

Unable or Unwilling: new normative framework or dangerous erosion of the framework on the use of force?

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XIIth Seminar for Legal Advisors of the Armed Forces
Geneva, 19 June 2019

Introduction: it ain't over till it's over

INTERNATIONAL LAW: SELF-DEFENSE

Which States Support the 'Unwilling and Unable' Test?

By **Elena Chachko, Ashley Deeks** Monday, October 10, 2016, 1:55 PM

As readers of *Lawfare* know, a growing number of States believe that use of force in self-defense against a non-state actor on the territory of a third State, without the consent of that third State, may be lawful under international law if the non-state actor has undertaken an armed attack against the State and the third State is itself unwilling or unable to address the threat posed by the non-state actor. The content of the “unwilling or unable” test, its pedigree, and whether it has become a part of customary international law have been widely debated among international law scholars and practitioners, and one of us has addressed those issues extensively elsewhere.

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The Absence of Practice Supporting the “Unwilling or Unable” Test

17.02.15 | 13 Comments

Regular readers of the blog know that one of my hobbyhorses is the “unwilling or unable” test for self-defense against non-state actors. As I have often pointed out, scholars seem much more



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● This article is more than 2 months old

Latin Americans fear precedent set by legal justification for Syria intervention

Countries fear that legal standard of states being 'unwilling or unable' to deal with terrorism could be used in Latin America

Julian Borger in
Washington

Tue 2 Apr 2019 14:00 BST



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▲ The yellow flag of US-backed Syrian Democratic Forces in the village of Baghuz, Syria Photograph: EPA

1.) Counting support for/opposition to U&U partly misses the point

- Cf. debates over the proper qualification of the position of Germany, Belgium, Denmark...
- State acceptance that self-defence can be triggered by non-State attacks absent State imputability or even State involvement
 - ‘armed attack’ without a prior ‘wrongful conduct’ on the part of the territorial State → not fundamentally incompatible with the law of State responsibility (cf. distress, necessity >< countermeasures)
- If self-defence can be exercised against non-State attacks and we reject U&U, then what else do we use to balance interests of victim State & territorial State?



2.) U&U as a new legal framework?

- U&U as part of the ‘necessity requirement’
- New and indeterminate?
- But manifestations of a similar test elsewhere...?

Article 17

Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
 - (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;



3.) Dangerous erosion of the UoF framework?

- Slippery slope: precedents we create can turn against us
 - illustrations

WHITE HOUSE

Trump claims Mexico 'unable, or unwilling' to halt caravan

By CAITLIN OPRYSKO | 10/31/2018 09:45 AM EDT



Donald J. Trump 
@realDonaldTrump



Our military is being mobilized at the Southern Border. Many more troops coming. We will NOT let these Caravans, which are also made up of some very bad thugs and gang members, into the U.S. Our Border is sacred, must come in legally. TURN AROUND!

♥ 122K 2:45 PM - Oct 31, 2018



💬 56.6K people are talking about this



Secretary of State Mike Pompeo claims terror threat as cause for U.S. action in Venezuela

Mike Pompeo told Fox Business Network's Trish Regan he believes Hezbollah has a presence in Venezuela



MATTHEW ROZSA

FEBRUARY 7, 2019 8:20PM (UTC)

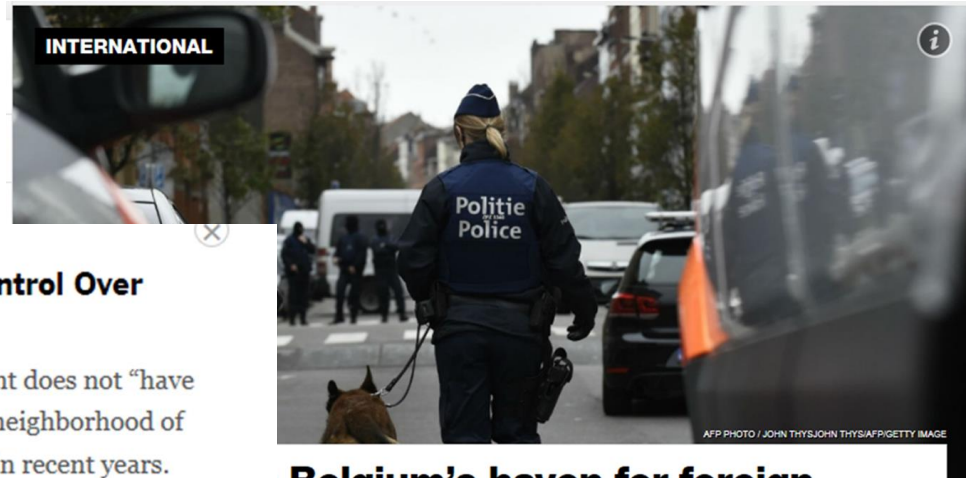


3.) Dangerous erosion of the UoF framework? (2)

Belgian Minister Says Government Lacks Control Over Neighborhood Linked to Terror Plots

Belgium's home affairs minister said that the government does not "have control of the situation in Molenbeek," a working-class neighborhood of Brussels that has been linked to several terrorism plots in recent years.

Speaking [on the VRT television channel on Sunday](#), the minister, Jan Jambon, said that the government would "step up efforts" to bring order to the area of the Belgian capital.



Belgium's haven for foreign

es to Brussels suburb where French police believe the Paris attacks were

- Insensitivity towards 'collateral damage'; fate of 'territorial' State?
- Risk of abuse particularly real if U&U is combined with GWOT discourse and broad understanding of pre-emptive self-defence in NSAG context (cf. Bethlehem principles)



4.) What now?

- Need for a more nuanced debate?
- How to balance interests/rights of victim State & territorial State?
 - Alternative criterion?
 - U&U? → what do we mean?
 - And/or?
 - Need to recognize that territorial State can pose restrictions
 - Cf. analogy to relief operations in armed conflict
 - Impact of human rights violations by territorial State?
 - Importance of reporting requirement
 - Cf. Latin-American initiative



