
Defending Weak States Against the “Unwilling or Unable” Doctrine of Self-Defense

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I. INTRODUCTION

On May 2, 2011, United States Navy SEALs entered Pakistani territory, allegedly without Pakistan's consent, to “capture or kill” Osama Bin Laden. Soon after, President Obama announced that the United States had “conducted an operation that killed Osama bin Laden, the leader of Al-Qaeda, and a terrorist who’s responsible for the murder of thousands of

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innocent men, women, and children.”¹ Pakistan vehemently objected to a “violation of its sovereignty”,² as it has also done for drone strikes carried out within its territory by the United States.³ The United States, on the other hand, defended the legality of its actions.⁴ Later on, it advocated that under international law it can continue to kill United States citizens associated with Al-Qaeda, whenever they “pose an imminent threat of attack to the United States” in host states without host state consent if that state is “unable or unwilling” to suppress the “threat”.⁵ No such limitation has been specified for the killing of non-state actors who may not be United States citizens – that is, the overwhelming majority of non-state actors targeted.

This situation is not unprecedented. Non-state actors, such as Al-Qaeda, operating within weak states such as Afghanistan and Somalia (“host states”) are often suspected of launching attacks against states such as the United States (“victim states”). These victim states have at times directly attacked such actors within the territory of the host state, without the host state's consent, alleging that the latter is unwilling or unable to prevent attacks. In the past decade alone, the United States has used predator drones to target suspected militants in Pakistan, Somalia and Yemen;⁶ the United Kingdom has used predator drones to target suspected militants in Afghanistan;⁷ Israel has targeted Hezbollah in Lebanon;⁸ Pakistan has

¹ Carrie Lyn D Guymon, Digest of United States Practice of International Law, (2011), online: Office of the Legal Adviser United States Department of State <<http://www.state.gov/documents/organization/194113.pdf>>.

² Owen Bowcott, Osama bin Laden death: Pakistan says US may have breached sovereignty, (5 May 2011), online: The Guardian <<http://www.guardian.co.uk/world/2011/may/05/osama-bin-laden-pakistan-us-sovereignty>>.

³ “US urged not to cross ‘red line’ in Fata”, Dawn (6 February 2013), online: <<http://dawn.com/2013/02/06/us-urged-not-to-cross-red-line-in-fata/>> (online version of article in prominent Pakistani newspaper).

⁴ Harold Hongju Koh, The Lawfulness of the U.S. Operation against Osama bin Laden, (May 19 2011), online: Opinio Juris <<http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/>>; Alan Silverleib, The Killing of Bin Laden: Was it Legal?, (2 May 2011), online: CNN World <http://articles.cnn.com/2011-05-04/world/bin.laden.legal_1_al-qaeda-leader-bin-cia-director-leon-panetta?_s=PM:WORLD> (“The raid ‘was conducted in a manner fully consistent with the laws of war,’ White House Press Secretary Jay Carney told reporters. Carney declined to offer specifics, but said ‘there is simply no question that this operation was lawful. ... (Bin Laden) had continued to plot attacks against the United States.’”).

⁵ United States Department of Justice, White Paper, *Lawfulness of a Lethal Operation Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force*, (undated), at 2, online: NBC News <http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf>.

⁶ Larisa Epatko, Controversy surrounds increased use of U.S. Drone Strikes, (10 October 2011), online: PBS Newshour <<http://www.pbs.org/newshour/rundown/2011/10/drone-strikes-1.html>>.

⁷ Louisa Brooke-Holland, *Unmanned Aerial Vehicles (drones): an introduction* (United Kingdom House of Commons International Affairs and Defence Section, Standard Note SN06493, 5 December 2012), online: United Kingdom Parliament <<http://www.parliament.uk/briefing-papers/SN06493.pdf>>.

⁸ Conal Urquhart & Chris McGreal, *Israelis invade Lebanon after soldiers are seized*, (12 July 2006), online: The Guardian <<http://www.guardian.co.uk/world/2006/jul/12/israelandthepalestinians.lebanon>>.

attacked suspected militants operating out of Afghanistan;⁹ and Kenya has attacked Al-Shabaab militants in Somalia.¹⁰ Recently, Ethiopia entered Eritrean territory to “wipe out bases used by militants who it contends have attacked Ethiopian targets”.¹¹ Even President Karzai once boasted that Afghanistan would send troops into Pakistan to reign in militants that were engaging in cross-border attacks if Pakistan would not act.¹²

Such self-defence has been very costly. Drone strikes carried out by the United States in Pakistan have killed at least 475 civilians, including 176 children, and the presence of drones in the sky continues to “terrorize” civilians.¹³ The 2006 Israeli invasion of Lebanon in response to Hezbollah’s killing of three and abduction of two Israeli soldiers cost the lives of some 1000 Lebanese.¹⁴ A Turkish air raid in 2011 targeting suspected members of the Kurdistan Workers Party (“PKK”) inside Iraq killed thirty-five civilians.¹⁵ In June 2011, Pakistan’s shelling of Afghanistan in pursuit of militants cost the lives of forty-two civilians and the flight of over 12,000 people for shelter.¹⁶

Thus, while victim states have genuine security concerns about attacks carried out by non-state actors, host states too need protection from the use of force by powerful victim states. Yet, as this article explains, extant scholarship on using force in ineffective host states has been fixated on the security of the victim state at the expense of the host state. First, despite the

⁹ AFP, *Afghans accuse Pakistan over fresh border shelling*, (25 September 2011), online: Dawn <<http://dawn.com/2011/09/25/afghans-accuse-pakistan-over-fresh-border-shelling/>>.

¹⁰ David McKenzie, *Kenya vows to hit Al-Shabaab across Somali border*, (16 October 2011), online: CNN <http://articles.cnn.com/2011-10-16/africa/world_africa_kenya-somalia_1_al-shabaab-qaeda-somali-capital?_s=PM:AFRICA>.

¹¹ Jeffrey Gettleman, *Ethiopia hits at bases run by militants in Eritrea*, (15 March 2012), online: New York Times <http://www.nytimes.com/2012/03/16/world/africa/ethiopian-troops-enter-eritrea.html?_r=2&ref=world&>.

¹² Carlotta Gall, *Karzai threatens to send soldiers into Pakistan*, (16 June 2008), online: New York Times <http://www.nytimes.com/2008/06/16/world/asia/16afghan.html?_r=2>.

¹³ Chris Woods & Christina Lamb, *Obama terror drones: CIA tactics in Pakistan include targeting rescuers and funerals*, (4 February 2012), online: The Bureau of Investigative Journalism <<http://www.thebureauinvestigates.com/2012/02/04/obama-terror-drones-cia-tactics-in-pakistan-include-targeting-rescuers-and-funerals/>>; Stanford Law School International Human Rights and Conflict Resolution Clinic & NYU School of Law Global Justice Center, *Living Under Drones: Death, Injury and Trauma to Civilians from United States Drone Practices in Pakistan*, (September 2012), online: Living Under Drones <<http://livingunderdrones.org/>> [*Living Under Drones*].

¹⁴ Anthony Shadid & Scott Wilson, “Hezbollah Raid Opens 2nd Front for Israel”, *The Washington Post* (13 July 2006) online: The Washington Post <<http://www.washingtonpost.com/wp-dyn/content/article/2006/07/12/AR2006071200262.html>>; “2006: War in Lebanon” *The Guardian* (20 August 2006) online: The Guardian <<http://www.guardian.co.uk/world/gallery/2008/jan/30/lebanon.israelandthepalestinians>> (timeline of 2006 conflict in Lebanon by Guardian newspaper).

¹⁵ “Turkish Jets Hits PKK Targets in Northern Iraq” Xinhuanet (12 February, 2012) online: Xinhuanet <http://news.xinhuanet.com/english/world/2012-02/12/c_131405793.htm>.

¹⁶ Hamid Shalizi, *Hundreds of Afghans protest against Pakistan shelling*, (11 July 2011), online: Reuters <<http://uk.reuters.com/article/2011/07/11/uk-afghanistan-protests-shelling-idUKTRE76A1V320110711>> (“As many as 12,000 Afghan civilians have fled villages along the border with Pakistan since mid-June, seeking refuge from frequent artillery barrages fired by Pakistani security forces, displaced families and the United Nations say.”).

heavy human toll that host states have quite clearly had to bear, scholars tend to start from the normative premise that it is the “vulnerable” victim state that always needs protection. This is despite the high number of casualties caused by victim states. Second, certain scholars have argued that the use of force by victim states within the territory of host states is justified, uncontroversial and legal even though the pedigree of the “unwilling or unable” doctrine within international law remains uncertain. The International Court of Justice (ICJ) has not recognized the doctrine, a number of scholars argue it has no place in international law, and state practice is ambiguous. Third, scholars have considered questions of doctrine in abstract isolation from the operational reality that victim states often tend to be relatively powerful states and host states, conversely, often tend to be relatively weak and therefore unable to deter victim state misbehaviour undertaken as “self-defence”. Although host states may be ineffective at suppressing non-state actors that carry out unlawful activities, they are often also, due to pervasive power inequalities, equally ineffective at holding victim states to account for arbitrary determinations of ineffectiveness. Further, even if there is a willingness on the part of the international community to step in to challenge and punish a victim state’s potentially spurious claim of self-defence, this may not be possible as it may not be easily observable whether, in any given case, a particular host state was indeed *de facto* ineffective. While doctrine should not handicap genuine claims of self-defence where a host state is *de facto* ineffective, it should also not become an apology for legitimating predatory or error-prone uses of force by victim states. This zero-sum tension between the two state’s security interests is succinctly captured by Kimberly Trapp who writes “*where ... a host State is ... unable to prevent its territory from being used as a base of terrorist operations, in contravention of its obligations under customary international law, the victim State is left with little choice. Either it respects the host State’s territorial integrity at great risk to its own security, or it violates that State’s territorial integrity*”.¹⁷

In light of the factors identified above and considering that states as diverse as the United States, Pakistan, India, Afghanistan and Kenya have used or claimed a right to use force in relatively weak states alleging self-defence, it is important to revisit the debate from a more nuanced doctrinal and policy perspective. This article takes up the task. It systematically sets out extant international legal scholarship on the use of force in ineffective host states, explains why current academic debates are incomplete and proposes remedies for dealing with the problem. Section II briefly sets out international law on the use of force and the rules of state responsibility for preventing attacks launched by non-state actors from a state’s territory. It also surveys scholarly analysis of state practice and decisions of the ICJ on using force in ineffective host states. Section III queries whether there is a need for doctrine in this area and critically analyzes the existing “unwilling

¹⁷ Kimberley N Trapp, “Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors” (2007) 56 Int’l & Comp LQ 141 at 147.

or unable doctrine". Section IV makes a normative proposal for involving the Security Council and Counter-Terrorism Committee as fact finders and information transmitters in determinations of host state ineffectiveness, so as to ensure a higher quality of decision-making that protects the interests of victim and host states. It also explains, by using the example of the United States-Pakistan relations, how the proposals could work. Section V concludes the article.

II. INTERNATIONAL LAW ON THE USE OF FORCE AND STATE RESPONSIBILITY

1. *The Use of Force*

The rules prohibiting states from using force are derived from the United Nations Charter (UN Charter) and customary international law. The ICJ has stated that "the prohibition on the use of force is a cornerstone of the UN Charter"¹⁸ and the late former ICJ President Nagendra Singh referred to the non-use of force a *jus cogens* norm of customary international law.¹⁹ Article 2(4) of the UN Charter states that "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."²⁰ Article 51 makes an exception for self-defensive uses of force stating that "nothing in the Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."²¹ Chapter VII of the UN Charter also makes it clear that the Security Council can authorize the use of force against another state to "maintain or restore international peace and security."²² While the ICJ reserved judgment on the issue in the *Nicaragua* case, some scholars opine that self-defence can also be exercised when an armed attack is "imminent".²³ The Charter also requires that "any measures taken by members in exercise of this right of self-defence shall be immediately reported to the Security Council".²⁴

The purpose of the prohibition is clear: it is an all-inclusive prohibition so as to ensure that states are left with no excuse to engage in aggression. As

¹⁸ *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* Judgment of 19 December 2005, [2005] ICJ Rep 168 at 223 [*Armed Activities*].

¹⁹ *Military and Paramilitary Activities (Nicaragua v United States)*, Merits, Separate Opinion of President Nagendra Singh, [1986] ICJ Rep 14 at 153 [*Military and Paramilitary Activities*] (Stating principle of non-use of force belongs to the realm of *jus cogens*, and is the very cornerstone of the human effort to promote peace in a world torn by strife.).

²⁰ *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7, art 2(4).

²¹ *Ibid*, art 51.

²² *Ibid*, art 42.

²³ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v US)*, Merits, [1986] ICJ Rep 14 at para 194. See e.g. Oscar Schachter, "The Right of States to Use Armed Force" (1984) 82:5 & 6 Mich L Rev 1620 at 1634; Derek Bowett, "Reprisals Involving Recourse to Armed Force" (1972) 66:1 Am J Int'l L 1 at 4.

²⁴ *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7, art 51.

Louise Doswald-Beck, Secretary-General of the International Commission of Jurists noted, the prohibition on force was "enshrined in the United Nations Charter in 1945 for a good reason: to prevent states from using force as they felt so inclined".²⁵ A United States delegate to the 1945 San Francisco conference similarly reported that "the intention of the authors of the original text was to state in the broadest terms an absolute all inclusive prohibition; ... there should be no loopholes."²⁶

This right of self-defence is further subject to the customary international law requirements of necessity, proportionality and immediacy.²⁷ Necessity governs when force can be used and requires that a victim state resort to force only when it is required to thwart an attack and when no other peaceful alternatives, such as diplomacy, remain feasible.²⁸ Proportionality dictates that the use of force must be no more than is required to mount a defense.²⁹ Immediacy requires that the action must be undertaken while the original armed attack is still occurring and there should be proximity in time between the start of the attack and the response in self-defence.³⁰

While states cannot directly use force against other states, they may also not engage in indirect attacks through, for example, supporting non-state militias. The Draft Code of Offences against the Peace and Security of Mankind accordingly states that it is an offense for a state to organize or support armed bands for incursions into the territory of another state or to tolerate the use of its territory as a base of operations by such armed bands.³¹ States also have a duty to "refrain from organizing or encouraging the organizing of irregular forces or armed bands ... for incursion into the territory of another State".³² Thus, depending on the level of control a state

²⁵ International Commission of Jurists, Communiqué de Presse, "ICJ Deplores Moves Towards a War of Aggression on Iraq" (18 March 2003) online: ICJ Press Releases <<http://www.icj.org/category/news/press-releases/page/73>>.

²⁶ *Documents of the United Nations Conference on International Organization, San Francisco, 1945* (London: United Nations Information Organisation in association with Library of Congress, 1945) at 335.

²⁷ See *Military and Paramilitary Activities*, *supra* note 19; Christine Gray, *International Law and the Use of Force*, 3d ed (OUP Oxford, 2008); Yoram Dinstein, *War, Aggression and Self-Defence*, 4th ed (Cambridge University Press, 2005).

²⁸ Gray, *supra* note 27 at 21; Dinstein, *supra* note 27 at 242.

²⁹ Michael Schmitt, "Counter-Terrorism and the Use of Force in International Law", in Fred L Borch & Paul S Wilson, eds, *International Law and the War on Terror*, (Newport: Naval War College International Law Studies vol 79, 2003) at 28.

³⁰ To illustrate how these conditions interact, see e.g. *Military and Paramilitary Activities*, *supra* note 19, at 122-123. The ICJ, in examining the legality of the use of force by the United States, opined that the conditions of necessity and proportionality were not fulfilled as the United States had acted several months after the presumed armed attack and when alternative methods for eliminating the danger were available. Compare this to the use of force after 9/11. Even in that case, the United States did not act immediately; it acted after almost a month. However, the armed attack on 9/11 and its magnitude were more clearly visible to the international community. Also, it was apparent that the United States had attempted to negotiate with the Taliban government in the month preceding the invasion. Hence, in this case, the delay might have been more acceptable.

³¹ "Report of the International Law Commission covering the work of its sixth session, 3 June-28 July 1954" (UN Doc A/2693) in 2 *Yearbook of the International Law Commission 1954*, vol 2 (New York: UN, 1959) at 150.

³² *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among*

exercises over a non-state actor, armed attacks by the actor may be attributable to that state, which could itself become a legitimate target of self-defence.³³

2. *The Responsibility of States to Prevent Attacks*

Each state also has a secondary obligation to prevent non-state actors from executing armed attacks against other states from within their territory. The ICJ has ruled in the seminal *Corfu Channel* case that a state must “not allow knowingly its territory to be used for acts contrary to the rights of other states”.³⁴ That is, “[a] State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction.”³⁵ Reiterating this obligation, pre and post 9/11 Security Council Resolutions³⁶ impose binding obligations on states to take extensive counter-terrorist measures,³⁷ “call also on the international community to redouble their efforts to prevent and suppress terrorist acts”³⁸ and “call upon all states to prevent such [criminal] acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature”.³⁹ However, this duty of prevention is not absolute.⁴⁰ Rather, it requires due diligence⁴¹ and is thus an obligation of means, not of result.⁴² Whether the standard has

States in Accordance with the Charter of the United Nations, GA Res 2625, UNGAOR, 25th Sess, Supp No 28, UN Doc A/8028, (1970), 121 at 123.

³³ See *Military and Paramilitary Activities*, *supra* note 19 at 55.

³⁴ *Corfu Channel Case (United Kingdom of Great Britain v Albania)*, Merits, [1949] ICJ Rep 4 at 22 [*Corfu Channel Case*].

³⁵ *Trail Smelter Case (United States of America v Canada)* (1938, 1941), 3 RIAA 1905 at 1963 (Convention for Settlement of Difficulties Arising from Operation of Smelter at Trail BC).

³⁶ See e.g. SC Res 1267, UNSCOR, 1999, UN Doc S/INF/55, 148; SC Res 1363, UNSCOR, 2001, UN Doc S/INF/57, 268; SC Res 1373, UNSCOR, 2001, UN Doc S/INF/57, 291 [SC Res 1373]; SC Res 1566, UNSCOR, 2004, UN Doc S/INF/60, 54 [SC Res 1566]; SC Res 1368, UNSCOR, 2001, UN Doc S/INF/57, 290 [SC Res 1368]. Also preambles to Security Council Presidential Statements on terrorism state: “The Security Council reaffirms that terrorism constitutes one of the most serious threats to international peace and security, and that any acts of terrorism are criminal and unjustifiable, regardless of their motivation, wherever, whenever and by whomsoever committed.” See also Statement by the President of the Security Council, UNSCOR, 2006, UN Doc S/PRST/2006/56 at 1; Statement by the President of the Security Council, UNSCOR, 2005, UN Doc S/PRST/2005/3 at 1; Statement by the President of the Security Council, UNSCOR, 2004, UN Doc S/PRST/2004/37 at 1 (using language identical to Jan. 18, 2005 resolution).

³⁷ SC Res 1373, *supra* note 36.

³⁸ SC Res 1368, *supra* note 36 at para 4.

³⁹ SC Res 1566, *supra* note 36 at para 3.

⁴⁰ RJ Erickson, *Legitimate Use of Military Force against State-Sponsored International Terrorism*, (Maxwell Air force Base: Air University Press, 1989) at 79; Richard B. Lilich & John M. Paxman, “State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities” (1977) 26 Am U L Rev 217 at 230; Robert Barnidge, *Non-State Actors and Terrorism: Applying the Law of State Responsibility and the Due Diligence Principle*, (T.M.C. Asser Press 2007).

⁴¹ Lilich & Paxman, *supra* note 40 at 230-231.

⁴² Tom Ruys and Sten Verhoeven, “Attacks by Private Actors and the Right of Self-Defense”

been met depends, in each case, on a number of inter-related factors including the foreseeability of risk,⁴³ the means the state possesses⁴⁴ to prevent the harm and whether there was an opportunity to prevent the harm.⁴⁵

In terms of foreseeability of risk, in the Alabama Arbitration of 1871, the tribunal declared that due diligence was to be exercised in "exact proportion to the risks" to which the belligerents may be exposed.⁴⁶ That is, a state should assess the probable risk of a harmful event occurring and is not obligated to divert all its resources towards preventing harm where the probability of occurrence may be minimal. A state that does not possess the means required to exercise due diligence to the degree necessary to prevent the harm will not be held responsible.⁴⁷ A state must also have the opportunity to prevent the injury. For example, the standard will be lower if the harmful activity occurs in a part of the state's territory where the "transportation and manpower" necessary for protecting⁴⁸ victims is not available. As Sohn and Baxter have pointed out, other factors that may be relevant in assessing the extent of the duty will depend on the territory in question, the nature of its terrain, the population and the "degree of civilization" of the area claimed.⁴⁹

It is clear then that the duty to suppress illegal conduct carried out by non-state actors must be applied in a flexible manner for host states that may be ineffective in meeting their due diligence duty due to lack of means. Sarah E. Smith argues that such states are not culpable if their power is not sufficient to control private actors.⁵⁰ Although they were writing in the 1970s—before the period of marked global emphasis on terrorism—Lilich and Paxman also essentially argued that "when no reasonable possibilities exist for preventing the activities, it may be proper to conclude that "[i]mmunity follows inability."⁵¹ As for states that are unwilling rather than unable – that is they possess the means to prevent attacks but opt not to do so – whether or not they have satisfied the due diligence test is a more complex question. For example, is a state unwilling to act because the costs of prevention outweigh its benefits, or is that state unwilling because it sympathizes with the ideology of the non-state actor? In the former situation it may still be acting diligently while in the latter, it will likely not be. Although some scholars have suggested a move towards strict liability for

(2005) 10 Journal of Conflict and Security Law 289.

⁴³ See Lilich & Paxman, *supra* note 40 at 230.

⁴⁴ See *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, [1980] ICJ Rep 3 at 34. See also Lilich & Paxman, *supra* note 40 at 230.

⁴⁵ *Ibid* at 246.

⁴⁶ *Alabama Claims arbitration* (May 8 1871), reprinted in J.B. Moore, *A Digest of International Law*, vol 7 (Washington: Government Printing Office, 1906) 1059.

⁴⁷ See Lilich & Paxman, *supra* note 40 at 270.

⁴⁸ See *ibid* at 230.

⁴⁹ Louis Sohn & Richard Baxter, *Convention on the International Responsibility of States for Injuries to Aliens* (Draft No. 12 with Explanatory Notes, 1961) 134 at 137.

⁵⁰ Sarah E. Smith, "International Law: Blaming Big Brother: Holding States Accountable for the Devastation of Terrorism" (2003) 56 Okla L Rev 735.

⁵¹ See Lilich & Paxman, *supra* note 40 at 270.

ineffective host states,⁵² it is important that an analysis of the reasons for why a state is unwilling continues to factor into determinations of state responsibility for ineffectiveness. For example, it is questionable why a developing host state should be legally obliged to divert a disproportionate amount of resources towards guaranteeing the security needs of a powerful victim state when it is unable to do so for its own citizens.

3. *Self-Defense within Ineffective Host States: A Gray Area?*

If a host state is not responsible for a non-state actor's attacks, can a victim state nevertheless use force within that host state's territory to target non-state actors? The ICJ has opined in the *Armed Activities of Congo* case and *Wall Advisory Opinion* that where attacks by a non-state actor cannot be attributed to a host state, the use of such force without obtaining the host state's consent would be illegal and therefore cannot be justified on grounds of ineffectiveness.⁵³ Interestingly, Trapp has offered an alternative interpretation of the ICJ's decision in *Armed Activities of Congo*, arguing that the decision should not at all be interpreted as prohibiting the use of force within ineffective host states but rather as prohibiting the use of force *against* host states unless the armed attack can be attributed to the host state.⁵⁴ Other scholars have also been critical of the ICJ's stance.⁵⁵ Scholars remain divided on the question. Some scholars agree with the ICJ that mere inability to prevent a terrorist attack does not automatically legitimate a resort to force within that state.⁵⁶ Among others, the late Antonio Cassese and Mary Ellen O'Connell subscribe to this view. Other scholars are of the view that necessity allows the victim state to use force in self-defence, arguing that it "may be legitimate to take military action against terrorists in states that are either unwilling or unable to meet their legal obligations ... to prevent terrorists from using their territory as launching pads for attacks on other countries".⁵⁷ For these scholars, the state's involvement in the armed attack

⁵² Renee Vark, "State Responsibility for Private Armed Groups in the Context of Terrorism", online: (2006) 11 *Juridica International* <http://www.juridicainternational.eu/public/pdf/ji_2006_1_184.pdf>; Vincent Proulx, "Babysitting Terrorists: Should States be Strictly Liable for Failing to Prevent Transborder Attacks" (2005) 23 *Berkeley J Int'l L* 615.

⁵³ *Armed Activities*, *supra* note 18 at 168; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136 at 194. It should be noted, that both of these opinions were delivered after 9/11, and thus it is clear that the court was cognizant of state practice and scholarship in the area, yet it did not support such a doctrine.

⁵⁴ Trapp, *supra* note 17.

⁵⁵ See, e.g. Michael Schmitt comments in "International Law and the Use of Drones," Summary of the International Law Discussion Group meeting held at Chatham House on Thursday, 21 October 2010 (arguing that "not only was the Court ignoring post 9/11 state practice, but that there was nothing in the text of the Article 51 which would indicate that an armed attack cannot be launched by a non-state actor"); Theresa Reinold, "State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11" (2011) 105 *American Journal of International Law* at 244 (noting that "conservative pronouncements on matters of self-defense--to the effect that private acts need to be attributed--are increasingly out of touch with post-9/11 state practice").

⁵⁶ Antonio Cassese, "The International Community's Legal Response to Terrorism" (1989) 38 *ICLQ* 589; Mary O'Connell, "Lawful Self Defence to Terrorism" (2002) 63 *U Pitt L Rev* 889.

⁵⁷ *New Threats and the Use of Force* (Copenhagen: Danish Institute for International Studies,

would affect only the choice of targets, not the legitimacy of force itself. That is, unless the attack was attributable to the host state or the host state impedes self-defence by the victim state, it cannot itself be targeted but non-state actors within its territory can be targeted without the host state's consent.⁵⁸ Kimberly Trapp, Greg Travalio, Noam Lubell, Michael Schmitt and Yoram Dinstein are proponents of this view.⁵⁹

Although at first glance the two opposing sets of views may seem irreconcilable, the boundaries are not that rigid. For example, Mary O'Connell, citing the cases of Israeli action against Hezbollah and Turkish and Iranian action against Kurdish insurgents, has stated that where a state "is unable to prevent on-going attacks, some limited force may be used to prevent future attacks."⁶⁰ Cassese also wrote that although a state that cannot control non-state actors may not itself bear responsibility, "may not oppose its sovereign rights to any foreign State that intends lawfully to use force" against the non-state actors.⁶¹ There has also been dissent within the ICJ. Judge Kooijmans in dissent wrote that, "if armed attacks are carried out by irregular bands from such territory against a neighbouring State, they are still armed attacks even if they cannot be attributed to the territorial State. It would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State, and the Charter does not so require."⁶² Judge Kooijmans, dissenting also in the *Wall Advisory Opinion*, stated that the refusal by the Court to recognize such a right of self-defence ran against Security Council Resolutions 1368 and 1373 which "recognize the inherent right of individual or collective self-defense without making any reference to an armed attack by a State."⁶³

Four scholars have also undertaken a review of state practice. Theresa Reinold finds that because victim states "proffered various legal rationales or, in some cases, none at all"⁶⁴ when using force in the territory of a host state, it is difficult to draw conclusions about the status of the doctrine by

2005) at 46, online: Danish Institute for International Studies <<http://www.diis.dk/sw12399.asp>>; see also Elizabeth Wilmshurst, "The Chatham House Principles of International Law on the Use of Force by States in Self-Defence" (2005) 55 ICLQ 963.

⁵⁸ It is questionable how, in practical terms, non-state actors can be targeted within the host state without injury being caused to the host state. For example, even targeted drone strikes, which proponents advocate are a precise mode of warfare, have caused a significant amount of civilian deaths and economic damage to civilians in Pakistan.

⁵⁹ Trapp, *supra* note 17; Greg Travalio & John Altenburg, "State Responsibility for Sponsorship of Terrorist and Insurgent Groups: Terrorism, State Responsibility, and the Use of Military Force" (2003) 4 Chi J Int'l L 97; Dinstein, *supra* note 27 at 247; Michael N Schmitt, "'Change direction' 2006: Israeli operations in Lebanon and the International Law of Self-Defense" (2008) 29 Mich J Int'l L 127 at 161 [Schmitt, "Change Direction"]; Noam Lubell, *Extraterritorial Use of Force against Non-State Actors* (New York: Oxford University Press, 2010) at 42.

⁶⁰ Mary Ellen O'Connell, "Evidence of Terror" (2002) 7 J Conflict L & Security 19 at 29.

⁶¹ Antonio Cassese, 2nd ed, *International Law* (Oxford: Oxford University Press, 2005) at 472.

⁶² *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)*, Separate Opinion of Judge Kooijmans, [2005] ICJ Rep 306 at 314; *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)*, Separate Opinion of Judge Simma, [2205] ICJ Rep 334 at 338 (concurring with Judge Kooijmans).

⁶³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Separate Opinion of Judge Kooijmans, [2004] ICJ Rep 219 at 229-230.

⁶⁴ Reinold, *supra* note 55 at 29.

looking at state practice, but nevertheless she observed that “states are making indiscriminate use of the unwillingness and inability scenarios to justify military action”.⁶⁵ A report by the Danish Institute for International Studies has also stated that “limited preventive military actions against Al Qaeda in weak states have generally been met with acceptance, if not outright support, from the international community”.⁶⁶ Tom Ruys and Sten Verhoeven, two other scholars who have studied state practice, note that, in the first 40 years of the UN Charter, victim states were generally condemned in their uses of force in ineffective host states.⁶⁷ In fact, the authors found that the Security Council often condemned incursions, many undertaken by Israel. However, after the Cold War, “states have frequently escaped condemnation by the Security Council and have even received occasional support from other states.”⁶⁸ Ruys and Verhoeven conclude, however, that the use of force in another state's territory without the attribution of an armed attack to it or substantial involvement of that state in an armed attack remains controversial and is not yet settled.⁶⁹

Ashley Deeks is another scholar who has addressed the issue. She relies on many of the same instances of state practice as the previously mentioned scholars, yet reaches a remarkably different conclusion. Deeks argues that “[m]ore than a century of state practice suggests that it is lawful for State X, which has suffered an armed attack by an insurgent or terrorist group, to use force in State Y against that group if State Y is unwilling or unable to suppress the threat.”⁷⁰ In reaching this conclusion, however, she fails to adequately engage with the ICJ's decisions to the contrary in the *Armed Activities of Congo* and *Wall Opinion* cases or acknowledge the body of scholarship that cuts against her argument. Indeed, even in terms of state practice, of the thirty-six cases Deeks cites since 1817 involving extra-territorial uses of force against non-state actors, she notes that only five countries, Israel, the United States, the United Kingdom, Russia and Turkey have “specifically invoked the ‘unwilling or unable test’ or a closely related concept.”⁷¹ This fact, coupled with her admission that she has not found a single case “in which states clearly assert that they follow the test out of a sense of legal obligation (i.e., the *opinio juris* aspect of custom)”⁷² dilutes Deeks' claim further. Certainly one must be especially careful of ascribing *ex post* legal views to legitimate behaviour of states when the states themselves

⁶⁵ *Ibid.*

⁶⁶ *New Threats and the Use of Force*, *supra* note 57 at 48.

⁶⁷ Tom Ruys & Sten Verhoeven, “Attacks by Private Actors and the Right of Self-Defense” (2005) 10 J Confl & Sec L 289.

⁶⁸ *Ibid* at 296.

⁶⁹ *Ibid* at 319-320.

⁷⁰ Ashley Deeks, “Unwilling or Unable: Toward a Normative Framework for Extra-Territorial Self-Defense” (2012) 52 Va J Int'l L 483 at 486.

⁷¹ *Ibid* at 549.

⁷² *Ibid* at 502, n 70; for a useful critique of Deeks' argument, see also Kevin Jon Heller, “Ashley Deeks' Problematic Defense of the ‘Unwilling or Unable’ Test”, *Opinio Juris* (15 Dec 2011), online: *Opinio Juris* < <http://opiniojuris.org/2011/12/15/ashley-deeks-failure-to-defend-the-unwilling-or-unable-test/> >.

have not explicitly or implicitly indicated that they are acting pursuant to legal obligation. That is, *opinio juris* is needed for the purposes of creating “novel rights or unprecedented exceptions”.⁷³

It is thus fair to summarize then that the legality of the “unwilling or unable” doctrine under international law, remains, as Jack Goldsmith has written, “unsettled”.⁷⁴ Considering that a right of self-defence in effective host states does not have any foundations in treaty law, its existence as customary law is debated, the ICJ has refused to recognize it and victim states’ uses of force in allegedly ineffective host states have not met with universal approval, it can only be safely asserted that the rules in this area remain murky. That is, while it is accurate to claim that, “[t]he assertion of a limited right to violate a nation’s borders to deal with a serious terrorist threat that the host nation is unwilling or unable to deal with is likely to be sympathetically received by most nations”,⁷⁵ *lex lata* it cannot be said with confidence, as Deeks asserts, that the “unwilling or unable” doctrine is at present an established rule of international law.

III. UNPACKING THE “UNWILLING OR UNABLE” DOCTRINE

1. Need for Doctrine

As state weakness and fragility persists, “safe havens” and “ungoverned spaces” within weak states may provide non-state actors with a base from which to engage in armed attacks against other states.⁷⁶ It is therefore not surprising that the 2002 United States National Security Strategy stated that the country was “threatened less by conquering states than ... by failing ones”.⁷⁷ Also, the list of states that have either targeted non-state actors beyond their borders or expressed a willingness to do so include not only traditionally strong states such as the United States, Russia and Israel but also weaker African countries such as Rwanda, Uganda and Kenya and

⁷³ *Military and Paramilitary Activities*, *supra* note 19 at 277.

⁷⁴ Jack Goldsmith, “Fire When Ready” *Foreign Policy* (19 March 2012), online: <http://www.foreignpolicy.com/articles/2012/03/19/fire_when_ready> (conceding that the test was not settled under international law and stating “this standard is not settled in international law, but it is sufficiently grounded in law and practice that no American president charged with keeping the country safe could refuse to exercise international self-defense rights when presented with a concrete security threat in this situation. The ‘unwilling or unable’ standard was almost certainly the one the United States relied on in the Osama bin Laden raid inside Pakistan”).

⁷⁵ Gregory M Travalio, “Terrorism, International Law, and the Use of Military Force” (2000) 18 *Wis Int’l LJ* 145 at 171; see also Christian J Tams, “The Use of Force Against Terrorists” (2009) 20 *EJIL* 359 at 381 (asserting that “the international community today is much less likely to deny, as a matter of principle, that states can invoke self-defence against terrorist attacks not imputable to another state. Instead debate has shifted towards issues of necessity and proportionality”).

⁷⁶ James A Piazza, “Incubators of Terror: Do Failed and Failing States Promote Transnational Terrorism?” (2008) 52 *Int’l Stud Q* 469 at 470 (“States rated highly in terms of state failures, irrespective of the type of state failure experienced, are more likely to be targeted by terrorist attacks, more likely to have their nationals commit terrorist attacks in third countries, and are more likely to host active terrorist groups that commit attacks abroad”).

⁷⁷ *The National Security Strategy of the United States of America*, September 2002, online: The White House Archives - President George W Bush <<http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/>>.

nuclear arch-rivals, Pakistan and India. Furthermore, as drone technology becomes financially and technically more accessible and the legal regime on using force becomes more permissive, it is almost certain that the number of states using force and the geographic scope of such force will continue to expand.⁷⁸ In fact, it has been suggested that non-state actors and as many as fifty countries are actively looking to develop drone technology.⁷⁹

It is thus imperative that such uses of force be regulated within a clear international legal framework and the debate be moved beyond abstract questions of doctrine to focus on optimally balancing the security preferences of victim and host states without privileging either unduly. Whether or not the current doctrine is satisfactory, *some* regime is certainly needed to regulate uses of force in ineffective host states. While it is true that doctrine can be abused by states, this is not in itself a good reason to avoid having rules. As Rosalyn Higgins has argued, in a similar vein, concerning whether or not there should be a doctrine of humanitarian intervention:

Many writers argue against the lawfulness of humanitarian intervention today. They make much of the fact that in the past the right has been abused. It undoubtedly has. But then so have there been countless abusive claims to the right to self-defense. That does not lead us to say that there should be no right of self-defense today. We must face the reality that we live in a decentralized international legal order, where claims may be made either in good faith or abusively. We delude ourselves if we think that the role of norms is to remove the possibility of abusive claims ever being made.⁸⁰

To critique and propose viable alternatives to doctrine, it is important to elaborate the doctrine that is currently discussed by scholars as a starting point. Ashley Deeks states that a victim state must take the following steps before it can use force to target non-state actors in the territory of an ineffective host state:

The victim state must (1) attempt to act with the consent of or in cooperation with the territorial state; (2) ask the territorial state to address the threat itself and provide adequate time for the latter to respond; (3) assess the territorial state's control and capacity in the relevant region as accurately as possible; (4) reasonably assess the means by which the territorial state proposes to suppress the threat; and (5) evaluate its prior (positive and negative) interactions with the territorial state on related issues".⁸¹

Other scholars have expressed similar views. Michael Schmitt argues

⁷⁸ Alejandro Sueldo, "The coming drone arms race" *Politico* (11 April 2012), online: [Politico](http://www.politico.com/news/stories/0412/75011.html) <<http://www.politico.com/news/stories/0412/75011.html>>; William Wan & Peter Finn, "Global race on to match U.S. drone capabilities", *The Washington Post* (4 July 2011) online: *The Washington Post* <http://www.washingtonpost.com/world/national-security/global-race-on-to-match-us-drone-capabilities/2011/06/30/gHQACWdmxH_story.html>.

⁷⁹ David Cortright, "The scary prospect of global drone warfare", Editorial, *Cable News Network* (19 October 2011) online: *CNN International* <http://edition.cnn.com/2011/10/19/opinion/cortright-drones/index.html?hpt=hp_c2>.

⁸⁰ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1995) at 247.

⁸¹ Deeks, *supra* note 70 at 506.

that “before a state may act defensively in another [state’s] territory, it must first demand that the state from which the attacks have been launched act to put an end to any future misuse of its territory. If the sanctuary state either proves unable to act or chooses not to do so, the state under attack may, following a reasonable period for compliance (measured by the threat posed to the defender), non-consensually cross into the latter’s territory for the sole purpose of conducting defensive operations.”⁸² Noam Lubell has also written that once the victim state has exhausted co-operative measures and yet the “[ineffective] state is not taking effective measures against the non-state actor, either due to lack of willingness or ability, forcible measures can be taken on that state’s territory.”⁸³

2. *Lack of Clarity*

A lack of any substantive clarity robs the “unwilling or unable” doctrine of much of its efficacy in guiding state behaviour. In principle, it is easy to agree with the broad proposition that where State X is ineffective in preventing its territory from being used to launch attacks against State Y, and State Y has attempted to “co-operate” reasonably without a satisfactory outcome, State Y should have some practical recourse, perhaps involving force even, to remedy such failure. That is, is it not unreasonable to propose, as a matter of abstract policy, that if a state is “too weak ... to prevent these operations ... that Utopia must patiently endure painful blows, only because no sovereign State is to blame for the turn of events.”⁸⁴ However, the crucial question of when precisely a host state can accurately be considered to be “unwilling or unable” remains thorny. Alleging that another state is unwilling or unable/ineffective can be a very subjective claim that is open to significant manipulation, particularly because a state’s effectiveness to deal with non-state actors may often not be easily observable to other states and thus provides greater room for conflicting and self-serving interpretations. For example, while repeated and persistent cross-border attacks may *prima facie* constitute some evidence of a state’s ineffectiveness, many related questions will still require resolution: is the source of the attack as alleged, since no state is involved? Has the victim state provoked it? Is the host state making efforts to arrest or punish the actors responsible? Is the victim state acting prematurely and possibly worsening the situation? Has it engaged in a *bona fide* effort to co-operate with the host state? Absent certainty as to whether these questions have been addressed internally by the victim state, the legality of any use of force remains in doubt.

Further, a test that requires the self-interested victim state to “attempt” to co-operate with another state to address a “threat” or to “reasonably” assess the host state’s capacity only weakens the already inadequate legal protection for weak states within the international system. It is so vague so as to allow a victim state to justify any number of fact patterns as self-defence.

⁸² Schmitt, “Change Direction,” *supra* note 59 at 161.

⁸³ Lubell, *supra* note 59 at 42.

⁸⁴ Dinstein, *supra* note 27 at 245.

When has a host state co-operated? A victim state could subjectively deem another state ineffective because it required more time or disputed the evidence upon which the victim state was relying. Alternatively, it could argue that the host state's proposal to arrest rather than kill the non-state actor is not sufficient to protect the victim state because it does not trust the judicial or law enforcement system of the host state and so forth. Similarly, a host state could erroneously claim that it is co-operative and effective even when it cannot suppress harmful conduct perpetrated by non-state actors. For example, for sake of argument, Russia may not be able to exercise a high degree of control over a remote part of its territory in Siberia. When should we say Russia is ineffective? Is seeking more time to deal with the problem indicative of inability? How much time is unreasonable? How many times does a state have to be unable to prevent the attacks before force should be authorized in its territory? If a state is improving its capacity, is it still unable? Realistically, all states may be "unable" at some point to prevent attacks just as "all states consistently fail some portions of their population."⁸⁵

Deeks argues that the victim state's approach in soliciting co-operation must be that of a "reasonable state" in that it must give the host state a "reasonable amount of time in which to respond to that threat" and make a "reasonable assessment of territorial control and state capacity".⁸⁶ However, there is little reason to think that the vagueness of such a test can be remedied by hoping that the victim state acts reasonably in self-defence – no state would claim that its own behaviour was unreasonable. Pakistan denies ineffectiveness to suppress Al-Qaeda on its territory while the United States continues to imply the opposite. Yet, this was most definitely the rationale that the United States relied on to justify its operation against Bin Laden within Pakistani territory.⁸⁷ Pakistan also denies Indian allegations of unwillingness to suppress non-state actors allegedly targeting India. Similarly, for a number of years, Russia has been calling on Georgia to allow Moscow to directly target non-state actors in the Pankisi Gorge – a somewhat lawless region of Georgia where Chechen rebels allegedly operate – yet, Georgia continued to deny ineffectiveness.⁸⁸ Eventually, Georgia was forced to allow United States and Russian soldiers into its territory to suppress rebels. In the absence of clarity then, it will often become inevitable that the powerful victim state gets to, unilaterally and without *ex post* or *ex ante* accountability, determine what qualifies as sufficient co-operation and what counts as ineffectiveness.

⁸⁵ Anna Simons & David Tucker, "The Misleading Problem of Failed States: a 'socio-geography' of terrorism in the post-9/11 era" (2007) 28:2 Third World Quarterly 387 at 387.

⁸⁶ Deeks, *supra* note 70 at 525.

⁸⁷ Marty Lederman, "The U.S. Perspective on the Legal Basis for the bin Laden Operation", *Opinio Juris* (24 May 2011), online: *Opinio Juris* <<http://opiniojuris.org/2011/05/24/the-us-perspective-on-the-legal-basis-for-the-bin-laden-operation/>>.

⁸⁸ Irakly Areshidze, "Chechen Incursions Prompt Flare-Up of Georgian-Russian Tension" *Eurasianet* (6 August 2002), online: *Eurasia.org* <<http://www.eurasianet.org/departments/insight/articles/eav080702a.shtml>>.

As Chimmi and Anghie note, such lack of clarity in international legal rules is particularly prejudicial for the weaker states likely to be subject to this doctrine.⁸⁹ When a state's "conduct is challenged as inconsistent with a legal norm or otherwise questionable, the state ... must respond— it must try to show that the facts are not as they seem to be; or that the rule, properly interpreted, does not cover the conduct in question; or that some other matter excuses non-performance".⁹⁰ This challenge, however, is only sustainable if the legal norm is reasonably clear. Making a rule precise and clear removes avenues for abuse. Even if a powerful state violates a clear test, this imposes a greater reputational cost on it than if the rule was ambiguous since it narrows the domain of argument for violation.⁹¹ Also, it is simply harder to comply with an unclear rule, even if the state is not wilfully disobedient.⁹²

A desire for clarity can also partly explain the content of international law on the prohibition of force, and in particular, the requirement that there be an armed attack before a right to self-defence can be claimed. As Louis Henkin wrote in *How Nations Behave*, an armed attack is "clear, unambiguous, subject to proof, and not easily open to misinterpretation or fabrication."⁹³ In fact, it has been acknowledged that the word 'armed' was deliberately included to reduce the occasions when force could be used, while alternatives such as 'direct attack' and 'attack' were rejected.⁹⁴ That is, armed attacks are "ordinarily self-evident ... There is rarely if ever any doubt as to whether it has occurred or by whom it was launched".⁹⁵ Thus it leaves a victim state with less room to justify an erroneous interpretation of the rules to legitimate a bogus claim of self-defence. Clarity is thus a necessary precondition for the rules to be self-enforcing and for international law to be effective.

3. Power Inequality and Information Asymmetry: Doctrinal Clarity Insufficient

However, even if the doctrine were clear, a victim state would often only

⁸⁹ Anthony Anghie & BS Chimni, "Third World Approaches to International Law and Individual Responsibility in Internal Conflicts" (2003) 2 Chinese J Int'l L 77 at 101 ("linguistic indeterminacies are resolved most often by resort to social context ... indeterminacy very rarely works in favor of Third World interests. Ambiguities and uncertainties are invariably resolved by resort to broader legal principles, policy goals or social contexts, all of which are often shaped by colonial views of the world.").

⁹⁰ Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1998) at 119.

⁹¹ Kenneth W. Abbott & Duncan Snidal, "Hard and Soft Law in International Governance" (2000) 54:3 Int'l Org 421; Kenneth W. Abbott et al, "The Concept of Legalization" (2000) 54:3 Int'l Org 401; Charles Lipson, "Why are some international agreements informal?" (1991) 45:4 Int'l Org 495.

⁹² See Chayes & Chayes, *supra* note 90.

⁹³ Louis Henkin, *How Nations Behave* (New York: Columbia University Press, 1979) at 142.

⁹⁴ Myra Williamson, *Terrorism, War and International Law: The Legality of the Use of Force Against Afghanistan in 2001* (Farnham, UK: Ashgate Publishing Limited, 2009) at 109.

⁹⁵ *Ibid*, quoting United States Senate, "Report of the Committee on Foreign Relations on the North Atlantic Treaty" (6 June 1949) Executive Report No 8 at 13.

be deterred from making erroneous claims of host state ineffectiveness if it fears that a breach may be detected and punished. That is, non-compliance must be observable. A punishment against an erroneous determination could take a number of forms: states may lower their reputational assessment of the victim state,⁹⁶ thus depriving it of the benefits of future co-operation or reducing its standing in the international community, or they may retaliate or reciprocate with a tit-for-tat response against the victim state – for example, by using force against the victim state. For any of these sanction mechanisms to work, though, two conditions must be satisfied: first, information must be available to the injured host state or other states in the international community that allows them to assess whether or not a victim state has made an unreasonable and erroneous determination of ineffectiveness. As Guzman writes “a violation of international law generates a reputational sanction only if some other country knows about the violation. It follows that a violation will lead to a smaller reputational loss if fewer countries know about it. By reducing the visibility of their violations, then, states reduce the reputational consequences”⁹⁷. Second, once information about compliance becomes available, there must be a credible mechanism to sanction a state that acts illegally. If a victim state realizes either, that its breaches will not be detected or, even if they are detected, that they will not be sanctioned (by the imposition of reputational costs, for example), the incentives to comply with the rule in question are reduced. Unfortunately, in the case of the “unwilling or unable” doctrine, it is unlikely that both these conditions can be concurrently satisfied. While the host state may possess information about an erroneous determination, it most likely will not be in a position to credibly punish a victim state, as host states tend to be significantly weaker than victim states. Table 1 below sets out twelve incidents since 2001 when victim states used force in allegedly ineffective host states and the relative “power” of each state based on a widely used measure of state power in international relations.⁹⁸

⁹⁶ Robert O Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton: Princeton University Press, 1984) at 106 (“Regimes rely not only on decentralized enforcement through retaliation but on government desires to maintain their reputations. ... For reasons of reputation, as well as fear of retaliation and concerns about the effects of precedents, egoistic governments may follow the rules and principles of international regimes even when myopic self-interest counsels them not to.”); Jack L Goldsmith & Eric Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005) at 90 (“States refrain from violating treaties (when they do) for the same basic reason that they refrain from violating non-legal agreements: because they fear retaliation from other states or some kind of reputational loss, or because they fear a failure of coordination.”); Robert D Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton: Princeton University Press, 1993) at 183 (“The sanction for violating [the norms and expectations generated by this network] is not penal, but exclusion from the network of solidarity and cooperation.”); Robert Axelrod, *The Evolution of Cooperation* (New York: Basic Books, 1984); see also Andrew Blandford, “Reputational Costs Beyond Treaty Exclusion: International Law Violations as Security Threat Focal Points” (2011) 10:4 Wash U Global Studies L Rev 669.

⁹⁷ Andrew T Guzman, *How International Law Works* (London: Oxford, 2007) at 96.

⁹⁸ The table is constructed from data available from a common dataset used to measure state capabilities, the Composite Index of National Material Capabilities. See J David Singer, Stuart

TABLE: POWER ASYMMETRIES BETWEEN VICTIM STATES AND
HOST STATES, 2001-2011

Year	Victim State	Power Rank	Host State	Power Rank
2001	United States	2	Afghanistan	77
2002	Russia	5	Georgia	114
2003	Uganda	80	DRC	127
2003	Israel	46	Syria	40
2004-2012	United States	2	Pakistan	13
2004	Rwanda	104	DRC	127
2006-2008	Turkey	12	Iraq	36
2006	Israel	46	Lebanon	93
2008	Columbia	32	Ecuador	71
2010	France	10	Mali	112
2011	Pakistan	13	Afghanistan	77
2011	Kenya	65	Somalia	110

As the table illustrates, in all but one instance of the use of force against non-state actors after 9/11 (2003 Israel-Syria conflict) in apparently ineffective host states, there were significant power inequalities between the victim and host state. It is thus questionable whether a victim state facing a much weaker host state in a private, adversarial and bilateral setting of such disparity would not be tempted to behave unreasonably in assessing whether the host state has been co-operative or whether it is effective in meeting its obligations.⁹⁹ It is indeed inconceivable to think that Somalia, Yemen or Pakistan would be able to punish the United States, even if it was clear to those states that the latter was making a bogus determination of ineffectiveness. Deeks notes that as a "historical matter, there appear to be few cases in which the territorial state objected to the use of force on its territory and then resorted to force in response."¹⁰⁰ This is hardly surprising; one would not expect a rational, but weak host state to retaliate against a much stronger state even if the victim state acted against it. Since it is unlikely that in over two centuries, a victim state has never used force unreasonably in the territory of a victim state, her finding simply confirms the hypothesis that weak host states are almost never in a position to credibly challenge victim states that use force in their territory illegally.

Yet, this begs a question. What prevents other states from substituting for the lack of power of a weak host state by stepping in to punish a

Bremer, and John Stuckey, "Capability Distribution, Uncertainty, and Major Power War" in Bruce Russett ed, *Peace, War, and Numbers* (Beverly Hills: Sage, 1972) 19.

⁹⁹ Nico Krisch, "International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order" (2005) 16 EJIL 369 at 390 ("Bilateral negotiations are far more likely to be influenced by the superior power of one party than are multilateral negotiations, in which other states can unite and counterbalance the dominant party"); Andrew T Guzman, "Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties" (1998) 38 Va J Int'l L 639.

¹⁰⁰ Deeks, *supra* note 70 at 533, n 164.

recalcitrant victim state? The problem here is that it is unlikely that credible information will be readily available to other states for them to make an informed assessment as to whether the victim state made an erroneous determination. When a state's armed forces attacks or intends to attack another state, the source of the attack, its magnitude and therefore the legitimacy of a self-defensive response is often more visible. In fact, movement of a state's troops, mobilization on the border, and statements of military and political leaders may be indicative. On the other hand, in the case of self-defence against non-state actors, there is often low-visibility as to whether or not an armed attack has actually taken place, whether the source is as alleged by the victim state and, most importantly, whether the host state is indeed ineffective at dealing with the suspected perpetrator, as claimed by the victim state. A lack of observability means that it becomes difficult for the international community to detect and therefore punish a victim state that makes arbitrary determinations.

This lack of observability can also have an opposite, yet equally perverse effect of hindering legitimate exercises of self-defence. If ineffectiveness is not visible to other states, relatively powerful host states can also "hold-up" genuine claims of self-defence by making erroneous claims of effectiveness in situations where the victim state is relatively weaker than the host state. For example, Afghanistan sometimes claims that Pakistan is ineffective at preventing non-state actor attacks against it. Even if the claim is assumed to be sound, since Pakistan's alleged ineffectiveness is not observable by the international community and Pakistan is not a state that Afghanistan can challenge, arguably Pakistan is able to block a potentially legitimate claim of self-defence. And this has historically been the case; despite allegations of ineffectiveness, Afghanistan has never used force to target non-state actors in Pakistan. Similarly, although Pakistan has been alleging for some time that India bears responsibility for attacks by non-state actors in its Baluchistan province, Pakistan has never been able to act in self-defence against its nuclear-armed neighbour, even if the allegations were true.¹⁰¹

Further, a lack of transparency in situations surrounding self-defence against non-state actors is troubling for yet another, more systemic, reason. As argued above, for international law to be effective, it must be identifiable when a state is cheating the rule, and recalcitrant states must be sanctioned even if punishment is simply reputational. If there is no transparency in state actions, other states cannot monitor behaviour, identify violations and therefore assess whether any particular state is 'cheating' the rules¹⁰² - in this

¹⁰¹ Qaiser Butt, "Balochistan conflict: PM's talks with leaders unlikely to succeed", Express Tribune (7 Aug 2011), online: Express Tribune <<http://tribune.com.pk/story/225958/balochistan-conflict-pms-talks-with-leaders-unlikely-to-succeed/>>.

¹⁰² Kenneth W Abbott & Duncan Snidal, "Why States Act Through Formal International Organizations" (1998) 42:1 J Confl Resolution 3 ["Why States Act"]; Helen V Milner, *Interests, Institutions, and Information: Domestic Politics and International Relations* (Princeton: Princeton University Press, 1997); James D Morrow, "Modeling the Forms of International Cooperation: Distribution vs. Information" 48:3 Int'l Org 387; Kenneth W Abbott, "Trust But Verify: The Production of Information in Arms Control Treaties and Other International Agreements" (1993)

case, the “unwilling or unable” doctrine. Kandori argues in the context of community enforcement of social norms that “a single defection by a member [then] means the end of the whole community trust, and a player who sees dishonest behaviour starts cheating all of his opponents. As a result, defection spreads like an epidemic and cooperation in the whole community breaks down”.¹⁰³ The international legal system operates on a similar principle. Even states that are not harmed by the defection of another state should have an incentive to punish states that violate the rules, for fear that violations will spread and international peace and security may be jeopardized. Thus, for community enforcement to be feasible, violations of rules must be observable and identifiable by other states. If this is not happening, the efficacy of the international legal system may be eroded.

Of course, a qualification is in order here. This article has emphasized that it is important that violations of doctrine should be identifiable for doctrine to be effective in constraining state behaviour. However, if states obey international law mainly out of normative preferences, as assumed by a number of international legal scholars, rather than out of some instrumental calculations, then an “unwilling or unable doctrine” may be effective even in the face of acute informational and power asymmetries.¹⁰⁴ However, the fragility of the prohibition on the use of force and ubiquitous nature of state aggression in recent decades would suggest that normative constraints have been weak at best.¹⁰⁵ Rather, it appears that in matters of national security and defense, states may be particularly less open to moralistic or idealistic constraints of international law. Here, rational calculations of cost-benefit analysis may play a greater role in determining what action a state should take. As such, perhaps a more realistic and policy-oriented approach to matters of international security would be desirable, and a rational choice framework, as adopted in this article, could show a greater potential in diagnosing the substantive problems and framing a better legal solution to the problem of self-defence in effective host states.¹⁰⁶

¹⁰³ Cornell Int'l LJ 1. Literature on the economics of information also notes this problem. Actors that wish to transact with counter-parties may have imperfect information about the behaviour of other actors, leading to adverse selection, moral hazard and information monopolies that hinder beneficial co-operation in the marketplace. See generally George Akerlof, “The Market for Lemons: Quality Uncertainty and the Market Mechanism” (1970) 84:3 QJ Econ 488; Michael Spence, “Job Market Signaling” (1973) 87:3 QJ Econ 355.

¹⁰⁴ Michihiro Kandori, “Social Norms and Community Enforcement” (1992) 59 Rev Econ Stud 63 at 69.

¹⁰⁵ See e.g. Abram & Antonia Handler Chayes, “On Compliance” (1993) 47:2 Int'l Org 175 at 179; Thomas M Franck, “Legitimacy in the International System” (1988) 82:4 AJIL 705 at 706 (“[C]ompliance is secured ... by perception of a rule as legitimate by those to whom it is addressed”.); Harold Hongju Koh, “Why Do Nations Obey International Law?” (1997) 106:8 Yale LJ 2599 at 2603 (describing a “process of interaction, interpretation, and internalization of international norms”).

¹⁰⁶ See e.g. Michael J Glennon, *The Fog of Law: Pragmatism, Security, and International Law* (Palo Alto: Stanford University Press, 2010).

¹⁰⁷ For rational choice approaches to international law, see generally Guzman, *supra* note 99; Eric A Posner & Alan O Sykes, *Economic Foundations of International Law* (Cambridge: Harvard University Press, 2013).

IV. AN ALTERNATE FRAMEWORK FOR SELF-DEFENSE IN INEFFECTIVE HOST STATES

1. *The Security Council as Fact-Finder and Information Transmitter*

In the last section, the article has sought to demonstrate that the unwilling or unable doctrine “contains [inherent] flaws that make it impossible to control behaviour, even if the will to do so exists.”¹⁰⁷ Whereas the *Caroline* case reversed “self-defense ... from a political excuse to a legal doctrine”,¹⁰⁸ the “unwilling or unable” doctrine could be credited with doing the opposite. The article acknowledges that the threat of non-state actors perpetrating armed attacks from the territory of fragile states is real; yet, it has sought to point out that it is not the only or even the most significant threat to international peace and security. Recent experience has demonstrated however, that equally catastrophic harm to persons and property can result from victim states “defending themselves”. Recognition of this fact is important to bridge the divide between scholars who flatly refuse the validity of the unwilling or unable doctrine and others who are willing to embrace this doctrine wholeheartedly in favour of victim states.

This article proposes that considering the acute power and informational asymmetries prevalent in the operation of the “unwilling or unable doctrine” and the lack of limitations on victim state behaviour, it is necessary to impose constraints on victim states if international peace and security is to be maintained.¹⁰⁹ It therefore proposes that, subject to existing restrictions on self-defence contained in the UN Charter and customary international law, as part of the “unwilling or unable doctrine” a victim state be permitted to use force in self-defence against non-state actors launching armed attacks from within ineffective host states, *if* the victim state is willing to bear the burden of disclosing to the Security Council why it deems the host state to be ineffective – or “unwilling or unable”. Ideally, a claim of ineffectiveness would precede an act of self-defence since members of the Security Council are always “on-call”.¹¹⁰ However, as a second best alternative, where an armed attack is imminent or has already been consummated, the reasons for ineffectiveness could be given as part of a state’s self-defence reporting obligations. The article, as explored in detail below, also proposes that the

¹⁰⁷ Sarah V Percy, “Mercenaries: Strong Norm, Weak Law” (2007) 61 Int’l Org 367 at 375.

¹⁰⁸ R Y Jennings, “The *Caroline* and *McLeod* Cases” (1938) 32 AJIL 82 at 82.

¹⁰⁹ Although it is beyond the scope of this article to engage the debate about pre-emptive uses of force, it firmly places itself in the spirit of the clear preferences expressed by a majority of states at the World Summit in 2005, that the rules on using force should not be relaxed. Thus, article 51 should remain the appropriate paradigm for self-defence against both, interstate armed attack and non-state actor armed attacks. See *World Summit Outcome*, UNGAOR, Res. 60/1, UN Doc A/RES/60/1 (2005) at para 77 (“We reiterate the obligation of all Member States to refrain in their international relations from the threat or use of force in any manner inconsistent with the Charter.”).

¹¹⁰ “Emergency Security Council Meeting on North Korea” *CBS News* (19 December, 2010) online: CBS News <http://www.cbsnews.com/2100-202_162-7163527.html>; “UN Holds Urgent Talks on Mali Crisis” *VOA News* (3 April, 2012) online: VOA News <<http://www.voanews.com/english/news/UN-Security-Council-to-Hold-Emergency-Meeting-on-Mali-145895285.html>>.

Security Council should draw on substantive expertise from its Counter-Terrorism Committee (CTC) to verify whether or not a particular host state is unwilling or unable. And in the event that information is still lacking as to discerning a state's effectiveness, or the host state does not challenge the claim, the Security Council should set-up a fact-finding mission to determine the question. The article does not propose empowering the Security Council but rather utilizing the Council as a channel for facilitating information about ineffective host states for the benefit of the international community.¹³⁴ In the end, each state is to judge for itself the legitimacy of an act of self-defence by another state and if necessary, punish the recalcitrant state.

To illustrate the point briefly, when Israel launched a major attack within Lebanese territory in 2006 to target Hezbollah, its Permanent Representative to the UN wrote that "responsibility for this belligerent act of war lies with the Government of Lebanon".¹¹¹ In a subsequent Security Council meeting, the Israeli representative stated that "Israel's actions were in direct response to an act of war from Lebanon."¹¹² Yet, as argued earlier, while Lebanon clearly has a duty to prevent attacks against Israel, even if the "unwilling or unable" doctrine were considered settled law, Israel's self-defence in its territory would not be legitimate unless Lebanon was *de facto* unwilling or unable to prevent the attacks. Yet, Israel did not specify in unambiguous terms why it is that Lebanon should be considered responsible or even ineffective. The failure by Israel to provide any basis on which to conclude why Lebanon should be deemed ineffective meant that neither the international community nor Lebanon had the ability to counter or assess the claim. According to the proposal advanced in this article, Israel would have a right to exercise self-defence under the "unwilling or unable doctrine" only if it provided information to the Security Council concerning how it had assessed Lebanon to be ineffective. Had Israel tried to co-operate with Lebanon? Had it furnished Lebanon with necessary intelligence and given it a reasonable opportunity to arrest the perpetrators? Had it provided any evidence of communication and diplomatic exchanges with Lebanon? Had Lebanon shown a capacity and willingness to meet its international law obligations, as per the CTC's records? Provided such information, Lebanon could have then countered Israel's claim. If it were unable to do so, the Security Council could arrange a fact-finding mission to investigate Lebanon's ability and willingness. If Lebanon refused to host such a mission or could not challenge the claim adequately still, then Israel, subject to other requirements of international law, would indeed be allowed to use force within Lebanese territory.

The Security Council would at this juncture act as a fact-finder and information transmitter for the international community in determining host state ineffectiveness. This has several advantages. Not only is the victim state

¹¹¹ 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, UN SC, 61st Year, UN Doc A/60/937, S/2006/515 (12 July 2006).

¹¹² UNSCOR, 61st Year, 5489th Mtg, UN Doc S/PV.5489 (July 14, 2006), at 6.

obliged to make its claim of ineffectiveness less opaque, but the host state also has an incentive to counter the claim. If victim and host states believe that justification will be needed for their actions, they are more likely “to provide truthful information.”¹¹³ Since information availability is crucial to ensuring state compliance with international laws,¹¹⁴ the incentives for both host and victim state misbehaviour would be reduced, thereby reducing the structural weaknesses present in the unwilling or unable doctrine. If the host state is not effective, the reasons will also come to the fore and the legitimacy and necessity of victim state action will become more visible for the international community. Thus, an entrenchment of the transparency proposals of this paper would similarly have some effect in preventing the “unwilling or unable” doctrine – which may serve a valuable purpose in some cases – from being abused.

The process would also add much needed consistency and clarity to defining ineffectiveness. If the Security Council, for example, finds (whether through voluntary disclosure or a fact finding mission) that State A did not send its police forces to a remote part of its territory to suppress a non-state actors and other states disapprove of such action, then that finding would no doubt hold “precedential value” for other states in a similar situation. Similarly, if other states have disapproved of the behaviour of State B when it gave an economically poor state ten days to suppress a non-state actor when the risk of attack was far from imminent, then that also would add conceptual clarity and predictability to the concept of state ineffectiveness.

Another significant benefit of such fact-finding would of course be capacity-building for ineffective host states.¹¹⁵ Many states that were at one point fragile and on the verge of failed or failed recovered in building their administrative capacity without military intervention.¹¹⁶ It is probable that

¹¹³ Arthur Lupia & Mathew D McCubbins, “Who Controls? Information and the Structure of Legislative Decision Making” (1994) 19:3 *Legis Stud Q* 361 at 368. (“If an information provider believes that the truth of his statement is likely to be verified, dissembling is less likely to get the information provider the outcome he desires. As a result, the more likely verification becomes, the more likely the information provider is to provide truthful information.”).

¹¹⁴ See Section III c, above at 21-25.

¹¹⁵ David Cortright, “A Critical Evaluation of the Counter-Terrorism Program: Accomplishments and Challenges” (Paper Presented to the Global Enforcement Regimes, Transnational Organized Crime, International Terrorism and Money Laundering, at the Transnational Institute, Amsterdam, 28-29 April 2005) [unpublished] (“The requirements for implementing Resolution 1373 often involve substantial levels of training, the development of new administrative systems, and the purchase and installation of technically sophisticated equipment. Many states need help to improve policing and law enforcement systems, and to create financial regulatory mechanisms and financial intelligence units. Assistance may also be needed for the development of computerized links among security-related units, improved systems for identifying fraudulent travel documents, better mechanisms for controlling customs and immigration, and computerized equipment to screen passengers and cargo at border entry points. The Security Council’s CTC has received numerous requests for assistance in these areas.”); Gerald B Helman & Steven R Ratner, “Saving Failed States”, *Foreign Policy* (Winter 1992-1993) 3 at 18-19 (In the context of rebuilding failed states so Helman & Ratner suggest that “the Security Council is the most efficient organ available, ... but [given its] limited experience with economic and social matters” a “subgroup” might be established in the UN Secretariat “to oversee each conservatorship”).

¹¹⁶ See The Fund for Peace, *The Failed States Index: Frequently Asked Questions*, at 10, online:

the Security Council may find that a host state cannot be “rescued” or that the state is only on the margin of ineffectiveness and therefore simply needs capacity building. The Security Council may be particularly well suited to recognize where such assistance is needed and make provision for it in the same forum that it is reviewing a claim of host state ineffectiveness – this would be more efficient than dealing with capacity and capacity-building in different forums or at different times.

The proposal advanced in this article, although grounded in policy squarely fits within the framework of existing international law. The Security Council is authorized under the UN Charter to “maintain international peace and security” Further, under the UN Charter, self-defensive force must already be reported to the Security Council. Indeed, what this article proposes is that states that invoke the “unwilling or unable” doctrine to use force in other states without their consent be required to furnish reasons why they consider a host state as ineffective. Also, the Security Council should take a more pro-active role and when necessary, to set up fact-finding missions to verify host state effectiveness. It has been stated that the “Security Council has the clearest Charter authority to establish a fact-finding body.”¹¹⁷ Article 34 of the UN Charter also makes clear that the Security Council has investigatory powers.¹¹⁸ Further, in 1991, the General Assembly passed a resolution affirming that “[t]he Security Council should consider the possibility of undertaking fact-finding to discharge effectively its primary responsibility for the maintenance of international peace and security”.¹¹⁹ Rosalyn Higgins has also written that the “Security Council can investigate any dispute and over the years some use has been made of fact-finding missions ... [and the] success of the fact finding missions has been variable, depending upon the co-operation of the state concerned and the quality of the team”.¹²⁰

2. *Involving the UN Counter-Terrorism Committee*

This article also suggests involving the CTC in fact-finding whether a state is ineffective. The CTC was created after September 11 to monitor

The Fund for Peace <<http://www.fundforpeace.org/global/?q=fsi-faq#9>> (“In the 1970s, analysts predicted dire consequences, including mass famine and internal violence in India, citing rapid population growth, economic mismanagement, and extensive poverty and corruption. Today, India has turned itself around. Similarly, South Africa appeared headed for a violent race war in the 1980s, but it pulled back from the brink in a negotiated settlement that ushered in a new era of majority rule, a liberal constitution, and the destruction of its nuclear weapons program. In the past year, since the 2005 index, several countries that were teetering on the edge improved measurably.”).

¹¹⁷ Edward A Plunkett Jr, “UN Fact-Finding as a Means of Settling Disputes” (1969) 9 Va J Int’l L 154 at 178.

¹¹⁸ *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7, art 34 (“The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.”).

¹¹⁹ *Declaration on Fact-Finding by the United Nations in the Field of Maintenance of International Peace and Security*, UN GA, 67th Plenary Meeting, UN Doc A/RES/46/59 (9 December 1991) at para 8.

¹²⁰ Higgins, *supra* note 80 at 171.

counter-terrorism enforcement measures and facilitate the development of state capacity to combat terrorism.¹²¹ The CTC “works to bolster the ability of United Nations Member States to prevent terrorist acts both within their borders and across regions”.¹²² Its mission, wrote one commentator, is to “raise the average level of government performance against terrorism across the globe.”¹²³

Almost all states are obliged to submit reports to the CTC annually since 2001. Such reports outline the efforts they have made to comply with Security Council Resolutions 1373 and 1624.¹²⁴ The CTC claims that “these reports form what many experts consider to be the world’s largest body of information on the counter-terrorism capacity of each of the 192 UN Member States”.¹²⁵ David Cortright writes that “CTC efforts to collect information from governments on counter-terrorism capacity and implementation have been highly successful.”¹²⁶ There is little doubt that UN member state compliance with CTC reporting requests has been very impressive and indeed the CTC “has received unprecedented co-operation from States.”¹²⁷ All UN member states submitted first-round reports to the CTC explaining their efforts to comply with Resolution 1373.¹²⁸ As of June 2007, 700 reports had been submitted to the CTC.¹²⁹ The CTC has also been highly successful in promoting the ratification and accession of international frameworks on counter-terrorism. Indeed, “[t]he CTC has received high levels of cooperation from UN member states.... Beginning in March 2005, the CTC started to conduct site visits to selected countries”.¹³⁰

Considering this, the CTC would thus have first-hand information not only about each state’s compliance with international obligations to prevent non-state attacks, but more importantly about each state’s ability and willingness to do so. It can thus add significant value to the fact-finding

¹²¹ For an overview of the CTC’s current work, including a survey of the implementation of the Security Council Resolution 1373, see generally *Letter dated 17 August 2011 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the Secretary-General*, UNSC, 66th Sess, UN Doc S/2011/463 (2011) [mimeo].

¹²² Security Council Counter-Terrorism Committee, *Our Mandate*, online: Security Council Counter-Terrorism Committee <<http://www.un.org/en/sc/ctc/>>.

¹²³ Eric Rosand, “Current Developments: Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism” (2003) 97 AJIL 333 at 334.

¹²⁴ See Security Council Counter-Terrorism Committee, *Country Reports*, online: Security Council Counter-Terrorism Committee <<http://www.un.org/en/sc/ctc/resources/countryreports.html>>.

¹²⁵ *Ibid.*

¹²⁶ Cortright, *supra* note 115 at 5.

¹²⁷ Eric Rosand, “The Security Council As ‘Global Legislator’: Ultra Vires or Ultra Innovative?” (2004) 28 Fordham Int’l LJ 542 at 583.

¹²⁸ Rosand, *supra* note 123 at 335.

¹²⁹ CSR Murthy, The UN Counter-Terrorism Committee: An Institutional Analysis, FES Briefing Paper 15 (September 2007), at 7, online: Friedrich-Ebert-Stiftung <<http://library.fes.de/pdf-files/iez/04876.pdf>> (“Since September 2001, member states deposited nearly 700 accession/ratification instruments relating to 12 UN-system generated laws with regards to suppression of terrorist acts in one or other form....To put it in other words, 40 per cent of the total number of accessions and ratifications deposited during the past five decades belong to the period after the CTC was established”).

¹³⁰ Cortright, *supra* note 115 at 3.

process for the Security Council. Of course, this is not to suggest that this information will be conclusive – only that the input from the CTC may need to be combined with other measures of capacity in combination with the Security Council's verification process to determine a state's ability or willingness.

A state's compliance assessment by the CTC would essentially be a function of three variables that assess a state's willingness to become effective in dealing with non-state actors. First, has a state ratified the relevant treaties or shown a determined resolve to do so? Second, has that state been able to comply with obligations under international law? Finally, the crucial question would be whether the state is *bona fide* attempting to improve its capacity annually and co-operating with data collection efforts of the CTC? Of course, the goal here is not to reduce a case-by-case nuanced assessment to a simple yes-no compliance question, but only to aid the Security Council and the international community in answering the question of compliance. Additionally, for the determinations of the CTC to be useful, its views and information about a particular state's compliance levels should be available on a continuous basis. That is, the international community must be aware of the direction a state is headed in terms of its compliance obligations for two different periods if it hopes to assist that state with improving its compliance levels or to simply sanction or outcast a state that is unwilling to do so. A state can truly be considered to be ineffective only if it persistently has poor compliance levels – for example, one or two bad years would not mean that the state is ineffective but it would highlight to victim states and the international community that the state may need assistance to prevent it from becoming permanently ineffective at suppressing non-state actors that carry out unlawful activities. Similarly, where a state is showing demonstrable signs of improvement, the victim state will need to justify its claim of ineffectiveness to a higher degree if it wishes to use force within such a state.

3. *Last Resort: Organizing Fact-Finding in Host States*

In ideal circumstances, the role of the Security Council would be passive. It would simply collect information that the victim and host states disclose voluntarily supplement it with information that the CTC possesses and in doing so, make the issue of a host state's ineffectiveness more transparent for the international community, thereby discouraging erroneous determinations. While disclosure would in many cases be voluntary as the victim and host state should both have incentives to present their effectiveness/ineffectiveness claims in the best lights so as to escape censure, there may be times when more active investigation and fact-finding may be necessary. Accordingly, the Security Council should act through its resolutions and request more information from states. If necessary, it could even set up fact-finding mission when faced with, for example, a host state that refuses to discuss its effectiveness or one that has not reported to the CTC for a number of years. In such cases, rather than open up the territory of that host state for intervention, considering the huge costs in terms of life and property that this has tended to entail in the past, the Council could

promptly set-up a fact finding mission to determine whether the host state is *de facto* effective. This could involve a country visit to the host state by a mission, similarly structured to those undertaken for human rights violations by Human Rights Council appointed Special Rapporteurs and working groups, to assess in greater detail the situation of the host state in terms of effectiveness. The mission could gather and collate reliable information on the sites from which non-state actors are alleged to operate, such as the Federally Administered Tribal Areas of Pakistan, interview military and police personnel and review the capacity of the host state's security and intelligence apparatuses to complement information furnished by the victim state. To the extent that the host state is wary of sharing sensitive information, guarantees of confidentiality – backed by the Security Council – could be furnished. Members of the 1540 Committee and the CTC, lawyers, security, police and counter-terrorism experts drawn from neutral states and host and victim state could be part of such a mission.

In the past, the Security Council has established investigative commissions in similar situations of disputed facts. For example, the Commission of Investigation concerning Greek frontier incidents was set-up in 1946 to “ascertain the facts relating to the alleged border violations along the frontier between Greece on the one hand and Albania, Bulgaria and Yugoslavia on the other”.¹³¹ Similarly, a crisis in the Middle East in 1958 presents another relevant example of fact-finding. According to E.A. Plunkett, “[w]hen the Lebanese government charged that the United Arab Republic was involved in massive, illegal and unprovoked intervention in its affairs, the Security Council established an observer group with the quasi-military function of proceeding to Lebanon ‘so as to ensure that there is no illegal infiltration of personnel or supply of arms or other material across the Lebanese borders.’ The fact-finding body reported in a manner that appeared to be objective.”¹³² In 2008, the Security Council called for the Secretary General to send a fact-finding mission to be dispatched to the border between Djibouti and Eritrea, to verify a situation where several days of fighting had led to several deaths.¹³³ Most recently, in a matter that substantively implicates the “unwilling or unable” doctrine, the UN Special Rapporteur on counter-terrorism and human rights commenced an investigation into civilian casualties of drone strikes carried out in allegedly ineffective states. This investigation team will include respected judges, lawyers and other experts from different parts of the world, including Pakistan and the United States.¹³⁴ If a Special Rapporteur, particularly

¹³¹ *Report of the Commission of Investigation concerning Greek Frontier Incidents Vol 3*, UN SC, 2d Year, UN Doc S/360/Rev.1 (1947) at 309, online: United Nations <http://www.un.org/en/sc/repertoire/46-51/Chapter%208/46-51_08-9-The%20Greek%20frontier%20incidents%20question.pdf>.

¹³² Plunkett Jr, *supra* note 117 at 166.

¹³³ “Security Council calls for UN fact-finding team to visit Djibouti-Eritrea border” (25 June 2008) online: UN News Centre <<http://www.un.org/apps/news/story.asp?Cr=djibouti&Cr1=border&NewsID=27162#.USJfevJlf9o>>.

¹³⁴ Chris Woods & Alice K Ross, “UN launches major investigation into civilian drone deaths”

dependent on the voluntary co-operation of states, can commence a fact-finding process that potentially implicates the interests of powerful states, why could the Security Council not be able to do the same for a relatively weak host state? In fact, even modest fact-finding that is paralyzed by Security Council inaction could have great utility in altering state opinion. Take for example, the situation in Syria. There is immense disagreement between the P-5 permanent members on how to proceed. Russia and China have blocked a number of resolutions. However, even amidst all this disagreement, Lakhdar Brahimi, who the Secretary General appointed as UN-Arab League Special Envoy, has been fact-finding and transmitting information about the dire situation in Syria to the Security Council.¹³⁵ Has this broken the deadlock in the Security Council and created some kind of consensus for action? Not yet, but it is undeniable that it has been at least partly responsible for making the international community more aware about the gravity of the situation. It has also embarrassed allies of Bashar Al-Assad, such as Russia, who may otherwise have been able to support the Syrian regime openly.¹³⁶

Of course, setting up of a fact-finding mission requires some needed cooperation from both the host state and members of the Security Council. In many cases of alleged ineffectiveness, a rational host state should be eager to demonstrate it is effective, and therefore forestall intervention. Also, since many host states tend to be some of the weakest states in the world, in cases of resistance, the Council's resolutions and authority could be brought to bear on that state without fear of upsetting a powerful state. It is also relevant to mention that the "1540 Committee" of the Security Council recently conducted a mission to the United States "to carry out a detailed fact-finding mission on how the United States implements UNSCR 1540 obligations."¹³⁷ If a powerful state such as the United States is receptive to fact-finding missions to determine effectiveness, then it would seem realistic to expect weaker host states – that are much less able to resist international pressure – to be at least as willing to do the same and co-operate with the Security Council when the alternative is censure. Additionally, to the extent that the assessment will be used to identify states that require capacity building assistance, host states may have an additional incentive to comply since a publicizing of its potential ineffectiveness might support requests for aid.¹³⁸ Nevertheless, if the host state continues to resist, then it must accept

(24 January 2013) online: The Bureau of Investigative Journalism <<http://www.thebureauinvestigates.com/2013/01/24/un-launches-major-investigation-into-civilian-drone-deaths/>>.

¹³⁵ See e.g. Louis Charbonneau, "Syria 'breaking up before everyone's eyes:' envoy tells U.N." *Reuters* (29 January 2013) online: Reuters <<http://www.reuters.com/article/2013/01/29/us-syria-crisis-un-idUSBRE90S11R20130129>>.

¹³⁶ See e.g. CNN Wire Staff, "Russia suspends new arms shipments to Syria" *Cable News Network* (9 July 2012) online: CNN <<http://edition.cnn.com/2012/07/09/world/meast/syria-unrest>>.

¹³⁷ See "United Nations Security Council Resolution 1540 Committee Visit to Washington, DC", *United States Department of State Office of the Spokesperson* (8 September 2011) online: United States Department of State <<http://www.state.gov/r/pa/prs/ps/2011/09/171907.htm>>.

¹³⁸ Gauthier de Beco, "Human Rights Indicators for Assessing State Compliance with

responsibility if the victim state ultimately uses this as an excuse to attack non-state actors within its territory without its consent. This is only reasonable: there is no reason why the victim state's act of self-defence, if it has disclosed its reasons for alleging ineffectiveness, should continue to be blocked by a non-cooperative host state. In fact, the ICJ stated in the *Corfu Channel* case that in circumstances where a state is not able to collect evidence because the territory on which the evidence exists is within the territorial control of another state, the claimant state should "be allowed a more liberal recourse to inferences of fact and circumstantial evidence".¹³⁹

It is of course entirely plausible that a resolution supporting a fact-finding mission may be vetoed by one of the permanent members. Yet, this risk should also not be overstated. All five permanent members of the Security Council have been victims of attacks emanating from allegedly ineffective host states and therefore have some, albeit limited, interest in co-operating.¹⁴⁰ A day after the attacks of 9/11, the Security Council unanimously voted for the passing of Resolution 1368, in which it "[recognized] the inherent right of individual or collective self-defense" and "condemn[ed] in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001".¹⁴¹ Yet, the interests of these states are not so homogeneous so as to simply allow a rubber-stamping of any use of force. For example, while it would be in China's interest that it retain an unlimited right to use force at will inside, say, Pakistan to target non-state actors causing disturbances in Xinjiang, it may constrain itself somewhat so as to not set a precedent for the United States to engage in similarly unconstrained action. Conversely, it would also not want to constrain the United States completely, so as to preserve a limited right of self-defence for itself in the future. This recurring tension between co-operation and conflict thus acts as a check on each victim state's unilateral claims. However, this is not to say that resolutions for fact-finding will smoothly pass through the Security Council; they may not. Yet, the potential risk of a fact-finding mission being blocked in some cases might be a necessary evil that pragmatism may require tolerating.

4. *Crossing into International Relations: Can the Security Council Make a Difference?*

The Security Council can significantly bolster the efficacy of the

International Human Rights" (2008) 77 *Nor J Int'l L* 23 at 28 ("States have shown themselves more willing to collect data for development indicators since they consider that the purpose of these indicators is not to criticise the government, but rather to support requests for aid.").

¹³⁹ *Corfu Channel Case*, *supra* note 34 at 30.

¹⁴⁰ For examples of the threat of non-state actors to other P5 members, see e.g. Michael Wines, "China Blames Foreign-Trained Separatists for Attacks in Xinjiang", *The New York Times* (1 August 2011) online: New York Times <http://www.nytimes.com/2011/08/02/world/asia/02china.html?_r=1&>; Mohammed Khan & Carlotta Gall, "Accounts After 2005 London Bombings Point to Al Qaeda Role From Pakistan", *The New York Times* (13 August 2006) online: New York Times <http://www.nytimes.com/2006/08/13/world/europe/13qaeda.html?pagewanted=all&_r=0>.

¹⁴¹ SC Res 1368, *supra* note 36 at preamble-para 1.

“unwilling or unable” doctrine, by injecting transparency into the process whereby ineffectiveness is determined. While this will surely not be successful in constraining all uses of force in weak host states,¹⁴² even modest information provision can nevertheless encourage states to improve the quality of their decisions so as to screen out bad uses of force that can result from adverse selection.¹⁴³ Indeed, scholars of international relations have long acknowledged that institutions can bring the international spotlight to bear on provocative behaviour and the Security Council is particularly apt to play this role.¹⁴⁴ It can do so by signalling information about the legality and accuracy of a victim state's claim of host state ineffectiveness to the international community and to the victim state's own citizens that may be concerned about the foreign policy of their government.¹⁴⁵ In fact, some scholars view the Security Council as the only international institution that can legitimize the use of force.¹⁴⁶ As Ian Johnstone points out, “the Security Council is valued to the extent that all but a few states believe it serves a useful purpose for the maintenance of peace and security, despite deep reservations about its unrepresentative composition and unequal distribution of voting power. Because it is a valued institution, reputations count there”.¹⁴⁷ Its refusal to authorize the 2003 Iraq War should be seen as a paradigm case where it exercised this function. It not only brought to light the weak arguments being made by the United States and the United Kingdom for going to war in Iraq, but also disseminated that information globally through debates by states within the Council, thus reinforcing the scepticism of much of the international community regarding these states' intentions. Scholarly disappointment with the inefficacy of the Security Council prior to the war is based on a traditional misconception of the mandate of the Security Council as an institution “whose job is [only] to

¹⁴² There is evidence that the United Nations Security Council has not fared well in preventing uses of force by powerful countries even when the legal basis for the use of force may not be robust. See e.g. Mariano-Florentino Cuéllar, “Reflections on Sovereignty and Collective Security” (2004) 40 *Stan J Int'l L* 211. For realist critiques of the efficacy of international institutions generally, see John Mearsheimer, “The False Promise of International Institutions” (1994) 19 *Int'l Sec* 5; Jack Goldsmith, “Sovereignty, International Relations Theory, and International Law”, Book Review of *Sovereignty: Organized Hypocrisy* by Stephen D Krasner (2000) 52 *Stan L Rev* 959; Stephen D Krasner, *Sovereignty: Organized Hypocrisy* (1999) (expressing scepticism that international law has any independent efficacy, particularly in relation to the use of force).

¹⁴³ Alexander Thompson, *Channels of Power: The UN Security Council and U.S. Statecraft in Iraq* (Ithaca: Cornell University Press, 2009).

¹⁴⁴ See e.g. Terrence L Chapman & Dan Rieter, “The United Nations Security Council and the Rally 'Round the Flag Effect” (2004) 46 *J Confl Res* 886.

¹⁴⁵ Domestic audiences may be looking for informational signals to assess international issues. Review of the international behaviour of a state by international institutions such as the Security Council can provide such signals. See Terrence L Chapman, “Audience Beliefs and International Organization Legitimacy”, (2009) 63 *Int'l Org* 733.

¹⁴⁶ See eg Thompson, *supra* note 143; Erik Voeten, “The Political Origins of the UN Security Council's Ability to Legitimize the Use of Force” (2005) 59 *Int'l Org* 527; Ian Hurd, “Legitimacy, Power, and the Symbolic Life of the UN Security Council” (2002) 8 *Global Governance* 35.

¹⁴⁷ Ian Johnstone, “Security Council Deliberations: The Power of the Better Argument” (2003) 14 *EJIL* 437 at 477.

maintain peace by enforcing rules and dictating the behaviour of states.¹⁴⁸ However, these scholars fail to recognize the Security Council's equally important role in acting as a "talking shop."¹⁴⁹ It is a forum where states debate, deliberate, screen and transmit signals about the justification of any use of force. Rather than view the Security Council as acting as an enforcer of the peace, it may thus be more realistic to view it as a forum where competing claims and interpretations are subject to "peer-review" by other states. The promotion of peace, by facilitating transparency, is precisely the sort of role the Security Council is well capable of fulfilling.¹⁵⁰

By acting as a fact finder and information transmitter, the Security Council, as per the proposals advanced here, screens and signals the quality of a victim state's use of force.¹⁵¹ Disseminating information about state behaviour thus reduces uncertainty regarding another state's intentions and makes it difficult for states to conceal ill intentions or violations of international law. As Jervis accurately captures, "[c]o-operation is made more likely not only by changes in payoffs, but also by increases in the states' ability to recognize what other [states] are doing".¹⁵² Transparency thus enables states to monitor behaviour, identify violations of rules and verify whether a particular state is "cheating" the rules, thereby promoting the efficacy of international law.

Such verification can also reduce the implications of power inequality between victim and host states. By taking the dispute about effectiveness away from a bilateral setting, the host state obtains a "voice" and gains opportunities for to lobby to form coalitions and organize blocking positions against more powerful victim states. Negotiating in the multilateral setting of the Security Council therefore gives weaker states greater influence,¹⁵³ as information about a state's coercive intentions spreads much more rapidly in a multilateral setting.¹⁵⁴

¹⁴⁸ Thompson, *supra* note 143; Thomas M Franck, "What Happens Now? The United Nations after Iraq" (2003) 97 AJIL 607.

¹⁴⁹ Kenneth Anderson, "United Nations Collective Security and the United States Security Guarantee in an Age of Rising Multipolarity: The Security Council as the Talking Shop of the Nations" (2009) 10 Chi J Int'l L 55 at 89 ("The debates over Russian intervention in Georgia, Kosovar independence or, for that matter, the Iraq War are emblematic of the talking shop role of the Security Council—and in those terms, each of those debates was a success for the Security Council, not a failure.").

¹⁵⁰ See Dan Lindley, *Promoting Peace with Information: Transparency as a Tool of Security Regimes* (Princeton: Princeton University Press, 2007).

¹⁵¹ For informational theories of legislative organization proposing that committees are designed to serve as sources of policy-relevant information for the legislature as a whole, see Alexander Thompson, "Coercion Through IOs: The Security Council and the Logic of Information Transmission" (2006) 60 Chi J Int'l Org 1; Abbott & Snidal, "Why States Act," *supra* note 102; Keith Krehbiel, *Information and Legislative Organization* (Ann Arbor: University of Michigan Press, 1992).

¹⁵² Robert Jervis, "From Balance to Concert: A Study of International Security Cooperation" (1985) 38:1 World Politics 58 at 73.

¹⁵³ This has been used to explain the lack of balancing against the US after the end of the Cold War. See Joseph S Nye, *Soft Power: The Means to Success in World Politics* (New York: Public Affairs, 2004).

¹⁵⁴ Guzman, *supra* note 99 at 72 ("The reputational consequences of a violation will be more

Of course, a powerful victim state may be wary of subjecting its claim to verification by the Security Council envisaged in this article, as disclosure entails costs of sovereignty, bargaining with other states and collecting and reporting information.¹⁵⁵ Why then would a powerful victim state be willing to take on the additional burden of disclosing its arguments to the Security Council? It may be because victim states care about their reputation. Concerns about reputation appear to form at least part of the explanation for why even a state such as the United States does not simply engage in forcible action in states such as Yemen or Somalia without offering *any* justification of its position. Neither host states, such as Yemen and Somalia, nor the international community can directly punish the United States, and yet resources are invested in defending the use of force in allegedly ineffective host states. Why would the United States care about its reputation in the international community? Vaughn P. Shannon suggests that leaders of states “value their social standing in international society seek to avoid negative social judgments” and choose policies, behaviour, and their justifications for both accordingly.¹⁵⁶ Alexander Wendt argues that a state needs “collective self-esteem,” that is, is “need[s] to feel good about itself, for respect or status.”¹⁵⁷ According to theorists such as Shannon and Wendt, maintenance of a “good or moral image” of a law-abiding state is therefore an end in itself. Since misbehaviour would be more easily detected by the system of Security Council involvement advocated for in this paper, States would thus, at least on the margin, try to avoid inviting the disapproval of other states¹⁵⁸ by claiming host state ineffectiveness erroneously. There are functional reasons for desiring a good reputation. It allows a state to have soft power that can be leveraged to bring other states’ preferences in line with its own. This soft power can suffer if a state is perceived as using force arbitrarily or excessively against weaker states. Soft power has been identified as important for the success of United States hegemony.¹⁵⁹ Channelling a claim of ineffectiveness through an institution can be costly for a victim state as compared to engaging in force unilaterally and if it opts to do so, it signals to and reassures the international community that it is a relatively law-abiding state¹⁶⁰ while also legitimating victim state self-defence. As one commentator

severe in a multilateral context—because the reputational information spreads quickly”).

¹⁵⁵ See William B T Mock, “An Interdisciplinary Approach to Legal Transparency: A Tool for Rational Development” (2000), 18 Dick J Int’l L 293 at 301 (“There are several opportunities for costs to arise in obtaining information because information gathering has several phases. First, information must be located. Then it must be acquired. Then it must be confirmed. Then it must be analyzed. ... At each phase, an information-seeker may incur costs” [footnote omitted]).

¹⁵⁶ Vaughn P Shannon, “Norms Are What States Make of Them: The Political Psychology of Norm Violation” (2000) 44 Int’l Stud Q at 294.

¹⁵⁷ Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999) at 236.

¹⁵⁸ See e.g. Anthony D’Amato, “Is International Law Really Law?” (1984) 79 Nw UL Rev 1293 at 1298 (Arguing that international law is still law despite its lack of centralized enforcement because in the international system “the social-disapproval factor operates as a sanction.”).

¹⁵⁹ Nye, *supra* note 153.

¹⁶⁰ Andrew Kydd, “Trust, Reassurance, and Cooperation” (2000) 54:2 Int’l Org 325; Thompson, *supra* note 143 at 10.

writes, “the mere fact that [power] is exercised through means of international law might enhance its authority” however “once it appears merely as [a state’s] tool, [law] will be unable to provide them with the legitimacy they seek.”¹⁶¹ Additionally, if host states observe that the victim state has not engaged in bilateral coercion and behaved reasonably “this provides [host states] with an incentive to follow the resulting agreements, leads to quasi voluntary compliance, and thus lowering the costs of enforcement (pacification).”¹⁶² Conversely, a state that realizes that the quality of its use of force is suspect or is not interested in preserving its reputation may deliberately choose not to report self-defence or submit information about state effectiveness to the Security Council, therefore signalling through its failure to report that its use of force may not be legal. Indeed, this much was acknowledged by the ICJ in the *Nicaragua* case when it stated 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.”¹⁶³ The favourable acceptance by NATO and OAS member States of the initial military response to 9/11 as a legitimate exercise of self-defence seems to have been based, at least partly, on the verifiability of the claims being made by the United States and its willingness to engage the Security Council meaningfully.

If a victim state subjected its claim to multilateral verification in an international organization, it may also mitigate other costs to the extent that such disclosure may promote assistance. For example, forty countries contributed personnel to the coalition effort in the First Gulf War, while financial contributions of \$54 billion were made.¹⁵⁸ In contrast, due to the lack of multilateralism shown by the United States when it bombed Sudan and Afghanistan in 1998, this had the effect of “aggravating bilateral relationships all over the place” and made them “more difficult to manage”.¹⁶⁴ Also, there is no guarantee that a victim state’s power to intervene in ineffective host states will continue indefinitely. If so, it has some self-interest in regulating the rules so as to prevent other powerful states in the future from exploiting the rules if its power were to decline.

5. *Applying Fact-Finding to the United States-Pakistan Relationship*

How would the proposal in this paper alter the operation of the unwilling or unable doctrine in practice in for example, the United States-Pakistan scenario? The United States has used force, including drone strikes to target suspected militants in Pakistan. The 2 May 2011 operation to capture or kill Osama Bin Laden is also a frequently invoked example of a victim state claiming a right to use force in a host state without its consent. It is also a case where the host state has repeatedly complained about violations of its sovereignty, denied that it has granted consent to the victim

¹⁶¹ Krisch, *supra* note 99 at 375, 408.

¹⁶² *Ibid* at 373.

¹⁶³ *Military and Paramilitary Activities*, *supra* note 19 at 105.

¹⁶⁴ Thompson, *supra* note 143 at 20.

state, and alleges helplessness in the face of a superpower's demands. On the contrary, the victim state has at times alleged that the host has not done enough or is unable to suppress non-state actors on its territory. It is thus a paradigmatic case for assessing how the "unwilling or unable" test would be applied based on the proposals made in this article.

A use of force on Pakistani territory without its consent would *prima facie* be a case of aggression and in violation of international law. However, even absent consent, the United States' use of force in Pakistan would be legal, at least under the "unwilling or unable" doctrine, if it were responding to a specific armed attack or if it had given Pakistan the opportunity and the evidence demonstrating that the particular non-state actors had harmed the United States. What intelligence on non-state actors has been shared between Pakistan and the United States is not public. What is public is that Pakistan has repeatedly complained about a violation of its sovereignty and in fact, recently requested that the United Nations investigate drone strikes carried out on its territory.¹⁶⁵ In fact, it cannot be said with certainty how the United States has assessed that Pakistan is unwilling or unable, or even on what basis Pakistan would refute those claims. The result thus is a repeated cycle where the United States launches drone strikes in Pakistani territory, many civilians are killed, the victim state claims that they were militants, the host state protests the violation of its sovereignty and third party sources confirm that civilians have indeed died.¹⁶⁶ Pakistan is hardly a match for the military might of the United States, so even if it *bona fide* believes that the United States is behaving aggressively and it is correct, it cannot retaliate to deter the United States. On the other hand, the international community is in no better position to assess whether the United States is complying with spirit and substance of the "unwilling or unable" doctrine even if it accepts its legality. Thus, it cannot impose any costs on the United States so as to prevent potentially illegal incursions into Pakistani territory.

How would other states know whether the United States action in Pakistan is legal or illegal? The rather vague nature of the "unwilling or unable" test, as discussed above, leaves other states with little or no information as to the legality of force used by a victim state and could allow victim states to cloak aggressive or error-prone uses of force as self-defence. Quite possibly, the United States could be coercing Pakistan or Pakistan could be falsely feigning an ability or willingness to deal with non-state actors when that is not the case. Hundreds of civilians have already lost their lives amidst this cycle of finger pointing.

¹⁶⁵ Owen Bowcott, "UN to Examine UK and US Drone Strikes" *The Guardian* (24 January 2013) online: The Guardian <<http://www.guardian.co.uk/world/2013/jan/24/un-examine-uk-afghanistan-drone-strikes>>.

¹⁶⁶ See e.g. Chris Woods, "Drone War Exposed – The Complete Picture of CIA Strikes in Pakistan" (10 August 2011) online: The Bureau of Investigative Journalism <<http://www.thebureauinvestigates.com/2011/08/10/most-complete-picture-yet-of-cia-drone-strikes/>>; "The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004-2013" (2013) online: New America Foundation <<http://counterterrorism.newamerica.net/drones/>>; *Living Under Drones*, *supra* note 13.

Adopting the proposal advanced in this article, the “unwilling or unable” doctrine would still be the correct test applied to judge the legality of the use of force, but decision-making would likely be more transparent with less danger of predation or error. Under the proposed system, if the United States sought to invoke the controversial “unwilling or unable” doctrine, it would need to disclose to the Security Council why it judges Pakistan to be “unwilling or unable”. Such a disclosure could be in the form of diplomatic letters and exchanges between the states that evidence that the United States provided Pakistan with evidence about the source of the threat and a reasonable opportunity to counter the non-state actor threat. It could also include replies or non-replies from the Pakistani government or a diplomatic refusal to provide a helpful defense of its position. If the United States suspects complicity between some Pakistani state actors and non-state actors, then it could disclose that evidence. The United States might wish to provide intelligence gathered showing links between the state and militants or visible signs of complacency to tackle them or a refusal to accept technical or military capacity building assistance that could be used to target non-state actors. Pakistan would also have the opportunity to challenge the determinations and disprove allegations of ineffectiveness in the Security Council. Pakistan might do so by demonstrating that it has been doing the best it can with the resources at its disposal; it could point to arrests of non-state actors and the military, civilian and financial losses that it has suffered in the process to demonstrate its will to suppress non-state actors. If Pakistan refuses to furnish evidence of its effectiveness or the information provided is inadequate, the Security Council would set-up a fact-finding mission that would investigate these matters in greater detail, within Pakistan’s territory. The goal of this fact-finding mission would be to determine conclusively whether or not Pakistan is ineffective. This scrutiny would depend to a significant extent on the quality of information being delivered by both states, but more importantly, by Pakistan. If the information disclosed by either state within the Security Council were of a low quality, it would signal misbehaviour and ill intentions. Thus, if Pakistan is feigning effectiveness when it really is not able to contain the threat, there is a higher probability that its claim would be challenged. In addition, since the CTC would be involved, Pakistan may find it harder to make false claims about its willingness to comply with anti-terrorism obligations because the CTC would possess firsthand knowledge about its compliance record.

Ultimately, if it becomes apparent that Pakistan is indeed ineffective, then that finding would have adverse long-term consequences for Pakistan in relation to the United States, which would of course be able to legitimate its self-defensive uses of force against non-state actors within Pakistan’s territory. A finding of ineffectiveness would not only legitimate force within Pakistani territory but it would also invite sanctions from the international community that would now be able to more accurately assess Pakistan’s effectiveness. On the other hand, if it appears that the United States has genuinely not given Pakistan an opportunity to deal with the suspects or if Pakistan is refusing to deal with the non-state actors because of the poor or

speculative quality of the information provided by the United States, then that would also become visible to other states and they could instead sanction the United States for misbehaviour. To be sure, both states will still, at least, initially need to cooperate bilaterally. But, if the proposal in this article were accepted, there would be an additional, more robust multilateral check to prevent bad-faith determinations and false claims of co-operation.

The point here is that the process of determining ineffectiveness will be partly removed from a bilateral, potentially coercive private setting to a multilateral one where the United States and Pakistan will both be subject to some scrutiny in the court of state opinion – albeit limited – by the international community and the Security Council.

V. CONCLUSION

The international legality of using force against non-state actors in weak host states without host state consent is unclear, yet victim states have used force on a number of occasions. While victim states have reasonable grounds to fear that non-state actors based in host states may attack them, there is much evidence to suggest that victim states are also quite capable of causing significant destruction within host states. Yet, by ignoring the unequal international environment in which the doctrine operates and by focusing narrowly on doctrinal questions, extant scholarship has largely marginalized the security concerns of host states and heavily privileged the security preferences of victim states.

This article argued that unless “ineffectiveness”, i.e. a state’s inability or unwillingness, becomes observable by the international community, the “unwilling or unable” doctrine may continue to be of limited efficacy in constraining arbitrary uses of force against weaker host states. Borrowing from international relations literature, it is thus proposed that if a victim state asserts a yet unsettled right to use self-defensive force in an ineffective host state, it should be required to disclose to the Security Council why it considers the particular host state to be ineffective. It is also suggested that the Security Council should act as a fact-finder and transmit information to the international community as to the accuracy of the victim state’s claim. For this purpose, in addition to information voluntarily disclosed by the victim and host state, the Security Council should seek information on a host state’s effectiveness from the CTC and, if necessary, set-up fact-finding missions to verify host state effectiveness.

Such verification can significantly improve decision making under the “unwilling or unable” doctrine. By acting as fact-finder and information transmitter, the Security Council could screen and signal the quality of the claim of ineffectiveness for the benefit of the international community. Since this would increase transparency of state behaviour, particularly on the margin, the proposed system would materially hinder victim states from engaging in uses of force predicated on erroneous pretexts of host state ineffectiveness while also encouraging host states that have a poor record of compliance to move towards compliance.

The goal of this article is to identify the issues and offer a practical and

balanced solution to the problems surrounding extra-territorial self-defence against non-state actors. In doing so, the article does not naively suggest that it will be an easy task to implement these proposals or that they are a panacea for the “unwilling or unable” doctrine. Unfortunately, the issue of self-defence against non-state actors lends itself to no easy or perfect solutions. Nonetheless, the proposal advanced in this article represents what would be a marked improvement over continuing with the operation of the “unwilling or unable” doctrine in its current form. Further, to the knowledge of the author, while legal scholarship has considered doctrinal issues in some depth already, it has thus far failed to produce proposed means by which the problems identified might be remedied. This article is a first attempt to fill this lacuna. As such, the suggestions contained in this article should be viewed as one proposed framework inviting further thought and elaboration in order.