK Conflict: A Visual Explainer | Crisis Group' <<https://www.crisisgroup.org/content/turkeys-pkk-conflict-visual-explainer>> accessed 8 September 2022

⁴⁷ United Nations Security Council 'The situation in Iraq', (18 December 2015) UN Doc S/PV.7589

⁴⁸ Hadzi-Vidanovic V, 'Kenya Invades Somalia Invoking the Right of Self-Defence' (*EJIL: Talk!*, 18 October 2011) <<https://www.ejiltalk.org/kenya-invades-somalia-invoking-the-right-of-self-defence/>> accessed 8 September 2022

⁴⁹ *ibid*

⁵⁰ Birkett DJ, 'The Legality of the 2011 Kenyan Invasion of Somalia and Its Implications for the Jus Ad Bellum' 18 *Journal of Conflict and Security Law* 427, 443

claim to a right to self-defence against Somalia, thus emulating a semblance of the ‘unwilling or unable’ doctrine to curb extraterritorial threats.

6. Pakistan and the ‘Unwilling or Unable’ Doctrine

6.1 Pakistan and the US - 2010s

The drone strikes carried out by the US in the 2010s received significant criticism. Under the pretext of self-defence, the Obama administration in particular carried out 353 drone strikes in the North Waziristan region of Pakistan, killing around 200 civilians.⁵¹ The Ministry of Foreign Affairs released a statement condemning the use of drone strikes as “a clear violation of Pakistan’s sovereignty and territorial integrity”.⁵² Harold Koh, the legal adviser to the US Department of State at the time claimed that “the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses” are factors that the US considers before launching its drone strikes.⁵³ The discourse around drone strikes as a means of eliminating ‘imminent threats’ focuses on a proportionality assessment: some argue that drones are used because they are “effective in killing so-called “high value targets” (HVTs) and other militants with fewer civilian loss”.⁵⁴ Thus, drone strikes have become increasingly used in the last decade to target militant leaders operating in regions such as the Pak-Afghan border, especially where it has been perceived that there is a lack of willingness of the Pakistani state to curb these threats on their own. However, the use of these drone strikes in Pakistan and Afghanistan, as well as in Yemen and Somalia, has been repeatedly condemned by these states as well as the European Union,⁵⁵ citing a lack of prior informed consent as the main factor of such action’s illegality.⁵⁶

Pakistan was also a target of the doctrine when the US conducted a raid to capture and kill Osama Bin Laden in 2011. According to Harold Koh, the Bin Laden raid was a valid exercise of the “inherent right to self-defence under international law.”⁵⁷ While acknowledging the difficulty of

⁵¹ ‘America’s Counterterrorism Wars’ (*New America*) <<http://newamerica.org/international-security/reports/americas-counterterrorism-wars/>> accessed 8 September 2022

Although the Bush and Trump administrations also carried out drone strikes in Pakistan, the number of drone strikes carried out by the Obama administration far surpasses the tally of the other two administrations.

⁵² ‘Pakistan Condemns US Drone Strike in North Waziristan – Ministry of Foreign Affairs’ <<https://mofa.gov.pk/pakistan-condemns-us-drone-strike-in-north-waziristan-4/>> accessed 8 September 2022

⁵³ Shapiro A, ‘U.S. Drone Strikes Are Justified, Legal Adviser Says’ *NPR* (26 March 2010) <<https://www.npr.org/templates/story/story.php?storyId=125206000>> accessed 8 September 2022

⁵⁴ Ahmad M, ‘The United States Use of Drones in Pakistan: A Politico-Strategic Analysis’ (2014) 41 *Asian Affairs* 21, 22

⁵⁵ United Nations Human Rights Council, ‘Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson’ (10 March 2014) UN Doc A/HRC/25/59, para 31

⁵⁶ *Ibid*, para 29

⁵⁷ ‘The Lawfulness of the U.S. Operation Against Osama Bin Laden’ (*Opinio Juris*, 19 May 2011) <<http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/>> accessed 8 September 2022

the application of the conventional international law on self-defence, Koh acknowledged the conflict with “an organized terrorist enemy that does not have conventional forces” that poses an ongoing yet imminent threat to the US and its allies.⁵⁸ Despite the raid’s success, 64% of Pakistanis disapproved the raid,⁵⁹ and 85% of those aware of the US raid believed that it should not have been conducted without the knowledge of the Pakistani government.⁶⁰ The latter also claimed that this was “an unauthorized unilateral action” by the US government which “shall not serve as a future precedent for any state, including the United States.”⁶¹ The language of ‘unable or unwilling’ has long been used against the Pakistani State by the US in defending its incursions on Pakistan’s sovereignty and against its territorial integrity under the guise of self-defence.

6.2 Pakistan and India - 2016

Relations between Pakistan and India were tumultuous in 2016. In January, there was a terrorist attack against the Pathankot Air Force Station in which seven Indian soldiers were killed in a gun battle which lasted 17 hours. India suspected that the attackers belong to Jaish-e-Mohammad, a non-state group it alleges is based in Pakistan. Later on in September of that year, another attack was conducted in Uri against Indian Army brigade headquarters in which 19 soldiers were killed for which India again held JeM responsible. The BBC reported it as “the deadliest attack on security forces in Kashmir in two decades”.⁶² The reaction to the two attacks was very different - while the Pathankot attack led to a joint investigation of the attack in which the two States collaborated, the Uri attack, by contrast, led to escalation and India conducted ‘surgical strikes’ in Pakistan.⁶³ The strikes were aimed at “preventing attacks being planned by Pakistan-based militants”.⁶⁴ While India reported significant casualties to terrorists, Pakistan denied that there were any strikes at all and said instead that two of its soldiers had been killed in cross-border shelling.⁶⁵

The Indian statement regarding the attacks stated that: “[t]he operations were basically focused to ensure that these terrorists do not succeed in their design of infiltration and carrying out destruction

⁵⁸ Ibid

⁵⁹ ‘A Look Back at Reaction to Bin Laden’s Death’ <<https://news.gallup.com/opinion/gallup/348971/look-back-reaction-bin-laden-death.aspx>> accessed 8 September 2022

⁶⁰ Ibid

⁶¹ Perlez J and Rohde D, ‘Pakistan Pushes Back Against U.S. Criticism on Bin Laden’ *The New York Times* (3 May 2011) <<https://www.nytimes.com/2011/05/04/world/asia/04pakistan.html>> accessed 8 September 2022

⁶² Militants attack Indian army base in Kashmir 'killing 17', *BBC News* (18 September 2016) <<https://www.bbc.com/news/world-asia-india-37399969>> accessed 22 September 2022

⁶³ Anatomy Of A Crisis: Explaining Crisis Onset in India-Pakistan Relations, *Stimson Center*, Sameer Lalwani & Hannah Haegeland <<https://www.stimson.org/wp-content/files/InvestigatingCrisesOnset.pdf>> accessed 22 September 2022

⁶⁴ Kashmir attack: India 'launches strikes against militants', *BBC News* (30 September 2016) <<https://www.bbc.com/news/world-asia-37504308>> accessed 22 September 2022

⁶⁵ Ibid, also see “Surgical Strikes” Redux?: Ratcheting Tensions in South Asia, *Opinio Juris* (26 February 2019) <<https://opiniojuris.org/2019/02/26/surgical-strikes-redux-ratcheting-tensions-in-south-asia/>> accessed 22 September 2022

and endangering the lives of citizens of our country.”⁶⁶ It also stated that they had captured terrorists which hailed from Pakistan and had “confessed to their training and arming in Pakistan or territory under the control of Pakistan.” India did not justify the attacks under the right to self-defence and instead relied on the non-legal moniker of them being ‘surgical strikes’. Commentators noted that this signalled India’s unwillingness to subscribe to the ‘unwilling or unable’ test,⁶⁷ however, there does not seem to be another justification posited for the attacks. India did not attempt to link JeM with Pakistan under the *Nicaragua* test and instead accused Pakistan of training and arming them. While this would amount to a violation of the use of force, it is not an armed attack against which there would be the right to self-defence, as per *Nicaragua*.

6.3 Pakistan and India - 2019

Tensions between Pakistan and India flared up again in 2019 when India launched an airstrike on the Pakistani town of Balakot. This was preceded by a suicide attack carried out in Pulwama, a town in occupied Kashmir, in which 44 Indian soldiers died.⁶⁸ Jaish-e-Muhammad (JeM), a terrorist organisation based in Pakistan, claimed responsibility for the Pulwama attack. The Balakot attack in 2019 was allegedly targeted at a JeM training camp; however, satellite imagery of the location struck, as well as local reports, suggest that no training camp was actually hit,⁶⁹ with some even calling the existence of the JeM training camp into question.⁷⁰ The Indian Foreign Secretary claimed that “The existence of such massive training facilities capable of training hundreds of jihadis could not have functioned without the knowledge of Pakistan authorities”,⁷¹ and that the Pakistani state “has taken no concrete actions to dismantle the infrastructure of terrorism on its soil.”⁷²

⁶⁶ Transcript of Joint Briefing by MEA and MoD, *Ministry of External Affairs, India* (September 29, 2016) <https://www.mea.gov.in/media-briefings.htm?dtl/27446/Transcript_of_Joint_Briefing_by_MEA_and_MoD_September_29_2016> accessed on 22 September 2022

⁶⁷ Legal Implications of the Recent India-Pakistan Military Standoff, *Opinio Juris* (8 March 2019) <<http://opiniojuris.org/2019/03/08/legal-implications-of-the-recent-india-pakistan-military-standoff/>> accessed 22 September 2022

⁶⁸ ‘Indo-Pak Ties in 2019: From Brink of War to Corridor of Peace’ *The Economic Times* (23 December 2019) <<https://economictimes.indiatimes.com/news/defence/indo-pak-ties-in-2019-from-brink-of-war-to-corridor-of-peace/articleshow/72923605.cms>> accessed 8 September 2022

⁶⁹ ‘Did Balakot Airstrikes Hit Their Target? Satellite Imagery Raises Doubts’ (*The Wire*) <<https://thewire.in/security/balakot-airstrikes-india-pakistan-satellite-images>> accessed 8 September 2022

⁷⁰ ‘Pakistani Village Asks: Where Are Bodies of Militants India Says It Bombed?’ | Reuters’ <<https://www.reuters.com/article/us-india-kashmir-village/pakistani-village-asks-where-are-bodies-of-militants-india-says-it-bombed-idUSKCN1QH298>> accessed 8 September 2022

⁷¹ ‘Statement by Foreign Secretary on 26 February 2019 on the Strike on JeM Training Camp at Balakot’ <<https://www.mea.gov.in/Speeches-Statements.htm?dtl/31089/Statement+by+Foreign+Secretary+on+26+February+2019+on+the+Strike+on+JeM+training+camp+at+Balakot>> accessed 8 September 2022

⁷² Ibid

Pakistan's former Prime Minister, Imran Khan, responded to the airstrikes in a speech, asking India to establish substantive proof of the Pakistani State's involvement in the Pulwama incident.⁷³ In doing so, Khan negated any links of State attribution that the Indian State could draw to the Pulwama attack. Nevertheless, the letter by the Indian Foreign Secretary draws upon the language of the 'unwilling or unable' doctrine in claiming that Pakistan has failed to dismantle such terrorist threats, thereby justifying its intervention.

It is unclear whether India invoked the doctrine in the context of self-defence. On the day of the initial strikes, the Foreign Secretary also stated that "in the face of imminent danger, a pre-emptive strike became absolutely necessary".⁷⁴ However, as Christian Henderson points out, "India did not invoke the right of self-defence or Article 51 of the UN Charter at any point within its justification",⁷⁵ which calls into question the legitimacy of the strike in the first place. Nor did the Indian state seek to establish the Pulwama bombings as an armed attack.⁷⁶ Despite claiming that the Pakistani state failed to control the JeM threat that led to the Pulwama attacks, it is unclear whether the airstrike launched on Balakot could at all be justified under the law of self-defence.

6.4 Pakistan and Afghanistan - 2022

On the 16th of April 2022, Pakistan launched airstrikes on the eastern Afghanistan provinces of Khost and Kunar, "killing at least 45 people, including 20 children".⁷⁷ The recent incident highlights the increasingly tense relationship between the bordering countries since the Taliban's takeover in 2021. According to some, the growing tensions are due to the unwillingness of the Taliban government to crack down on the Tehreek-e-Taliban Pakistan (TTP),⁷⁸ a militant organisation operating from Afghanistan which is classified as an anti-Pakistan insurgent group. The following day, the Pakistan Foreign Ministry stated that "terrorists [were] operating with impunity from Afghan soil to carry out activities in Pakistan"⁷⁹, with the recent Taliban takeover strengthening the TTP. However, the Taliban has denied providing a "safe haven" for TTP

⁷³ 'Revisiting February 27, 2019: PAF's Befitting Reply to Indian Aggression' <<https://casstt.com/post/revisiting-february-27-2019-paf-s-befitting-reply-to-indian-aggression/310>> accessed 8 September 2022

⁷⁴ Ibid at 46

⁷⁵ Henderson C, 'Tit-for-Tat-for-Tit: The Indian and Pakistani Airstrikes and the Jus Ad Bellum' (*EJIL: Talk!*, 28 February 2019) <<https://www.ejiltalk.org/tit-for-tat-for-tit-the-indian-and-pakistani-airstrikes-and-the-jus-ad-bellum/>> accessed 8 September 2022

⁷⁶ Ibid

⁷⁷ 'Pakistani Airstrikes Escalate Conflict on Afghan Border - The New York Times' <<https://www.nytimes.com/2022/04/30/world/asia/pakistan-airstrikes-afghanistan-taliban.html>> accessed 8 September 2022

⁷⁸ Siddique A, 'Pakistan's Deadly Air Strikes Inside Afghanistan Increase Tensions With Taliban' *RFE/RL* (17:07:15Z) <<https://gandhara.rferl.org/a/pakistan-air-strikes-afghanistan-taliban-relations/31814993.html>> accessed 8 September 2022

⁷⁹ Ibid

militants.⁸⁰ Earlier, Prime Minister Shehbaz Sharif cautioned the Taliban government of retaliation for the ambush in North Waziristan, which caused the death of seven Pakistani soldiers.⁸¹ However, it is unclear whether these particular airstrikes were part of said retaliation, or whether they were pre-emptive in nature.

7. The Way Forward?

Consistency in foreign policy is crucial to consolidating the legal value of the law on self-defence, as inconsistent *opinio juris* provides discursive licence to states in the Global North to propagate the validity of the ‘unwilling or unable’ doctrine. Essentially, to claim a violation of territorial sovereignty when another state seeks to eradicate an imminent threat, and then intervene in another State’s territory claiming self-defence, would undermine the validity of any objection to the doctrine. Thus, Pakistan’s position must therefore remain staunchly against the exercise of the ‘unwilling or unable’ doctrine, particularly in the context of the Afghanistan airstrikes, to remain consistent in their position on the law of self-defence.

For the Global South, it is especially dangerous to endorse the doctrine - even indirectly - as it functions to reinforce the doctrine’s legitimacy in the Global North. The lack of a homogenous opposition to the doctrine in the Global South is particularly problematic; on the one hand, States may diplomatically oppose the ‘unwilling or unable’ doctrine while on the other, promise military assistance to states fighting terrorist threats in third States’ territories. The incident in Afghanistan exemplifies this: dissent to the doctrine fades when a State perceives a threat to its own territorial sovereignty. As can be seen in the other examples cited above, a consistent position on the doctrine is difficult to maintain when an objecting State itself faces a threat from an NSAG operating in a third, usually bordering, State’s territory. However, the inconsistency in diplomatic positions in itself will inevitably legitimise further interventions under the doctrine, as States will look for any semblance of legitimacy for such interventions to maintain a strategic upper hand.

If the ‘unwilling or unable’ doctrine is to be accepted in international law, a complete upheaval of the current law on self-defence would be required. Certain efforts have been taken to initiate discourse about a more expansive approach to self-defence to include self-defence against non-state actors. At the 8262nd meeting of the UN Security Council in 2018, the majority of delegates echoed similar concerns about the Security Council and its failure to adequately address the continued violations of the Charter. Specifically, the delegate of Brazil highlighted that “the threshold for a tacit agreement between the 193 parties to the Charter is far from being met. The

⁸⁰ Goldbaum C, Padshah S and Steffensen NM, “‘I Lost Everything’: Pakistani Airstrikes Escalate Conflict on Afghan Border’ *The New York Times* (30 April 2022) <<https://www.nytimes.com/2022/04/30/world/asia/pakistan-airstrikes-afghanistan-taliban.html>> accessed 8 September 2022

⁸¹ Torelli C, ‘Pakistani Airstrike Leaves 47 Civilians Dead, 22 Injured in Afghanistan’s Khost and Kunar Provinces’ (*AOAV*, 22 April 2022) <<https://aoav.org.uk/2022/pakistani-airstrike-leaves-47-civilians-dead-and-22-injured-in-afghanistans-khost-and-kunar-provinces/>> accessed 8 September 2022

State practice being invoked by those seeking a reinterpretation is erratic and ambiguous”.⁸² This view echoes concerns about delegitimising the mandate of the Security Council’s collective security mission.⁸³ Some states, such as Ireland and Mexico, pushed for a restrictive use of the veto by the Permanent Five members, as well as an expanded role of the International Criminal Court to prosecute those who abuse the parameters of acceptable conduct during self-defence operations as ‘crimes of aggression’.⁸⁴ The report on this meeting particularly indicates the continued hesitation and reluctance of the global community to expand the notion of self-defence to target non-state actors. This continued hesitation and reluctance should be taken as a clear signal that the doctrine is a dangerous expansion of self-defence that threatens to undermine the progress in collective security that the international community has made thus far.

At the same time, however, it is clear that the world has shifted from one which is largely State-centric to one in which there are a plurality of actors, most especially non-state actors, which now engage in conduct that used to be the prerogative of States alone, namely the ability to wage war. The question thus remains: is a consensus on an expansion of self-defence more probable than it was four years ago? If so, such a discussion needs to be had on an immediate basis to prevent further illegalities, geared towards consolidating a legal framework that provides for adequate checks and balances on the right of pre-emptive self-defence. If not, the practice needs to be eradicated, and greater emphasis should be placed on empowering the Security Council in promoting world peace and order, extending its competencies to tackling threats posed by non-state actors as well.

8. Conclusion

The ‘unwilling or unable’ doctrine remains a contentious topic in the law on the use of force. The existence of non-state actors poses a real threat to particularly bordering States and this is exacerbated by the territorial State’s failure to curb the threat on its own. However, the current law on self-defence requires the attribution of an armed attack to a State, as per the ICJ’s test in *Nicaragua*. For an attribution of an armed attack by non-state actors to a State, the State must have sent the armed band or had substantial involvement in their activities. This is not the case in any of the State practice discussed in this paper where victim States conducted attacks against the host State where such non-state actors were operating without those actions being attributable. As such, the doctrine has been invoked where there are no, or few, links between the host State and the non-state actor. Currently, the work that has been produced to legitimise the doctrine of ‘unwilling or unable’ is largely academic; there is a lack of authoritative international law, evidenced by either treaties or consistent State practice, to this effect.

⁸² United Nations Security Council ‘Maintenance of international peace and security’ (17 May 2018) UN Doc S/PV.8262, 44

⁸³ *Ibid*, 19-20

⁸⁴ *Ibid*, 41-42

As a result, the doctrine cannot be accepted under international law. The risk of its abuse for the interests of militarily-powerful States, at the expense of weaker States, threatens to destabilise the collective security system that the international community has strived for under the banner of the United Nations. The Global South's inconsistency in the stance against the 'unwilling or unable' doctrine can serve as grounds for its continued use and potential legitimation. If objection does not remain persistent, the door remains open for this to be recognised as State practice in the future. States in the Global South cannot condemn a practice they themselves seek legitimacy for when they invoke it against other states in the Global South. Thus, it is imperative that the Global South presents a united front against the doctrine's continued use, including Pakistan, which has been a victim to this doctrine in the past. In so doing, it would be better if these States limit the exercise of self-defence against non-state actors in third States without attribution and work collaboratively to condemn any invocation of 'unable or unwilling'. Under international law, this doctrine is not legal and if the Global South acts cohesively, it will not become the law.